Defenders of Wildlife v. Jewell: Environmentalists Win the Latest Battle in the Fight over Gray Wolves, but Who Will Win the War?

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DEFENDERS OF WILDLIFE v. JEWELL:
ENVIRONMENTALISTS WIN THE LATEST BATTLE IN THE
FIGHT OVER GRAY WOLVES, BUT WHO WILL WIN THE WAR?

Rachel Kenigsberg

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1 J.D. Candidate, Harvard Law School, Class of 2016. The author would like to
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INTRODUCTION

At one time, there were an estimated 380,000 gray wolves (Canis lupus) living in North America. By the 1930s, the systematic eradication of the gray wolf to make way for ranching and farming extirpated the gray wolf population in the northern Rocky Mountains (“NRM”) of the United States. The passage of the Endangered Species Act (“ESA”) and the gray wolf’s subsequent listing as endangered led to the reintroduction of gray wolves in the NRM. Today there is a population of approximately 1,650 wolves in this region. In January 2012, the Fish and Wildlife Service (“FWS”) issued a new rule removing the gray wolf in Wyoming from the endangered species list. This rule was held to be arbitrary and capricious in Defenders of Wildlife v. Jewell (“Defenders”), which caused the gray wolf to be relisted in 2014.

Part I of this comment describes the general delisting process under the ESA and the many attempts by FWS to delist the NRM gray wolf. Part II examines the Defenders decision, which blocked FWS’s latest attempt to delist the gray wolf in Wyoming. Part III explains the benefits of this decision, which includes strengthening the requirements for state recovery plans. This section also demonstrates that Defenders does not end the long fought battle over gray wolf protection. FWS could likely still delist the gray wolf if Wyoming simply agrees to maintain over 100 wolves in the state, or if Congress passes a bill delisting the species. Finally, Part IV offers an alternative way to ensure higher benefits.

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3 This region covers wolves living in Wyoming, Idaho and Montana. Id.
5 Id. at 447.
6 Jenny K. Harbine, Gray Wolves in the Northern Rockies Again Staring Down the Barrel at Hostile State Management, 36 ECOLOGY L. CURRENTS 195, 195 (2009).
protection for species such as the gray wolf by clarifying and strengthening the definition of the word “conservation” within the ESA by agency rulemaking. A strengthened definition would require recovery goals with a higher minimum population and only allow approval of state recovery plans that will actually continue to increase the species’ population numbers. This will help ensure that NRM gray wolves maintain a healthy and stable population.

I. BACKGROUND

A. Statutory Background: The Delisting Process under the Endangered Species Act

Congress passed the ESA in 1973 to protect endangered and threatened species and the ecosystems upon which they depend. The FWS and the National Marine Fisheries Service (“NMFS”) publish and maintain a list of species deemed endangered or threatened. The agency in charge must consider five factors when determining if a species should be listed: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued

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9 It is currently defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).
10 An endangered species means “any species which is in danger of extinction throughout all or a significant portion of its range.” Id. § 1532(6) (2012).
11 A threatened species means any species that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20) (2012).
12 Id. § 1531(b) (2012).
13 NMFS is in charge of marine species and the FWS is responsible for freshwater fish and all land species. Species that occur in both habitats, such as sea turtles, are jointly managed. As such, the gray wolf is managed exclusively by the FWS. 50 C.F.R. § 402.01(b) (2015).
14 Id.
existence.” Once listed, the FWS can prevent any federal action that may jeopardize the given species and can prosecute anyone for taking that species.

The principal goal of the ESA is “to return listed species to a point at which protection under the Act is no longer required.” A species may be delisted on the basis of recovery only if the “best scientific and commercial data available” indicate that it is no longer endangered or threatened “after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . to protect such species.”

To delist a species, the FWS must first propose the action in the Federal Register in order to allow other agencies, experts and the public to comment. Within a year of publishing this notice, and after analyzing these comments, FWS must announce a final decision either completing the delisting process or maintaining the species’ protected status under the ESA. Once a species is delisted, the FWS “shall implement a system in cooperation with the State to monitor effectively for not less than five years” the status of the species in order to ensure its survival after losing ESA protection. The state typically takes the lead role in the planning and implementation of this system. Thus, delisting a species

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16 "The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Id. § 1532(20) (2015).
17 Id. §§ 1536, 1538.
19 A species can also be removed from the ESA because the initial listing and classification was erroneous or if the species is now extinct. Id.
21 16 U.S.C. § 1533(b)(5). This process of delisting a species is a substantive rulemaking, subject to the requirements of 5 U.S.C. § 553(b)–(c), and reviewable as an agency action subject to arbitrary and capricious review under 5 U.S.C. § 706(2)(A).
23 16 U.S.C. § 1533(g). If monitoring seems to indict that the species was listed premature it can be relisted on an emergency basis while formal relisting is considered. Id.
moves its protection and survival from federal to predominantly state control.

B. The Long Battle over Gray Wolves and the Endangered Species Act

Until the second half of the 19th century, there were a substantial number of gray wolves living in the Northern Rocky Mountains ("NRM"), but hunting, poisoning and habitat destruction caused the population to sharply plummet.25 By the 1930s, the gray wolf had been exterminated from the Northern Rockies.26 This led the FWS to designate the gray wolf in the NRM as endangered in 1973, the same year the ESA was passed.27 In 1987, the FWS identified three recovery zones for the NRM gray wolves: Northwestern Montana, Central Idaho and the Yellowstone National Park area of northwest Wyoming.28 The FWS originally set a recovery goal at a minimum of 10 breeding pairs29 in each of these three zones.30 This recovery goal was revised in 1994 to clarify that the thirty or more breeding pairs must comprise “300+ wolves in a metapopulation (a population that exists as partially isolated sets of subpopulations) with genetic exchange between subpopulations.”31 In 1995, the FWS started relocating wolves from Canada into the Northern Rockies to reestablish a population

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25 Perry, supra note 4, at 445. In fact, “During the first half of the nineteenth century, over 35,000 wolves were estimated to inhabit the Yellowstone region” alone. Id. Today, there is an estimated 1,774 gray wolves in the entire northern Rocky Mountain Region. Defenders, 68 F. Supp. 3d at 197.
26 Perry, supra note 4, at 445.
27 Defenders, 68 F. Supp. 3d at 197.
28 Id.
29 A breeding pair was originally defined as two wolves of the opposite sex at an age capable of producing young for a minimum of three consecutive years. See Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population’s Status as an Experimental Population, 77 Fed. Reg. 55,530, 55,531 (Sept. 10, 2012) (to be codified at 50 C.F.R. pt. 17). This was revised in 1994 to mean “an adult male and an adult female wolf that have produced at least two pups that survived until December 31 of the year of their birth, during the previous breeding season.” Id.
30 Id.
31 Id.
using the non-essential experimental population language in section 10(j).  

FWS started to reclassify and delist the gray wolf population incrementally across three distinct population segments ("DPS"s): Eastern, Western and Southwestern in 2003. A district court in Oregon vacated this approach because, *inter alia*, it was arbitrary and capricious for the FWS to reclassify a species from endangered or threatened in a DPS based on the recovery of only the core population. In 2005, the FWS published Rule 10(j), which enabled states with approved wolf management plans to petition the FWS for lead management authority for experimental wolf populations consistent with this rule. FWS had already approved Montana and Idaho’s wolf management plans as adequate to ensure that the wolf population remained stable. In contrast, Wyoming’s management plan was not approved by FWS because it classified the vast majority of its wolf population as predatory animals, which meant anyone could kill wolves without genuine oversight. During this period the NRM gray wolf was

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36 *Id.*
managed by the state government in Montana and Idaho, but by the federal government in Wyoming.

Wyoming then sought to revise its wolf management plan, but it still remained committed to managing only seven breeding pairs of wolves outside national park lands and kept the wolf classified as a predatory animal in nearly 90% of the state. Despite these minimal changes, the FWS accepted Wyoming’s new management plan. This approval led FWS to publish a new rule in 2008 delisting the NRM gray wolf in its full range. In *Defenders of Wildlife v. Hall*, a preliminary injunction was granted reinstating ESA protection. In that case, the court found that the plaintiffs were likely to succeed on the merits of their claim, namely that FWS’s decision to delist the wolf in its full NRM range was arbitrary and capricious because, *inter alia*, Wyoming’s management was inadequate since it had not set a fixed or permanent commitment to a certain number of breeding pairs.

In 2009, FWS attempted to delist the wolf again, but this time only in Montana and Idaho. After this rule was finalized, the states planned wolf hunts, which would allow 75 gray wolves in Montana (15% of the state’s population) and 220 wolves in Idaho (25% of the state’s population) to be killed by hunters. In 2010, the District of Montana vacated this ruling by deciding that FWS cannot delist a species on a state-by-state basis. This decision

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40 Id.
41 Id., at 1164.
42 Id. at 1160.
meant that the NRM gray wolf must have the same status under the ESA in Wyoming, Montana and Idaho, which in turn mandated that FWS could not delist the NRM gray wolf until Wyoming developed an adequate state management plan.\textsuperscript{46}

With the agency out of options, Congress then attempted to delist the gray wolf in Montana and Idaho. Six different independent bills tried to delist the gray wolf in these states, but all failed to garner enough votes.\textsuperscript{47} Ultimately, a provision was added to the Defense Appropriation Bill that would reissue the 2009 Final Rule delisting the gray wolf in Montana and Idaho, and shield the re-issued rule from judicial review.\textsuperscript{48} This bill passed and was upheld by the Ninth Circuit,\textsuperscript{49} leaving the gray wolf in the confusing situation of being a listed species in Wyoming but a delisted species in Montana and Idaho.

Meanwhile, Wyoming was revising its state management system in order to obtain FWS approval after the court deemed its plan inadequate\textsuperscript{50} in 2010.\textsuperscript{51} Wyoming’s revisions included setting hunting seasons and permit limits as “necessary to reasonably ensure at least ten (10) breeding pairs of gray wolves and a total of at least one hundred (100) individual gray wolves are located in this state outside of Yellowstone National Park and the Wind River Indian Reservation at the end of the current calendar year.”\textsuperscript{52} With these changes, the FWS approved its plan and delisted the gray wolf in Wyoming.\textsuperscript{53}

\textsuperscript{46} Id.
\textsuperscript{47} Perry, supra note 4, at 452.
\textsuperscript{49} All. for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012).
\textsuperscript{50} Hall, 565 F. Supp. at 1164.
II. The Defenders Case and the Court’s Opinion

Several environmental groups filed suit against the FWS over its rule removing the gray wolf in Wyoming from the endangered species list, which transferred management of the gray wolf in Wyoming from federal to state control. ESA listing and delisting determinations are subject to judicial review under the Administrative Procedure Act. This means that the court can only reverse an agency action, finding or conclusion if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The plaintiffs argued that this FWS decision was arbitrary and capricious for three reasons: (1) Wyoming’s regulatory mechanisms were inadequate to protect the gray wolf; (2) the level of genetic exchange shown in the record did not warrant delisting; and (3) the gray wolf is still endangered within a significant portion of its range. The plaintiffs moved for summary judgment based on these rationales.

The District Court for the District of Columbia granted the plaintiffs’ motion for summary judgment in part and denied it in part, ultimately relisting the gray wolf on the endangered species list. Judge Amy Jackson agreed with the FWS that the level of genetic exchange between wolf sub-populations was sufficient and that the gray wolf was no longer endangered within a significant portion of its range. However, she agreed with the plaintiffs on their first rationale that FWS could not reasonably rely on Wyoming’s potentially insincere intention to preserve wolves when it deemed Wyoming’s regulatory mechanisms to be ade-

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54 The environmental groups were the Center for Biological Diversity, Defenders of Wildlife, Fund for Animals, Humane Society of the United States, Natural Resources Defense Council, and the Sierra Club. They originally filed separately but were all consolidated into one case.
55 Defenders, 68 F. Supp. 3d at 196.
57 Id.
58 Defenders, 68 F. Supp. 3d at 1.
59 Id.
60 Id.
61 Id.
quate. Thus, her decision to grant summary judgment for the plaintiff was based solely on the inadequacy of Wyoming’s management plan.

Wyoming’s management plan is essential to the delisting process because § 1533(a)(1) of the ESA requires the FWS to evaluate “the inadequacy of existing regulatory mechanisms” when making a delisting decision. In this case, Wyoming’s management approach was simply a non-binding statement contained in the addendum to its Gray Wolf Management Plan that the state intended to manage a population above its minimum management targets to ensure the required population buffer. The plaintiffs contended that it was arbitrary and capricious for the FWS to rely on this wholly non-binding statement in making a delisting decision, since achieving the necessary population buffer is an essential part of the mandated recovery goal. The plaintiffs highlighted their point by arguing that FWS could not mandate that it was necessary for Wyoming to manage more than 10 breeding pairs and 100 wolves as a condition for delisting without requiring the state to “implement a legally enforceable commitment that would satisfy” that requirement.

Before assessing the potential inadequacies of Wyoming’s commitment, Judge Jackson conceded that there is “little legal authority” governing this question on whether FWS can rely on a non-binding and unenforceable representation when making a delisting decision. She relied heavily on two district court cases that looked at similar situations involving the FWS. First, in Biodiversity Legal Foundation v. Babbitt, the court held that the FWS could not use a possible future action by the United States Forest Service to provide sanctuary for the wolf as part of their

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62 Id.
63 Id.
65 FWS set the minimum recovery goal as at least 10 breeding pairs and at least 100 wolves in Wyoming outside Yellowstone National Park and the Wind River Indian Reservation. Id.
66 Defenders, 68 F. Supp. 3d at 204 (citing 77 Fed. Reg. 55,530, 55,554).
67 Id.
68 Id. at 205.
69 Id. at 207.
assessment of whether a species should be listed as endangered. Second, in *Oregon Natural Resources Council v. Daley*, the court held that the FWS could not use the anticipated results of a study as the rationale for not listing a species as threatened. These cases indicate that merely possible actions or studies cannot be used as the exclusive rationale in the listing process. Judge Jackson extended this jurisprudence to delisting decisions since both are governed by § 1533 of the ESA. As such, Judge Jackson found that the non-binding statement that Wyoming simply intended to meet the FWS goals was insufficient grounds for a delisting. Accordingly, the Court held that the FWS’ determination that Wyoming’s regulatory scheme was adequate under the ESA was arbitrary and capricious. The gray wolf was then relisted in Wyoming.

### III. The Significance of *Defenders* and Its Implication on the Future of the Endangered Species Act and the Gray Wolf

#### A. *Defenders* Strengthened the Requirement for State Management Plans

In the addendum to its Gray Wolf Management Plan, Wyoming stated that it “intends to manage for a [gray wolf] population above its minimum management targets.” The use of the word “intends” shows that Wyoming is not making any type of legally binding commitment. Furthermore, this statement is vague about how Wyoming will actually manage the gray wolf to ensure this population is maintained. Before the decision in *Defenders*, there was minimal jurisprudence dealing with the issue of whether FWS can rely on non-binding and unenforceable representations when making decisions. In fact, Judge Jackson stated that there is “little legal authority governing [that] question.” Judge Jackson

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72 *Defenders*, 68 F. Supp. 3d at 207
73 *Id.*
74 *Id.* at 204 (citing 77 Fed. Reg. 55,530, 55,554).
75 *Id.* at 207.
76 *Id.*
handled the question by looking at the language of the ESA and the few cases that did deal with similar issues.

The language of ESA seemed to demonstrate that listing determinations should not be based on possible, vague future actions. Section 1533(a)(1) lists the factors FWS can consider when making a delisting decision, which include “the adequacy of existing regulatory mechanisms.”77 The phrase “existing regulatory mechanisms” unambiguously precludes unenforceable promises of action, which are neither existing nor regulatory.78 Furthermore, the regulation goes on to say that the FWS must base its decision to list or delist a species “solely on the basis of the best scientific and commercial data available to him . . . after taking into account those efforts, if any, being made by any State . . . .”79 The present tense nature of the phrase “efforts . . . being made” again seems to indicate that FWS is only supposed to look at the current practices of a state since a voluntary vague promise of future action is by definition not an action currently being taken by the state. This further demonstrates that FWS cannot use an unenforceable promise to maintain the wolf population because there is no concrete action “being made” by the state. Taken together, the language of the ESA seems to mandate that FWS cannot rely on non-binding promises of future action when making a delisting decision.

This interpretation is supported by the few cases that have dealt with similar issues. A Ninth Circuit panel held that a purely voluntary conservation plan is not a “functional substitute for critical habitat designation.”80 While this case does not deal with the specific issue of listing determinations, it does demonstrate that requirements in the ESA cannot be fulfilled by voluntary compliance measures. There are also two cases from the District Court of the District of Columbia that address whether FWS can use possible future actions as the rationale for deciding whether to list a species under the ESA. Since § 1533 of the ESA covers both

listing and delisting decisions, this jurisprudence can be extended to delisting cases. In *Biodiversity Legal Foundation v. Babbitt*, the court held that the FWS could not use the possible future action of the Forest Service to potentially provide sanctuary for the Alexander Archipelago wolf of southeastern Alaska as an excuse to deny a petition to list it as endangered.\(^{81}\) Instead, the Court made clear in that case that a listing “determination must be made on the basis of the current Forest Service Plan.”\(^{82}\) Furthermore, in *Southwest Center for Biological Diversity v. Babbitt*, the court reversed FWS’s decision not to delist the Queen Charlotte goshawk because it again found that FWS “cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record.”\(^{83}\) These cases demonstrate that FWS cannot solely consider future actions or promises when making the decision to remove a species from the endangered species list. Therefore, FWS should not have relied solely on Wyoming’s ambiguous intentions to manage the gray wolf population to comply with the minimum recovery goals.

The government attempted to argue that the *In Re Polar Bear* decision, upholding the FWS rule listing the polar bear as a threatened species established that non-binding promises could be relied upon by FWS when making a listing determination.\(^{84}\) In that case, FWS did assume the harvest regulations employed by most countries with polar bears were “flexible enough to allow adjustments in order to ensure that harvests are sustainable” as the polar bear population declines due to habitat destruction.\(^{85}\) However, the decision to list the polar bear as threatened did not rest on that assumption.\(^{86}\) Instead, FWS explicitly relied only on existing regulatory mechanisms when deciding if polar bears should be

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\(^{82}\) Id.
\(^{83}\) Id. at 112 (internal citation omitted).
\(^{85}\) Id. at 112 (internal citation omitted).
\(^{86}\) Id. at 111.
listed. This simply establishes that non-binding statements can be part of the equation when assessing the sufficiency of an array of regulatory mechanisms. In contrast, in this case, FWS specifically and solely relied on the non-binding statements in the addendum, when making the delisting decision. In fact, there are no other regulatory mechanisms in place to ensure that the gray wolf population in Wyoming is managed at the appropriate level. Thus, Judge Jackson was correct in deciding that this case did not address the question in Defenders about whether an agency can solely rely on uncertain future plans when making a delisting decision.

Judge Jackson’s decision to not allow FWS to rely on non-binding and unenforceable representations when making the decision to delist a species strengthens the requirement for state management plans. It is the first time the court has made clear that a state must make binding and enforceable plans to maintain a healthy population of a species before that species can be delisted. This new requirement is essential for effective species protection because it is illogical to allow non-binding regulatory mechanisms to be the basis of delisting since the non-binding nature of potential state plans “make[s] their protections illusory.” This means even if a plan seemed adequate to ensure the continued survival of a species there is no guarantee that it will be followed. For instance, a state could express an intention to maintain the wolf population at 50% higher than the required minimum as a buffer, but they could give out permits that cause the population to fall beneath that number without any legal ramification. Thus, the binding agreement is necessary to ensure that a state has a legal commitment to maintain the viability of the species’ population once delisting occurs. Furthermore, requiring a binding commitment demonstrates that a given state is actually legally bound to ensure that a species population does not sharply decline after being delisted. It would be counterproductive for the federal government to delist a

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87 Id. at 112 (“[I]n making our finding we have not relied on agreements that have not been implemented.” (citation omitted)).
88 Defenders, 68 F. Supp. 3d at 207.
species that has recovered if the state has no plan to keep that species’ population above the threatened level.

The critical difference that this new requirement makes can be seen by comparing Montana and Idaho’s recovery plans to Wyoming’s proposed plan at the time. Both Montana and Idaho gave the FWS concrete commitments to conserve at least 15 breeding pairs and set a fixed trophy game area within the state.90 This plan, while far from ideal, helps ensure a continued viable population of gray wolves after they lost federal protection by regulating the number of wolves hunted within the state. In contrast, Wyoming’s regulatory structure included no type of legally enforceable commitment to keep the wolves from declining below the threatened threshold.91 In fact, in about 80% of Wyoming’s land, anyone could kill a limitless number of wolves on sight for any reason.92 In the first month Wyoming had control over its wolves, approximately 15% of the wolf population was killed.93 By contrast, in the 2011–2012 hunting season in Idaho and Montana, the wolf population declined at an annualized rate of 2.9% per month.94 The difference between these state plans demonstrates the importance of the requirement in Defenders for

90 Endangered and Threatened Wildlife and Plants; Final Rule To Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and To Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15,123.
92 Michael Winter, Judge Restores Protections to Wolves in Wyoming, USA TODAY, Sept. 23, 2014.
93 Press Release, Natural Resource Defense Counsel, Suit Filed Against Wyoming’s Kill-at-Will Wolf Policy (Nov. 13, 2011). Before Wyoming took over wolf management, the state’s wolf population was 328. At least 49 wolves were killed, but the number could be higher because of delayed or neglected reporting of kills. Id.
94 In the beginning of 2011, there was an estimated wolf population of 1,579 in Montana and Idaho. During that year, 545 wolves were killed in both states. Id.; IDAHO DEPARTMENT OF FISH AND GAME, 2011 IDAHO WOLF MONITORING PROGRESS REPORT 5 (2012); MONTANA FISH, WILDLIFE AND PARKS, MONTANA’S WOLF POPULATION UP 15 PERCENT IN 2011 (2012).
B. Defenders restricts the state’s role in the ESA

The passage of the Endangered Species Act expanded federal authority over wildlife management. It gave the federal government the power to list a species as endangered or threatened. Once a species is listed, the federal government has the obligation to determine the critical habitat and recovery plan for each species. This gives the federal government the lead role in determining which species need protection and for creating a management plan to protect the species. Every five years, the ESA requires a reassessment on whether a species should be removed from the endangered species list or changed from threatened to endangered (or vice versa). While the federal government is also in charge of this reassessment process, the state has traditionally also played an important role.

This process involves the FWS assessing whether a species status should be changed based on the “best scientific and commercial data available after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State . . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices.” While the federal government appraises whether a species should be delisted based on science, the state’s efforts play a significant role in whether the delisting actually occurs, since the FWS is required to consider that in its decision-making. This means that the federal government may be persuaded to delist a species based on a state’s efforts. Additionally, FWS must work with the state to implement a monitoring system after

96 Id. § 1533 (b)(2).
97 Id. § 1533 (f).
98 Id. § 1533(c)(2).
99 Id.
100 Id. § 1533(b)(1)(A).
delisting a species.\textsuperscript{101} Thus, the federal government and the state traditionally work together in both the delisting process and in monitoring the species post-delisting, with the federal government in the leading role.

The decision in \textit{Defenders} gives state less power over species that have recovered in two key ways. First, this decision expands the scope of the FWS review of the state plan to include more than just specific efforts made to protect a species, such as “predator control, protection of habitat and food supply.”\textsuperscript{102} In particular, it requires the FWS to examine whether a state has made a legal commitment to ensure the species’ population does not decline below the minimum numbers.\textsuperscript{103} In this case, Judge Jackson found that FWS should not have transferred control over the wolf population to Wyoming because the state made no concrete or legally binding commitment to protect the species at a level above the minimum.\textsuperscript{104} \textit{Defenders} expanded what state effort means to include actual binding commitments of the state.\textsuperscript{105} This gives the federal government more lasting control over a recovered species.

Second, \textit{Defenders} changes the standard of reviewing the state plan from mandatory consideration to mandatory rejection of plans that will not maintain FWS recovery goals. The language of the ESA clearly states that FWS needs to take into account states’ efforts when making a listing or delisting decision.\textsuperscript{106} Before \textit{Defenders}, this consideration of the state plan was all that was required by the ESA. For instance, when delisting the gray wolf in Wyoming, the FWS originally approved Wyoming’s plan even though there was no guarantee of the required buffer.\textsuperscript{107} Judge Jackson made clear that this type of approval was not within FWS’s authority. Instead, FWS could not give Wyoming control over its gray wolf population until it made a binding commitment

\begin{footnotes}
\item[101] FWS must “implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species.” 16 U.S.C. § 1533(g)(1).
\item[102] \textit{Id.} § 1533(b)(1)(A).
\item[103] \textit{Defenders}, 68 F. Supp. 3d at 203–04.
\item[104] \textit{Id.}
\item[105] \textit{Id.}
\item[107] \textit{Defenders}, 68 F. Supp. 3d at 207.
\end{footnotes}
to regulate the gray wolf population at the mandated level.\textsuperscript{108} Going forward, the federal government will maintain control over a species until the state creates a concrete plan to meet the recovery goal set by the FWS. Thus, FWS cannot simply review the state plan but instead must reject any state plan that will not comply with set recovery goals.

This requirement decreases a state’s power over wildlife management because the only two choices a state has are to either make a recovery plan that meets all federal targets or allow the federal government to completely regulate the given species. Thus, \textit{Defenders} expanded the role of the federal government because a species could be fully recovered but remain under federal protection indefinitely because of inadequate state plans. Even if the plan is deemed adequate, federal recovery goals are still required to shape the state’s policy.

This new approach has already played a role in another ESA case heard by the District Court of the District of Columbia. In \textit{Humane Society of the United States v. Jewell}, Judge Howell held that the FWS rule delisting the Great Lakes gray wolves was also arbitrary and capricious due to the inadequacy of state regulations in this region.\textsuperscript{109} The court specifically mentions that five of the nine states where this subspecies live had a “near total lack of regulatory mechanisms to protect the gray wolf.”\textsuperscript{110} The regulatory mechanisms in place in the remaining states were also deemed insufficient without further explanation by FWS explaining why those plans were sufficient for the species’ protection.\textsuperscript{111} For instance, the Court found that FWS could not merely approve Minnesota’s plan, which allows “virtually unregulated killing of nearly one-sixth of all wolves in the state, and the ability to kill any wolf that wanders into sixty-five percent of the State” without justification as to how this approach is adequate to prevent the wolf from becoming threatened or endangered again.\textsuperscript{112} Overall, this case demonstrates that \textit{Defenders of Wildlife v. Jewell} set a

\textsuperscript{108} \textit{Id.}
\textsuperscript{110} \textit{Id. at 49.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id. at 50.}
precedent that a species cannot be delisted unless FWS can show there is a state plan in place that will ensure its continued recovery. This means a species will stay under federal protection even after it has recovered unless a state creates an adequate recovery plan.

C. *Defenders only provides temporary protection for the wolves*

While *Defenders* ensured the Wyoming gray wolf’s protection for now by placing it back on the endangered species list, it does not ensure lasting protection for the species. Judge Jackson made clear that the delisting was overturned simply because of Wyoming’s inadequate management plan, which means that FWS’s assessment that the gray wolf is no longer threatened or endangered as long as the population remains above the recovery goal of more than 100 wolves and 10 breeding pairs was upheld. As such, FWS could likely delist the gray wolf in Wyoming again as soon as the state passes a legally binding statute to maintain the recovery goal. There is also the possibility that Congress will pass a bill delisting the wolf in Wyoming. Thus, the holding in *Defenders* is largely a procedural hurdle for Wyoming, which leaves three main problems for the gray wolf: an insufficient recovery goal; the allowance of weak state plans; and the potential for detrimental Congressional involvement.

1. **The recovery goal is insufficient for a healthy wolf population**

During the first half of the 19th century, over 35,000 gray wolves were estimated to live in Wyoming, but FWS has set the recovery goal at only 100 wolves outside Yellowstone National Park and the Wind River Indian Reservation. Since approxi-
mately 110 wolves live within those two regions, this recovery goal is met at a population of only 210, which is .6% of the estimated original population in the state. The NRM gray wolf population as a whole in Idaho, Montana, and Wyoming is also currently below 1% of its original population. These low numbers indicate that FWS is delisting species with critically low population sizes.

These population numbers are significantly lower than the population levels for other species when they were delisted. As of 2014, only nine North American mammals and birds, besides the gray wolf, have been delisted because their population recovered. For a species to be delisted it must no longer be in danger or likely to become in danger of extinction throughout all or a significant portion of its range. In all nine of the previous cases, this has meant that the given species had “achieved one or both of the following: (1) a minimum population of 1000 breeding pairs or (2) an increasing or stable population well distributed across the majority of the original range of the species.” At least six of the nine species had met both of these criteria before they were delisted. On the other hand, the NRM gray wolf population is still far short of meeting either criterion, since it has only recovered about 6% of its original range, and FWS estimates there are only 100 breeding pairs in the NRM. FWS’s recovery goal allows it

117 Bergstrom et al., supra note 2, at 994.
118 See U.S. FISH AND WILDLIFE SERVICE, DELISTING REPORT (2014). The nine species are the brown pelican (Atlantic and East Gulf coastal DPS), gray whale (Eastern Pacific DPS), arctic peregrine falcon, American peregrine falcon, Aleutian Canada goose, Columbian white-tailed Deer (Douglas County DPS), bald eagle (lower 48 population), Virginian northern flying squirrel, and the Steller sea lion (Eastern DPS). Id. Other species have been delisted because of extinction or an erroneous initial listing and classification. Id.
120 Bergstrom, supra note 2, at 994.
121 Id.
122 Id. at 106. Defenders holds that neither the number of breeding pairs nor the small percentage of land the gray wolves lived were a factor when finding the delisting arbitrary and capricious, which means that the gray wolf can be
to delist the gray wolf with an unprecedented lack of actual recovery.

Furthermore, none of the nine previously delisted species had been subjected to any significant level of purposeful population reduction post-delisting.\textsuperscript{123} The only species with a harvest allowance was the Yellowstone DPS grizzly bear,\textsuperscript{124} but permits were restricted to ensure the population did not fall below the population size when delisting occurred.\textsuperscript{125} In contrast, the FWS’ stated recovery goal of maintaining a minimum population of merely 300 wolves is 80\% percent fewer than currently occupy the Northern Rocky Mountains region.\textsuperscript{126} Hunting has already started to cause the NRM wolf population to decline. From June 2011 to June 2013, approximately 1,600 wolves were killed in Idaho, Montana and Wyoming.\textsuperscript{127} This high level of permitted hunting further threatens the already low gray wolf population.

Wolves are also more at risk for extinction with a lower population than other species because of their pack structure.\textsuperscript{128} In general, there is only one breeding pair per family of wolves.\textsuperscript{129} This means that the population of wolves does not increase as significantly on a year-to-year basis as a species where virtually all adults breed.\textsuperscript{130} Furthermore, if the alpha male of a pack dies the whole pack often falls apart, which can lead to the deaths of younger wolves\textsuperscript{131} and can also increase interbreeding, which

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\textsuperscript{123} Bergstrom, supra note 2, at 996.
\textsuperscript{124} The Yellowstone grizzly bear was relisted as threatened in 2009. Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015 (9th Cir. 2011).
\textsuperscript{125} Bergstrom, supra note 2, at 996.
\textsuperscript{126} Earth Justice et al, Northern Rockies Gray Wolf Delisting Fact Sheet, IDAHO DEPARTMENT OF FISH AND GAME.
\textsuperscript{127} Jim Dutcher, Jamie Dutcher & Garrick Dutcher, Don’t Forsake the Gray Wolf, N.Y. TIMES, June 7, 2013.
\textsuperscript{128} See Bergstrom et al., supra note 2, at 994–95.
\textsuperscript{129} Id.
\textsuperscript{130} See id.
\textsuperscript{131} Brett French, Shooting of Collared Wolves Impacts Research, BILLINGS GAZETTE, Nov. 01, 2009 (citing Doug Smith, a Yellowstone Nation Park biologist, saying that wolves often split up when the alpha wolves are killed which can lead to the pups being abandoned).
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causes a loss of genetic diversity. Studies using the proposed harvest levels of NRM wolves predicted that wolves would decline effectively to an extinction level in less than 10 years unless relisted. The recovery goal set for wolves is simply unrealistic and should be raised in order to keep a stable wolf population in the region.

Furthermore, scientists and the international community have confirmed the inadequacy of the NRM gray wolf recovery goal. First, 250 scientists signed a letter to FWS stating that the current recovery goal for gray wolves was “insufficient to achieve an effective population size large enough to maintain essential genetic diversity.” Second, the International Union for Conservation of Nature (“IUCN”), which sets internationally recognized protocols for conservation, requires “listing a species as ‘vulnerable’—which is comparable to ESA ‘threatened listing’—if the population size drops below 1000 ‘mature’ individuals.” A mature individual is an animal capable of reproducing. Below this threshold, the population may lose the genetic diversity needed for a healthy population. The minimum requirement of only 300 total wolves is significantly below this threshold, especially since typically only the alpha male and female of a pack reproduce.

According to the scientific community, the recovery goals set for the gray wolf are simply too low to ensure the continued recovery of the species. As is discussed in section IV, a solution to this issue would be to strengthen the requirements for delisting through agency rulemaking.

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132 Bergstrom, supra note 2, at 994-95.
133 Id. In conducting this study, the researchers “varied several parameters including age distribution of the wolves, breeding pools, total percentage of breeding wolves, dispersal survival, age of mortality, and percentage dispersing between NRM and YNP, from realistic and conservative values to extremely liberal . . . values. In 100 percentage of 10,000 simulations for all conditions, the population declined, effectively to extinction (i.e., 100 individuals, a size well below the 450 at which the DPS would need to be relisted) in less than 10 years.” Id.
134 Harbine, supra note 6, at 200-01.
135 Id.
136 Id.
137 Id.
2. **THE FWS NEEDS TO REQUIRE BETTER PROTECTIVE STATE PLANS TO ENSURE A HEALTHY AND CONTINUOUS WOLF POPULATION**

While *Defenders* rejected Wyoming’s wolf management plan, it does nothing to protect the rest of the NRM wolf population. FWS approved both Montana and Idaho state recovery plans despite the threat they pose to the continued survival of the gray wolf population. Both states have boards\(^{138}\) that establish the number of wolves that can be killed by the public each year. For instance, in the 2013–2014 hunting and trapping season in Idaho, 302 wolves were killed with a remaining 113 permits for additional kills left at the end of the year.\(^ {139}\) Similarly, in Montana hunters and trappers killed 230 wolves during the 2013–2014 season, which is 37% of the wolves alive at the start of the season.\(^ {140}\)

These numbers do not include wolves killed under Idaho and Montana’s defense of property statutes that impose no upper bound on the overall number of wolves that can be killed if the wolf poses a perceived threat to human safety, livestock or domestic dogs.\(^ {141}\) In Montana, individual landowners can kill up to 25 wolves without any review and after that the landowner can kill up to 100 with approval by the Montana Fish and Wildlife Commission every 25 kills.\(^ {142}\) The landowner can also kill any wolf while it is attacking livestock without affecting the above quotas.\(^ {143}\) This approach leads to an unregulated number of wolf kills in Montana. For instance, in 2013, 75 additional wolves were killed in Montana under the defense of property statute.\(^ {144}\)

\(^{138}\) The Montana Fish Wildlife and Park Commission and the Idaho Fish and Game Commission set the mortality quota for the wolves in their respective states.

\(^{139}\) Idaho Department of Fish and Game, Wolf Harvest Information. http://fishandgame.idaho.gov/public/hunt/?getPage=121


\(^ {141}\) Id.


\(^ {143}\) Id.

Idaho, property owners can similarly kill any wolf without a permit for molesting or attacking livestock or domestic animals.

This practice, in combination with the allowed hunting, could easily reduce the wolf population below the minimum number specified in the delisting requirements. Approving a recovery plan that could cause the wolf population to become threatened or endangered again is counterproductive to the purpose of the ESA. Therefore, FWS should not be allowed to approve state recovery plans unless they will actually ensure the continued survival of the species. One way this could be achieved is by strengthening the requirements for delisting through agency rulemaking as discussed infra in section IV.

3. CONGRESS COULD CODIFY WYOMING’S ORIGINAL STATE PLAN

It is possible that Congress could override the decision in Defenders, leaving Wyoming’s current state plan in place. In 2008, when a district court judge reinstated ESA protection over the entire NRM gray wolf species, Congress attempted to get the wolf delisted in Montana and Idaho. After several independent bills failed to garner enough votes, a provision was slipped into the 2009 Defense Appropriation Bill. The appropriation bill passed,
causing the gray wolf to lose ESA protections in Montana and Idaho. When the Ninth Circuit upheld this rider, it set a dangerous precedent for allowing Congress to delist any species simply for political reasons.149

Congress could similarly delist the gray wolf in Wyoming by passing either an independent bill or by slipping it into another important bill that is likely to pass. Wyoming Governor Matt Mead has made clear that Wyoming’s best chance at regaining control over the wolves is now through this type of congressional action.150 Representatives Reid Ribble (R-WI) and Cynthia Lummis (R-WY) have already introduced a bill that would delist the gray wolves in Wyoming and the Great Lakes states.151 The bill currently has 14 sponsors and has been referred to the House Committee on Natural Resources.152 Thus, the future of Wyoming’s gray wolf population may be at the mercy of potential congressional action.

IV. POTENTIAL SOLUTION: AGENCY ACTION IS NEEDED TO CLARIFY WHEN A SPECIES CAN BE DELISTED

Currently, there is significant ambiguity on when a species can be delisted. This ambiguity has led to different species being delisted with vastly different levels of recovery. For instance, another “apex” predator, the bald eagle, was removed from the ESA when there were an estimated 9,789 breeding pairs in the continental United States.153 There were also still two protective regulatory mechanisms in place to continue to protect the species post delisting: the Bald and Golden Eagle Protection Act and the

149 All. for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012).
150 Ben Neary, Wyoming Governor Eyes Congressional Fix on Wolf Delisting, SALT LAKE TRIBUNE, Nov. 1 2014.
151 To direct the Secretary of the Interior to reissue final rules relating to listing of the gray wolf in the Western Great Lakes and Wyoming under the Endangered Species Act of 1973, and for other purposes, H.R. 884, 114th Cong. 82 (2015).
152 Id.
Migratory Bird Treaty Act. These regulations continue to prohibit the “taking” of bald eagles.

In contrast, the FWS repeatedly attempted to remove the NRM gray wolf from the ESA with a population of only approximately 1,650 individual wolves and without any other federal regulation in place to give lasting protection to the species. This demonstrates that there is currently no set standard for when FWS determines a species is recovered enough to survive post delisting. This can allow for politically driven decision-making where certain animals such as the bald eagle are protected longer because it is seen as a national symbol, while the wolf loses protection earlier because it is seen as a nuisance. Since the ESA makes no distinction between different species, the FWS should not be giving different levels of protection based on politics or popularity. Thus, it would beneficial for FWS to promulgate a new uniform rule that clarifies when a species has recovered enough to be delisted. This would create a fairer and more uniform approach to the delisting process.

A. The Proposed New Rule

Currently, FWS can delist a species if the best scientific and commercial data available determines that the given species is neither endangered nor threatened. The ESA lays out factors that the FWS should consider when making this determination but does not have any specific population minimum requirements. Thus, FWS should clarify through rulemaking that a species is only recovered enough to be delisted if the population is and can remain self-sustaining. This would entail making recovery goals with a higher minimum population and only approving of state recovery plans that will legally ensure the species’ population numbers remains stable once delisting occurs. This modified approach would ensure a newly recovered species could not be immediately hunted down, as is happening to the gray wolf.

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155 Id.
156 Harbine, supra note 6, at 195.
There have already been several studies on the necessary size of self-sustaining populations. An often-cited study estimates that an effective population size of at least 500 individuals is needed for minimum population viability to avoid the impact of genetic interbreeding. Effective population sizes are generally 10–20% of the census population, which would mean the minimum total population necessary to ensure population viability, is between 2,500 and 5,000 wolves. The International Union for Conservation of Nature sets the minimum size for a healthy population at 1,000 individuals capable of reproducing. These numbers are all significantly higher than the current minimum of only 300 NRM wolves. FWS should use these studies and conduct its own research to determine a minimum population base level for all species. This would help ensure that there is always a stable and healthy population before delisting occurs.

Furthermore, this population can only be maintained if FWS mandates viable protective state recovery plans by requiring states to protect a self-sustaining population size. Such a rule would most likely invalidate current wolf management plans in Montana and Idaho that permit the killing of hundreds of wolves each year. As discussed earlier, this type of killing will likely lead to genetic interbreeding which would put the entire wolf population at risk. Revised state plans would include stricter hunting regulations to ensure that populations do not decline significantly post delisting. Overall, these changes will ensure that FWS protects the species by only approving state plans that will maintain a self-sustaining population level.

B. Legal Authority for the Proposed Rule

The court gives agencies considerable deference to resolve statutory ambiguity. Courts follow the two-step *Chevron* test to
determine whether deference should be given in a particular circumstance.\footnote{162} The two steps are whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable.\footnote{163} This framework “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”\footnote{164} Thus, an agency’s interpretation should only be overturned if it is “arbitrary, capricious or manifestly contrary to the given statute.”\footnote{165} The Supreme Court has made clear that this high level of deference is given even if an agency is changing its interpretation of a statute.\footnote{166} Thus, FWS can clarify how it determines if a species has recovered enough to be delisted as long as the new rule passes the \textit{Chevron} two-step test.

\textbf{1. CONGRESS DID NOT DIRECTLY SPEAK TO WHEN A SPECIES HAS RECOVERED}

Courts have consistently held that when Congress lists various factors for an agency to consider, with no particular structure for consideration, it is within the agency’s discretion to “decide how to account for the [] factors, and how much weight to give each factor.”\footnote{167} In this case, the ESA provides guidance on delisting but ultimately grants the FWS the authority to determine whether and when a species should be delisted.\footnote{168} Specifically, the...
ESA states that a species cannot be delisted unless the “best scientific and commercial data available . . . substantiate[s] that [the species] is neither endangered nor threatened.”169 This means that a species can only be fully delisted when it is neither “in danger of extinction throughout all or a significant portion of its range” nor “likely to become so within the foreseeable future.”170 When determining whether a species fits into one of these qualifications, the FWS must evaluate five criteria: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; [and] (E) other natural or manmade factors affecting its continued existence.”171

While the ESA provides some direction on assessing recovery, it does not provide clear guidance on when a species has recovered sufficiently for delisting to occur. The ESA merely lists factors to consider without any explanation of how to weigh them or how much of a reduction of a threat is enough to ensure a species has sufficiently recovered. By only listing various factors without any particular structure for consideration, Congress has given FWS the discretion to “decide how to account for the [] factors, and how much weight to give each factor.”172 Thus, FWS should be allowed to fill in the statutory gaps created by the unweighted factors by making its own regulations on when a species can be delisted. The proposed new rule, clarifying that a species can only be delisted if a population is and can remain self-sustaining, should easily pass Chevron step-one.

169 50 CFR 424.11(d).
172 See, e.g., Weyerhaeuser Co., 590 F.2d at 1045; BP Exploration & Oil, Inc., 66 F.3d at 796.
2. **This Interpretation Is a Permissible Construction of the ESA**

The second *Chevron* step is determining whether the agency’s interpretation is reasonable.\(^{173}\) A court cannot impose its own construction of the statute when the agency’s interpretation “is based on a permissible construction of the statute.”\(^{174}\) In this case, the ESA is silent as to the specifics of delisting a species and instead provides a five-factor test to help FWS determine if a species is in danger of extinction or likely to become so within the foreseeable future. The ESA specifically grants the FWS the responsibility to look at those factors when determining if a species is still endangered or threatened.\(^{175}\) The decision to restrict delisting of species unless the population is and can remain self-sustaining falls within this broad grant of discretion given to the FWS to determine whether a species is still at risk.

Furthermore, the requirements in the proposed regulation all fit within the prongs of its five-factor test for delisting. The requirement that the population must have a stable self-sustaining population fits within prong (C) because a smaller population is more likely to decline due to diseases from interbreeding. Additionally, requiring stricter state management plans fits within prong (D) because it involves the inadequacies of an alternative regulatory mechanism. Thus, interpreting the ESA to require a minimum population size and a more protective state recovery plan falls within a permissible construction of the ESA delisting procedures.

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\(^{173}\) *Chevron*, 467 U.S. at 843; *see also*, *e.g.*, *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014); *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013).

\(^{174}\) *Chevron*, 467 U.S. at 843; *see also* *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 981 (1986) (holding that a court is “preclude[d] . . . from substituting its judgment for that of the [agency]” when the agency’s interpretation of the given statute is “sufficiently rational”).

\(^{175}\) *E.g.*, *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1141 (9th Cir. 2007) (“In the ESA, Congress expressly delegated authority to the [FWS] to develop criteria for evaluating petitions to list endangered species.”).
This means that the proposed new rule should easily pass *Chevron* step-two.

**CONCLUSION**

*Defenders of Wildlife v. Jewell* is a victory for environmentalists in the short-term by ensuring the temporary protection of gray wolves in Wyoming and expanding federal power over the protection of endangered and threatened species. On the other hand, it does little to protect the gray wolf and other similarly situated species in the long-term. *Defenders* makes clear that wolves can be delisted as soon as Wyoming legally agrees to maintain a population of over 100 wolves. This concession means that the inadequate recovery goal and highly problematic state management plan can remain in place. In order to ensure the continued protection of endangered and threatened species, FWS needs to clarify and strengthen the requirements for delisting. This will mandate more accurate recovery goals and ensure that state plans actually provide lasting protection to the species, which is the intended goal of the ESA. If this is not done and essentially unregulated hunting of the gray wolf is permitted, the continued survival of the species will be in jeopardy. Thus, the future of the gray wolf largely lies in the hands of the federal government.