



The Gray Wolf and the Endangered Species Act: A Brief Legal History

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Summary

The wolf had all but disappeared from the lower 48 states when the Endangered Species Act (ESA) put it on its first list of protected species in 1973. Since then, the wolf has held every status of protection under the ESA at one time or another, in one place or another. Regulatory efforts have switched from increasing protections of the wolf—culminating in the reintroduction of wolves into three parts of the American West in the 1990s—to reducing protection of the wolf where its population has surged. Litigation has marked each step of the way. Where litigation and regulation have not succeeded, legislation has been tried.

This report is a companion report to CRS Report RL34238, *Gray Wolves Under the Endangered Species Act: Distinct Population Segments and Experimental Populations*. It is intended to provide a brief history of the laws, regulations, and lawsuits related to the wolf's protected status. Fuller analyses of the concepts discussed in this report can be found in that longer report.

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Background

The gray wolf could be seen as one example of the Endangered Species Act (ESA) achieving its goal: bringing an endangered species to the point that the protection of the act is no longer needed.¹ At the time of its listing, the gray wolf was nearly extirpated from all of the lower 48 states except Minnesota. Since enactment of the ESA, the gray wolf has had every form of protection the act offers: threatened, endangered, delisted, and experimental. The population of the gray wolf has grown during this period, prompting many to argue that protection is no longer necessary. The U.S. Fish and Wildlife Service (FWS) reports 1,651 wolves in the Northern Rocky Mountains as of December 31, 2010;² approximately 4,269 wolves in the Western Great Lakes area as of December 10, 2010;³ and 50 wolves in the Southwest as of January 2011.⁴ The history of its recovery (and whether it actually has recovered) is marked by conflict, with each change bringing litigation and, frequently, legislation.

Listing History

Before the gray wolf was protected as a *species* under the ESA, wolf *subspecies* were protected: the Eastern Timber wolf, the Northern Rocky Mountain gray wolf, and the Mexican wolf. This distinction ended in 1978 with the listing of *Canis lupus*, the gray wolf, which was listed as endangered throughout the lower 48 states except Minnesota, where because of a larger population, it was classified as threatened.⁵ Thus, in 1978, a map of gray wolf protection would have looked like this:

¹ See 16 U.S.C. § 1531(b)—the purpose of act is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1532(3)—definition of conservation.

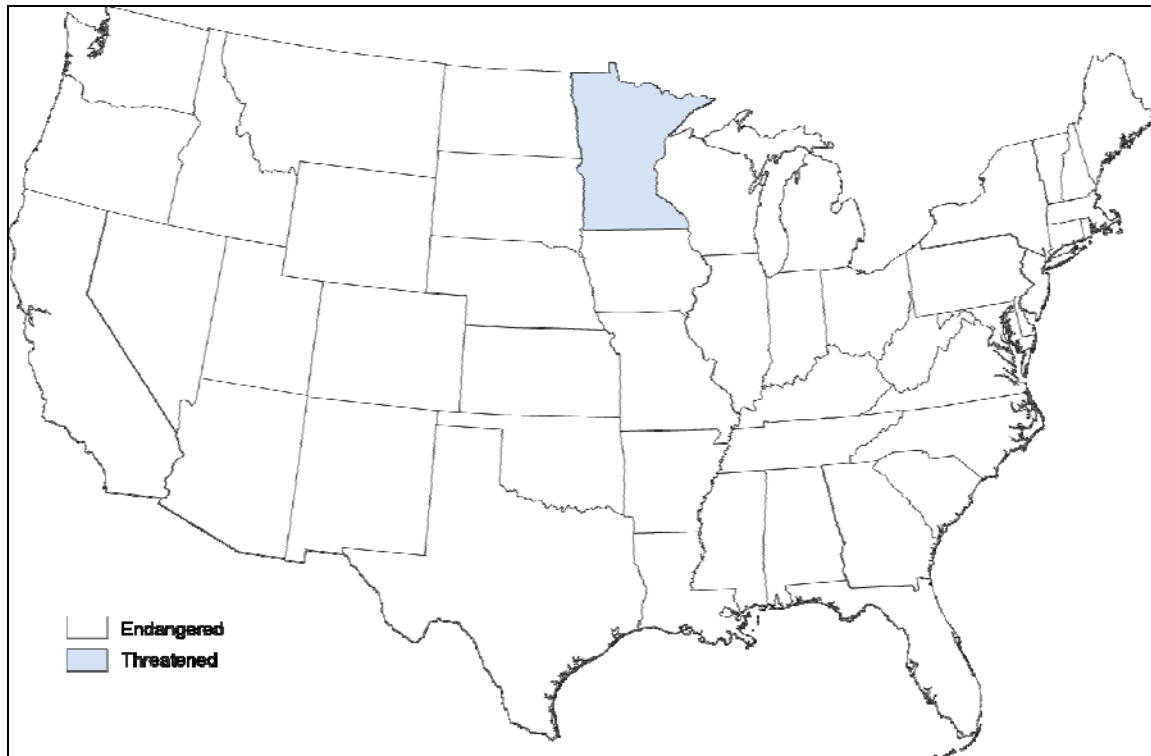
² Rocky Mountain Wolf Recovery 2010 Interagency Annual Report Summary and Background, available at <http://www.fws.gov/mountain-prairie/species/mammals/wolf/annualrpt10/index.html>.

³ FWS Midwest Region Press Release, *Status of Wolves in the Western Great Lakes Under the Endangered Species Act* (December 10, 2010), available at <http://www.fws.gov/midwest/News/release.cfm?rid=320>.

⁴ FWS Southwest Region Press Release, *2009 Mexican Wolf Population Survey Complete* (February 5, 2010), available at <http://www.fws.gov/southwest/docs/WolffinalPopCount2009NewsReleaseFeb52010.pdf>.

⁵ 43 Fed. Reg. 9607 (March 9, 1978). *Endangered* is defined as being in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). *Threatened* is defined as likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20).

Figure I. Gray Wolf Protection after 1978 Listing



Source: Congressional Research Service.

Experimental Populations

In 1982, the ESA was amended to allow reintroduction of endangered or threatened species into areas they used to occupy.⁶ The term for these reintroduced species is Experimental Populations (Ex Pops). In the case of the gray wolf, three Ex Pops were planned: Central Idaho, the Yellowstone area, and the Blue Range area in Arizona and New Mexico. All were deemed nonessential experimental populations, meaning they are treated as threatened species under most circumstances.⁷ While the default under the ESA is that threatened species may not be killed or harmed (just as endangered species),⁸ the ESA also allows *Special Rules* regarding a threatened species, which may allow *taking* the species. Special Rules provide customized protection that FWS deems necessary and advisable for the species' conservation. Such rules were issued for the gray wolf Ex Pops, detailing when a wolf might be killed. FWS could not issue rules if the wolves were listed as endangered.

⁶ P.L. 97-304 § 6(6), 96 Stat. 1424; 16 U.S.C. § 1539(j).

⁷ 16 U.S.C. § 1539(j)(2)(C).

⁸ The ESA prohibits *taking* an endangered species. 16 U.S.C. § 1538(a)(1)(B). Taking is defined as "harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

Eventually, 66 wolves were released into Central Idaho and Yellowstone in 1995 and 1996.⁹ The Mexican gray wolf was returned in the Blue Range area beginning in 1998.¹⁰ Reintroduction has been controversial from the time Congress authorized it. For example, a rider to the Appropriations Act for 1992 banned spending any money to release wolves into Yellowstone and Central Idaho for that fiscal year.¹¹ Lawsuits were filed challenging both the reintroduction and the delay.¹² The wolf Ex Pop program was upheld. Following the reintroduction of the Mexican gray wolf, a map of gray wolf protection would have looked like this:

Figure 2. Gray Wolf Protection after Reintroduction of Mexican Gray Wolf

(Valid through present, except during times DPSs were designated)



Source: Congressional Research Service based on information from 59 Fed. Reg. 60266 (November 22, 1994) (Yellowstone); 59 Fed. Reg. 60281 (November 22, 1994) (Central Idaho); and 63 Fed. Reg. 1766 (January 12, 1998) (Blue Range).

⁹ 59 Fed. Reg. 60266 (November 22, 1994) (Central Idaho); 59 Fed. Reg. 60252 (November 22, 1994) (Yellowstone).

¹⁰ 63 Fed. Reg. 1752 (January 12, 1998).

¹¹ P.L. 102-154; 105 Stat. 993.

¹² *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998) (upholding Ex Pop wolf reintroduction program); *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000) (upholding Ex Pop wolf reintroduction program); *New Mexico Cattle Growers v. U.S. Fish and Wildlife Service*, 1999 WL 34797509 (D.N.M. 1999) (upholding reintroduction of Ex Pop wolves to New Mexico and Arizona); *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834 (D.D.C. 1992) (suit to force reintroduction of wolf into Yellowstone as planned was ruled moot due to Appropriations Act).

The Central Idaho and Yellowstone wolves flourished. As of December 31, 2009, their population was 1,706,¹³ dropping slightly to 1,651 in 2010.¹⁴ In relation, the Mexican gray wolf population has been flat, ranging between 26 wolves in 2001 and peaking at 59 wolves in 2006.¹⁵ In January 2011, the population totaled 50, nearly a 20% increase from 2010.¹⁶

A federal court is considering the argument that because the Ex Pops in the Northwest are no longer geographically isolated, they no longer fit the statutory definition.¹⁷ The court has suggested that the Ex Pop status would end without further regulatory action.¹⁸ If this is upheld, the wolves would become part of the lower 48 states' general population and be classified as endangered. In that case the map in **Figure 1** would describe the wolf population, with the addition of the Mexican gray wolf Ex Pop.

Distinct Population Segments

Congress revised the definition of *species* in 1978 by eliminating taxonomic categories below subspecies from the definition, except for vertebrates.¹⁹ It also created the term *distinct population segment* (DPS).²⁰ A DPS refers to a portion of a listed species separated from the rest of the species by genetic distinction and range.²¹

2003: Western, Eastern, Southwestern

Regulatory efforts to decrease protection of the gray wolf began with an April 2003 rulemaking that created three DPSs of the gray wolf—Western, Eastern, and Southwestern.²² The Western and Eastern DPSs were downlisted from endangered to threatened. The rulemaking also delisted gray wolves in the Southeast (meaning they were no longer covered by the ESA), keeping the Southwestern DPS as endangered, and leaving the Ex Pops in place. Following that 2003 rulemaking, the map of gray wolf protection looked like this:

¹³ FWS Memorandum, *Service review of the 2009 wolf population in the NRM DPS* [Northern Rocky Mountain Distinct Population Segment] (April 26, 2010), available at <http://www.fws.gov/mountain-prairie/species/mammals/wolf/post-delisting-wolf-monitoring/doc20100428072425.pdf>.

¹⁴ Rocky Mountain Wolf Recovery 2010 Interagency Annual Report, available at <http://www.fws.gov/mountain-prairie/species/mammals/wolf>.

¹⁵ FWS Mexican Wolf Recovery Program, Annual Progress Reports 2001 through 2008, available at <http://www.fws.gov/southwest/es/mexicanwolf/documents.shtml>.

¹⁶ FWS, Blue Range Wolf Reintroduction Area Monthly Project Updates, available at http://www.fws.gov/southwest/es/mexicanwolf/BRWRP_notes.cfm.

¹⁷ This issue may not be resolved if a settlement in another case—in which the plaintiffs agreed to dismiss their claims in this case—takes effect. See *Defenders of Wildlife v. Salazar*, CV-09-77-DWM (D. Mont.).

¹⁸ *Defenders of Wildlife v. Gould*, CV-08-14-M-DWM (D. Mont. January 28, 2011) (Order to Show Cause).

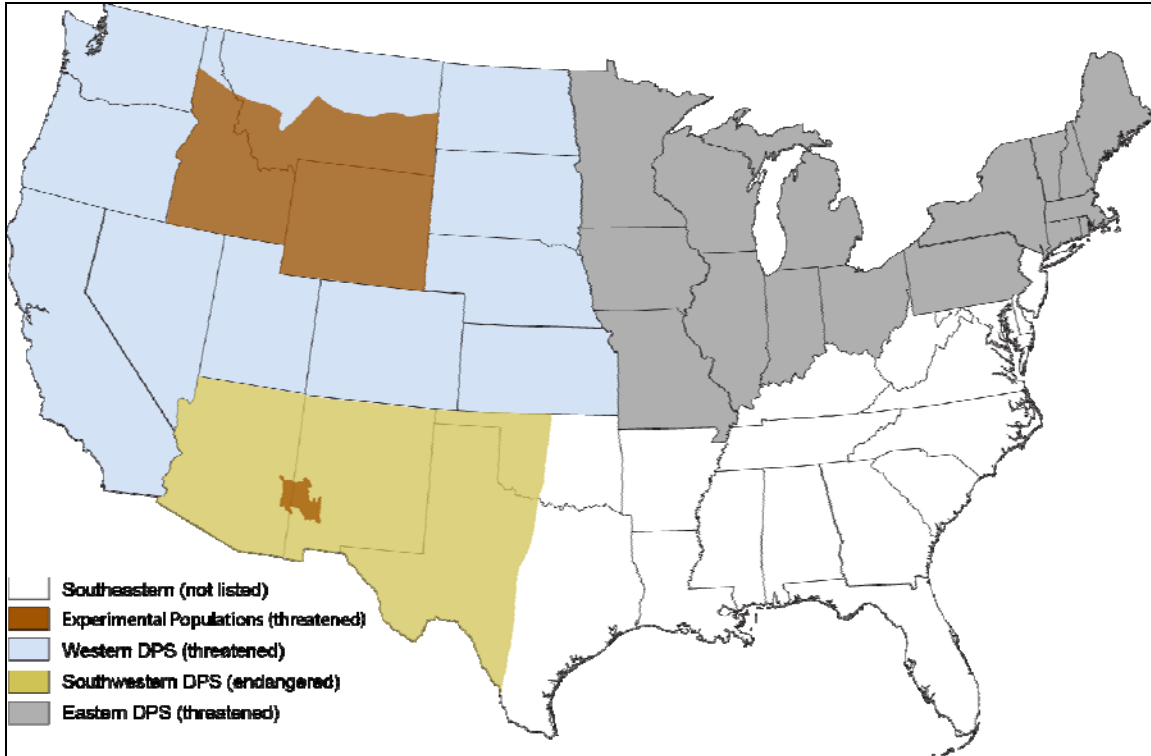
¹⁹ H.Rept. 95-1625 at 25 (September 25, 1978).

²⁰ P.L. 93-205, § 3(11), 87 Stat. 886, defined *species* as: “any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.” See 16 U.S.C. § 1532(16) for the current definition of *species*.

²¹ See 61 Fed. Reg. 4722 (February 7, 1996) for the FWS DPS Policy.

²² 68 Fed. Reg. 15803 (April 1, 2003).

Figure 3. Gray Wolf Protection after 2003 DPS Designations
(Valid until 2005 court decisions)



Source: Congressional Research Service based on information from 68 Fed. Reg. 15862 (April 1, 2003).

That rule lasted until 2005 when two different courts held that the rulemaking violated the ESA, primarily by the way it calculated the range of the wolf.²³ Both courts vacated the rule. The wolf returned to the protective status shown in **Figure 2**.

2007 and 2008: Western Great Lakes, Northern Rocky Mountains

New DPSs were designated in 2007 and 2008. They, too, were eventually invalidated by courts.

In February 2007, FWS designated the Western Great Lakes DPS.²⁴ On that same day, FWS delisted the DPS. Additionally, FWS proposed naming a Northern Rocky Mountain DPS.²⁵ It proposed delisting the entire DPS, if Wyoming revised its state management plan. If Wyoming's plan did not change, significant portions of Wyoming would remain as a protected Ex Pop. The final rule, in February 2008, designated a DPS of the eastern third of Washington and Oregon, a small part of north-central Utah, and all of Montana, Idaho, and Wyoming. The Ex Pops in the

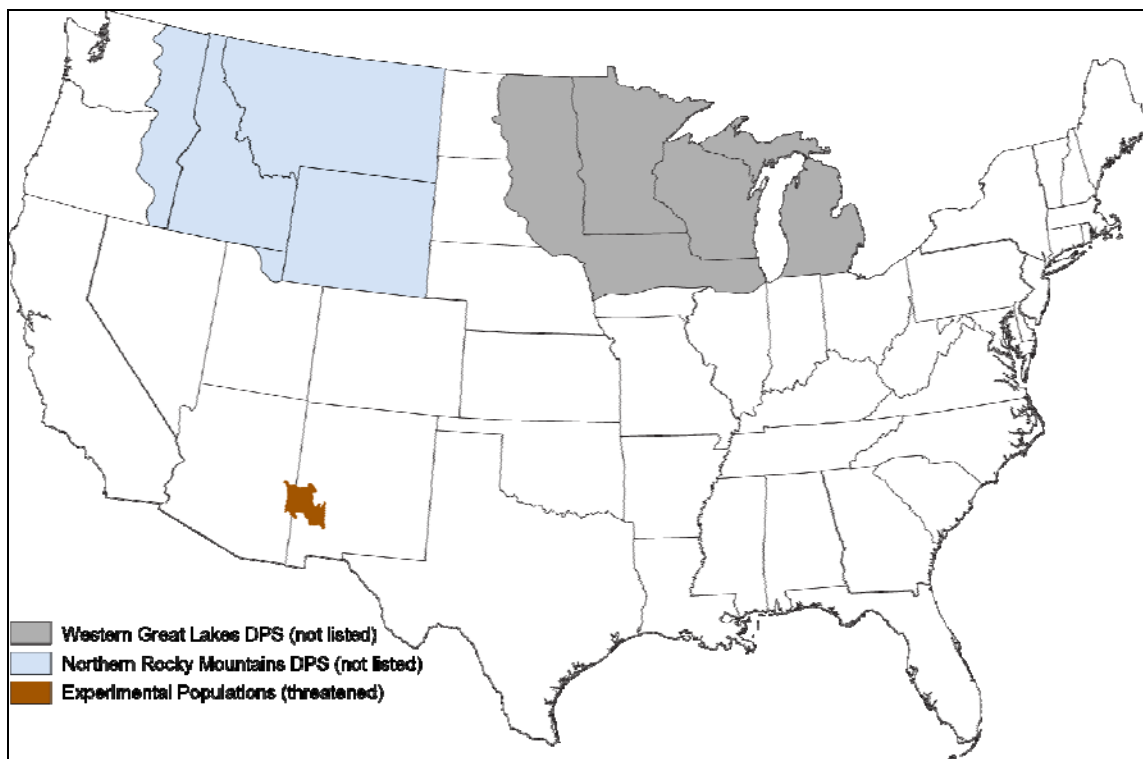
²³ *Defenders of Wildlife v. U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156, 1172 (D. Or. 2005) (“FWS downlisted the entire Eastern and Western DPSs without analyzing the threats to the graywolf [sic] outside of the core areas, as required”); *National Wildlife Federation v. Norton*, 386 F. Supp. 2d 553, 564 (D. Vt. 2005) (“FWS appears to be classifying the graywolf [sic] based upon geography, not biology”).

²⁴ 72 Fed. Reg. 6052 (February 8, 2007).

²⁵ 72 Fed. Reg. 6106 (February 8, 2007).

Northern Rocky Mountain area were reclassified, although not expressly. At that point, the gray wolf protection map would have looked like this:

Figure 4. Gray Wolf Protection after 2007-2008 DPS Designations
(Valid until 2008 court decisions)



Source: Congressional Research Service based on 2008 data from FWS and Montana Fish, Wildlife and Parks.

Notes: The data for this map are from 2008, and not based on the information published in the FWS DPS notices (72 Fed. Reg. 6058; 73 Fed. Reg. 10517), which is from 2006.

As mentioned, both DPSs were nullified by courts. The District Court of D.C. vacated the Western Great Lakes DPS designation and the delisting rulemaking in September 2008, holding that because the DPS program was created to enhance protection, the way FWS used it to delist may be contrary to the ESA.²⁶ The District Court of Montana issued a preliminary injunction halting the delisting in July 2008.²⁷ The court held that there was no showing that the genetic interchange among wolf packs in the area was stable enough to support delisting. Without adequate gene flow, wolves could become inbred, perhaps leading back to endangerment. FWS voluntarily withdrew the rule, and the wolf protection shown in **Figure 2** was reinstated.²⁸

²⁶ Humane Society of the United States v. Kempthorne, 579 F. Supp. 2d 7 (D.D.C. 2008).

²⁷ Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160 (D. Mont. 2008).

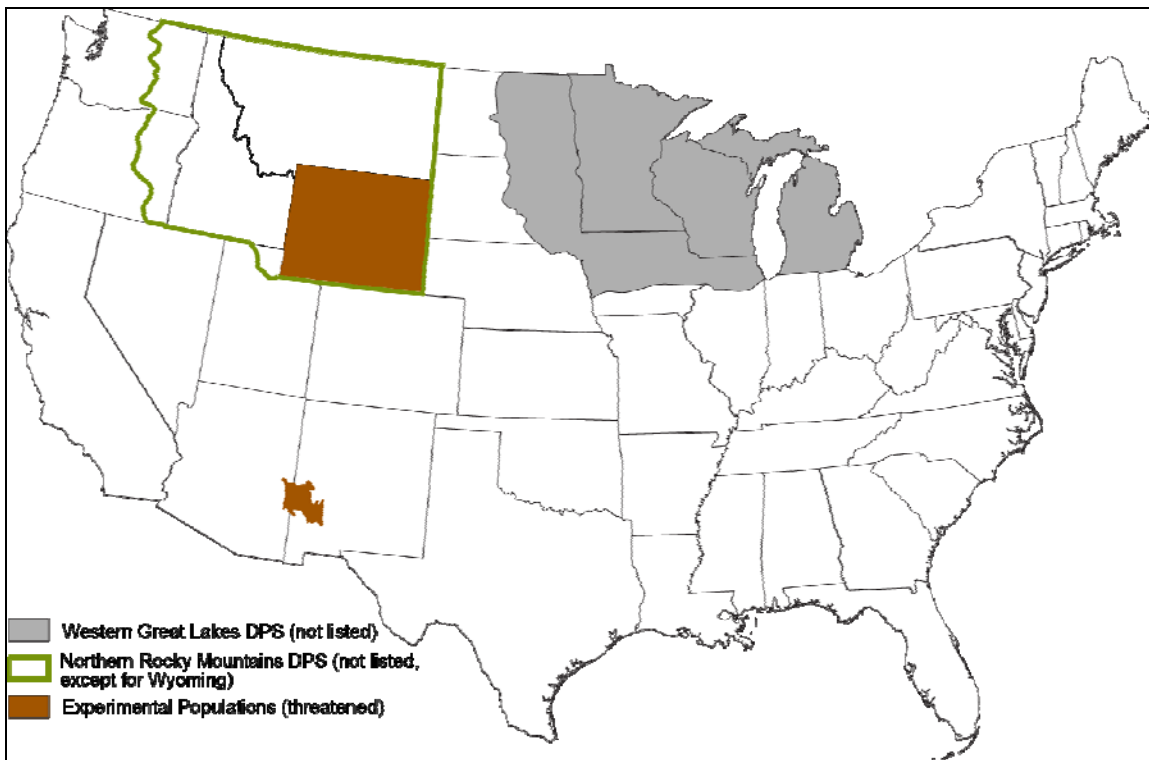
²⁸ 73 Fed. Reg. 75356 (December 11, 2008).

2009: Western Great Lakes, Northern Rocky Mountains

On April 2, 2009, FWS again issued notices designating DPSs in the Western Great Lakes²⁹ and the Northern Rocky Mountains.³⁰ Those wolves were delisted, mostly. The boundaries of these DPSs were largely the same as in the 2007-2008 listings, except that while Wyoming was part of the DPS, its wolves were not delisted. The wolves in Wyoming kept their Ex Pop status, although the rest of the Ex Pop in the Northern Rocky Mountains was extinguished by the rulemaking. The only protected wolves in the lower 48 states at that time were the Wyoming and Blue Range Ex Pops. Following the April 2009 rulemaking, wolf protection looked like this:

Figure 5. Gray Wolf Protection after 2009 DPS Designations

(Valid until 2009 settlement of Western Great Lakes DPS lawsuit and 2010 decision regarding Northern Rocky Mountain DPS)



Source: Congressional Research Service based on 2009 data from FWS and Montana Fish, Wildlife and Parks.

Once again, the rulemakings were withdrawn following lawsuits. The district court, considering the Northern Rocky Mountain DPS, held that delisting all but the Wyoming wolves violated the ESA because the ESA did not allow listing or delisting of a subgroup of a DPS.³¹ After suit was

²⁹ 74 Fed. Reg. 15069 (April 2, 2009).

³⁰ 74 Fed. Reg. 15123 (April 2, 2009).

³¹ *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

filed challenging the Western Great Lakes DPS, the parties settled.³² FWS withdrew both the rulemakings, separately,³³ and wolf protection returned to what is shown in **Figure 2**.

Subsequent litigation between the state of Wyoming and FWS led to another look at Wyoming's management plan. The court ordered FWS to reconsider whether Wyoming's wolf management plan would meet recovery goals for the species.³⁴ The Wyoming plan would have to be deemed adequate before it could be given management authority over its wolves.

Conditional Settlement Agreement

In March 2011, FWS entered a conditional settlement agreement with most of the plaintiffs that challenged the 2009 Northern Rocky Mountain DPS rule. However, the district court rejected a motion for the initial procedural step, effectively ending the settlement.³⁵ The settling plaintiffs had filed a motion asking the court to reinstate the 2009 DPS rule as it applied to Montana and Idaho until FWS could issue a new rule. The court held it lacked authority under the ESA to do that. Its August 2010 decision held that the 2009 DPS rule violated the ESA. Reinstating part of that rule would lead to killing wolves in violation of the act. The agreement would have allowed Montana and Idaho to reduce its wolf populations, even though those wolves were protected.

The court also found that the agreement was not fair to the four non-participating plaintiffs, which had objected to the 2009 rule, nor to the non-participating defendant-intervenors, which had appealed the 2010 decision. Additionally, the court found that the FWS monitoring would not be adequate and that FWS's agreement to withdraw a Solicitor's Opinion without issuing a new one did little to advance the issues in dispute.³⁶

Legislation

The 112th Congress is considering legislation to limit protection of the gray wolf. The ESA provides that listing decisions are made by regulation based solely on the best scientific data available.³⁷ Up to this point, Congress appears not to have delisted a species by statute. In fact, prior to 2010, legislative efforts regarding listing of any species were extremely rare.³⁸

³² Humane Society of the United States v. Salazar, Civ. No. 09-1092 (D.D.C. July 2, 2009).

³³ 74 Fed. Reg. 47483 (September 16, 2009) (Western Great Lakes); 75 Fed. Reg. 65574 (October 26, 2010) (Northern Rocky Mountains).

³⁴ Wyoming v. U.S. Department of the Interior, No. 09-CV-118J, 2010 U.S. Dist. LEXIS 122829 (D. Wyo. November 18, 2010).

³⁵ Defenders of Wildlife v. Salazar, 09-cv-77-DWM (D. Mont. April 9, 2011).

³⁶ Defenders of Wildlife v. Salazar, 09-cv-77-M-DWM (D. Mont.). This report gives only an abbreviated version of the settlement. More details are available in CRS Report RL34238, *Gray Wolves Under the Endangered Species Act: Distinct Population Segments and Experimental Populations*.

³⁷ 16 U.S.C. § 1533(b).

³⁸ All examples were from the 100th Congress and were proposed amendments to the Endangered Species Act Amendments of 1987. They were not passed. See 133 Cong. Rec. H. 11248 (proposed amendment to prevent the Concho water snake from being considered a listed species); 133 Cong. Rec. H. 11248 (proposed amendment to prevent the gray wolf from being considered a listed species); and 133 Cong. Rec. H. 11617 (proposed amendment to prevent the leopard darter minnow from being considered a listed species).

The bills of the 112th Congress take different approaches regarding the wolf. H.R. 509 (Rehberg) and S. 249 (Hatch) would amend the ESA to say that the act does not apply to the gray wolf. Those bills would affect all gray wolves, regardless of location, which would include the populations in the Southwest as well as the Western Great Lakes and Northern Rocky Mountain areas.

The Full-Year Continuing Appropriations Act of 2011 (H.R. 1473, § 1713) would direct FWS to reissue the 2009 final rule that established a Northern Rocky Mountain DPS and delisted the wolf except in Wyoming. The bill would bar judicial review of the rule, but would still allow regulatory actions, such as delisting in Wyoming, or relisting of the DPS, should the wolf's status change. FWS would have 60 days to reissue the regulation. Section 1713 states that it would not alter the November 2010 Wyoming District Court ruling that remanded Wyoming's management plan to FWS.

H.R. 510 (Rehberg) addresses wolves in just two states: Idaho and Montana. It would set up state regulation of the wolf, allowing those states to impose their own regulatory schemes, including continuing protections at the same levels as the ESA. It is less clear how H.R. 510 would affect existing federal protection. It says "Any wolf in Idaho or Montana shall not be treated under any status of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), including as an endangered species, a threatened species, an essential experimental population, or a nonessential experimental population." Presumably, it is meant that the wolves shall not be treated as protected under or covered by the ESA, regardless of their status.

In contrast to H.R. 1473, the Delisting Gray Wolves to Restore State Management Act of 2011 (S. 321—Baucus) would give that regulation the force of law. This would appear to preclude any subsequent regulatory modification of the listing status of those wolves, including delisting wolves in Wyoming. Changes would have to be by act of Congress.

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