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Lobo Returns from Limbo: *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*

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ABSTRACT

The Mexican wolf was exterminated by the federal government. In 1998, Mexican wolves were reintroduced into Arizona and New Mexico as a nonessential experimental population. The livestock industry brought suit. The federal district court in New Mexico Cattle Growers Ass'n correctly rejected industry allegations of Endangered Species Act and National Environmental Policy Act violations. The translocation of wolves and the discovery of hybrid pups continued the litigation. The federal district court in Coalition of Arizona/New Mexico Counties properly upheld the reintroduction. Nevertheless, the program remains under siege. The reintroduction of the Mexican wolf is an important victory for environmental groups in the War for the West.

I. INTRODUCTION

There is an ongoing struggle over the ownership, control, and management of western public lands.¹ Initially, resource industries, such as ranching, farming, mining, logging, and energy development, dominated western public land policy. This was clearly demonstrated by the extermination of the wolf in the West. Recently, environmental

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1. Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 36-38 (1999). See generally George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982); George Cameron Coggins & Margaret Lindeburg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982); George Cameron Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery 1934-1982*, 13 ENVTL. L. 295 (1983); George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983); George Cameron Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497 (1984).

protection and ecological management have become additional cornerstones of western public lands management. This has generated conflict with resource industries, which spawned efforts to place western lands under state and county control to provide for greater protection of private property. The reintroduction of the Mexican wolf is an important battle in the War for the West regarding the control and management of public lands.²

The return of the Mexican wolf, the lobo, to the Southwest, like the reintroduction of the gray wolf to the northern Rockies and the red wolf to North Carolina,³ has been controversial. The Mexican wolf, a crucial link in the Southwest ecosystem, was exterminated by the federal government to serve the interests of the livestock industry and hunters. The federal government engaged in a war against the wolf and other predators until the environmental movement in the 1960s and 1970s. As a result of this movement, new statutes were enacted including the National Environmental Policy Act (NEPA)⁴ and the Endangered Species Act (ESA),⁵ which protect wolves and other predators.

Section 10(j) of the ESA permits the reintroduction of an endangered species outside of its current range to conserve that species. Mexican wolves were reintroduced into the Blue Range Wolf Recovery Area (BRWRA) in central Arizona and New Mexico in 1998 as a nonessential experimental population.⁶ The livestock industry brought suit challenging the reintroduction. The U.S. District Court for the District of New Mexico in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*⁷ correctly upheld the reintroduction of the Mexican wolf by the U.S. Fish and Wildlife Service (FWS). Despite deliberate efforts to undermine the reintroduction program, the Mexican wolf survived. Wolf translocation within the BRWRA and the discovery of hybrid pups rekindled litigation. In 2005, the U.S. District Court for the District of New Mexico in *Coalition for Arizona/New Mexico Counties for Stable*

2. See generally Anita P. Miller, *America's Public Lands: Legal Issues in the New War for the West*, 24 URB. LAW. 895 (1992) [hereinafter Miller, *Legal Issues*]; Anita P. Miller, *The Western Front Revisited*, 26 URB. LAW. 845 (1994) [hereinafter Miller, *Western Front*]; Anita P. Miller, *The War for the West: At Issue*, 28 URB. LAW. 861 (1996); Anita P. Miller, *Evolving Objectives in the War for the West*, 30 URB. LAW. 757 (1998).

3. See generally Edward A. Fitzgerald, *Wyoming Farm Bureau Federation v. Babbitt: The Children of the Night Return to the Northern Rocky Mountains*, 16 J. NAT. RES. & ENVTL. L. 79 (2002) [hereinafter Fitzgerald, *Wyoming Farm Bureau*]; Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1 (2002).

4. 42 U.S.C. § 4321 (2000).

5. 16 U.S.C. § 1531 (2000).

6. 16 U.S.C. § 1539(j).

7. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367M/JHG, 1999 U.S. Dist. LEXIS 19096 (D.N.M. Oct. 28, 1999).

*Economic Growth v. U.S. Fish & Wildlife Service*⁸ did not alter the program. Opponents of Mexican wolf reintroduction are currently pursuing an administrative strategy to reverse their judicial defeats. The reintroduction of the Mexican wolf is an important victory for environmentalists in the War for the West regarding the control and management of public lands.

This article examines the history of the Mexican wolf's extermination in the context of federal public land law, analyzes the Mexican wolf's reintroduction and the resulting New Mexico Cattle Growers Association (NMCGA) litigation, reviews post-litigation developments, examines the recent Coalition for Arizona/New Mexico Stable Counties decision, and scrutinizes the proposed administrative changes to the Mexican wolf program.

II. HISTORY OF THE MEXICAN WOLF

The federal government owns much of the land west of the Mississippi, including 44.6% of Arizona and 34.2% of New Mexico. Federal management of public lands progressed through distinct, but overlapping, periods. During the period of acquisition from Independence through the purchase of Alaska in 1867, the United States expanded its territory by conquest, purchase, negotiation, and annexation. During this period, the federal government transferred public lands to private interests in order to raise revenues, encourage settlement, and promote economic development.⁹

Cattle ranching dominated the Southwest during the nineteenth century. Large unregulated herds grazing on public and private lands faced threats from Apaches and wolves. After the Civil War, the federal army moved into the Southwest and eliminated the Apache threat. In the 1870s and 1880s, railroad development allowed western livestock to move east. By the 1890s, the open range was gone and cattle ranching became a competitive business.¹⁰ In 1893, the livestock industry

8. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., CIV.-03-0508 MCA/LCS (D.N.M. Jan. 31, 2005). Tania Soussan, *Judge Dismisses Anti-Wolf Effort*, ALBUQUEQUE J., Feb. 2, 2005, at B3.

9. GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 10, 35-102 (5th ed., 2002) (The federal government owns 62% of Alaska, 83% of Nevada, 63% of Idaho, 65% of Utah, 53% of Oregon, 44% of California, 50% of Wyoming, 37% of Colorado, 28% of Montana, and 29% of Washington.)

10. D. Bernard Zaleha, *The Rise and Fall of BLM's Cooperative Management Agreements*, 17 ENVTL. L. 125, 129 (1986) (also noting that "the number of cattle in Arizona increased from 50,000 in mid-century to an estimated 1.5 million in 1891"); DAVID E. BROWN, *THE WOLF IN THE SOUTHWEST: THE MAKING OF AN ENDANGERED SPECIES* 31 (1983).

collapsed due to drought, overgrazing, and depression. As a result, every cow became crucial and ranchers could not afford livestock losses to predators.¹¹

Bounty systems were implemented to protect the herds. The 1893 Arizona-New Mexico Territorial Bounty Act allowed counties to appropriate money for bounties on "predatory wolves, big bears, mountain lions, bobcats and coyotes."¹² In 1909, the New Mexico legislature enacted a bounty act. Each county was authorized to levy an annual tax not to exceed one mill on the assessed value of the entire county's taxable property to maintain a "Wild Animal Bounty Fund." The bounty was ten dollars per mountain lion, two dollars per coyote and wildcat, and fifteen dollars per lobo wolf. A person was required to make a bounty claim within 90 days after the kill by filing an affidavit before the county clerk and swearing the animal was killed in the county paying the bounty. The claimant had to present the dead animal's scalp or the entire hide of the lobo to collect.¹³

The bounty system worked well in the short term. Counties funded the bounties by assessing a tax. Bounties were paid and the targeted species populations decreased. Some counties underfunded their bounty programs or did not assess a bounty tax, so bounty hunters transported the animals to neighboring counties. Recognizing the free rider problem, counties stopped assessing the tax altogether. Inadequate funds placed bounties in arrears.¹⁴

Private parties, such as the NMCGA, decided to supplement the public funds.¹⁵ The NMCGA offered its own bounty, providing an additional \$25 for wolves and mountain lions and \$10 for every wolf pup or lion kitten killed on the range. Financial problems quickly emerged. The NMCGA required hunters to assign their county bounties, but the bounties were sometimes five to six years behind. The NMCGA began to question the efficacy of bounties for controlling predators. Whenever predators became scarce in one area, bounty hunters moved to another area. High reproductive capability allowed predators to repopulate the former area. The bounties provided incentives for hunters to maintain a

11. BROWN, *supra* note 10, at 18-19, 41-43.

12. *Id.* at 43.

13. ROBERT K. MORTENSEN, *IN THE CAUSE OF PROGRESS: A HISTORY OF THE NEW MEXICO CATTLE GROWER'S ASSOCIATION* 71 (1983).

14. *Id.*

15. DAN MILES GISH, *A HISTORICAL LOOK AT THE MEXICAN GRAY WOLF IN EARLY ARIZONA TERRITORY AND SINCE STATEHOOD* 65 (nd) (noting that private bounties in Arizona ranged from \$25 to \$50).

supply of predators in order to sustain their livelihood.¹⁶ In 1916, the NMCGA stopped its bounty and directed its efforts toward securing federal and state funds for predator control.¹⁷

Hunters joined the livestock industry's call for predator control. In the late nineteenth century, national organizations, such as the National Audubon Society and the Boone and Crockett Club, were formed to advocate the preservation and regulation of wildlife.¹⁸ Neither Arizona nor New Mexico had state game and fish commissions when they were admitted to the Union in 1912. To fill the gap, sportsmen organized and supported the establishment of game conservation organizations in New Mexico in 1914 and in Arizona in 1923. Sportsmen joined ranchers and demanded that the federal government kill wolves to protect the game supply.¹⁹

At the end of the nineteenth century, the federal government began to withdraw and reserve public lands for designated purposes such as national forests, national parks, wildlife refuges, and grazing districts. Federal administrative regimes such as the Forest Service, Park Service, FWS, and Bureau of Land Management (BLM) were established to manage and control over 625 acres or 96% of the public domain.²⁰ Federal efforts at wildlife management began with the establishment of the U.S. Biological Survey (Biological Survey) in the Department of Agriculture in 1885 to study the effects of birds and mammals on agriculture. Initially the Biological Survey was an advisory service, but it began advocating predator control in 1907.²¹ The Forest Service, seeking to develop a constituency for federal retention of national forests, supported predator control. The Forest Service, which had begun to issue grazing permits, reasoned that, since ranchers paid federal grazing fees, they should receive predator protection. The Forest Service began to kill predators in the Southwest. In 1908, 232 wolves were killed in New Mexico and 127 wolves were killed in Arizona.²² The Park Service soon followed the example of the Forest Service.²³

16. George Cameron Coggins & Parthenia Blessing Evans, *Predators' Rights and American Wildlife Law*, 24 ARIZ. L. REV. 821, 827 (1982).

17. MORTENSEN, *supra* note 13, at 71.

18. Coggins & Evans, *supra* note 16, at 837; THOMAS A. LUND, AMERICAN WILDLIFE LAW 60-73 (1980).

19. BROWN, *supra* note 10, at 52.

20. See COGGINS ET AL., *supra* note 9, at 102-37.

21. BROWN, *supra* note 10, at 47; J.J. MCCOY, WILD ENEMIES 161-62 (1974).

22. *Id.* at 48.

23. Timothy B. Strauch, *Holding the Wolf by the Ears: The Conservation of the Northern Rocky Mountain Wolf in Yellowstone National Park*, 27 LAND & WATER L. REV. 33, 42-44 (1992) (noting that the Park Service, viewing its mission as the protection of big game, joined with

The onset of World War I increased the demand for U.S. meat. The livestock industry pressured influential western congressional representatives on key committees for additional federal predator control.²⁴ In 1915, Congress appropriated \$125,000 for the Biological Survey to conduct predator control on public lands. The agency was transformed from an advisory one to a service one. By the end of 1916, the Predator and Rodent Control (PARC) branch of the Biological Survey was organized into eight districts, each with a supervisor. Stokley Ligon, the head of the combined New Mexico and Arizona district, determined that 300 Mexican wolves were present in New Mexico. Ligon estimated that each wolf killed three cows per month, resulting in the death of 10,800 cows per year. At \$30 per head, it was costing \$324,000 per year to feed the Mexican wolves.²⁵ The Biological Survey hired professional hunters and trappers who utilized steel traps, poison baits, denning, shooting, and roping to kill predators.²⁶ Bounties were not offered. Instead, the furs of predators were sold at auction and the funds deposited into the Treasury.²⁷ Federal programs created constant friction between salaried government hunters and private trappers.²⁸

In 1917, the NMCGA, New Mexico Wool Growers (NMWG), and State Game Protective Association wanted the Secretary of Agriculture to allocate more money for predator control. They claimed that predators and rodents generated six million dollars per year in livestock loss, which translated into losses of 50-million pounds of meat. Livestock loss was detrimental to the war effort. The Secretary of Agriculture established a federal matching fund of \$25,000 for Biological Survey predator control.²⁹

After the Biological Survey became a service agency, its clientele, ranchers and woolgrowers, gained more influence because of their financial contributions. The demand for federal predator control exceeded the available funding, so the cost was shifted over to the livestock industry. In 1918, the Biological Survey began cooperative programs with the states, counties, and livestock associations. The Biological Survey investigated complaints and provided hunters with equipment, while livestock growers funded the effort through a head tax

the Biological Survey to kill 136 wolves, including 80 pups, virtually eliminating the wolves from Yellowstone by 1926).

24. JAMES B. TREFETHEN, *AN AMERICAN CRUSADE FOR WILDLIFE* 284 (1975).

25. GARY LEE NUNLEY, *THE DIVISION OF ANIMAL CONTROL, THE MEXICAN GRAY WOLF IN NEW MEXICO* 15 (1977).

26. *Id.* at 5-14; BROWN, *supra* note 10, at 32-41.

27. MORTENSEN, *supra* note 13, at 71.

28. GISH, *supra* note 15, at 74.

29. MORTENSEN, *supra* note 13, at 72.

on livestock in the affected areas.³⁰ In 1918 and 1919, the PARC budget increased and the New Mexico-Arizona combined district was subsequently split. Mark Musgrave headed the Arizona District. Ligon, who remained in control in New Mexico, declared that "the big wolves have been so reduced in numbers in New Mexico and Arizona that they no longer confront us as a serious menace."³¹

In 1919, an Arizona statute provided that state funds would be equivalent to those the federal government spent on predatory animal control in the state.³² That year the New Mexico legislature sought to make the federal-state program permanent by enacting a statute that established a cooperative program with the Secretary of Agriculture or Biological Survey for the destruction of "predatory wild animals, [and] rodent pests in the interests of the protection of crops and livestock and improvement of range conditions." \$25,000 was appropriated for the matching federal-state program, which became the model for the Rocky Mountain West.³³

The Biological Survey appropriation act for 1920 provided for "experiments, demonstration, and cooperation" in destroying harmful animals. The "cooperation" mandate stimulated interest group activity. The NMCGA and NMWG acted as advisors to the Biological Survey. Regional stockmen associations sprang up to deal with predator control. The regional associations elected managers, levied assessments, and paid the salaries of hunters, who coordinated their activities with the Biological Survey. By 1922 there were 40 associations advising the agency. By the mid 1920s, PARC received one quarter of its funding from the livestock industry.³⁴

In the 1920s, PARC attempted to prevent wolves coming north from Mexico where drought and revolution were occurring. In 1923, New Mexico repealed the 1909 bounty act and increased the predatory animal fund by \$25,000. The state wanted the federal government to match its \$50,000 annual commitment, but the federal government never spent more than \$32-33,000 annually during the decade.³⁵

There was a rapid reduction in the wolf population from 1915 through the 1920s.³⁶ In 1924, Ligon stated that "a survey of the wolf

30. Thomas R. Dunlap, *Values for Varmints: Predator Control and Environmental Ideas, 1920-1939*, 53 PAC. HIST. REV. 141, 147-58 (1984); Coggins & Evans, *supra* note 16, at 835-37.

31. BROWN, *supra* note 10, at 58-60.

32. GISH, *supra* note 15, at 93.

33. MORTENSEN, *supra* note 13, at 72.

34. *Id.*; THOMAS R. DUNLAP, *SAVING AMERICA'S WILDLIFE* 39 (1988).

35. MORTENSEN, *supra* note 13, at 72.

36. BROWN, *supra* note 10, at 54-103 (Extermination - the Final Solution - 1915 to 1925); GISH, *supra* note 15, at 39; NUNLEY, *supra* note 25, at 14-77.

situation in the State indicates that these, the greatest cattle-killers, are no longer a real menace."³⁷ By 1925, the wolf ceased to be a major predator in the Southwest. A few wolves were found at Fort Apache and on the San Carlos and Jicarilla Apache Indian Reservations. The wolves coming from Mexico across the San Madre Mountains posed the only significant problem. In 1925, Ligon stated that "the passing of the wolf in New Mexico, as well as in other western states, is every year becoming more apparent."³⁸

In 1928, the Secretary of Agriculture was called on to investigate and report on "the feasibility of a five year cooperative program...for the purposes of eradication, suppression, or bringing under control of predatory animals within the US, and estimated costs thereof."³⁹ The Secretary reported that such an effort was possible over the next ten years and would save ten dollars for every one dollar spent. Complete eradication was not possible, but the wolf could be brought under control. The cost of federal predator control over the past 13 years averaged \$432,042 per year. The annual price tag for the new ten-year program was \$1,378,700, or 243% above the amount apportioned for fiscal year 1929. New Mexico's share would be \$77,460 per year or two-thirds of its current allotment.⁴⁰

Scientists began to question federal predator control in the 1920s. Objections to the federal extermination of predators were raised at the American Society of Mammology meeting in 1924. Scientists saw the Biological Survey as a tool for the livestock industry, which paid half of the agency's predator control budget of \$5 million a year.⁴¹ The Biological Survey responded by asserting that large predators "no longer have a place in our advancing civilization."⁴² According to the Biological Survey, predators caused significant economic losses to ranchers unable to control them. The agency was simply assuming this responsibility.⁴³

A scientific committee appointed in 1924 to study federal predator control reported in 1928 that predators should be restricted to national parks and wilderness areas. Many scientists disagreed with the report's findings. They accused the Biological Survey of cooperating with the western livestock industry and state governments to conduct an extermination campaign that was politically motivated and based on

37. BROWN, *supra* note 10, at 70.

38. *Id.* at 71.

39. MORTENSEN, *supra* note 13, at 72.

40. *Id.* at 72-73.

41. BRUCE HAMPTON, *THE GREAT AMERICAN WOLF* 140 (1997); DUNLAP, *supra* note 34, at 50.

42. Dunlap, *supra* note 30, at 148.

43. *Id.* at 147-49.

false data and bad science. According to the scientists, ranchers and state officials exaggerated livestock losses. Further, predators did not pose a serious threat to livestock. The dissenters argued that the predator control policy should be replaced by a "system of intelligent controls" adapted to the specific needs of different western regions.⁴⁴

In 1930, the American Society of Mammologists questioned the economic rationale for killing predators and called for a scientific study of the issue. In response, Congress delayed the entire appropriation for the Biological Survey. PARC pleaded with the Society to withdraw opposition, which threatened Biological Survey wildlife refuges and research programs. PARC promised to target and end the killing. The Society sent a letter to Congress limiting its opposition solely to predator control. Congress then released the PARC appropriation. Despite this ostensible new start, PARC returned to its prior practice and continued to indiscriminately kill predators.⁴⁵ Ironically, PARC later misrepresented the Society letter as support for its predator control program.⁴⁶

Congress did not intend to stop the war against predators. In 1931, Congress enacted the Animal Damage Control Act (ADCA),⁴⁷ which provided statutory authority for PARC.⁴⁸ The Secretary of Agriculture was authorized to investigate the best methods of eradication, suppression, or control on national forests and other areas of the public domain, as well as on state, territorial, or privately owned lands, of mountain lions, wolves, and other animals injurious to agriculture, horticulture, forestry, animal husbandry, wild game, fur, and birds and to conduct campaigns for the destruction or control of such animals.⁴⁹ The ADCA authorized one million dollars per year from

44. *Id.* at 149-53.

45. *Id.* at 154-55; FAITH McNULTY, MUST THEY DIE?: THE STRANGE CASE OF THE PRAIRIE DOG & THE BLACK-FOOTED FERRET 14-16 (1971).

46. McNULTY, *supra* note 45, at 15-16; Coggins & Evans, *supra* note 16, at 835-37; Wick Corwin, *Predator Control and the Federal Government*, 51 N.D. L. Rev. 787, 802 (1975); Dunlap, *supra* note 30, at 154-55.

47. 7 U.S.C. § 426 (1976). See Coggins & Evans, *supra* note 16, at 835-36.

48. Coggins & Evans, *supra* note 16, at 836 ("[T]he ADC Act of 1931 apparently was a hasty afterthought that has endured only because of its obscurity....The Act spells out no central aim or purpose; its implicit premise is that all 'injurious' species should be destroyed."); June C. Edvenson, *Predator Control and Regulated Killing: A Biodiversity Analysis*, 13 UCLA J. ENVTL. L. & POL'Y 31, 45 (1995) (noting that the American Humane Society declared that "such myopic legislation is counterproductive, Congress has failed to change the 1931 law largely because domination of relevant congressional committees by Western interests made change impossible").

49. See Coggins & Evans, *supra* note 16, at 835-36; Edvenson, *supra* note 48, at 44.

1932 to 1941, but no funds were appropriated because of the depression and preparations for World War II.⁵⁰

The enactment of the Taylor Grazing Act in 1934, which established grazing districts on public lands, closed the public domain and terminated the federal government's policy of disposal of public lands.⁵¹ The Secretary of the Interior was authorized to regulate grazing through the issuance of permits for a fee. Ranchers maintained a steady influence over the program through advisory boards.⁵² Fees for grazing on public lands were always set well below those charged for national forest and private land grazing.⁵³ The Grazing Service, now the BLM, supported predator control on public lands.⁵⁴

Scientific wildlife management emerged in the 1930s. Aldo Leopold introduced ecosystem management and carrying capacity concepts as wildlife management tools.⁵⁵ The Park Service changed its policy regarding predator control and declared that "no native predator shall be destroyed on account of its normal utilization of any other park animal, excepting if that animal is in immediate danger of extermination, and then only if the predator is not itself a vanishing form."⁵⁶

Scientists continued to criticize federal predator control.⁵⁷ In 1939, control over predator management moved from the Biological

50. MORTENSEN, *supra* note 13, at 73.

51. COGGINS ET AL., *supra* note 9, at 46-102. Zaleha, *supra* note 10, at 130 (noting that the Act allowed the Secretary of the Interior to designate up to 80 million acres as grazing districts and the remaining public lands were under the jurisdiction of the General Land Office and subject to sale).

52. 43 U.S.C. § 315(a)-(d) (1994); Edverson, *supra* note 48, at 41-46; Patrick Austin Perry, *Law West of the Pecos: The Growth of the Wise Use Movement and the Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. Rev. 275, 290-91 (1996).

53. SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES* 158-65, 181-88 (2d ed., 1980); MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 68-72 (1983); TOM ARRANDALE, *THE BATTLE FOR NATURAL RESOURCES* 158-68 (1983); Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 1978 U.S.C.A.N. (92 Stat. 1803) 4069, 4106-115.

54. Coggins & Evans, *supra* note 16, at 839 ("[N]either the Department of Agriculture nor other divisions in the Department of Interior followed the NPS...and extermination remained the policy....").

55. *Id.* at 838-39; George Cameron Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 64-75 (1981); DUNLAP, *supra* note 34, at 65-83.

56. Coggins & Evans, *supra* note 16, at 839 (quoting P. MATHIESEN, *WILDLIFE IN AMERICA* 81 (1959)); DURWARD L. ALLEN, *OUR WILDLIFE LEGACY* 237 (1962).

57. Sigurd Olsen noted that the wolf "is an integral part of the wilderness community, the destruction of which would destroy the fine balance between related forms." HAMPTON, *supra* note 41, at 150. Nevertheless, Olsen recognized that "the politics of wolf preservation and the science of studying wolves is more vicious and complicated than any wolf pack I've had the pleasure of studying." *Id.*

Survey to the Department of the Interior, where the livestock industry exerted even greater control over the program.⁵⁸ In 1940, the Biological Survey was combined with the Bureau of Fisheries to form the FWS and, as a result, predator control expanded. Congress doubled the PARC budget from 1940 to 1950, and again by 1970.⁵⁹ From 1937 through 1970, the Biological Survey killed 1,574 Mexican wolves.⁶⁰

The development of the pesticide industry in the 1940s intensified chemical warfare against predators. Two new toxins were introduced in the 1940s: thallium sulfate and compound 1080 (sodium fluoroacetate). Thallium sulfate was efficient but killed too many small animals. It was replaced by compound 1080, which proved more effective for large predator control and not as dangerous to small animals. The "coyote getter," which consisted of an exploding cyanide capsule hidden in a substrate attractive to animals, was also developed in the 1940s. The "coyote getter" killed too many pets and was eventually replaced by the M-44, which utilized a spring rather than a cartridge to shoot cyanide into the victim. Federal efforts regarding wolf eradication with these new toxins were so successful that in 1944 Stanley Young concluded that "the wolf has been definitely brought under control and presents a very minor problem, except in limited areas in the United States."⁶¹ The program was initiated and continued at the insistence of the livestock industry.⁶²

Public perception of wildlife began to change with the emergence of the environmental movement in the 1960s and 1970s.⁶³ New federal statutes protected wildlife⁶⁴ and elevated the status of wildlife in the management of national forests⁶⁵ and public lands.⁶⁶ The

58. Corwin, *supra* note 46, at 802–03; Coggins & Evans, *supra* note 16, at 839.

59. Corwin, *supra* note 46, at 803 n.130; MCCOY, *supra* note 21, at 164 (noting that in the 1950s and 1960s PARC carried out more than 700 agreements with federal and state agencies; counties; local municipalities; universities; private organizations; and individual farmers, ranchers, and landowners).

60. STANLEY A. CAIN ET AL., PREDATOR CONTROL—1971, REPORT TO THE CEQ AND THE DEPARTMENT OF INTERIOR BY THE ADVISORY COMMISSION ON PREDATOR CONTROL 22 (1972) [hereinafter CAIN REPORT].

61. STANLEY P. YOUNG & EDWARD A. GOLDMAN, THE WOLVES OF NORTH AMERICA 385 (1944).

62. U.S. FISH & WILDLIFE SERV., MEXICAN WOLF RECOVERY PLAN 8 (1982), <http://ifw2es.fws.gov/Documents/R2ES/RecoveryPlan.pdf> [hereinafter MEXICAN WOLF RECOVERY PLAN].

63. Coggins & Evans, *supra* note 16, at 840–48.

64. Bald Eagle Protection Act of 1940, 16 U.S.C. § 668 (2000); Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§ 661–667(e) (2000); Endangered Species Conservation Act of 1969, 16 U.S.C. §§ 668cc–6 (repealed 1973); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (2000).

65. Multiple-Use and Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531.

Wilderness Act of 1964 and the National Wildlife Refuge System Act of 1966 set aside public lands for the benefit of wildlife.⁶⁷ The federal government's war on predators was criticized on biological, economic, and political grounds.⁶⁸ The image of the wolf began shifting from a wanton killer to a noble hunter. The wolf became a symbol of the wilderness that had to be preserved.⁶⁹

PARC and the livestock industry refused to acknowledge a need for wolf rehabilitation.⁷⁰ Nevertheless, the Leopold Report in 1964 concluded that federal predator control was no longer a balanced component of animal husbandry. PARC, according to the Report, was killing more predators than necessary and needed proper management. PARC had become a semi-autonomous agency whose role had expanded beyond its need. PARC was servicing the livestock and agriculture industry, which paid its bills. A reassessment of PARC goals and implementation was necessary to reflect the shifting public interest.⁷¹ PARC ignored the Report's recommendations, which the livestock industry opposed.⁷²

The Leopold Report led to a change in PARC hierarchy, but field agents continued to retain a close relationship with the livestock industry.⁷³ In 1965, the Division of Wildlife Services (DWS) was established in the Department of the Interior (DOI). The DWS was responsible for pesticide appraisal, pesticide monitoring, and wildlife enhancement. Even though the DWS was formed for both conservation and control, the majority of its focus was on control (90% killing and 10% conservation). This satisfied its principal constituent, the livestock industry.⁷⁴

66. 43 U.S.C. §§ 1411-1418 (expired 1970).

67. Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (2000); National Wildlife Refuge System Act of 1966, 16 U.S.C. § 668(dd)-(ee); Coggins & Evans, *supra* note 16, at 843-44.

68. Coggins & Evans, *supra* note 16, at 840-43; Edvenson, *supra* note 48, at 44-54.

69. HAMPTON, *supra* note 41, at 167-68; DUNLAP, *supra* note 34, at 105-10; TREFETHEN, *supra* note 24, at 281-82.

70. HAMPTON, *supra* note 41, at 170-72.

71. Coggins & Evans, *supra* note 16, at 848-50 (citing Leopold et al., *Predator and Rodent Control in the U.S.*, report submitted to Stewart Udall, Secretary of the Interior (Mar. 9, 1964), reprinted in *Predatory Mammals and Endangered Species: Hearings on H.R. 689 and Related Bills before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 495-506 n.273 (1972)); Edvenson, *supra* note 48, at 42-43; HAMPTON, *supra* note 41, at 173.

72. MCCOY, *supra* note 21, at 168-69.

73. HAMPTON, *supra* note 41, at 173.

74. McNULTY, *supra* note 45, at 34-35; Coggins & Evans, *supra* note 16, at 845-50; Corwin, *supra* note 46, at 804-06.

The Leopold Report also stimulated efforts in Congress to end federal predator control, including hearings on several initiatives taken by the federal government to properly manage wildlife resources.⁷⁵ The hearings provided a forum for groups opposed to federal predator control. Simultaneously, books and articles focused public attention on chemical warfare.⁷⁶ Federal predator poisoning became a national issue by the 1970s.⁷⁷

In 1971, the Council on Environmental Quality and the DOI sponsored a joint study on federal predator control. The resulting Cain Commission report, echoing the Leopold Report, recognized that the federal predator control program "contain[ed] a high degree of built in resistance to change."⁷⁸ According to the Cain Report, the public-private funding scheme "maintains a continuity of purpose in promoting the private interest of livestock growers, especially in the western rangeland states."⁷⁹ The Report noted that the livestock industry's financial support served to promote the policy of reducing predator populations with little attention to the effects on other fauna.⁸⁰

The Cain Commission determined that predator control had little impact on predator populations. Livestock loss to predators was inconsistent and difficult to measure. Though the overall losses were slight, some ranchers suffered a disproportionate burden. Heavy livestock losses were isolated and attributed to individual predators who acquired a taste for livestock. Furthermore, the resulting ecological disruptions raised questions regarding the costs and benefits of federal predator control.⁸¹ The Commission made several specific recommendations calling for the end to nonselective control methods and calling for an emphasis on controlling individual predators habituated to livestock consumption.⁸²

The Cain report, coupled with numerous eagle killings,⁸³ prompted President Nixon to issue Executive Order number 11,643 in 1972, which restricted toxin use for predator control on federal lands.⁸⁴ The Environmental Protection Agency (EPA) halted interstate shipment

75. McNULTY, *supra* note 45, at 35–40.

76. MCCOY, *supra* note 21, at 168–71.

77. DUNLAP, *supra* note 34, at 131–41.

78. CAIN REPORT, *supra* note 60, at 2.

79. *Id.*

80. *Id.*; Coggins & Evans, *supra* note 16, at 851–52.

81. Corwin, *supra* note 46, at 804–06.

82. CAIN REPORT, *supra* note 60, at 5–14. Coggins & Evans, *supra* note 16, at 851.

83. McCoy, *supra* note 21, at 134–43.

84. Exec. Order 11643, 37 Fed. Reg. 2875 (Feb. 9, 1972); Coggins & Evans, *supra* note 16, at 852–54.

of all pesticides registered for use against predators and suspended and canceled the registration for all products containing thallium sulfate, sodium cyanide, strychnine, and compound 1080.⁸⁵ The Federal Insecticide, Fungicide, and Rodenticide Act was amended in 1972 to allow experimental use permits for toxicants if necessary for registration. Several states and federal agencies soon applied for experimental use permits for various predator control poisons. President Ford liberalized the executive order to allow for experimental use of toxins on federal lands and federal programs subject to EPA prescription in 1975.⁸⁶

In 1973, "the Wolf Specialist Group of the International Union for the Conservation of Nature was formed." The group developed a Wolf Manifesto for global wolf conservation, which declared that wolves "have a right to exist in a wild state." This right "derives from the right of all living creatures to co-exist with man as part of natural ecosystems." The group encouraged governments to enact measures to protect wolves.⁸⁷

In 1978, the Secretary of the Interior established an advisory committee to examine federal predator control relating to sheep. The committee report, "Predator Damage in the West," concluded that (1) predator control should focus on individuals and local populations, not species; (2) predators were not driving ranchers out of business; (3) improved ranching practices were more efficient for protecting sheep than predator control; and (4) environmental concerns should be given equal weight with sheep loss. The report did not determine whether ADCA predator control efforts affected the loss of sheep to predators.⁸⁸ The report, commenting on the implementation of the Leopold and Cain Commission recommendations, concluded that "many of the recommendations of the Leopold and Cain Commissions had been enacted while others are no longer relevant because other events and actions that have occurred since they were made."⁸⁹

85. Manufactures, Formulators, Distributors, and Registrants of Economic Poisons Notice, 37 Fed. Reg. 5718-20 (Mar. 18, 1972); Coggins & Evans, *supra* note 16, at 854-56.

86. Coggins & Evans, *supra* note 16, at 854-56 (referencing Exec. Order 11917, 41 Fed. Reg. 22,239 n.357 (May 28, 1976), amending Exec. Order 11643). In 1982, President Reagan revoked Exec. Order 11643 in its entirety, including Ford's amendment. *Id.* at 856 (Exec. Order 12342, 47 Fed. Reg. 4223 n.359 (Jan. 27, 1982)).

87. HAMPTON, *supra* note 41, at 176.

88. Coggins & Evans, *supra* note 16, at 856-60; U.S. FISH & WILDLIFE SERV., PREDATOR DAMAGE IN THE WEST: A STUDY OF COYOTE MANAGEMENT ALTERNATIVES 3-4 (1978) [hereinafter PREDATOR DAMAGE IN THE WEST]. The 1978 report provided the information for the Environmental Impact Statement (EIS) on Animal Damage Control in the West, which supported existing practices. The EIS was severely criticized. *See id.*

89. PREDATOR DAMAGE IN THE WEST, *supra* note 88, at 4.

The DOI's Office of Audit and Investigations also reviewed the program and reflected the earlier Leopold and Cain Commission findings.⁹⁰ Professor George Cameron Coggins, a noted commentator, provided a similar assessment. Professor Coggins declared that the program was still being funded by county and private concerns. There was no universal professional training for DWS staff. There was no regulation preventing private predator control on federal lands. Predator control was still allowed in wilderness areas where grazing had been grandfathered in. Professor Coggins stated that, "[i]n short, most of the recommendations on predator control reform, made by the two most prestigious bodies ever to address the question, went for naught. The major exception for a decade was indiscriminate predator poisoning on the public lands, but it too is now in jeopardy."⁹¹

The new policy of environmental protection angered resource and commodity interests, which historically dominated western public land management. New statutes were enacted that established environmental mandates, planning processes, and public participation. Environmental groups were able to participate in the "iron triangles" of government to influence policy. The courts reviewed federal agency decisions to ensure compliance with the myriad of environmental statutes.⁹² The traditional benefactors of federal land management saw their access to western lands and water being threatened by a new set of policy actors with a different agenda. The enactment of the Federal Land Policy and Management Act (FLPMA) in 1976, which terminated most of the disposition of public lands and declared the policy of permanent federal retention of public lands, was the final straw.⁹³ The resource and commodity industries joined with disaffected western state governments to demand that the federal government surrender control over public lands. This federal-state struggle became known as the Sagebrush Rebellion or "the Great Terrain Robbery."⁹⁴

90. DUNLAP, *supra* note 34, at 160.

91. Coggins & Evans, *supra* note 16, at 852.

92. EDWARD A. FITZGERALD, *THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT*, 5-26 (2001). Sandra Davis, *Fighting over Public Lands: Interest Groups, States, and the Federal Government*, in *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* 14-30 (Charles Davis ed., 2d ed. 2001).

93. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2000). See 30 U.S.C. §§ 22-39 (2000) (Some areas remain available for disposition under the 1872 Mining Law, which is the last remnant of the disposition era.).

94. Davis, *supra* note 92, at 14-30. See also MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 165-67 (1983); Sally K. Fairfax, *Beyond the Sagebrush Rebellion: The BLM as Neighbor and Manager in the Western States*, in *WESTERN PUBLIC LANDS, THE MANAGEMENT OF NATURAL RESOURCES IN A TIME OF DECLINING FEDERALISM* 79-91 (John G. Francis & Richard Ganzel eds., 1984); Bruce Babbitt, *Federalism and the Environment: An*

The Sagebrush Rebellion began in 1978 when the Western Council of State Governments and Western Region of National Association of Counties agreed to challenge federal ownership of public lands.⁹⁵ Different strategies were pursued. Bills were introduced into Congress that provided for the transfer of federal lands to state governments. However, none of the bills made it out of committee.⁹⁶ In 1979, Nevada passed a statute asserting state ownership of public lands controlled by the BLM.⁹⁷ Other state legislatures passed similar statutes, including Arizona and New Mexico.⁹⁸ Nevada brought suit challenging the FLPMA that was rejected by the federal district court.⁹⁹

The Sagebrush Rebellion failed because political, social, and economic changes were underway in the West. Proponents were poorly organized. There was a split between western ranchers, who wanted state ownership, and economic libertarians, who advocated private ownership.¹⁰⁰ Not all of the western states sought ownership of federal lands. Some realized that the benefits of federal ownership, including cheap grazing fees, reclamation projects, federal roads, and subsidized

Intergovernmental Perspective of the Sagebrush Rebellion, 12 ENVTL. L. 847 (1982); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); Richard D. Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505; Michael E. Shapiro, *Sagebrush and Seaweed Robbery: State Revenue Losses from Onshore and Offshore Federal Lands*, 12 ECOLOGY L.Q. 481 (1985); George Cameron Coggins & Doris K. Nagel, "Nothing besides remains": *The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 491-97 (1990).

95. A. Constandina Titus, *The Nevada "Sagebrush Rebellion" Act: A Question of Constitutionality*, 23 ARIZ. L. REV. 263, 265 (1981).

96. R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* 101-11 (1993).

97. Titus, *supra* note 95, at 266-68. The Nevada bill excluded national parks, national monuments, national forests, wildlife refuges, defense reserves, Department of Energy holdings, Bureau of Reclamation lands, and Indian reserves.

98. *Id.* at 264 n.5. Other states include Colorado, Hawaii, Idaho, Utah, Washington, and Wyoming.

99. *Nevada v. United States*, 512 F. Supp. 166, 171-72 (1981). The court held that the Property Clause in Article I does not preclude the federal government from obtaining property for governmental purposes nor limit federal authority over property subsequently acquired by conquest or acquisition. The public domain passes to the federal government when a state is admitted into the Union. The status of public lands is determined by the conditions of admission. Nevada disclaimed title over its public lands when admitted to the Union. The Property Clause in Article IV of the U.S. Constitution grants the federal government unlimited authority over public lands. Congress, not the courts, determines how the public trust is administered. The federal government can sell or retain ownership of public lands without state consent.

100. Donald Snow, *The Pristine Silence of Leaving It All Alone*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE* 28-29 (Philip D. Brick & R. McGreggor Cawley eds., 1996).

timber sales, far outweighed the costs of administering such lands. Finally, the new president, Ronald Reagan, an avowed Sagebrush rebel, did not support the transfer of title from the federal to the state governments.¹⁰¹

President Reagan eased the pain of defeat by appointing leaders of the Sagebrush Rebellion to important positions, such as Secretary of the Interior, James Watt, and BLM Director, Anne Burford. Much of the executive bureaucracy was staffed by westerners sympathetic to Rebellion goals who subsequently managed federal lands as a good neighbor. The influence of environmental groups decreased while development on public lands increased.¹⁰²

The election of Ronald Reagan, who was supported by western ranchers and developers, signaled another change in direction for federal predator control. Secretary Watt instructed the FWS to review "all management alternatives for the Animal Damage Control program." The FWS later announced research resumption on Compound 1080, the return of denning, and a challenge to the order canceling and suspending the use of 1080.¹⁰³ President Reagan ended the executive order prohibiting poison use on federal lands in 1982 as a "political payoff" to the livestock industry.¹⁰⁴

At the end of the Reagan administration, the Wise-Use movement arose from the ashes of the Sagebrush Rebellion. The Wise-Use movement continues to advocate the termination of environmental controls on development, the exclusive use of federal lands by extractive industries, the protection and subsidization of commodity interests on public lands, and support for motorized recreation.¹⁰⁵ The Wise-Use movement claims to be a grassroots campaign but is subsidized and supported by major resource development industries.¹⁰⁶ This movement, which promotes the myth that resource development is the dominant

101. Davis, *supra* note 92, at 20-23.

102. *Id.*; Richard M. Mollison & Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97, 104-07 (1982).

103. DUNLAP, *supra* note 34, at 162-63.

104. Coggins & Evans, *supra* note 16, at 856, 862.

105. Ron Arnold, *Overcoming Ideology*, in A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE, *supra* note 100, at 15, 18; Snow, *supra* note 100, at 30-32. See also Philip D. Brick & R. McGreggor Cawley, *Knowing the Wolf, Tending the Garden*, in A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE, *supra* note 100, at 5.

106. Arnold, *supra* note 105, at 32-33; Perry, *supra* note 52, at 276-77.

interest of the West, supports property rights¹⁰⁷ and county supremacy.¹⁰⁸

III. THE REINTRODUCTION OF THE MEXICAN WOLF

In the 1970s, many new federal environmental statutes were enacted that protected wildlife,¹⁰⁹ most importantly NEPA and the ESA. In 1998, the Mexican wolf was reintroduced into the Blue Range Wolf Reintroduction Area (BRWRA) as a nonessential experimental population pursuant to section 10(j) of the ESA. The FWS conducted an Environmental Impact Statement (EIS) pursuant to NEPA for the reintroduction. Both statutes were the focus of the litigation.

A. Endangered Species Act

The ESA was enacted in 1973 to address species extinction.¹¹⁰ The ESA acknowledges that endangered and threatened species provide "esthetic, ecological, educational, historical, recreational, and scientific value."¹¹¹ The ESA provides "for the conservation, protection, restoration and propagation of species of fish, wildlife, and plants facing extinction."¹¹² The Supreme Court described the ESA as "the most comprehensive legislation for the preservation of endangered species

107. Perry, *supra* note 52, at 277-78. See also Nancie G. Marzulla, *Property Rights Movement: How It Began and Where It Is Headed*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE*, *supra* note 100, at 39-58; Glenn P. Sugameli, *Environmentalism: The Real Movement to Protect Property Rights*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE*, *supra* note 100, at 59-72; Kirk Emerson, *Taking the Land Rights Movement Seriously*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE*, *supra* note 100, at 115-34.

108. Davis, *supra* note 92, at 23-24. See also Karl Hess, Jr., *Wising Up to the Wise Use Movement*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE*, *supra* note 100, at 161-84; Rene Erm II, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1993-1994); Perry, *supra* note 52, at 307-19; Karen Budd-Falen, *Protecting Community Stability and Local Economies: Opportunities for Local Government Influence in Federal Decision- and Policy Making Process*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE*, *supra* note 100, at 73-85.

109. Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-1340 (2000); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1371-1421h; Sikes Act of 1974, 16 U.S.C. § 670a-670o. Coggins & Evans, *supra* note 16, at 840-48.

110. See MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW 193-212* (1997).

111. 16 U.S.C. § 1531(a)(3).

112. S. REP. NO. 93-307, at 1 (1973), as reprinted in 1973 U.S.C.C.A.N. 2989.

ever enacted by any nation.”¹¹³ The Court declared that “Congress intended endangered species to be afforded the highest priorities,” and “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction.”¹¹⁴

Section 4 of the ESA authorizes the Secretary to utilize the best scientific evidence and list domestic or foreign species as endangered or threatened.¹¹⁵ An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.”¹¹⁶ A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹¹⁷

Section 7 of the ESA requires federal agencies to further “the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.”¹¹⁸ Each federal agency must insure that action, which it authorizes, funds, or carries out, is not likely to “jeopardize the continued existence of any endangered species or threatened species.”¹¹⁹ The federal agency must consult with the Secretary to determine if an endangered or threatened species is present.¹²⁰ If one is present, the agency must perform a biological assessment to determine if the species will be affected by the proposed action.¹²¹ If the species will be affected, the agency must consult with the FWS through the Secretary of the Interior.¹²² After the consultation, the FWS must issue a biological opinion that addresses the likely impact on the species and reasonable alternatives to protect the species and recommends a particular course of action.¹²³ If the species is jeopardized, the project can not go forward without an exemption.¹²⁴

The ESA was amended and reauthorized in 1978 and 1979. The Endangered Species Committee or “God Squad” was established to provide an exemption from the stringent requirements of section 7, if the federal activity is deemed to be in the national interest.¹²⁵ The Secretary

113. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

114. *Id.* at 174, 184.

115. 16 U.S.C. § 1533(a)-(b) (2000).

116. *Id.* § 1532(6).

117. *Id.* § 1532(20).

118. *Id.* § 1536(a)(1).

119. *Id.* § 1536(a)(2).

120. *Id.* § 1536(a)(3).

121. *Id.* § 1536(c)(1).

122. *Id.* § 1536(b).

123. *Id.* § 1536(b)(3)(A).

124. *Id.* § 1536(a)(2).

125. *Id.* § 1536(a)(2). Rule 4.1

was also directed to develop and implement recovery plans that are designed to ensure the conservation or survival of each listed species.¹²⁶

The definitions of conservation in section 3 and recovery plans in section 4, combined with the section 7 mandate to carry out programs for the conservation of species, authorize the Secretary to translocate and reintroduce endangered and threatened species back to their historic ranges.¹²⁷ There was, however, no distinction between the protections afforded to natural as opposed to reintroduced species. This generated political opposition to reintroduction.¹²⁸

In 1982, Congress provided a more efficient means to advance species recovery and decrease political opposition by enacting section 10(j) of the ESA,¹²⁹ which grants the Secretary flexibility to establish and decrease the protection afforded to any reintroduced species.¹³⁰ Section 10(j) identifies an experimental population as "any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species."¹³¹ Section 10(j)(2) authorizes the Secretary to release "any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species."¹³² "Before authorizing the release...the Secretary shall by regulation identify the population and determine, on the basis of the best available information,

126. *Id.* § 1533(f) (2001); H.R. Rep. No. 95-1625, at 19 (1978) as reprinted in 1978 U.S.C.C.A.N. 9453, 9469; H.R. Rep. No. 95-1804, at 27-28 (1978) as reprinted in 1978 U.S.C.C.A.N. 9494, 9494-95). See also BEAN & ROWLAND, *supra* note 110, at 210-12.

127. 16 U.S.C. § 1532(3) (1978). Conservation means 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. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Id.
128. Mimi S. Wolok, *Experimenting with Experimental Populations*, 26 ENVTL. L. REP. 10,018, 10,019 (1996).

129. H.R. REP. NO. 97-567, at 3233 (1982) as reprinted in 1982 U.S.C.C.A.N. 2807, 2833.

130. 16 U.S.C. § 1539(j) (1994). See Doremus, *supra* note 1, at 18-31.

131. 16 U.S.C. § 1539(j) (1994).

132. 16 U.S.C. § 1539(j)(2)(A). See also 50 C.F.R. § 17.81(b) (1984); Wolok, *supra* note 128, at 10,021.

whether or not such population is essential to the continued existence of the endangered species or a threatened species."¹³³ All members of the experimental population "shall be treated as a threatened species."¹³⁴ A nonessential population is only managed as a threatened species "within the National Wildlife Refuge System or the National Park System."¹³⁵ Otherwise it is treated "as a species proposed to be listed." No critical habitat is designated for a nonessential population.¹³⁶

B. National Environmental Policy Act

NEPA establishes a national commitment by the federal government to protect the environment¹³⁷ and backs this commitment with action forcing requirements.¹³⁸ When a federal agency contemplates a major federal action that significantly affects the environment, the agency must prepare an EIS, which discusses (1) the environmental impacts of the proposed action, (2) any unavoidable environmental effects, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of the environment and the maintenance of long-term productivity, and (5) any irreversible and irretrievable commitment of resources.¹³⁹ The EIS insures that federal officials have considered environmental factors in their decision-making process. Furthermore, the EIS informs the public and other political actors about the potential consequences of the proposed federal activity.¹⁴⁰

Courts view NEPA as a procedural, rather than substantive, statute.¹⁴¹ NEPA is an environmental full disclosure law that does not require a federal agency to choose the most environmentally benign course of action.¹⁴² A federal agency's NEPA compliance is reviewed pursuant to the Administrative Procedures Act (APA) to determine if the agency's action is "arbitrary, capricious, an abuse of discretion, or

133. 16 U.S.C. § 1539(j)(2)(B). See 50 C.F.R. § 17.81(c)(2). See also Wolok, *supra* note 128, at 10,021.

134. 16 U.S.C. § 1539(j)(2)(C) (1994) (subject to exceptions outlined in the statute).

135. *Id.* at § 1539(j)(2)(C)(i).

136. *Id.*

137. 42 U.S.C. § 4321 (2000). See Edward A. Fitzgerald, *The Rise and Fall of Worst Case Analysis*, 18 U. DAYTON L. REV. 1, 4-8 (1992).

138. 42 U.S.C. § 4332(C) (1975).

139. *Id.*

140. See *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n.*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

141. See *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978); *Kleepe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

142. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

otherwise not in accordance with law" or "without observance of procedure required by law."¹⁴³ The agency's decision is entitled to a "presumption of regularity," but that presumption will not shield the agency's "action from a thorough, probing, in-depth review."¹⁴⁴

C. Mexican Wolf Recovery Program

The Mexican wolf was declared an endangered species in 1976.¹⁴⁵ It was also protected by state law in Arizona in 1973, in New Mexico in 1977, and in Texas in 1977. In 1978, all gray wolves in the United States were declared endangered species, except in northeastern Minnesota where they were considered a threatened species.¹⁴⁶ Mexico also lists the Mexican wolf as an endangered species, but government protection is problematic.¹⁴⁷

The killing of the last Mexican wolf, the Aravaipa wolf, was a "political assassination."¹⁴⁸ After the Mexican wolf was declared an endangered species, Arizona ranchers feared that the Aravaipa wolf would become the founder of the new line of wolves. Arizona ranchers offered a bounty on the wolf, which was killed as a backlash to the ESA enactment.¹⁴⁹

Section 4(f) of the ESA requires the Secretary of the Interior to develop and implement recovery plans "for the conservation and survival of endangered and threatened species."¹⁵⁰ The Mexican wolf

143. 5 U.S.C. § 706(2)(A), (D) (2000); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The Supreme Court explained that

[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416 (citations omitted).

144. See *Methow Valley Citizens Council*, 401 U.S. at 415.

145. The Determination that Two Species of Butterflies are Threatened Species and Two Species of Mammals are Endangered Species, 41 Fed. Reg. 17,737 (Apr. 28, 1976) (to be codified at 50 C.F.R. pt. 17).

146. *Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota*, 43 Fed. Reg. 9607, 9612 (Mar. 9, 1978).

147. *Mexican Wolf Recovery Plan*, *supra* note 62, at 10; David Parsons, *Case Study: The Mexican Wolf*, 36 N.M. J. SCI. 101, 110 (1996).

148. STEVE GROOMS, *THE RETURN OF THE WOLF* 154 (1993).

149. *Id.* at 154-56.

150. Endangered Species Act § 4(f), 16 U.S.C. § 1533(f) (2000). See generally Federico Cheever, *Recovery Planning, the Courts and the Endangered Species Act*, 16 NAT. RESOURCES & ENV'T 106 (2001).

recovery team was formed in 1979. In 1982, the United States and Mexico agreed to a recovery plan, which concluded that there was “no possibility for complete delisting of the Mexican wolf,” but only a down listing to a threatened species.¹⁵¹ The plan was designed to conserve and ensure the survival of the subspecies by maintaining a captive breeding program and reestablishing a viable, self-sustaining population of 100 wolves in a 5,000 square mile region of the wolf’s historic range.¹⁵²

The captive breeding program was initiated with the capture of five Mexican wolves, one pregnant female and four males, by Roy McBride from 1977 through 1980 in Durango and Chihuahua, Mexico. Three of the animals produced offspring (two males, one female) that established the certified captive lineage. Two additional populations determined to be pure bred Mexican wolves were certified in July 1995. The U.S. population known as the Ghost Ranch line consists of 21 known animals, all descended from two founders. The original sire was captured in 1959 near Tumacacori, Arizona. The founding female was purchased in 1961 by a tourist in Mexico, so it is not known if she was born in the wild or in captivity. The Mexican population known as the Aragon line consists of eight animals in the San Juan de Aragon Zoo in Mexico City. Their origin is unknown. All three lines are pure Mexican wolves. Two of the four members of the certified lineage were probably mother and son, reducing the unrelated members to three. The total captive population is descended from seven founders.¹⁵³

The recovery plan, which was developed just months before the enactment of section 10(j), lay dormant because of a lack of funding and political opposition. The FWS declared that it would not proceed without the support of state fish and game commissions. This almost doomed the program because the Arizona, New Mexico, and Texas game and fish commissions, which are funded in part by hunting fees, opposed wolf reintroduction.¹⁵⁴

National and local groups pushed for reintroduction in 1986. The FWS asked the states to identify proposed sites. Texas stonewalled; Arizona identified 15 sites, but none had been evaluated; New Mexico suggested the White Sands Missile Range (WSMR) where 4,000 square acres provided enough room for 40 wolves.¹⁵⁵ The commanding general

151. *Mexican Wolf Recovery Plan*, *supra* note 62, at 23.

152. *Id.*

153. Parsons, *supra* note 147, at 111–14.

154. GROOMS, *supra* note 148, at 157–60. BOBBIE HOLADAY, RETURN OF THE MEXICAN WOLF 27–28 (2003).

155. GROOMS, *supra* note 148, at 159; HOLADAY, *supra* note 154, at 25–30.

of WSMR initially was sympathetic to the reintroduction but withdrew his support under pressure from the nearby ranching community.¹⁵⁶

In April 1990, a coalition of environmental groups sued the Secretary of the Interior and the Army for failing to carry out the wolf recovery plan. The coalition alleged that the FWS violated section 4(f)(1) of the ESA by failing to establish a wild population of Mexican wolves. They also asserted that the Defense Department violated section 7(a)(1) by not "carry[ing] out programs for consideration of endangered species." When the Army withdrew consideration of White Sands as a release site in 1987, the commander stated that he was simply following the FWS regional policy of not permitting reintroduction where state game and fish commissions objected. It was not appropriate to give state/local governments veto power over federal action.¹⁵⁷

The suit was consistent with General Accounting Office (GAO) criticism of FWS implementation of recovery plans. Before the 1978 ESA amendments requiring recovery plans, the FWS had only approved plans for eight percent of the domestic species. Plans for another 19 percent were under development. After the amendments, plan development accelerated. By late September 1987, the agency approved plans for 56 percent of the domestic species and plans were underway for another 18 percent. Many tasks in the plans were not undertaken, however. Only about half of the tasks in the sixteen approved plans had been initiated. Officials claimed that an increase in the workload and static funding were to blame. The GAO declared that adherence to plans and guidelines would ensure the efficacy of recovery plans and maximize the utility of the funds.¹⁵⁸

Shortly after the notice of intent to sue was filed, the Army reversed its decision regarding White Sands. In October 1990, David Parsons was appointed the full-time Mexican wolf recovery coordinator with instructions to expedite the recovery plan.¹⁵⁹ In the summer of 1991 the International Union for the Conservation of Nature declared that Mexican wolf reintroduction was the most important wolf conservation program in the world. The Arizona Fish and Game Commission announced that 77 percent of the respondents in a state-wide poll favored Mexican wolf reintroduction. The Arizona Cattle Growers Association and Wool Producers Association proclaimed tentative support for the program. The Defenders of Wildlife established a

156. HAMPTON, *supra* note 41, at 191.

157. Parsons, *supra* note 147, at 117-18.

158. U.S. GEN. ACCT. OFF., ENDANGERED SPECIES: MANAGEMENT IMPROVEMENTS COULD ENHANCE RECOVERY PROGRAM 4 (1989), available at <http://161.203.16.4/d17t6/137715.pdf>.

159. Parsons, *supra* note 147, at 118; HOLADAY, *supra* note 154, at 152.

\$100,000 compensation plan for livestock killed by Mexican wolves.¹⁶⁰ In 1991, the FWS developed a general plan for Mexican wolf reintroduction. The timing was inopportune because of the federal deficit and competition with red and gray wolf reintroductions.¹⁶¹

In a negotiated stipulated settlement in 1993, the FWS agreed to implement the recovery plan as expeditiously as possible to release the Draft EIS (DEIS) and proposed rule for nonessential experimental population by May 1994. The Final EIS (FEIS) and final rule would be issued by March 1995. The release of Mexican wolves was scheduled for July 1996.¹⁶²

The funding for Mexican wolf recovery had been stagnant at \$150,000 per year. With the aid of Senator DeConcini (D-Ariz.) and Representative Sidney Yates (D-Ill.), the chair of the Interior Appropriations subcommittee, funding was increased to \$400,000 in 1994. This allowed the EIS process to move forward.¹⁶³

The DEIS was not released until 1995, 14 months after the court-mandated deadline. The Apache and Gila National Forests and the White Sands base were identified as potential reintroduction sites. A survey by the League of Women Voters indicated that 62% of New Mexico respondents supported reintroduction, while 22 percent were opposed. In the four affected rural counties, 50 percent supported wolf reintroduction and 30 percent were opposed.¹⁶⁴

Despite public support, the plan remained an uphill battle. A bill was introduced in the Arizona legislature that provided a bounty for the killing of endangered wolves.¹⁶⁵ Senator Domenici (R-N.M.), who was strongly supported by the livestock industry, was dubious about reintroduction. The NMCGA declared that the plan would evict rural residents, destroy their culture, and override property rights. The root of the issue seemed not to be wolf reintroduction, but rather federal intrusion.¹⁶⁶ The NMWG claimed federal government oppression in the form of inadequate predator control, rangeland reforms, and Forest Service regulations. The New Mexico Farm and Livestock Association viewed wolf reintroduction as a threat to small business and misuse of

160. HAMPTON, *supra* note 41, at 192.

161. HOLADAY, *supra* note 154, at 50–64. GROOMS, *supra* note 148, at 160.

162. HOLADAY, *supra* note 154, at 75–76.

163. *Id.* at 70–72.

164. Defenders of Wildlife, Restoring the Mexican Wolf: Mexican Wolf Chronology, <http://www.defenders.org/wildlife/wolf/lobochro> (last visited Jan. 20, 2006).

165. HOLADAY, *supra* note 154, at 88.

166. Keith Easthouse, *Recovery Plan Faces Uphill Battle*, SANTA FE NEW MEXICAN, June 28, 1995, at A1.

the ESA.¹⁶⁷ Governor Johnson of New Mexico and Governor Symington of Arizona opposed the reintroduction, citing the fear of rabies, negative economic impacts, bad science, and the potential change in status to an essential population. The Arizona Game and Fish Commission supported wolf reintroduction in White Sands, in New Mexico, but not in the BRWRA. The New Mexico Game and Fish Commission flatly opposed reintroduction.¹⁶⁸

Facing impending litigation,¹⁶⁹ the FWS finally released the FEIS in December 1996, 21 months beyond the scheduled March 1995 release date. This precluded the possibility of wolf release in the spring. However, in March 1997, the Secretaries of the Interior and Agriculture, along with the Deputy Secretary of the Army, agreed to allow the reintroduction to proceed.¹⁷⁰

The final rule for the reintroduction of the Mexican wolf into the BRWRA as a nonessential experimental population pursuant to section 10(j) of the ESA was published in January 1998.¹⁷¹ The BRWRA, which covers 6,854 square miles, consists of 95 percent national forest, including the Apache and Gila National Forests. The BRWRA is within the historic range of the Mexican wolf and is isolated from any known naturally occurring population of wild wolves.

The designation of the wolves as a nonessential experimental population provided the Secretary with flexibility. A reintroduced Mexican wolf located outside of a national park or wildlife refuge was treated as a species proposed for listing. The federal agency had to confer, as opposed to consult, on any actions that were likely to jeopardize a species. A reintroduced Mexican wolf in a national park or wildlife refuge was considered a threatened species, so formal consultation was required. The nonessential experimental population designation allowed for the harassment and limited taking of wolves upon a threat to humans or the killing of livestock. The release furthered

167. Michael Hartranft, *Sides Poised for N.M. Wolf Fight*, ALBUQUERQUE J., June 28, 1995, at A1.

168. U.S. Fish & Wildlife Serv., *Final Environmental Impact Statement – Reintroduction of the Mexican Wolf Within Its Historic Range in the Southwestern United States* 5-39 to 5-45 (Nov. 1996) [hereinafter *FEIS*] (letters from Governors Johnson and Symington); Tony Davis, *A Controversial Creature*, ALBUQUERQUE TRIB., Nov. 15, 1995, at C1 (quoting Senator Domenici: "In light of the New Mexico Game and Fish Department's announcement that an Arizona site would be more advantageous...I believe the Fish and Wildlife Service must work with state and local officials and the general public to see if a solution can be found").

169. HOLADAY, *supra* note 154, at 106-11.

170. Defenders of Wildlife, *supra* note 164.

171. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752 (Jan. 12, 1998).

the conservation of the Mexican wolf. If captive wolves were not released within a reasonable time, genetic, physical, and behavioral changes resulting from prolonged captivity could diminish the prospects for reintroduction.¹⁷²

The FWS planned to move Mexican wolves to the Sevilleta National Wildlife Refuge in central New Mexico where they would be paired and moved to release pens. A "soft release" was planned. The wolves would be held in pens for several weeks of acclimation. Fourteen groups would be released over a five-year period with a goal of establishing 100 wolves in the BRWRA. Initially, the wolves would be released into the Apache National Forest in Arizona and allowed to disperse into the Gila National Forest in New Mexico. Problem wolves would be captured and relocated into the Gila National Forest. The wolves would not be allowed to establish territory beyond the BRWRA.¹⁷³

In January 1998, eleven wolves in three family groups (Campbell Blue, Hawks Nest, and Pipestem packs) were brought to pens in preparation for release. Secretary Babbitt welcomed the wolves in the face of rancher protest.¹⁷⁴ Several livestock groups brought suit against the FWS to halt the release, alleging NEPA and ESA violations. The wolves were quietly released into eastern Arizona as the suit proceeded.¹⁷⁵

Richard Humphrey killed the first Mexican wolf when it allegedly threatened his dog. He later changed his story, claiming self defense.¹⁷⁶ The FWS, hoping to bank some good will, refused to prosecute. This angered wolf supporters, who predicted an open season on wolves.¹⁷⁷ In 1998, five of the thirteen released wolves were shot, one was missing and presumed dead, three were recaptured, and one pup born in the wild disappeared after its mother was shot.¹⁷⁸ Only three

172. *Id.* at 1754-56.

173. *Id.*

174. John Hill, *Interior Secretary Babbitt Welcomes Wolves' Homecoming*, ALBUQUERQUE TRIB., Jan. 26, 1998, at A7.

175. Mike Taucher, *Ranchers Sue to Block Wolf Release*, ALBUQUERQUE J., Mar. 28, 1998, at A1; John Hill, *Wolves Quietly Released Near New Mexico*, ALBUQUERQUE TRIB., Mar. 31, 1998, at A1.

176. Mike Taucher, *New Threat Stalks Gray Wolves*, ALBUQUERQUE J., Nov. 15, 1998, at A1.

177. Editorial, *Hunt the Wolf Killers*, ARIZ. DAILY STAR, Nov. 12, 1998.

178. Fish & Wildlife Serv. Sw. Reg'l Off., *Environmental Assessment for the Translocation of Mexican Wolves Throughout the Blue Range Wolf Recovery Area in Arizona and New Mexico*, Feb. 10, 2000, at 3 [hereinafter *Environmental Assessment*].

males remained in the wild.¹⁷⁹ Wildlife advocates argued that organized “eco-terrorism” was attempting to defeat the reintroduction of the Mexican wolf.¹⁸⁰ A \$50,000 reward was offered for wolf killers.¹⁸¹

In September 1999, David Parsons, the director of the Mexican wolf project, proposed the translocation of problem wolves into New Mexico.¹⁸² Translocation to the Gila National Forest had been discussed generally in the EIS, the Record of Decision, and the Statement of Findings.¹⁸³ The Gila National Forest area contains 700,000 acres free of federal grazing permits. However, Parsons “retired” later in September. Purportedly, he was to be rehired, but the FWS reneged. Program advocates questioned why Parsons was not rehired.¹⁸⁴

Opponents to reintroduction were prevalent. The proposed translocation of problem wolves to New Mexico was opposed by Catron and Grant Counties, the leaders in the county supremacy movement.¹⁸⁵ Representative Joe Skeen (R-N.M.), an opponent of wolf reintroduction, demanded the release of the problem wolves be delayed, claiming the EIS was outdated. Representative Skeen, a member of the House Appropriation Subcommittee of the Interior, threatened the funding for the project.¹⁸⁶ Despite this vociferous opposition, 22 wolves were released in 1999. The released wolves included ten adults and 12 pups born in acclimation pens.¹⁸⁷

179. Tim Molloy, *Babbitt Releases Wolf, Sends Message to Reintroduction Foes*, ASSOCIATED PRESS STATE & LOCAL WIRE, Nov. 17, 1998, available at www.news-star.com/stories/111798/lif_wolf.shtml.

180. Taugher, *supra* note 176.

181. Defenders of Wildlife, *supra* note 164.

182. Mike Taugher, *Gila Wolf Release Pushed for Next Year*, ALBUQUERQUE J., Oct. 30, 1999, at E3; Wes Smalling, *Activists Want Changes in Wolf Reintroduction Policy*, SANTA FE NEW MEXICAN, Sept. 14, 2000, at C1; *Environmental Assessment*, *supra* note 177, at 5. The FWS determined that “the most likely reasons for relocating wolves include: conflicts with livestock or other domestic animals; dispersal of wolves into inappropriate areas; replacement of a lost mate; or genetic management of the wild population.” *Id.*

183. *Environmental Assessment*, *supra* note 178, at 2 (“[T]ranslocation can benefit wolves and human activities by limiting conflicts with people and livestock, avoiding wolf losses, and aiding in the dispersal of wolves into suitable locations throughout the BRWRA.”).

184. Wes R. Smalling, *Wild Wolves and Red Tape*, SANTA FE NEW MEXICAN, Dec. 2, 1999, at C1.

185. *Environmental Assessment*, *supra* note 178, at 13 (noting that county commissions in Catron and Grant counties passed resolutions opposing the relocation of problem wolves into the counties – December 20, 1999 and January 13, 2000 respectively).

186. Mike Taugher, *Skeen Opposes Gila Wolf Plan*, ALBUQUERQUE J., Dec. 23, 1999, at A1; Mike Taugher, *Grant County ‘Prohibits’ Wolf Release*, ALBUQUERQUE J., Jan. 14, 2000, at B3.

187. *Environmental Assessment*, *supra* note 178, at 3–4. In 1999, six pups were born in the wild in the Pipestem Pack. Two wolves were killed: one by a car, another by a mountain lion. Five pups died (two of the 12: three of the six). The Pipestem Pack was recaptured

IV. NEW MEXICO CATTLE GROWERS ASS'N V. U.S. FISH & WILDLIFE SERVICE

In October 1999, the U.S. District Court for the District of New Mexico rendered its decision in the litigation brought by the NMCGA¹⁸⁸ against the FWS,¹⁸⁹ challenging the Mexican wolf reintroduction on NEPA and ESA grounds. The court correctly rejected the NMCGA contentions regarding livestock depredation rates, the hybridization of the reintroduced population, the existence of a naturally occurring population of Mexican wolves in the BRWRA, the impacts on other endangered and threatened species, federal consultation with state and local governments, and the need for a Supplemental EIS.

The issues in the litigation focused on questions of fact that involved "evaluating the data and drawing conclusions from it"¹⁹⁰ and questions of policy that were "predictive and...judgmental."¹⁹¹ Courts are generally deferential to administrative agencies regarding fact questions, which "are the product either of scientific or expert inquiry and judgment or of an assimilation of detailed and varied evidence or experience, for which the agency is particularly well qualified by virtue of its bureaucratic organization of resources."¹⁹² Courts are also deferential to agency policy determinations, which "reflect political choices-accommodation of competing interests, application of value choices, and responsiveness to the electorate."¹⁹³

because of livestock depredation. One of the seven-member Gavilan Pack had not yet been recaptured. *Id.*

188. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. 98-367M//JHG, 1999 U.S. Dist. Lexis 19096 (D.N.M. Oct. 28, 1999). Other parties include the New Mexico Public Lands Council, Livestock Bureau, New Mexico Wool Growers Association, New Mexico Farm & Livestock Bureau, Hidalgo County Cattle Growers Association, Greenlee County Cattle Growers Association, Production Credit Association of New Mexico. *Id.*

189. *Id.* The defendants are Secretary of the Interior, Bruce Babbitt; Director of the FWS, Jeff Hasket; Regional Director, Nancy Kaufmann. The defendant-intervenors are Defenders of Wildlife, National Parks and Conservation Association, Preserve Arizona's Wolves, Southwest Center for Biological Diversity, White Sands Wolf Coalition, Sky Island Alliance, Jeff Williamson. *Id.*

190. *California v. Watt*, 668 F.2d 1290, 1301 (1981).

191. *Id.* at 1302. The adequacy of an EIS is determined by the rule of reason. The Second Circuit declared that "[s]uch a determination...is not strictly a finding of fact but rather an exercise of judgment as to what is reasonable under given circumstances which, of course, may vary from case to case." *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1375 (1977).

192. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW – RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 32 (1990).

193. *Id.* at 33–34. See also Pamela Ansary, *A New Dimension of NEPA – The Rule of Reason Assigned to Multistage Projects*, 44 *BROOK. L. REV.* 1097, 1115–17 (1978).

A. Livestock Depredation

The FWS examined depredation rates in Minnesota, Montana, and Alberta (the northern area). Utilizing the Yellowstone reintroduction equation, FWS calculated the number of cows in the recovery area per the number of cows in the northern area, times the number of wolves in the recovery area per the number of wolves in the northern area, times the mean annual depredations in the northern area, times the multiplier. The result equaled the estimated number of depredations.¹⁹⁴ The FWS recognized that the duration of free-range grazing in the BRWRA was eight to twelve months and four to six months in the northern area, so utilized a multiplier of 1.5-2. The FWS circulated the analysis to 22 experts who pointed out differences between the BRWRA and the northern area; including more open range calving, higher cattle density, lower prey availability, difficulties in locating missing stock, startup effects, nonfatal wounding, and the lack of feeding pastures. For its low depredation estimate, the FWS utilized a multiplier of two, which was based on a different length of open-grazing seasons, and a multiplier of five for its high depredation estimate, which was based on expert views. The FWS estimated that one to 34 head of cattle would be killed by wolves, which constitutes 0.001% to 0.04% of the 82,600 cattle in the BRWRA.¹⁹⁵

The NMCGA argued that the FWS methodology was flawed and failed to consider relevant contrary information. Specifically, the FWS failed to consider the ratio of wild and domestic prey in the BRWRA and failed to utilize the best available science. Two studies of wolf depredation in regions of Italy and Spain, which are similar to the BRWRA, indicated that the wolf was a nonselective predator that consumed wild and domestic prey in proportion to its availability. Wolves, according to the study, did not select wild over domestic prey, but preferred smaller and younger animals.¹⁹⁶ Both of these studies relied upon by the NMCGA were published in scientific journals prior to the publication of the FEIS but were not cited by the FWS.¹⁹⁷

194. *FEIS*, *supra* note 168, at 4-4 to 4-9.

195. Brief of Defendants Response in Opposition to Plaintiffs' July 16, 1999 Opening Brief on the Merits at 41-46, N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., No. CV-98-367-ELM/JHG/ACE (D.N.M. Oct. 28, 1999). [hereinafter Defendants' Brief].

196. Juan Carlos Blanco et al., *Distribution, Status and Conservation Problems of the Wolf Canis Lupus in Spain*, 60 *BIOLOGICAL CONSERVATION* 73 (1992); Alberto Meriggi et al., *The Feeding Habits of Wolves in Relation to Large Prey Availability in Northern Italy*, 19 *ECOGRAPHY* 287 (1996).

197. Brief of Plaintiff at 15-23, N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., No. CV-98-367 HB/LFG (D.N.M. Oct. 28, 1999). [hereinafter Plaintiffs' Brief].

The NMCGA contended that the FWS knew its studies were flawed.¹⁹⁸ According to the NMCGA, the FWS failed to consider the killings by offspring of the 100 reintroduced wolves and unconfirmed livestock losses from wolf depredation.¹⁹⁹ A more accurate estimate of wolf depredation was provided by Dr. Maceina, who concluded that 500 to 700 cattle and 120 to 150 sheep would be lost to wolves.²⁰⁰

The court refused to consider the studies because they were not part of the administrative record²⁰¹ and properly concluded that the FWS adequately analyzed wolf depredation. This was a policy question. NEPA only requires the agency to adequately consider the issue and make a reasonable decision. The FWS did not have to consider every study. There was no showing that the FWS selectively excluded the studies, two of which had not been completed prior to the FEIS. The FWS methodology was appropriate and entitled to substantial judicial deference. Disagreement among experts is not a basis for invalidating an EIS.²⁰²

Even if the court had considered the excluded studies, its conclusion would not have been altered. Dr. Maceina failed to see differences between the European areas and BRWRA. The 1992 Spanish study focused on the Zamora region of Spain, where wolf density was five-to-eight times greater than in the BRWRA and the wolves fed principally on sheep and other small ungulates. The 1996 Italian study focused on the Cantabrian Mountains, where wolf density was five-to-twenty times greater than the BRWRA and cattle density was two-and-a-half times greater than in the BRWRA. Despite the higher cattle and wolf densities, the author of the Italian study, Meriggi, concluded that, "in the presence of a rich and abundant wild ungulate guild [in study area C],

198. *Id.* at 18–21. NMCGA argued the Minnesota depredation rate is too low. The ratio of wild to domestic prey in Minnesota is 125% greater than in the BRWRA, so more wild prey is available. Livestock is restricted to the northeast, so there is little overlap with the wolf range. Farms are more supervised, discouraging wolf activity. Montana also has a higher wild to domestic prey ratio than the BRWRA. Most wolf killings in Montana occur in Glacier National Park where no livestock is present. The number of Montana killings is not consistent with Defenders of Wildlife compensation figures. Finally, in Alberta, predatory wolves are shot, so they learn not to prey on livestock. *Id.*

199. *Id.* at 21–23.

200. *Id.* at 16–17 (citing Michael J. Maceina, *Analysis of Potential Mexican Wolf Depredation Rates in the Blue Ridge Wolf Recovery Area* (1999)).

201. *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367M/JHG, 1999 U.S. Dist. LEXIS 19096, at *48–53 (D.N.M. Oct. 28, 1999).

202. *Id.* at 52–64.

wolf diet was mainly based on these prey despite the high availability of livestock."²⁰³

There were other errors in Dr. Maceina's analysis. First, Dr. Maceina assumed that cattle are evenly spread across the BRWRA in space and time. However, only 69 percent of the BRWRA supports livestock allotments. Of that 69 percent, approximately half of the allotments are seasonal, so grazing is only permitted for part of the year. Cattle and wolves will not overlap the same areas throughout the year and problem wolves will be removed.²⁰⁴

Second, Dr. Maceina claimed that 120 to 150 sheep would be killed. This estimate did not acknowledge that sheep are only located in a remote corner of the BRWRA. Additionally, the FEIS already allows that, if any sheep are killed by a wolf, the wolf will be removed.²⁰⁵ Third, Dr. Maceina failed to recognize that the FWS considered differences in wild and domestic prey ratios, prey availability, and free ranging cattle that make the BRWRA different than the northern regions. The FWS used multipliers as high as 4.5 to compensate for such differences.²⁰⁶

Finally, empirical evidence refuted Dr. Maceina's findings. As of September 20, 1999, wolves had spent 4,978 days in the BRWRA (one day for every wolf in the wild). Wolf depredation consisted of four cows and no sheep. According to Dr. Maceina's model, each wolf would kill five to seven cattle and 1.2 to 1.5 sheep per year. There should have been 68 to 95 dead cows and between 16 to 20 dead sheep. Extrapolating from existing evidence, there would be 29 dead cows, which was well within the expected depredation of one to 34 cows.²⁰⁷

B. Hybrid Wolves

The FWS employed a six-person committee, chaired by Dr. Phillip Hedrick, to examine the genetic lines of the reintroduced population. The committee considered the morphology and molecular genetics of the breeding lines, as well as molecular techniques, including mitochondrial DNA, multilocus DNA fingerprinting, and microsatellite

203. Declaration of David R. Parsons in Support of Federal Defendant's Response Brief on the Merits, *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367 ELM/JHG/ACE 1999 U.S. Dist. Lexis 19096, at *2-3 (D.N.M. Oct. 28, 1999) [hereinafter *Parsons Declaration*].

204. *Id.* at 4.

205. *Id.*

206. *Id.*

207. *Id.* at 5.

loci analysis. The committee concluded that the captive wolves were not hybrids but pure Mexican wolves.²⁰⁸

The NMCGA alleged that the FEIS failed to consider the possibility that reintroduced wolves were not genetically pure but were instead dog and coyote hybrids. The ESA does not authorize the release of hybrids, which will not preserve the species. The Ghost Ranch line, whose founder's lineage could not be traced with certainty, manifested some dog-like characteristics. Testimony by Roy McBride, the original trapper, and Curtis Carley, an original member of the recovery team, supported this position. The FWS determination of genetic purity of the Ghost Ranch line was dubious. Finally, adversaries to reintroduction cited studies in Minnesota showing that approximately half the wolf population was hybridized.²⁰⁹

The court found that even though the FEIS did not consider the hybrid issue, the FWS thoroughly analyzed the issue. Expert opinion showed that the reintroduced wolves came from three breeding lines free from introgression by dogs and coyotes and were "genetically pure" Mexican wolves.²¹⁰

The court's factual conclusion on the hybrid issue was supported by the evidence. Utilizing state-of-the-art genetic techniques, the FWS genetic committee determined the three founding lines were Mexican wolves. The findings were confirmed by another study comparing the genetic data from the Ghost Ranch and Aragon lines performed by scientists at UCLA and the Institute for Nature Conservation Research of Tel Aviv University. The scientists compared the "microsatellite polymorphisms" with 151 gray wolves, 142 coyotes, and 42 dogs. The studies concluded that the Mexican wolves "do not have alleles otherwise specific to domestic dogs or coyotes but rather share alleles found in certified Mexican wolves." The two lines of captive wolves "are unlikely to have been founded by a simple cross between a gray wolf and a domestic dog or coyote but likely represent the descendants of pure Mexican gray wolves." Since the wolves were genetically pure, they "should be used as a source for reintroduction to the southwestern U.S., if possible."²¹¹

The NMCGA relied on the work of Dennis Parker, who wrote an unpublished paper in 1987: "Southwest Wolves: Discussion of Their Taxonomical Arrangement." The paper was revised in 1995

208. Defendants' Brief, *supra* note 195, at 20-24.

209. Plaintiffs' Brief, *supra* note 197, at 27-31.

210. N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., No. CIV 98-367M/JHG, 1999 U.S. Dist. LEXIS 19096, at *65-66 (D.N.M. Oct. 28, 1999).

211. Defendants' Brief, *supra* note 195, at 21-22.

("Reintroduction of the Mexican Wolf: Instrument of Recovery or Instrument of Demise?") and served as a comment on the DEIS. The FWS put together the six-person genetic committee of eminent scientists to examine Parker's assertions. The results appeared in an appendix to the FEIS.²¹²

Parker asserted that the captive population was inbred and would be unable to successfully repopulate the Mexican wolf population. The captive population consisted of two founding males and a founding female, which was too narrow a genetic base to permit survival in the wild. The FEIS pointed out that Parker ignored the work of scientists who had addressed the genetic lines of wolves. Scientists had established that the three founding members were drawn from the same source population and were distinct from other North American wolves. The Ghost Ranch and Aragon lines, which were unrelated to the founding lineage, were deemed pure Mexican wolves through genetic analysis, increasing the founding captive population to seven members. There is adequate genetic variability for a viable population. Recent studies demonstrate that the genetic variability of the captive population is not different than the wild population of grey wolves.²¹³

Parker alleged that the male founder of the Ghost Ranch line was purportedly a hybrid.²¹⁴ The skull showed canine features and taxonomic studies indicated dog-like characteristics within the Ghost Ranch line. The FEIS concluded that there were undocumented statements that the founder was a hybrid and that the skull showed dog-like characteristics, but the sources of the dog-like characteristics were not demonstratively genetic rather than environmentally caused. The phenotype of skulls was influenced by captive breeding. Additionally, taxonomic studies of the Ghost Ranch and Aragon lines did not show dog-like characteristics but primarily demonstrated affinities with the other wolf groups. Most importantly, molecular evidence for micro-satellite loci showed no indication that the male founder of the Ghost Ranch line has ancestry from a dog or dog-wolf hybrid.²¹⁵

The FWS committee was critical of Parker's work. David Mech, a noted wolf expert, declared that the paper "misinterprets and misconstrues" the evidence and "ignores other salient studies." The paper was not "an objective analysis," but an effort to prevent the reintroduction of wolves.²¹⁶

212. FEIS, *supra* note 168, app. K, at .K-6; HOLADAY, *supra* note 154, at 90-94.

213. FEIS, *supra* note 168, app. K.

214. Parker made similar assertions regarding the Aragon line. *Id.* at K-8.

215. *Id.* at 7-8.

216. *Id.* at 8-9.

The evidence submitted by the NMCGA was dubious. Roy McBride was an experienced trapper, not an expert on molecular genetics. Carley was not a genetic expert but relied on earlier physiological taxonomic methods that were considered less reliable than more modern genetic taxonomic methods. Furthermore, the hybridization of wolves in Minnesota was not relevant to the Mexican wolf.²¹⁷

C. Presence of a Naturally Occurring Wolf Population

The FWS determined that there was no evidence that Mexican wolves were already present in the BRWRA. The FWS analyzed all alleged wolf sightings in Arizona, New Mexico, Texas, and northern Mexico from 1983–1993. The FWS interviewed individuals and conducted field surveys regarding sightings after 1993. Technicians solicited responses at 1,727 howling stations along a 1,600 mile route. Searches for wolf tracks and scat were unsuccessful.²¹⁸

The NMCGA argued that there was a native population of Mexican wolves in the BRWRA. They argued that, because there were reported sightings of individual wolves in the region, there was an existing population. They argued that the reintroduction of a nonessential experimental population was impermissible under section 10(j) of the ESA.²¹⁹

The court, upholding the FWS factual determination, found no support for this conclusion except anecdotal information. The FEIS acknowledged that since 1983 there were six unconfirmed reports of wolf sightings in the BRWRA. The last verified sighting of the Mexican wolf in New Mexico occurred in 1976 and in Arizona in 1983, or possibly 1995. The FWS conducted wolf howling surveys in seven different habitat areas. The FWS also did scent monitoring, howling surveys, searches for dens and kill sites, hunts for tracks, and track plaster-castings. Additionally, the FWS employed recording devices and remote cameras and conducted formal investigations of alleged wolf sightings. The evidence demonstrated that no Mexican wolves were present in the BRWRA.²²⁰

The occurrence of a natural population of Mexican wolves in the BRWRA posed an interesting legal question that was analyzed in

217. Defendants' Brief, *supra* note 195, at 23–24 & n.21.

218. *Id.* at 24–28.

219. Plaintiffs' Brief, *supra* note 197, at 29.

220. *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, CIV No. 98-367M/JHG, 1999 U.S. Dist. LEXIS 19096, at *69 (D.N.M. Oct. 28, 1999).

Wyoming Farm Bureau Federation v. Babbitt,²²¹ a case that dealt with the reintroduction of the gray wolf into the northern Rocky Mountains.²²² Section 10(j)(1) of the ESA requires an experimental population to be "wholly separate geographically from non-experimental populations of the same species."²²³ The FWS defined a wolf population to be "at least two successful breeding pairs for at least two years."²²⁴ The district court in *Wyoming Farm Bureau Federation* accepted the FWS definition of population but determined that the references to individuals and specimens in the legislative history mandated that experimental populations be "wholly separate geographically" from individual dispersers.²²⁵

The U.S. Court of Appeals for the Tenth Circuit, reversing the district court, upheld the FWS's definition of population.²²⁶ The court determined that "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."²²⁷ Moreover, it was highly unlikely that lone dispersers would meet another solitary wolf, breed, and produce two pups yearly for two consecutive years. The populations left behind by individual dispersers were very unlikely to expand because the lone wolf moves on.²²⁸

This issue was also addressed by the U.S. Court of Appeals for the Ninth Circuit in *United States v. McKittrick*.²²⁹ McKittrick was convicted of killing a wolf that was part of an experimental population. He claimed that the experimental population designation was invalid because the wolves were not "wholly separate geographically" from the naturally occurring wolves present in Yellowstone National Park. The Ninth Circuit, specifically rejecting the district court's reasoning in

221. 987 F. Supp. 1349 (D. Wyo. 1997).

222. Fitzgerald, *Wyoming Farm Bureau*, *supra* note 3, at 80.

223. 16 U.S.C. § 1539(j)(1).

224. *FEIS*, *supra* note 168, at 5-59. *See also* 59 Fed. Reg. 60,252, 60,256 (Nov. 22, 1994); *Wyo. Farm Bureau*, 987 F. Supp. at 1371; *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1234 n.3 (10th Cir. 2000).

225. *Wyo. Farm Bureau*, 987 F. Supp. at 1372-75.

226. The court relied on *Chevron v. NRDC*, 467 U.S. 837 (1984), which establishes a two-step process for statutory interpretation. The first step requires the court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has not addressed the issue, the court moves on the second stop to determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

227. *Wyo. Farm Bureau*, 199 F.3d at 1234.

228. *Id.* at 1234.

229. 142 F.3d 1170, 1174-75 (9th Cir. 1998).

Wyoming Farm Bureau,²³⁰ upheld the FWS finding that the experimental population of gray wolves was geographically separate and no natural populations were in the area. The Ninth Circuit concluded that "lone wolves, or dispersers, do not constitute a population."²³¹

Section 10(j)(2)(A) of the ESA states that the Secretary "may authorize the release...of any population (including eggs, propagules, or individuals) of an endangered species or threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species."²³² The federal district court in *Wyoming Farm Bureau* held that "the plain language of section 10(j)(2)(A) speaks to the range of the 'species' without specific reference to a 'population.'"²³³ The district court held that the release of the experimental population was not outside the current range of the species because the range of individual dispersers constituted the current range of the species. The district court did not equate the range of wolf packs with the range of the species.²³⁴

The Tenth Circuit rejected the district court's interpretation and determined that the territory occupied by a single wolf does not constitute the current range of the species.²³⁵ The court held that the definition of species must be consistent with conservation and recovery. The FWS properly focused on distinct, interbreeding population segments or subspecies, not individual animals. The Tenth Circuit declared that "an individual animal does not a species, population or population segment make."²³⁶

The NMCGA relied on the federal district court's decision in *Wyoming Farm Bureau*. However, the rationale of the Tenth Circuit dictated that, even if there are individual Mexican wolves in the BRWRA, this does not violate section 10(j) because no population of Mexican wolves is present. The FEIS notes that, if there is a wild Mexican wolf in the area, it can interbreed with the reintroduced wolves and enhance genetic diversity of the population.²³⁷

230. *Id.* at 1175.

231. *Id.* (internal quotation marks omitted).

232. Endangered Species Act, 16 U.S.C. § 1539(j)(2)(a) (2000).

233. *Wyo. Farm Bureau*, 987 F. Supp. at 1375.

234. *Id.*

235. *Wyo. Farm Bureau*, 199 F.3d at 1235-36.

236. *Id.* at 1236.

237. *FEIS*, *supra* note 168, at 5-59.

D. Consideration of Other Endangered Species

Section 7(a)(2) of the ESA prohibits all federal agencies from taking any actions that are "likely to jeopardize the continued existence of any endangered species."²³⁸ Each federal agency must insure, through consultation with the FWS, that any action it authorizes, funds, or implements is not likely to jeopardize the continued existence of any listed species. The federal agency proposing the action must assess whether the proposed action may affect a listed species.²³⁹ If the agency decides that the action will not affect a listed species, the consultation process is not necessary. If the agency decides the action may affect a listed species, it must enter into consultation with the FWS.²⁴⁰ If, however, the agency concludes through informal consultation or the preparation of a biological assessment that the proposed action is "not likely to adversely affect" the listed species, and FWS concurs with the determination, the consultation process is ended.²⁴¹ After informal consultation with U.S. Forest Service and intra-agency consultation, the FWS concluded that implementation of the Mexican wolf reintroduction program would not have any adverse affect on any listed species.²⁴²

NMCGA alleged that the FEIS failed to consider the impacts on endangered and threatened species. The FEIS listed 15 endangered and threatened species and another 61 scheduled for listing but contained only a limited discussion of the impacts of Mexican wolf reintroduction on these species. The FWS determined that no analysis was necessary because wolves are not known to prey on the species in question and because later review would occur. There were no studies about indirect impacts of wolf reintroduction on vegetation and other animals in the BRWRA. For example, the FEIS noted that the Mexican spotted owl and Mexican wolf may overlap, but no data was presented that the wolf would or would not jeopardize the owl. This failure to analyze impacts on other endangered and threatened species violated NEPA and the ESA.²⁴³

The court held that the FEIS adequately considered the impact of the recovery program on endangered and threatened species in the BRWRA.²⁴⁴ The FWS collected and considered data on numerous species

238. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000) (emphasis added).

239. *Id.* See also 50 C.F.R. § 402.14(a) (2004).

240. Endangered Species Act, 16 U.S.C. § 1536(a), (b) (2000).

241. 50 C.F.R. §§ 402.13, 402.14(a) (2004).

242. Defendants' Brief, *supra* note 195, at 28–29.

243. Plaintiffs' Brief, *supra* note 197, at 31–32.

244. N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., CIV. No. 98-367M/JHG, at *74–75 (D.N.M. 1999).

in Arizona and New Mexico, particularly endangered and threatened species.²⁴⁵ The court determined that experts disagreed on the impacts and that little consensus existed regarding the management of endangered and threatened species. The needs of the species were often in opposition to one another. Although the FWS did not resolve the conflicts, it did not fail to consider all relevant factors to make a reasonable decision thereunder. The FEIS included all relevant and essential information for making an informed decision.²⁴⁶

The court's decision was correct because it was based on the adequacy of the FWS's consideration of the issue, which is a policy question. The NMCGA complained about the information summary on endangered species in the FEIS. However, this was not the only data considered by the FWS. For example, the threat to the Mexican spotted owl is considered in another document, the Mexican spotted owl recovery plan. The FWS determined that the Mexican wolf may, but is not likely to, impact the Mexican spotted owl because their principal prey does not generally overlap. The Mexican wolf primarily takes larger ungulates and infrequently kills smaller mammals, the primary prey of the Mexican spotted owl. The FWS noted that the wolf may help owl recovery by reducing overgrazing by deer and elk in the BRWRA.²⁴⁷

E. Federal Consultation

Federal regulations regarding experimental populations require the FWS to "consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules."²⁴⁸ Any regulation regarding an experimental population "shall, to the maximum extent practicable, represent an agreement between the FWS, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population."²⁴⁹ The FWS complied with this mandate by sending notices to all affected parties; holding

245. Protected species in the BRWRA include the Gila trout, Gila topminnow, American peregrine falcon, whooping crane, bald eagle, and black footed ferret. The FWS also considered the potential impacts on the white sided jackrabbit, Mexican spotted owl, desert bighorn sheep, spotted bat, and wild turkey. Several protected plants in the area were identified including the parish alkali grass, Mimbres figwort, Mogollon clover, grama grass cactus, and Pinos Altos flameflower. *Id.* at 72.

246. *Id.* at 70-75.

247. Defendants' Brief, *supra* note 195, at 31 n.27.

248. 50 C.F.R. § 17.81(d) (2004).

249. *Id.*

public hearings about reintroduction; and consulting with all relevant state, county, and local governments and interests. The FWS did not reach any agreements but did incorporate some of the suggestions into the regulation pertaining to land use restrictions on private lands, road closure, and harassing and killing marauding wolves.²⁵⁰

The NMCGA alleged that the FWS failed to comply with the public comment and consultation requirement. The NMCGA further alleged that FWS arbitrarily ignored the complaints of land owners regarding the destruction of their livestock and private property. The FWS, according to the NMCGA, was mandated to enter into private agreements with affected private land owners. Furthermore, the FWS failed to discuss coordination with state and/or local governments.²⁵¹

The NMCGA attempted to have the court indirectly address the validity of the counties' "custom and culture" ordinances. The BRWRA is located within southern Apache and northern Greenlee Counties in Arizona and southern Catron, northern Grant, and western Sierra counties in New Mexico. Approximately two-thirds of "Greenlee and Catron Counties are in the BRWRA." Apache, Catron, Greenlee, and Sierra counties have land use ordinances that establish the environmental planning and review processes and require federal decisions within the counties be subject to local approval. Catron and Sierra counties also enacted ordinances prohibiting the release of wolves into the wild.²⁵² Each of the affected counties opposed the reintroduction of the Mexican wolf and asserted that reintroduction would threaten local custom and culture.²⁵³ The FEIS declared that the reintroduction would not violate the Catron and Sierra County ordinances prohibiting the release of wolves, but recognized "wolf reintroduction and the accompanying federally-adopted experimental population rule would conflict with and preempt certain county ordinances."²⁵⁴

These ordinances are the product of the County Supremacy movement, which began at the National Federal Lands Conference in 1989 under the leadership of Karen Budd, a protégé of James Watt and counsel for the NMCGA in the Mexican wolf litigation.²⁵⁵ From 1991 through 1994, 35 counties enacted ordinances asserting control over public lands despite near unanimous opposition from state attorney

250. Defendants' Brief, *supra* note 195, at 32-35.

251. Plaintiffs' Brief, *supra* note 197, at 23-26.

252. FEIS, *supra* note 168, at 3-10, 4-11.

253. *Id.* at 5-58 to 5-74.

254. *Id.* at 4-11, 4-12.

255. Andrea Hungerford, "Custom and Culture" Ordinances: Not a Wise Move for the Wise Use Movement, 8 TUL. ENVTL. L.J. 457, 460-61 (1995).

generals.²⁵⁶ The alleged basis for the custom and culture ordinances was NEPA, which requires consultation with state and local governments; FLPMA, which mandates the BLM to "coordinate...land use inventory, planning and management activities" with state and local governments; and the ESA, which requires the FWS to notify state and local governments regarding proposed listings, changes in critical habitat, and recovery plans.²⁵⁷

The court, upholding the FWS policy determination, found that the FEIS contained whole sections on consultation and coordination. There were four public hearings prior to the release of the wolves and the FWS received over 1,300 comments. There was extensive public input from Arizona's and New Mexico's Game and Fish departments, the White Mountain and San Carlos Apache tribes, and the Departments of Agriculture and Defense. The FWS kept the local public informed and worked with local officials to generate support for the proposal. Foreseeably, support was difficult to obtain. The court found that the FWS did not neglect or deal with this issue in an arbitrary and capricious manner.²⁵⁸

The court's decision was supported by the text of the regulation that requires only a good faith effort to achieve such an agreement prior to reintroduction. The decision was also consistent with the federal district court's holding in *Wyoming Farm Bureau Federation v. Babbitt*.²⁵⁹ The Federation asserted that the regulation grants individuals holding any interest in land that may be affected by the establishment of an experimental population with greater procedural rights than the general public. Relying on legislative history, the Wyoming Farm Bureau Federation contended that, prior to the release of an experimental population on or near private land, "the landowner must be fully apprised of the release and the regulations under which the population will be managed."²⁶⁰ Furthermore, the "regulations should be viewed as an agreement among the federal agencies, the state fish and wildlife agencies and any landowners involved. Changes in the regulations

256. Elizabeth M. Osenbaugh & Nancy K. Stoner, *The County Supremacy Movement*, 28 URB. LAW. 497, 498, 508-09 (1996).

257. Perry, *supra* note 52, at 311-12; Hungerford, *supra* note 255, at 469-70; Matthew Hilton, *Defending the Right of Local Governments to Contribute to Decision Making Regarding Public Lands in the Western United States*, 27 URB. LAW. 267, 275-80 (1995); Miller, *Legal Issues*, *supra* note 2, at 900-01.

258. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367M//JHG, 1999 U.S. Dist. Lexis 19096, at *75-81 (D.N.M. Oct. 28, 1999).

259. See generally *Wyo. Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349 (D. Wyo. 1997).

260. *Id.* at 1365.

should only be made after close consultation with all of the affected parties."²⁶¹

The federal district court in *Wyoming Farm Bureau*, upholding the sufficiency of the FWS consultation, held that neither the text of the regulations nor the legislative history of section 10(j) requires the FWS "to obtain approval and 'agreement' from persons holding any interest in land which may be affected by the establishment of an experimental population before enacting experimental population rules."²⁶² The FWS and Congress only intended that "such rules and regulations, to the maximum extent practicable, serve as a type of cooperative agreement, between the affected parties." There is no requirement that the FWS reach agreements with all affected government agencies and landowners.²⁶³

The federal district court in *WYFBF* did not address the validity of the counties' "custom and culture" ordinances, but similar ordinances have not been upheld. The "custom and culture" ordinances received a lethal blow in *Boundary Packers v. Boundary County*.²⁶⁴ In 1992, Boundary County Idaho enacted an ordinance, *Boundary County Interim Land Use Policy Plan*, which was modeled on the Catron County ordinance.²⁶⁵ Several environmental organizations sued the county. The Idaho Supreme Court held that the county ordinance was preempted by federal statutes regarding the management of public lands, including the ESA, Wild and Scenic Rivers Act, and Wilderness Act. Federal preemption occurs when the federal government intends to occupy the field at issue or there is conflict between federal and state law. The county cannot limit federal acquisition of land or federal land withdrawals or demand local approval of federal actions.²⁶⁶ Furthermore, the unconstitutional provisions cannot be severed from the ordinance.²⁶⁷

F. Supplemental Environmental Impact Statement

The NMCGA alleged that a Supplemental EIS (SEIS) was necessary. The FEIS failed to disclose all relevant information. The Spanish and Italian studies on wolf depredation were not part of the

261. *Id.*

262. *Id.* at 1365-66.

263. *Id.* at 1366 (emphasis added).

264. *Boundary Backpackers v. Boundary County*, 913 P.2d 1141 (Idaho 1996); See generally Miller, *Western Front*, *supra* note 2, at 846-49.

265. *Boundary Backpackers*, 913 P.2d at 1143-45; Miller, *Western Front*, *supra* note 2, at 846.

266. *Boundary Backpackers*, 913 P.2d at 1146-48.

267. *Id.* at 1148.

administrative record and needed to be circulated for notice and comment. FWS comments on the studies did not remedy the defect but were merely a post hoc rationalization. Furthermore, "new" sightings of Mexican wolves in the BRWRA contradicted the FWS assumption that no natural wolves were present in the BRWRA.²⁶⁸

The court upheld the FWS factual determination²⁶⁹ and found that NMCGA allegations were not supported by law.²⁷⁰ An SEIS need only be filed when there are "significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts."²⁷¹ What is "significant" is left to agency discretion.²⁷² The court can only override the agency's decision if it is arbitrary and capricious.²⁷³ Nothing showed that the failure of the FWS to conduct an SEIS was arbitrary and capricious.²⁷⁴

V. POST-LITIGATION DEVELOPMENTS

The reintroduction of the Mexican wolf has been successful despite efforts to sabotage the program.²⁷⁵ In 2000, wolves in the Gavilan Pack migrated from Arizona and were recaptured in the Gila Forest after killing livestock.²⁷⁶ In February, the FWS published an Environmental

268. Plaintiffs' Reply to Defendants' and Defendant-Intervenors' Responses to Plaintiffs Opening Brief on the Merits at 17-23, *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367 M/JHG, 1999 U.S. Dist. Lexis 19096 (D.N.M. Oct. 28, 1999).

269. *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997). SEIS challenges are "classic example[s] of...factual dispute[s] the resolution of which implicates substantial agency expertise" (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989)). *Id.*

270. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367 M/JHG, 1999 U.S. Dist. Lexis 19096, at *78-82 (D.N.M. Oct. 28, 1999).

271. *Id.* at 79 (citing *Or. Natural Res. Council*, 490 U.S. at 372).

272. *Id.*

273. *Id.* at 79-80. The court pointed out that the case the plaintiff's relied on for the assertion that a SEIS was "reasonable and necessary" had been overturned. *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir.1992); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994).

274. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV. 98-367 M/JHG, 1999 U.S. Dist. Lexis 19096, at *80-81 (D.N.M. Oct. 28, 1999).

275. Brian Kelley of the FWS, applauding the success of the Mexican wolf reintroduction program, stated, "We are exceeding every other program like this that's ever been attempted by every measure." Associated Press State & Local Wire, *Congressman Doubts Science Behind Wolf Program*, July 26, 2002.

276. Mike Taugher, *Wolf Pack in Gila to Be Recaptured*, ALBUQUERQUE J., Jan. 13, 2000, at A1; *Environmental Assessment*, *supra* note 178. There were eight confirmed livestock (cattle and horses) depredations through January 2000. Only one occurred in 1998, on a miniature horse colt. The remaining depredations occurred in 1999 by two packs that were sustaining young pups (five in one pack, six in the other). These depredations occurred where deer

Assessment regarding the translocation of Mexican wolves into New Mexico. Representative Skeen's opposition to relocation in New Mexico intensified.²⁷⁷ Nevertheless, the first translocation of Mexican wolves into New Mexico from the Mule and Pipestem packs occurred in the spring of 2000.²⁷⁸

The Bush administration came into office in 2001. Secretary of the Interior Gail Norton was not expected to expand the Mexican wolf program.²⁷⁹ The first three-year review of the Mexican wolf program was completed in June 2001.²⁸⁰ The report stated that, as of July 2001, approximately 35 of the 69 wolves released since March of 1998 still inhabited the BRWRA. Wolves were illegally shot, hit by vehicles, untrackable, captured and returned to captivity, and found dead of natural causes. Significantly, the wolves functioned as a population: killing natural prey, forming pairs, and reproducing in the wild. During the first three years, there were 14 instances of livestock damage due to wolves. Ranchers were compensated by Defenders of Wildlife, a private environmental organization, through their compensation fund.²⁸¹ The June 2001 report recommended that Mexican wolves be initially released into the Gila National Forest and allowed to establish territories outside the BRWRA. Further, livestock operators on public lands should be responsible for carcass management and disposal. The number of wolves killed by humans had to be decreased. Finally, the wolves should not be frequently recaptured.²⁸² Representative Skeen, who became the chair of the House Appropriation Subcommittee on the Department of the Interior, questioned the report's objectivity and called for an independent panel including non-biologists and people who "have no

and cattle graze on a year-round basis. There were no depredations where elk are the primary prey and cattle are grazed seasonally. *Id.* at 4.

277. Mike Taugher, *Gila Wolf Analysis Requested*, ALBUQUERQUE J., Feb. 24, 2000, at D3.

278. Tania Soussan, *State's First Wolf Release Will Be in Gila*, ALBUQUERQUE J., Apr. 1, 2000, at A1.

279. Tania Soussan, *New Mexicans Divided over Interior Nominee*, ALBUQUERQUE J., Jan. 14, 2001, at A1.

280. Paul C. Paquet et al., *Mexican Wolf Recovery: Three Year Program Review and Assessment*, Conservation Breeding Specialist Group, June 2001, <http://southwest.fws.gov/bwolfrpt.pdf>.

281. The compensation fund was created in 1987 and expanded in 1995 to cover the Southwest. By the end of 2003, the fund spent \$27,288.00 in the Southwest. Brief of Defendant-Intervenors Response in Opposition to Plaintiff's Motion for a Preliminary Injunction, at 9-10, Coalition of Ariz. & N.M. Counties for Stable Econ. v. U.S. Fish & Wildlife Serv., CIV. No. 03-508 (D.N.M. July 6, 2004).

282. Paquet et al., *supra* note 279, at 61-69; Tania Soussan, *Gray Wolf Findings Applauded*, ALBUQUERQUE J., May 9, 2001, at B3.

connection with ongoing wolf reintroduction programs.”²⁸³ The House Appropriations Committee demanded “an independent review” of the program.²⁸⁴

The FWS considered the Mexican wolf’s reintroduction into the Gila National Forest in 2002.²⁸⁵ Livestock killing in Catron County by several relocated wolves increased opposition to the program.²⁸⁶ Prior to his retirement, Representative Skeen reiterated his call for an independent review of the program.²⁸⁷ Wolf-dog hybrids from the Pipestem pack were discovered and euthanized.²⁸⁸

In 2003, the newly elected governor of New Mexico, Bill Richardson, expressed his support for the Mexican wolf recovery program. The Arizona and New Mexico Game and Fish commissions took over the daily administration of the program.²⁸⁹ The White Mountain Apache Tribe, unlike the San Carlos Apache Tribe,²⁹⁰ allowed the release of Mexican wolves on its reservation in June 2003.²⁹¹ The FWS also relocated wolves into the Gila National Forest, expanding the

283. Press Release, Assoc. Press, Skeen Asks Norton for Independent Review of Wolf Program, Assoc. Press State & Local Wire (May 18, 2001).

284. H.R. REP. NO. 107-103, at 30 (2001); Tania Soussan, *House Panel OKs Added Program Scrutiny*, ALBUQUERQUE J., June 14, 2001, at A14.

285. Ben Neary, *Plan to Release Wolves Raises Concern*, SANTA FE NEW MEXICAN, Feb. 27, 2002, at A1.

286. Tania Soussan, *Wolves Kill Catron Calves*, ALBUQUERQUE J., Apr. 2, 2002, at A1; Tania Soussan, *County Requests Wolf Program Changes*, ALBUQUERQUE J., May 13, 2002, at A2.

287. H.R. Rep. No. 107-564, at 31-32 (2002); Press Release, Assoc. Press, *Congressman Doubts Science Behind Wolf Program*, Assoc. Press State & Local Wire (July 26, 2002); Editorial, *One Review Is Enough for Mexican Gray Wolf*, ALBUQUERQUE J., July 28, 2002, at B2.

288. Tania Soussan, *Trapped by Doubts*, ALBUQUERQUE J., Aug. 31, 2003, at B1. In November 2003, the FWS did another informal intra-agency consultation regarding the translocation and hybridization. The State Supervisor agreed with the acting coordinator of the Mexican wolf program’s conclusions that “the agency actions in question are ‘not likely to jeopardize’ the Mexican wolf.” Coalition of Ariz. & N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., CIV. No. 03-508, at 13-14 (D.N.M. July 6, 2004).

289. Tania Soussan, *States Take On Wolf Program*, ALBUQUERQUE J., Feb. 7, 2003, at B3.

290. Tania Soussan, *Wolf Killing Stock to Be Shot*, ALBUQUERQUE J., June 18, 2004, at B3.

291. In 2000, the White Mountain Apache Tribe adopted its own Mexican wolf recovery plan and in 2001 the Tribe hired a biologist. The Tribe’s goal is to return six packs of wolves to their historic territory. The White Mountain Apache Tribe is the home of the Bonito Creek Pair, one of the few naturally occurring wild bonded pairs of wolves in the program. Press Release, White Mountain Apache Tribe, *White Mountain Apache Tribe Releases Wolves on the Reservation* (June 4, 2003), available at http://www.wolf.org/wolves/news/live_news_detail.asp?id=484; Peter Friederici, *Welcoming Home an Old Friend*, DEFENDERS, Summer 2002, at 16-17, available at <http://www.defenders.org/defendersmag/issues/summer02/wolfwelcome.html>.

population to 19 wolves.²⁹² The first Mexican wolf was killed in that area after relocation by the federal government for cattle depredation.²⁹³ Few of the changes recommended in the three-year review were implemented.²⁹⁴ Thirteen Mexican wolves were shot or run over in Arizona and New Mexico.²⁹⁵

In 2004, Arizona and New Mexico were granted greater control over Mexican wolf management.²⁹⁶ Nevertheless, there was the possibility of additional litigation regarding the Mexican wolf. Environmental groups threatened to bring suit if the recommendations of the June 2001 three-year study were not implemented.²⁹⁷ The livestock industry was also contemplating a suit regarding the FWS plan to release two wolf packs with pups conceived in the wild, but born in captivity, directly into Gila National Forest. The recovery plan does not permit initial releases into New Mexico; Mexican wolves must first set foot in Arizona.²⁹⁸

The FWS released a draft five-year report on the Mexican Wolf recovery in December 2004 that echoed the findings in the 2001 three-year report. The draft report asserted that the boundaries for wolf recovery were too restrictive and were impeding wolf recovery. Mexican wolves, according to the report, had to be released and allowed to settle throughout the Southwest. This would preclude the frequent recapturing of wolves, which is expensive, stressful on the wolves, and disruptive to the packs. Approximately 36 percent of all recaptures have been caused by wolves leaving their political boundaries. The report pointed out that Mexican wolf depredations were within the projected forecast: 26 cattle, 2 sheep, 1 horse, 2 dogs, as well as 4 probable and 14 possible incidents. Further, the Defenders of Wildlife paid \$33,000 in compensation. Finally,

292. Press Release, Assoc. Press, Wolves Released into Gila Wilderness, Assoc. Press State & Local Wire (Apr. 9, 2003); Press Release, Assoc. Press, Wolves to Be Released in Gila Wilderness (June 5, 2003); Tania Soussan, *Wolves to Run Free in Gila Wild*, ALBUQUERQUE J., June 6, 2003, at B3.

293. Jeff Jones, *Killing of Wolf a First for Feds*, ALBUQUERQUE J., May 30, 2003, at A1.

294. Soussan, *supra* note 288.

295. Tania Soussan, *Two More Wolves Found Dead*, ALBUQUERQUE J., Jan. 7, 2004, at B3; Press Release, Assoc. Press, Thirteen Endangered Mexican Gray Wolves Killed Last Year, Assoc. Press State and Local Wire (Apr. 29, 2004).

296. Soussan, *supra* note 288; Jeff Jones, *Wolves Called Blessing and Bane*, ALBUQUERQUE J., Apr. 7, 2004, at B3; Jeff Jones, *State Runs with Wolves*, ALBUQUERQUE J., Apr. 8, 2004, at D3; Press Release, Assoc. Press, Update of wolf recovery plan delayed, Assoc. Press State & Local Wire (Apr. 19, 2005).

297. The groups want direct releases into the Gila National Forest, the establishment of wolf territory beyond the recovery area, and the removal of horse and cattle carcasses by ranchers. Tania Soussan, *Changes Sought to Wolf Program*, ALBUQUERQUE J., Mar. 30, 2004, at D3.

298. Tania Soussan, *Wolves' Release Alters Rules*, ALBUQUERQUE J., Apr. 24, 2004, at A1.

the report called for ranchers to remove or neutralize carcasses on their land. Ninety-one percent of the wolves that kill livestock first acquire their taste from carcasses.²⁹⁹

The FWS attempted to decrease the protection for the gray wolf by creating three discrete population segments in the East, West, and Southwest and downlisting the wolf's status from endangered to threatened in most of the eastern and western states. The Mexican wolf retained endangered species status and the northern boundary of its range was expanded to Highway 50 in Utah and Interstate Highway 70 in Colorado.³⁰⁰ Environmental groups brought suit, challenging the final regulation.³⁰¹

On January 31, 2005, the U.S. District Court for the District of Oregon invalidated the regulation, downlisting the status of the gray wolf from endangered to threatened in most of the United States.³⁰²

299. Tania Soussan, *Review Urges More Room for Wolves*, ALBUQUERQUE J., Jan. 10, 2005, at A1.

300. Endangered & Threatened Wildlife & Plants, 68 Fed. Reg. 15,804-01, 15,818 (Apr. 1, 2003).

301. Press Release, Assoc. Press, A Fourth Gray Wolf Turns Up, Assoc. Press State & Local Wire (Oct. 2, 2003); Nina Fascione, *America's Wolves Threatened Again*, DEFENDERS Spring 2003, at 6-11. For a full discussion of the suit, see Edward A. Fitzgerald, *Defenders of Wildlife v. Norton: Dysfunctional Downlisting Defeated*, 33 B.C. ENVTL. AFF. L. REV. (forthcoming 2006).

302. *Defenders of Wildlife v. Secretary, U.S. Dep't of the Interior*, CIV. No. 03-1348-JO (D. Or. Jan. 31, 2005). The court held the following: First, the Secretary's finding that the current range of the wolf in the western Great Lakes and northern Rocky Mountains constitutes the only significant portion of the wolf's range violates the Ninth Circuit decision in *Defenders of Wildlife v. Norton* and the ESA. The Ninth Circuit held that "a species can be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was." *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001). Such areas exist in the northeastern and northwestern United States. *Defenders of Wildlife v. Secretary, U.S. Dep't of the Interior*, CIV. No. 03-1348-JO, at 20-24. Second, the Secretary's conclusion that the viability of two sustainable populations in the East and West is all that is necessary for recovery violates *Defenders of Wildlife* and the ESA. The exclusion of other areas of the wolf's historic range "render[s] the phrase 'significant portion of its range' superfluous." *Id.* at 21-22 (internal brackets and quotation marks omitted). Furthermore, the Secretary's interpretation contradicts congressional intent "to protect species in 'any portion of its range.'" *Id.* (quoting H.R. Rep. No. 412, 93rd Cong., 1 Sess. (1973)). Third, the Secretary violated Interior's own Discrete Population Segment Policy, which is designed to circumscribe a population whose conservation status differs from other populations within the species. The Secretary inverted the policy. Instead of drawing lines around the recovered core populations, the FWS extended the boundaries of the core areas to encompass the entire historic range of the wolf. As a result, the conservation status of different wolf populations within each discrete population segment varies from recovered to extinct. There are major areas within each discrete population segment where wolves need additional protection. *Id.* at 26-28. Finally, the Secretary violated section 4(a) of the ESA by downlisting the entire eastern and western discrete population segments without analyzing the threats to the wolf

Although the court did not specifically rule on the issue, the decision negated the expansion of the Mexican wolf's northern range.³⁰³

VI. COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH V. FISH & WILDLIFE SERVICE

The livestock industry rekindled its earlier litigation in April 2003.³⁰⁴ The Coalition for Arizona/New Mexico Counties for Stable Economic Growth³⁰⁵ brought suit, seeking an injunction to halt any further Mexican wolf releases in the BRWRA.³⁰⁶ The Coalition alleged that the discovery of the hybrid wolves in the Pipestem pack required intra-agency consultation and violated the conservation mandate in section 10(j) of the ESA. They argued that hybridization would permit the introgression of canine genetic material into the wolf population and that continual interbreeding with hybrids would lead to the extinction of genetically pure Mexican wolves.³⁰⁷ The Coalition contended that an SEIS was necessary to discuss the translocation of problem wolves into the secondary recovery area, the resulting depredation rates in the secondary area, and the issue of hybridized Mexican wolves.³⁰⁸

The FWS responded to Coalition contentions, stating that intra-agency consultation with noted experts demonstrated that hybridization in the wild was rare and not a significant threat to the Mexican Wolf.³⁰⁹

outside the core areas. Downlisting can only occur according to enumerated factors, which are based on science. *Id.* at 28-31.

303. *Id.* at 31.

304. Soussan, *supra* note 288.

305. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS (D.N.M. July 6, 2004). Six of the nine organizations were plaintiffs in the earlier suit: N.M. Cattle Growers Association, Grant County Farm & Livestock Bureau, N.M. Farm & Livestock Bureau, N.M. Public Lands Council, Ariz. Cattle Growers Association and N.M. Wool Growers, Inc. *Id.* at 9 n.2. The other three plaintiffs are the Coalition, Gila Permittees Association, and the Mimbres Farm & Livestock Bureau.

306. *Id.*

307. Plaintiff's Memorandum in Support of a Motion for a Preliminary Injunction at 12-18, Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS (D. N.M. July 6, 2004). See *American Wildlands v. Norton*, 193 F. Supp. 2d 244 (D.D.C. 2002), for a discussion of the hybridization issue. See also Kate Geoffroy & Thomas Doyle, *Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?*, 16 NAT. RES. & ENVT. 82, 86 (2001).

308. Plaintiff's Memorandum in Support of a Motion for a Preliminary Injunction, *supra* note 306, at 21-33.

309. Dr. Ron Nowak concluded that the potential for hybridization "does not appear to be a significant threat to Mexican wolves." Defendant-Intervenors' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, at 27, Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS (D. N.M. July 6, 2004). Nowak went on to state that "there is no evidence that wolf-dog hybridization

The breeding cycle of wolves and dogs was not synchronous.³¹⁰ Steps taken by the FWS would prevent hybridization.³¹¹ The best way to avoid hybridization, according to the FWS, was to increase the population of wild Mexican wolves.³¹² The FWS argued that an SEIS was not necessary because all of the issues had been adequately discussed in the FEIS and Environmental Assessment (EA).³¹³ Furthermore, any cessation of the relocation or the removal from the wild would jeopardize Mexican wolf recovery.³¹⁴

In July 2004, the federal district court denied the Coalition's request for a preliminary injunction. The court held that the issues of depredation, hybridization, and translocation had been adequately discussed in the FEIS and EA.³¹⁵ Sufficient intra-agency consultation had occurred. The single instance of hybridization did not undermine the ESA conservation mandate.³¹⁶ The court held that the reintroduction and translocation of Mexican wolves should continue because it "further[s] the conservation of the species and thereby advance[s] the congressional

leads to significant (if any) genetic introgression from the dog to wild wolf populations. Even if an individual wolf should cross with a domestic dog, there is little basis to expect that any offspring would backcross into the wild wolf population." *Id.* Dr. Phil Hedrick determined that "hybridization is not a major concern for the persistence of the wild Mexican wolf population." *Id.*

310. Federal Defendants' Notice of Filing Declaration of Dr. Joy Nicholopoulos in Support of Federal Defendants' Response to Plaintiffs' Motion for Preliminary Injunction at 5-8, Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS (D.N.M. July 6, 2004).

311. *Id.* at 8-10. The FWS took steps to minimize interbreeding by "(1) releasing mated pairs, (2) closely monitoring and studying released wolves and their offspring, (3) capturing and relocating wolves that disperse out of the recovery area, and (4) re-establishing wolf populations in numbers sufficient that potential wolf mates are available for dispersing wolves." Defendant-Intervenors' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 309, at 9.

312. Dr. Nowak concluded that "the best means to combat [hybridization] would be to insure the viability and protection of the introduced Mexican wolf population and to continue the release operation, so as to provide for the maximum extent of self-sustaining and naturally functioning packs. Any backing off would only contribute to any theoretical problem." *Id.* at 10.

313. Federal Defendants' Notice of Filing Declaration of Dr. Joy Nicholopoulos in Support of Federal Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, *supra* note 309, at 17-29; Defendant-Intervenors' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 309, at 14-25.

314. Federal Defendants' Notice of Filing Declaration of Dr. Joy Nicholopoulos in Support of Federal Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, *supra* note 309, at 12-17; Defendant-Intervenors' Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 309, at 25-31.

315. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS, 30-42 (D.N.M. July 6, 2004).

316. *Id.* at 42-47.

priorities set forth" in the ESA. The court found that "the risk of harm to Plaintiffs' interests is outweighed by the risk of irreparable environmental harm to the Mexican gray wolf as a species" that probably would occur if the FWS efforts "were halted or scaled back by court action at this juncture." The court further stated that granting injunctive relief "would be contrary to the public interest."³¹⁷

On January 31, 2005, the federal district court rendered a decision on the merits.³¹⁸ The court pointed out that the issues in the case were factual questions that required deference to administrative expertise. Such deference was consistent with the Supreme Court's recent admonishment that section 706 of the Administrative Procedures Act was "designed to protect agencies from judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both the expertise and information to resolve."³¹⁹ The court found no merit in the Coalition's NEPA claims. All of the issues were adequately discussed in the EIS, Record of Decision, Final Rule, EA, and Finding of No Significant Impact. The FWS took a "hard look" at the environmental impacts of the translocation project.³²⁰ The court also rejected the Coalition's ESA assertions. The court found that there had been adequate intra-agency consultations and compliance with the conservation mandates of sections 7 and 10(j) of the ESA.³²¹

VII. THE BUSH ADMINISTRATION REACTION

After failing in the courts, ranchers, hunters, and FWS officials, opponents of the Mexican wolf's reintroduction, pursued an administrative strategy. As a result, the FWS suspended the activities of the Mexican wolf recovery team in the spring of 2005. At the same time, Representative Pearce (R-N.M.) arranged a meeting with the opponents. According to Craig Miller of Defenders of Wildlife, the meeting

317. *Id.* at 49-51.

318. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS (D.N.M. Jan. 31, 2005). *See also Judge Dismisses Challenges to Wolf Reintroduction*, Associated Press State & Local Wire (Feb. 2, 2005); Tania Soussan, *Judge Dismisses Anti-Wolf Effort*, ALBUQUERQUE J., Feb. 2, 2005, at B3; *Judges Double Up in Favor of Wolves*, DEFENDERS, Spring 2005, at 24.

319. Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv., No. CIV 03-508 MCA/LCS, 27 (D.N.M. Jan. 31, 2005) (citing *S. Utah Wilderness Alliance v. Norton*, 124 S. Ct. 2373, 2381 (2004)) (internal quotation marks omitted).

320. *Id.* at 58.

321. *Id.* at 58-62.

demonstrated the “sweetheart relationship” between the livestock industry and the Bush Administration.³²²

After the meeting, the FWS drafted several new standard operating procedures and proposed a moratorium,³²³ both of which were contrary to the 2001 three-year report and inimical to the success of the Mexican wolf recovery program. First, the FWS proposed a one-year moratorium on the release of captive Mexican wolves into the wild from July 1, 2005 to June 30, 2006. This would prevent the infusion of genetic material into the population. Dr. Philip Hedrick pointed out that only the McBride lineage was well represented in the Mexican wolf population. Mexican wolves from the Aragon and Ghost Ranch lines should be reintroduced as soon as possible into the wild to contribute to the genetic mix and to avoid genetic introgression.³²⁴

Second, the FWS proposed a one-year ban on the translocation of wolves that had killed livestock within the past year into any jurisdiction (state or tribal) except where they were captured. This would preclude the translocation of wolves from Arizona to New Mexico, which was the primary source of the wolf population in New Mexico.³²⁵

Third, the FWS proposed the extermination of wolves that were responsible for attacking three head of livestock, if they could not be trapped within ten days, and the immediate killing of wolves responsible for attacking four domestic animals. This would increase the lethality of the control program, which reduced the Mexican wolf population from 55 to 44 in 2004.³²⁶

VIII. CONCLUSION

The federal government, prompted by the livestock industry and hunters, exterminated the Mexican wolf from the Southwest. The loss of the Mexican wolf, which is a critical link in the ecosystem, disrupted the ecological balance in the Southwest. The wolf, which is a summit

322. Tania Soussan, *Wolf Recovery Plan Update on Hold*, ALBUQUERQUE J., Apr. 19, 2005, at D3.

323. The Mexican Wolf Blue Range Reintroduction Project Adaptive Management Oversight Committee, *DRAFT Proposal on a Response to Public Issues Raised at Recent Meetings Sponsored by Congressman Pearce at Glenwood and Socorro, New Mexico* (Apr. 26, 2005).

324. See Center for Biological Diversity, *What's at Stake: Help Defeat Proposed Anti-Mexican Wolf Policies!*, <http://actionnetwork.org/campaign/lobo99/explanation> (last visited Jan. 14, 2006).

325. *Id.*

326. *Id.* See also Michael Robinson, *Chances with Wolves*, ALBUQUERQUE TRIB., June 21, 2005.

predator, sustains biological diversity and maintains ecosystem harmony.³²⁷ The wolf helps its prey by providing for

- 1) sanitation (removal of diseased animals to prevent epidemics); 2) natural selection (culling of deformed or genetically inferior animals before reproduction); 3) stimulation of prey productivity (acceleration of reproduction rates among prey through higher twining and fertility); and 4) population control (maintenance of prey populations that can be supported by the habitat, protecting against overgrazing and erosion.).³²⁸

The benefits of wolf restoration are spread across the ecosystem. When the wolves make a kill, sustenance is provided for the entire food chain. After the wolves are finished, scavengers take their share, insects clean the carcass, and birds feed on the insects.³²⁹ The wolves also maintain an important balance among predators. Wolves limit the coyote population, which grows in their absence. This leaves much of the coyote's prey, mainly small rodents, for predatory birds such as hawks, eagles, and owls. The diminution of the coyote helps the fox, which coexists with wolves.³³⁰ The wolves also seem to help plant regeneration and diversity by discouraging profligate grazing by their prey.³³¹

The federal government engaged in a general campaign against the wolf and other predators until the emergence of the environmental movement in the 1960s and 1970s.³³² Due to this movement, new statutes were enacted, including NEPA and the ESA, which protect the wolf and other predators. The federal government also developed a recovery plan for the Mexican wolf that provided for wolf reintroduction into the BRWRA as a nonessential experimental population pursuant to section 10(j) of the ESA.

327. Fitzgerald, *supra* note 3, at 19-28. See also James Terborgh et al., *The Role of Top Carnivores in Regulating Terrestrial Ecosystems*, in CONTINENTAL CONSERVATION: SCIENTIFIC FOUNDATIONS OF REGIONAL RESERVE NETWORKS 39-64 (Michael E. Soulé & John Terborgh eds., 1999).

328. FEIS, *supra* note 168, at 4-4. The net effect of wolf reintroduction is an estimated 4,800 to 10,000 fewer deer (7%-22%) and 1,200 to 1,900 fewer elk (6%-17%). *Id.* at 4-2.

329. Craig R. Enochs, Note, *Gone Today, Here Tomorrow: Policies and Issues Surrounding Wildlife Reintroduction*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y, Summer 1997, at 91, 99.

330. *Id.*

331. This phenomenon is known as a "trophic cascade." Ken Kostel, *A Top Predator Roars Back*, ONEARTH, Summer 2004, at 6; Mark Hebblewhite et al., *Human Activity Mediates a Trophic Cascade Caused by Wolves*, 86 ECOLOGY 2135 (2005).

332. For recent criticism of federal predator control, see Todd Wilkinson, *Why Won't ADC Stop Its Predator War?*, DEFENDERS, Spring 1996, at 6.

The federal government concluded that the reintroduction of the Mexican wolf into the BRWRA will not significantly harm the livestock industry.³³³ Government predator control programs in the BRWRA are restricted.³³⁴ Federal and state plans and policies will not be affected by the Mexican wolf's reintroduction, but some county ordinances may be preempted.³³⁵ Minor land use restrictions may be imposed.³³⁶ Tourism will likely increase in the BRWRA.³³⁷ However, there will be a loss of benefits to some hunters, as well as reduced hunting expenditures.³³⁸

The livestock industry, the major force behind the wolf's extermination, brought suit against Mexican wolf reintroduction in 1999, alleging violations of the federal NEPA and ESA. The federal district court properly rejected the industry contentions regarding the discussion of predation rates, the hybridization of the reintroduced wolves, the existence of a natural population of wolves, the impact on other endangered and threatened species, consultation with state and local governments, and the necessity for an SEIS. The issues are not questions of statutory interpretation. The legal issues pertaining to wolf reintroduction were addressed and formulated in *Wyoming Farm Bureau Federation v. Babbitt*.³³⁹ The ESA issues concerning hybridization of the reintroduced wolves and the existence of a natural population of wolves in the BRWRA and the NEPA issue regarding the need for an SEIS³⁴⁰ are questions of fact that involve "evaluating the data and drawing conclusions from it."³⁴¹ The NEPA issues regarding depredation rates, impacts on other endangered species, and consultation are policy questions that are "predictive" and "judgmental."³⁴² Courts are generally

333. *FEIS*, *supra* note 168, at 4-9. See *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. U.S. Fish & Wildlife Serv.*, Civ. No. 03-0508 MCA/LCS, 15-16 (D.N.M. July 6, 2004) (noting that, from April 23, 1998 through August 25, 2003, there were 18 instances of depredation by Mexican wolves that resulted in the death of cows or calves and 7 instances that resulted in injuries to cows and calves).

334. *FEIS*, *supra* note 168, at 4-10.

335. *Id.* at 4-10 to 4-12.

336. *Id.* at 4-12.

337. *Id.*

338. *Id.* at 4-12 to 4-14.

339. Fitzgerald, *Wyoming Farm Bureau*, *supra* note 3, at 80.

340. SEIS challenges are "classic examples of...factual disputes the resolution of which implicates substantial agency expertise." *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989)).

341. *California v. Watt*, 668 F.2d 1290, 1301 (D.C. Cir. 1981).

342. *Id.* at 1302. See also *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1375 (2nd Cir. 1977).

deferential to a federal agency's fact and policy determinations because these issues involve technical expertise³⁴³ and professional judgment.³⁴⁴

There is an ongoing debate regarding judicial oversight of administrative action.³⁴⁵ The deferential view holds that courts should defer to agency decision making because the executive branch is constitutionally mandated to "take care that the laws be faithfully executed."³⁴⁶ Congress delegates authority to the agency to implement the law. When implementing the law, the agency engages in a political balancing process that belongs to the democratically accountable executive branch.³⁴⁷ Agencies are more competent than courts to deal with complex policy disputes.³⁴⁸

The supervisory model, on the other hand, recognizes the important role of the courts in overseeing administrative actions to advance the constitutional principles of separation of powers and checks and balances. Judicial review ensures that the executive branch faithfully executes the law and acts within the parameters of the statute to carry out its purposes. Judicial review prevents agency capture and keeps the agency accountable to Congress and the public.³⁴⁹ Courts are competent to resolve complex policy disputes.³⁵⁰

343. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 31-32 (1990).

344. *Id.* at 33-34. See also Ansary, *supra* note 193, at 1115-17. The Supreme Court noted that "[t]he principle purpose of the APA limitations...is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both the expertise and information to resolve." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66, 124 S. Ct. 2373, 2381 (2004).

345. FITZGERALD, *supra* note 92, at 14-20.

346. U.S. CONST. art. II, § 3.

347. Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. AM. U. 255, 257 (1988). For a broader discussion that includes the legislative branch, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365-68 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989).

348. For a discussion of some of the issues surrounding courts, agencies, and policy see Donald L. Horowitz, *THE COURTS AND SOCIAL POLICY* 1-21 (1977); R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 343-92 (1983); Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549 (1989); Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991).

349. For a discussion of the role of courts in supervising agencies, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970). See also Abner J. Mikva, *How the Courts Should Treat Administrative Agencies*, 36 AM. U. L. REV. 1, 8 (1986); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163, 212 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2080-81 (1990).

350. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307-08 (1976). See generally Harold Leventhal, *Environmental Decisionmaking and the Role of*

The NMCGA decision reflects aspects of both models. The federal district court upheld the FWS decision, but only after insuring that the FWS took a “hard look” at all relevant factors. The court studied the FWS record “to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.”³⁵¹ The court recognized that the FWS “has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest.”³⁵² The court insured that the FWS “has given reasoned consideration to all the material facts and issues.”³⁵³ The court’s decision, which “combines judicial supervision with a salutary principle of judicial restraint,” furthered the partnership between courts and administrative agencies to carry out the public interest.³⁵⁴

The Mexican wolf reintroduction has been relatively successful despite deliberate efforts to sabotage the program. The translocation of wolves within the BRWRA and the discovery of hybrid pups resurrected litigation, but the federal district court in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth* upheld the reintroduction program. However, there is still the threat of future litigation by the livestock industry regarding the direct release of wild-born pups into the Gila National Forest and by environmental groups regarding the implementation of the 2001 FWS report recommendations. The livestock industry is also pursuing an administrative strategy with the Bush administration to undermine the program.

The reintroduction of the Mexican wolf is an important victory for the New West environmentalists against the Old West resource exploiters in the War for the West. Cass Sunstein points out that the law not only prescribes behavior but also expresses underlying cultural values.³⁵⁵ The return of the Mexican wolf is a metaphor for federal public land policy.³⁵⁶ Robert Keiter aptly observed that the “restoration of the wolf can be viewed as the end of an era of agricultural dominance on the

the Courts, 122 U. PA. L. REV. 509 (1974); James L. Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498 (1977).

351. *Greater Boston Television Corp.*, 444 F.2d at 850 (citing *Los Angeles v. F.M.C.*, 385 F.2d 678, 681 (D.C. Cir. 1967)).

352. *Id.* at 851.

353. *Id.*

354. *Id.* at 851–52.

355. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025–29 (1996).

356. See Brick & Cawley, *supra* note 105, at 4.

public domain and the ascendancy of ecosystem-oriented resource management policies."³⁵⁷

357. Robert B. Keiter & Patrick T. Holscher, *Wolf Recovery Under the Endangered Species Act: A Study in Contemporary Federalism*, 11 PUB. LAND & RESOURCES L. REV. 19, 34 (1990).