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## **Reintroduction of the Gray Wolf: The Battle Over the Future of Endangered Species Policies**

by

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# REINTRODUCTION OF THE GRAY WOLF: THE BATTLE OVER THE FUTURE OF ENDANGERED SPECIES POLICIES

*Christopher T. Cook*

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## I. INTRODUCTION

A simple plan to reintroduce an endangered species into the nation’s largest national park has ignited political, environmental, and legal firestorms that have reached far beyond the mountains of Yellowstone National Park. In January 1995, the federal government implemented its program for reintroduction of gray wolves into Yellowstone National Park and central Idaho.<sup>1</sup> In the months following the introduction of four Canadian gray wolves into the park, twenty-five other wolves were released into the mountains.<sup>2</sup> From the outset, the United States Fish and Wildlife Service, the department charged with development and implementation of the wolf reintroduction,<sup>3</sup> has faced opposition not only from local ranchers, who are afraid of the effects the wolves will have upon their livestock,<sup>4</sup> but also from environmentalists, who feel that the programs implemented by the federal government are too lenient and do not provide enough protections for the wolves from ranchers and hunters.<sup>5</sup>

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1. See Tom Kenworthy, *Once-Banished Predator Released in Idaho Rockies: Four Canadian Wolves Move to Wilderness Area*, WASHINGTON POST, Jan. 15, 1995, at A1.

2. See Robert C. Moore, *The Pack is Back: The Political, Social, and Ecological Effects of the Reintroduction of the Gray Wolf to Yellowstone National Park and Central Idaho*, 12 T.M. COOLEY L. REV. 647, 647 (1995).

3. See *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349, 1354 (D. Wyo. 1997) [hereinafter *Babbitt I*], *rev’d* 199 F.3d 1224 (2000).

4. See *id.* at 1366.

5. See *id.* at 1360.

Ultimately, the federal government's attempt to satisfy both sides of the debate through compromise has not worked, and has only served to heighten the debate and threaten the wolf population that has been reintroduced.<sup>6</sup> The compromise has resulted in these disparate groups combining forces to file suit in federal district court attacking the reintroduction plan and policies implemented by the Fish and Wildlife Service.<sup>7</sup> Into this legal and political debate has come the recent discovery of wolves in Montana, which have naturally migrated south from Canada.<sup>8</sup> The identification of these new wolves only adds to the debate by questioning the necessity of the effort of reintroduction and the exorbitant cost to the federal government.<sup>9</sup>

The purpose of this Note is to provide a historical analysis of wolf reintroduction into Yellowstone Park, and the legal and political issues that have been raised by the program. An attempt will also be made to identify the future of the Yellowstone wolves. The ultimate outcome of the Yellowstone wolves will have a far-reaching effect on the federal government's policies regarding the future of the Endangered Species Act. Reintroduction programs have been discussed regarding regionally extinct species in Minnesota, Michigan, and Maine, as well as in other states.<sup>10</sup>

Are the costs, both monetary and political, worth the intangible values reintroduction provides to society and the environment? That is the ultimate question that will need to be answered by the courts before the futures of the wolves and other like species are decided.

## II. HISTORY OF THE REINTRODUCTION OF THE GRAY WOLF

### A. *The American Gray Wolf*

Wolves were once the dominant predator species in the United States.<sup>11</sup> During the first one hundred fifty years of the United States, the wolf was hunted down and killed in every way imaginable by ranchers, hunters, and the federal government, because of the perceived dangers wolves presented to livestock and people.<sup>12</sup> In the 1920s, the federal government implemented an extensive program to eliminate the gray wolf through the use of bounty hunters.<sup>13</sup> For all practical purposes, the goal of the government was achieved by 1924 when government authorities estimated the gray wolf population in the lower forty-eight states was "no more than ten to fifty animals in any

6. See Moore, *supra* note 2, at 647-48.

7. See *Babbitt I*, 987 F. Supp. at 1353-58.

8. See Florangela Davila, *Gray Wolves' Return Hailed as Success, but Court Fight Continues*, SEATTLE TIMES, June 4, 1999, at A1.

9. See Moore, *supra* note 2, at 678.

10. See Beurmond Banville, *Residents Say Wolf Unwelcome: Worries Aired at County Session*, BANGOR DAILY NEWS, May 28, 1999, at B1.

11. See *Restoring Wolves* (last visited Oct. 24, 2000) <<http://www.defenders.org/wildlife/wolf/ynpfact.html>> [hereinafter *Restoring Wolves*].

12. See Davila, *supra* note 8.

13. See Moore, *supra* note 2.

one state."<sup>14</sup> The extinction of the gray wolf in Yellowstone Park occurred in 1926, when the last wolf was eliminated.<sup>15</sup>

The population of the gray wolf in the lower forty-eight states remained all but non-existent for the next fifty years.<sup>16</sup> In 1974, the gray wolf was listed as an endangered species under the Endangered Species Act in every state but Minnesota, where the wolf population was sufficient for the species to be listed only as threatened.<sup>17</sup>

The classification of the gray wolf as endangered and threatened required the United States Fish and Wildlife Service to take action to conserve the species.<sup>18</sup> Through conservation efforts, which continue today, the wolf population has increased slightly.<sup>19</sup> It is currently estimated that nearly three thousand gray wolves inhabit the wilderness of the lower forty-eight states.<sup>20</sup> Of that population, approximately two thousand-six hundred of the animals are found in Minnesota.<sup>21</sup>

The loss of the gray wolf from Yellowstone Park has had a dramatic effect upon the ecology of the park.<sup>22</sup> Prior to extinction, the gray wolf maintained the top level of the food chain and provided balance throughout the chain by eliminating overpopulation of certain prey species, such as elk.<sup>23</sup> The disparity in the population of species was not limited only to the animals on which the wolf preyed, but also extended to other wildlife.<sup>24</sup> The loss of the wolf had far ranging unpredictable results on the Yellowstone ecology, including the explosion of competitor hunter species, such as coyotes.<sup>25</sup> The growth of the coyote population caused a dwindling of the populations of foxes, badgers, and martens because these animals compete for the same prey.<sup>26</sup> The effect extended beyond predator species.<sup>27</sup> Scavengers, such as bears and ravens, were no longer able to feed off of the remains of wolf kills of elk.<sup>28</sup> These animals were forced to find other sources for scrounging.<sup>29</sup> The loss of the wolf from the pinnacle of the food chain resulted in a "bottom-heavy" food chain, which was growing heavier and heavier at the bottom with each passing year.<sup>30</sup>

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14. Davila, *supra* note 8.

15. See *Restoring Wolves*, *supra* note 11.

16. See generally Davila, *supra* note 8 (stating the gray wolf was listed as endangered as defined by the Endangered Species Act throughout the lower 48 states).

17. See *id.*

18. See The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994); Moore, *supra* note 2, at 652.

19. See *Restoring Wolves*, *supra* note 11.

20. See Davila, *supra* note 8.

21. See Banville, *supra* note 10.

22. See Jeffrey Kluger, *The Big (Not So Bad) Wolves of Yellowstone*, TIME, Jan. 19, 1998, at 22,

24.

23. See *id.*

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.*

### B. *Endangered Species Act*

The plan to reintroduce wolves into Yellowstone Park can trace its formation to the passage of the Endangered Species Act in 1973.<sup>31</sup> The congressional intent in the passage of the Act was to

provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.<sup>32</sup>

The Act went on to require the Secretary of the Interior to provide a list of those species that were endangered and threatened, and produce a plan for the conservation and survival of listed species.<sup>33</sup> The basis for the determination of whether a species is endangered or threatened is to be based upon "the best scientific and commercial data available."<sup>34</sup> The Secretary must also take into account the efforts being made by states or foreign nations to protect the species.<sup>35</sup>

In 1982, Congress amended the Endangered Species Act to provide additional protections for endangered species.<sup>36</sup> The amendment provided the Secretary of the Interior with the authority to introduce "experimental populations" of endangered species into wilderness areas.<sup>37</sup> An "experimental population" is defined as any endangered or threatened species' population, including offspring, eggs, or individual animals, which are placed outside of the current natural habitat of that species.<sup>38</sup> The Secretary must also determine whether "such release will further the conservation of such species."<sup>39</sup> The issuance of this amendment paved the way for the reintroduction of the gray wolf into the Yellowstone area.

### C. *Reintroduction of the Gray Wolf*

The passage of the 1982 Amendment to the Endangered Species Act was the result of efforts by environmentalists and wildlife authorities concerned with dramatic changes in the ecology of Yellowstone National Park.<sup>40</sup> It is clear from the

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31. See The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (1994); Moore, *supra* note 2, at 651.

32. The Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (1994).

33. See *id.* at § 1533(a)(1).

34. *Id.* at § 1533(b)(1)(A).

35. See *id.*

36. See Moore, *supra* note 2, at 652.

37. See The Endangered Species Act of 1972, 16 U.S.C. § 1539(j) (1994).

38. See *id.* at § 1539(j)(1)-(2).

39. *Id.* at § 1539(j)(2)(A).

40. See Kluger, *supra* note 22, at 24.

Congressional Record that wolves were one of the main species Congress was thinking of when it passed the amendment.<sup>41</sup>

Once congressional approval was provided through the amendment, it did not take long for the United States Fish and Wildlife Service to produce a plan for reintroduction of the gray wolf into Yellowstone Park and Idaho.<sup>42</sup> While the initial draft of the plan was introduced in 1982, it took nearly five more years before the final Rocky Mountain Wolf Recovery Plan was approved on August 3, 1987.<sup>43</sup> The plan called for the reintroduction of an experimental population of gray wolves into three wolf recovery areas.<sup>44</sup> Northwestern Montana, central Idaho, and Yellowstone National Park were selected as the three recovery areas.<sup>45</sup> As well as identifying the location of the proposed reintroduction, the plan also listed the intent to issue "special rules with liberal management to address human concerns and potential conflicts."<sup>46</sup> These "special rules" included the ability to relocate wolves by federal or state agencies in an effort to minimize effects upon ranchers, as well as provide for compensation for losses of livestock.<sup>47</sup>

Following the production of the final Rocky Mountain Wolf Recovery Plan, Congress provided authorization for studies regarding wolf reintroduction.<sup>48</sup> The studies produced evidence in support of reintroduction and the Department of the Interior released an initial environmental impact statement ("EIS") titled "Wolves for Yellowstone?" in May of 1990.<sup>49</sup> Following the EIS, the Wolf Management Committee was formed by Congress to form a finalized plan regarding the reintroduction of the gray wolf.<sup>50</sup> The Wolf Management Committee presented to Congress that provided for the reintroduced wolves to be designated as an experimental population.<sup>51</sup> This allowed for provisions in the plan for the killing of wolves that were threatening or killing livestock.<sup>52</sup> Opposition to the initial plan was strong and the proposed plan never received the needed congressional approval.<sup>53</sup> At the end of 1990, it appeared the plan for reintroduction of gray wolves was dead on arrival.

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41. See generally S. REP. NO. 418 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807 (discussing the addition of provisions that would allow for the reintroduction of species into new habitats for the purpose of protecting those endangered or threatened species).

42. See Brian N. Beisher, *Are Ranchers Legitimately Trying to Save Their Hides or Are They Just Crying Wolf—What Issues Must Be Resolved Before Wolf Reintroduction to Yellowstone National Park Proceeds?*, 29 LAND & WATER L. REV. 417, 421-22 (1994).

43. See *id.* at 422.

44. See *id.*

45. See *Restoring Wolves*, *supra* note 11.

46. FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, WOLF RECOVERY IN YELLOWSTONE NATIONAL PARK & CENTRAL IDAHO: ALTERNATIVE SCOPING BROCHURE 5 (1992).

47. See *id.*

48. See Beisher, *supra* note 42, at 422.

49. See *id.* at 422; Moore, *supra* note 2, at 653.

50. See Beisher, *supra* note 42, at 422-23; Moore, *supra* note 2, at 653.

51. See Moore, *supra* note 2, at 653.

52. See *id.*

53. See *id.*

In 1992, Congress began the process of forming a plan, for the reintroduction of the gray wolf, when it authorized the preparation of an environmental impact statement by the Fish and Wildlife Service.<sup>54</sup> The final statement issued by the Fish and Wildlife Service also provided for an experimental population designation and relaxed regulations regarding the killing of wolves that were threatening livestock.<sup>55</sup> The finalized rules for reintroduction were released on November 23, 1994.<sup>56</sup>

The rules called for the ultimate goal of achieving viable populations of wolves in central Idaho and the Yellowstone Park area.<sup>57</sup> It was determined that the Canadian gray wolf was the appropriate subspecies for reintroduction as it was identical to the extinct Rocky Mountain gray wolf.<sup>58</sup> Wolf reintroduction was conducted in two separate releases, one in Idaho and one in Yellowstone Park.<sup>59</sup> By all scientific accounts, the health and growth of the wolf population has been phenomenal.<sup>60</sup> However, the introduction of fifteen gray wolves into central Idaho in January 1995, and fourteen into Yellowstone in March 1995, did not end the controversy over the program. Instead it merely switched the battle from a political setting to a legal forum.<sup>61</sup>

### III. THE JOINING OF THE LEGAL BATTLE OVER THE GRAY WOLF

#### A. Wyoming Farm Bureau Federation v. Babbitt

Following the implementation of the reintroduction of the gray wolf into Yellowstone Park, several diverse groups ("plaintiffs") filed suit in federal district court in Wyoming to halt the reintroduction program.<sup>62</sup> The ultimate goal of ending the program for reintroduction that had been developed by the Fish and Wildlife Service created strange bedfellows.

The American Farm Bureaus, by and through its members, farm bureaus in Montana, Idaho and Wyoming, filed suit to remove the experimental population in Yellowstone because of the perceived threat the wolf population presented to its member ranchers.<sup>63</sup> In contrast, the National Audubon Society ("NAS") and other environmental organizations also fought the reintroduction program because of the lack of protection it provided to the natural wolf population migrating from Canada into the Montana and

54. See *id.* at 653-654.

55. See *id.* at 654.

56. See FISH AND WILDLIFE SERVICE PRESS RELEASE, FINAL RULES CLEAR THE WAY FOR WOLF REINTRODUCTION IN YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO (NOV. 23, 1994).

57. See *id.*

58. See Moore, *supra* note 2, at 655.

59. See *id.* at 654.

60. See Banville, *supra* note 10; Davila, *supra* note 8; *Let the Gray Wolf Roam Free*, L.A. TIMES, July 5, 1999, at B4; *Rapid Growth of New Wolf Population Catches Attention of Idaho Officials*, SALT LAKE TRIB., August 22, 1998, at A1.

61. See Davila, *supra* note 8.

62. See Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1229 (10th Cir. 2000) (citing *Babbitt I*, 987 F. Supp. at 1355) [hereinafter *Babbitt II*].

63. See Scott R. Cleere, *Wolf Reintroduction as an Experimental Population Under the Species Act: Wyoming Farm Bureau Federation v. Babbitt*, 36 IDAHO L. REV. 83, 98-99 (1999).

Wyoming areas.<sup>64</sup> The NAS argued that the final rules of the Fish and Wildlife Service's Reintroduction Plan ("final rules") allowed for ranchers and landowners to kill wolves in certain instances.<sup>65</sup> The NAS felt that the allowance of killing of the experimental wolves by ranchers was in essence a removal of the natural population of wolves from the Endangered Species list because ranchers would not be able to determine if they were killing a wolf that had been reintroduced or a wolf that had naturally migrated into the area.<sup>66</sup>

The Wyoming Farm Bureau Federation ("Farm Bureau"), on behalf of its rancher members, argued that the reintroduction of a wolf population in Yellowstone Park was improper based upon the natural population of wolves found in Wyoming and Montana.<sup>67</sup> It went on to state that there was no way for the Fish and Wildlife Service to keep the experimental population in Yellowstone from interacting with the natural populations in Wyoming and Montana.<sup>68</sup> In support of its argument, the Farm Bureaus called the court's attention to section 10(j) of the Endangered Species Act.<sup>69</sup> The Endangered Species Act allows for the Secretary of the Interior to release "experimental populations" of endangered species when the experimental population can be "wholly separate geographically from nonexperimental populations of the same species."<sup>70</sup> The Farm Bureaus argued that the presence of natural populations of Canadian gray wolves in Montana and in parts of Wyoming, without any way to keep the natural and experimental populations separated, violated the provisions of the Act.<sup>71</sup> Therefore, the argument continued, the experimental population should be removed from its protective status.<sup>72</sup> The Farm Bureaus brought evidence of sightings of lone non-experimental wolves in areas inhabited by the experimental populations to show that the reintroduced population of wolves were not geographically separate, and thus in violation of the Act.<sup>73</sup>

The Fish and Wildlife Service maintained that at no point during the introduction of wolves into Yellowstone Park was there ever a known natural migrating population of wolves in the area.<sup>74</sup> It maintained that the Farm Bureau's argument failed to properly utilize the appropriate definition for the term "populations" as meant in the Endangered Species Act, and was thus flawed.<sup>75</sup> In arguing this point, the Service pointed out that the Endangered Species Act failed to provide a definition for the term "population."<sup>76</sup> The Fish and Wildlife Service maintained that the proper definition for a

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64. See *Babbitt I*, 987 F. Supp. at 1358.

65. See Cleere, *supra* note 63, at 97.

66. See *id.* at 99.

67. See *Babbitt I*, 987 F. Supp. at 1370.

68. See *id.*

69. See *id.* (citing The Endangered Species Act of 1973, 16 U.S.C. § 1539(j) (1994)).

70. The Endangered Species Act of 1973, 16 U.S.C. § 1539(j)(1) (1994).

71. See *Babbitt I*, 987 F. Supp. at 1370.

72. See *id.*

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.*

population should be one that has “at least two breeding pairs of wild wolves successfully raising at least two young each . . . for two consecutive years,”<sup>77</sup> and that the evidence presented by the plaintiff Farm Bureaus of sightings of individual wolves was not sufficient to show that a natural population existed.<sup>78</sup>

The district court did not find the arguments of the Fish and Wildlife Service persuasive, and ruled that potential interaction of the experimental and natural wolf populations was a violation of the Act.<sup>79</sup> The court stated that, while the definition proposed by the Fish and Wildlife Service was one that would be appropriate under the Endangered Species Act, it was not supported by reviewing the intent of Congress when passing the Act.<sup>80</sup> The court held that the legislative history regarding reintroduction shows that the committee “did not intend to allow an ‘experimental population’ to exist where it was not wholly separate geographically from any natural population, unless the times of geographic separation are ‘reasonably predictable and not . . . a result of random and unpredictable events.’”<sup>81</sup> The court went on to hold that any discussion or argument regarding the definition of population was misplaced.<sup>82</sup> The court ruled that any interaction of the two populations was improper under the intent of the reintroduction provisions of the Endangered Species Act.<sup>83</sup> The presence of individual naturally found gray wolves in Montana and Wyoming was enough to make the introduction of an experimental population into Yellowstone Park improper.<sup>84</sup>

The NAS, in addition to arguing violations of the Endangered Species Act due to interactions of experimental and natural wolf populations, also alleged violations in the implementation of the final rules used for the reintroduction of the wolves.<sup>85</sup> It maintained that the final rules, proposed and implemented by the Fish and Wildlife Service, violated the Endangered Species Act by, in effect, removing the gray wolf from the Endangered Species List through the allowance of the killing of wolves that had injured ranchers’ livestock.<sup>86</sup> In essence, it was argued, the final rules allowed for a “de facto delisting” of the gray wolf from the Endangered Species List.<sup>87</sup>

The Endangered Species Act requires the Secretary of Commerce to determine and recommend the status of any species it deems to be either threatened or endangered.<sup>88</sup> The list of endangered species is to be maintained and updated by the Secretary of the Interior following the recommendations of the Secretary of

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77. *Id.* at 1371.

78. *See id.* at 1375.

79. *See id.* at 1374.

80. *See id.*

81. *Id.* at 1373.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See Cleere, supra* note 63, at 98-99.

86. *See Inga Haagenson Causey, The Reintroduction of the Wolf in Yellowstone: Has the Program Wounded the Very Species It Sought to Protect?*, 11 TUL. ENVTL. L.J. 461, 468 (1998).

87. *See id.* at 472; Cleere, *supra* note 63, at 98-99. *See also Babbitt I*, 987 F. Supp. at 1375.

88. *See The Endangered Species Act of 1973*, 16 U.S.C. § 1533 (1995).

Commerce.<sup>89</sup> The Secretary of the Interior may not remove an endangered or threatened species from the list without the “prior favorable determination made . . . by the Secretary of Commerce.”<sup>90</sup> The NAS maintained that the actions of the Secretary of the Interior in approving the final rules utilized by the Fish and Wildlife Service amounted to a delisting of the gray wolf from protection without the prior recommendation of the Secretary of Commerce, and thus violated the Endangered Species Act.<sup>91</sup>

The Fish and Wildlife Service countered the NAS argument by contending that the Endangered Species Act allows for the reduction of Endangered Species protection in regards to reintroduced experimental populations.<sup>92</sup> The Act identifies that an experimental population, deemed not to be “essential to the continued existence of a species,” need not be maintained as an endangered species under section 1533 of the Act.<sup>93</sup> Therefore, the Final Rules were appropriate for the experimental population of wolves in Yellowstone Park.

Again, the district court did not find the Fish and Wildlife Service’s argument persuasive.<sup>94</sup> The court held that while the Endangered Species Act did allow for limitations on endangered species protection for experimental populations, it did not allow for such limitations when a natural population of the same species was interacting with the experimental population.<sup>95</sup> Instead, when experimental and natural populations of an endangered species come into contact, the appropriate standard is to apply the protections found in section 1533, and not the limited protections found in section 1539, which are applied for reintroduced experimental species.<sup>96</sup> The court held that the “blanket treatment of all wolves found within the designated experimental population areas as experimental animals is contrary to law.”<sup>97</sup>

Based upon its determination that the reintroduction of gray wolves into Yellowstone Park violated the Endangered Species Act by allowing for the interaction of experimental and natural populations, and by failing to provide adequate protections as mandated by the Act, the district court, in December of 1997, ordered the removal of the entire experimental population of reintroduced wolves from Yellowstone Park.<sup>98</sup> The court did grant a stay of its order pending appeal.<sup>99</sup> The future of the gray wolf, and the reintroduction programs implemented by the United States Fish and Wildlife Service, was in grave danger.

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89. *See id.*

90. *Id.*

91. *See Babbitt I*, 987 F. Supp. at 1375.

92. *See id.*; The Endangered Species Act of 1973, 16 U.S.C. § 1539(j) (1994).

93. The Endangered Species Act of 1973, 16 U.S.C. § 1539(j)(2)(C)(i) (1994).

94. *See Babbitt I*, 987 F. Supp. at 1375.

95. *See id.*

96. *See id.*

97. *Id.* at 1375-76.

98. *See id.*

99. *See id.* at 1376.

## B. *The Overturning of Wyoming Farm Bureau*

Following the ruling of the district court in Wyoming, several separate appeals were filed with the Tenth Circuit Court of Appeals in an attempt to overturn the lower court's ruling.<sup>100</sup> These appeals were consolidated by the Court of Appeals and arguments were held.<sup>101</sup> The main argument offered by those opposing the lower court's decision was that the lower court misinterpreted the legislative intent and history of the Endangered Species Act, and therefore committed error in ordering the removal of the experimental population of wolves from Yellowstone Park.<sup>102</sup> The Court of Appeals agreed and reversed the lower court order regarding the removal of the experimental reintroduced wolf population.<sup>103</sup>

In overturning the lower court, the appellate court reinterpreted the Endangered Species Act and the legislative intent regarding the passage of the Act.<sup>104</sup> The higher court ruled that the Fish and Wildlife Service's definition of "population" was totally appropriate in light of the purpose of the reintroduction provisions of the Endangered Species Act.<sup>105</sup> The court stated that while

the Endangered Species Act does not define the relevant terms or otherwise address the precise question at issue—whether the phrase “wholly separate geographically from nonexperimental populations” means that a reintroduced population of animals must be separate from every naturally occurring individual animal. [citation omitted] Instead, as the statutory language and legislative history make clear, Congress deliberately left the resolution of this type of management/conservation issue to the Department.<sup>106</sup>

The higher court went on to state the legislative intent for the implementation of section 1539 was to provide greater flexibility to the Secretary of Interior in implementing reintroduction programs for endangered species.<sup>107</sup> The court applied the analysis conducted by the Ninth Circuit Court of Appeals when it analyzed the purpose of the reintroduction sections of the Endangered Species Act in *United States v. McKittrick*.<sup>108</sup> In *McKittrick*, the Ninth Circuit evaluated whether the federal government had a legal basis for the implementation of laws which made the taking, possessing, and transporting of a wolf identified as an endangered species, by the Department of Interior, as illegal.<sup>109</sup> The Ninth Circuit held that the purpose for allowing greater flexibility to the Secretary of Interior was to provide for better conservation and recovery of

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100. See *Babbitt II*, 199 F.3d at 1225.

101. See *id.* at 1228.

102. See *id.* at 1230-31.

103. See *id.* at 1241.

104. See *id.* at 1231-33.

105. See *id.* at 1234.

106. *Id.* (citing *United States v. McKittrick*, 142 F.3d 1170, 1174 (9th Cir. 1998); *Babbitt I*, 987 F. Supp. at 1371-74).

107. See *id.* at 1233.

108. See *id.* See also *McKittrick*, 142 F.3d at 1174.

109. See *McKittrick*, 142 F.3d at 1172-73.

endangered species.<sup>110</sup> In *Wyoming Farm Bureau v. Babbitt*, the Tenth Circuit came to a similar conclusion when it deferred to the Department of Interior's interpretation regarding language in the Endangered Species Act, so long as it did not "conflict with the plain language" of the Act.<sup>111</sup>

In analyzing whether the plain language of the statute was violated, the court looked to the Department of Interior's definitions regarding the gray wolf population and separation of the reintroduced and natural wolf populations.<sup>112</sup> The Department defined "population" as a "potentially self-sustaining group 'in common spatial arrangement,' and thus determined a 'geographic separation' is any area outside the area in which a particular population sustains itself."<sup>113</sup> The court held that the Department's definitions were appropriate and did not conflict with the plain language and intended purpose of the Endangered Species Act.<sup>114</sup>

These definitions preclude the possibility of population overlap as a result of the presence of individual dispersing wolves — by definition lone dispersers do not constitute a population or even part of a population, since they are not in 'common spatial arrangement' sufficient to interbreed with other members of a population. Moreover, since it is highly unlikely a lone wolf will encounter another solitary wolf of the opposite sex and reproduce for two years running, the populations left behind by the lone wolves do not expand simply because they travel away.<sup>115</sup>

The court ultimately held that the definitions used by the department were "consistent with the language and objectives of the Endangered Species Act *as a whole*."<sup>116</sup>

In holding that the Department's definitions were consistent and appropriate, the court stated that the evidence detailing the unreasonableness of the definitions was insufficient to allow for intervention of the reintroduction program.<sup>117</sup> The court stated that "the mere presence of contradictory evidence does not invalidate the agencies' actions or decisions."<sup>118</sup> It was held that it would be inappropriate for the courts to interfere in an agency action, such as the reintroduction of the gray wolf, without "substantial evidence in the administrative record" to support a claim of improper application by an agency of a statutory requirement.<sup>119</sup>

Based upon these holdings, the Tenth Circuit Court of Appeals vacated the district court's stay, and remanded the case back to the district court with orders to enter an order upholding the reintroduction rules implemented for the reintroduction of the

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110. *See id.* at 1176.

111. *Babbitt II*, 199 F.3d at 1234.

112. *See id.*

113. *Id.* (citing *Babbitt I*, 987 F. Supp. at 1373).

114. *See id.*

115. *Id.*

116. *Id.* (emphasis added).

117. *See id.* at 1236.

118. *Id.* at 1241.

119. *Id.*

gray wolf.<sup>120</sup> Although the Tenth Circuit's decision has closed a chapter on the reintroduction of the gray wolf, it is by no means the last chapter in the book on government-sponsored reintroduction of endangered species.

#### IV. THE FUTURE OF REINTRODUCTION OF ENDANGERED SPECIES

##### A. *Other Battle Grounds*

The ruling of the Tenth Circuit does not end the battle over the reintroduction of the endangered species and the appropriateness of the action. Several state legislators, Governors, and United States Representatives have promised legislative attempts to provide limitations on the federal actions to reintroduce further endangered species.<sup>121</sup> Many of these efforts have revolved around the argument that the protection of these reintroduced species, such as the gray wolf, allows for a governmental taking of ranchers' property in situations where the wolves kill livestock.<sup>122</sup>

The chairman of the House Resources Committee, Don Young (R-Alaska) has introduced a bill in Congress that would amend the Endangered Species Act.<sup>123</sup> The bill calls for the federal government to pay landowners for the use of their land in situations where "even a small part of their property" is used as a wildlife habitat.<sup>124</sup> In essence the act provides for a legislative expansion of the definition of a governmental taking. The bill would also allow for payments in situations where endangered and reintroduced species "wander onto private land and kill livestock."<sup>125</sup>

Opponents of such legislation argue that, by attempting to widen the takings laws and providing for broader allowances for payments to landowners, the act will become gutted.<sup>126</sup> Such regulations would make it economically and practically impossible to introduce further endangered populations. The purpose and the intent of the Endangered Species Act will be handicapped to such an extent that it will become meaningless. In 1995 President Clinton vetoed a similar bill,<sup>127</sup> but in light of the presidential election in 2000, and the uncertainty regarding the policies of future administrations, there is no guarantee that such a bill would not meet with a favorable response now.

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120. *See id.*

121. *See* John Gibeaut, *Endangered Again: A Government Effort to Reintroduce Predators to the Wild is Pitting Conservationists Against Ranchers in a Struggle for Judicial Intervention on Nature's Law for the Survival of the Fittest*, A.B.A. J., July 1999, at 54, 56-57 (1999). The article details efforts in Idaho and New Hampshire to limit reintroduction efforts. *See id.*

122. *See id.* at 57.

123. *See id.*

124. *Id.*

125. *Id.*

126. *See id.*

127. *See id.*

### B. *Plans for Future Reintroduction*

When looking at the future of possible reintroduction of endangered species, it becomes apparent that a detailed long-term plan does not exist.<sup>128</sup> This is due to the Department of Interior's "project-by-project" planning.<sup>129</sup> The Department has elected this ad hoc approach in an attempt to avoid controversy and opposition from political and private forces.<sup>130</sup> The selection of the types of species to be reintroduced has become a very extensive process. The Department has attempted to select species that are "charismatic" and popular in society.<sup>131</sup> It has also become important for the species to be of such a type that can survive on remote federal lands.<sup>132</sup>

Based on these criteria the Department of Interior has reintroduced several species with varying degrees of success.<sup>133</sup> Species such as the California condor and the gray wolf have enjoyed expansion of the reintroduced experimental populations in remote federal lands in California, Idaho, Montana, and Wyoming.<sup>134</sup> Disregarding the political and legal battle over the reintroduction of the gray wolf, the experimental populations in Yellowstone Park have shown unparalleled success in increased population and growth of several packs in the area.<sup>135</sup>

Because of these successes, and in spite of the legal and legislative battles over the future of the reintroduction under the Endangered Species Act, the Department of Interior does not appear to be slowing in its attempts to go forward with further reintroduction. The Department is currently looking and evaluating possible reintroduction of wolf populations in northern Michigan, Maine, and North Carolina.<sup>136</sup> The Department has also recently gone forward with a plan to reintroduce the Mexican red wolf into remote areas of New Mexico and Arizona.<sup>137</sup> While the future of the Mexican red wolf is still unclear, it is apparent that the Department of Interior has no plans to limit its continued attempts to reintroduce endangered species under the auspices of the Endangered Species Act.

## V. CONCLUSION

A simple plan to reintroduce an endangered species into the remote tracks of Yellowstone Park has grown into a legal, political, economic, and environmental battle over the future of the United States environmental policies. While the plan for the reintroduction of the gray wolf has proven to be a sound economic policy that has

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128. See Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 2 (1999).

129. See *id.*

130. See *id.*

131. See *id.*

132. See *id.* at 2-3.

133. See *id.* at 2.

134. See *id.* at 1-2.

135. See Moore, *supra* note 2, at 653.

136. See Doremus, *supra* note 128, at 1; Banville, *supra* note 10.

137. See Doremus, *supra* note 128, at 1-2, 35 n.186.

ensured the expansion of the experimental population, it has not been a sound political policy. In an effort to appease all interested parties, the Department of Interior and the United States Wildlife Service have instead suffered attacks from all sides and have in essence been squeezed by both extremes.

Environmentalists feel not enough protection has been offered to the experimental and nonexperimental wolf populations in the lower forty-eight states.<sup>138</sup> Ranchers feel that too many protections have been granted to the wolf and not enough compensation has been offered for their alleged losses.<sup>139</sup>

Ultimately, the Department of Interior and the Fish and Wildlife Service have been guilty of that most common political trait—compromise. It has tried to please too many people with too many diverse viewpoints. The Department, in trying to find a middle ground, has been attacked from opposing sides of the spectrum. Instead of picking either heightened protection for the gray wolf or heightened protection for the rights of landowners and ranchers, it has elected to find a middle ground on which both sides may attack the position. The big loser in this political gamble was not the Department of Interior or the Fish and Wildlife officials; the big loser has been the endangered species that the agencies were setting out to protect. And while the gray wolf may be safe under the current plan, there is no clear idea of what the future of the species will be. While the Tenth Circuit has provided an immediate reprieve for the gray wolf and other potential reintroduced species, that reprieve is only as good as the elected officials at the local, state, and federal levels. This safety is only as good as the next election or judicial appointment.

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138. See generally *id.* (describing, inter alia, the ramifications of protecting wolf populations).

139. See *id.* at 31.