

# The Reintroduction of the Wolf in Yellowstone: Has the Program Fatally Wounded the Very Species It Sought to Protect?

Inga Haagenson Causey\*

*What is man without the beast?  
If all the beasts were gone,  
men would die from a great loneliness of spirit.  
For whatever happens to the beasts,  
soon happens to man.  
All things are connected.*

—Chief Seattle

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## I. INTRODUCTION

Before reintroduction, the last year that more than one wolf was seen in Yellowstone was 1926.<sup>1</sup> Through myth and legend, the wolf became

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\* B.S. 1994, University of Colorado, Boulder; J.D. Candidate 1999, Tulane Law School. The author would like to thank Connie Oudrejka and Brandon Causey for their unending support.

1. See MAUREEN GREELEY, WOLF 126 (Susan Lauzau ed., Barnes & Noble Book 1997) (1996).

one of society's most hated creatures. The extirpation of the wolf began long before the United States was even a country. As early as 300 B.C., wolfhounds were bred by the Irish for killing wolves.<sup>2</sup> Wolves were abolished from Denmark by 1772, from Ireland by 1821, and from Britain by 1848.<sup>3</sup> North America soon followed suit. In the mid-1800s, after the decimation of the buffalo, the fur trade shifted and wolves became prime targets.<sup>4</sup> As the number of farms and ranches grew in middle America, so too did the number of cattle and sheep. Although there were very few records of cattle attacks by wolves during this early period, ranchers waged a war against the wolves that today would seem incomprehensible.<sup>5</sup> Ranchers and "wolfers" alike began to insert strychnine into the carcasses of dead animals in hopes of killing wolves that fed on the animal.<sup>6</sup> As many as one hundred dead wolves could be found at a single bait.<sup>7</sup> Between 1870 and 1877, approximately 55,000 wolves were killed each year.<sup>8</sup> By about 1900 the wolf was eradicated from most of the eastern United States.<sup>9</sup> In 1907, the United States Biological Survey declared the extermination of the wolf as the paramount objective of the government.<sup>10</sup> Three hundred full-time hunters and trappers were hired for predator control and bounties were offered to kill wolves.<sup>11</sup> Montana records reported that a total of 80,730 wolves were killed from 1883 to 1918.<sup>12</sup> In Yellowstone alone, from 1914 to 1926, 136 wolves were killed.<sup>13</sup> By 1926, the wolf was gone from the Great Plains.<sup>14</sup> Washington State killed its last wolf in 1940, and both Colorado and Wyoming abolished the last of their wolf population in 1943.<sup>15</sup> The United States succeeded in eliminating the wolf from nearly 95 percent of its original habitat.<sup>16</sup>

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2. *See id.* at 104.

3. *See id.*

4. *See id.* at 106.

5. *See id.*

6. *See id.*

7. *See* 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, 39 (1992).

8. *See id.*

9. *See id.* at 108.

10. *See* GREELEY, *supra* note 1, at 106.

11. *See id.*

12. *See* Post Register, *War on the Wolves was Fierce, Cruel* (last modified Jan. 15, 1995) <<http://www.idahonews.com/wolf/w8war.htm>>.

13. *See id.*

14. GREELEY, *supra* note 1, at 108.

15. *See id.*

16. *See id.*

Finally in 1973, pursuant to the Endangered Species Act<sup>17</sup> (ESA or the Act), the wolf that once lived in Yellowstone National Park, known as the Northern Rocky Mountain Wolf, was listed as an endangered species.<sup>18</sup> The entire species of gray wolf (*canis lupus*) was listed as endangered in the lower 48 states, except in Minnesota where it was listed as threatened.<sup>19</sup> Although wolf pack activity has not been confirmed in Yellowstone since the 1930's, from 1927 through 1966, thirty-five "sightings" of single or pairs of wolves came from the northern area of the Park.<sup>20</sup> However, since the 1970's there have been no confirmed sightings of wolves in Yellowstone.<sup>21</sup>

Efforts to restore the gray wolf to the northern Rocky Mountains date back to 1872, when the Yellowstone Park Act was enacted.<sup>22</sup> The Yellowstone Park Act demands that the Secretary of the Interior "prevent the wanton destruction of game."<sup>23</sup> A 1973 plan for Yellowstone Park specified that the park's goal was to conserve the park's natural ecosystem by restoring native species that were eliminated by humans.<sup>24</sup> The reintroduction of the gray wolf in Yellowstone has met with much controversy and the future of the wolf in the park is uncertain.

On December 12, 1997, the United States District Court for the District of Wyoming held that the reintroduction of the wolf in Yellowstone violated the ESA.<sup>25</sup> District Court Judge Downes further ordered that all reintroduced wolves be removed from Yellowstone.<sup>26</sup> He stated that the killing of "experimental population" wolves in Yellowstone and Idaho which are caught attacking livestock violates the ESA because there is a chance that the wolf which was killed will not be an "experimental population" wolf, but actually a naturally occurring wolf.<sup>27</sup> Additionally, he held that an experimental population is allowed only when the experimental population is wholly separate geographically from

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17. Endangered Species Act, Pub. Law 93-205, Dec. 23, 1973, 87 Stat. 884 (codified as amended in 16 U.S.C. §§ 1531-1544 (1994)).

18. See *Wyoming Farm Bureau Fed'n v. Babbitt*, Nos. 94-CV-286-D, 95-CV-027-D, 95-CV-1015-D 1997 WL 781027, at \*1 (D. Wyo. Dec. 12, 1997).

19. See *id.*

20. See Strauch, *supra* note 7, at 44-45.

21. See *id.* at 45.

22. See Robert C. Moore, *The Pack is Back: The Political, Social, and Ecological Effects of the Reintroduction of the Gray Wolf to Yellowstone National Park and Central Idaho*, 12 T.M. COOLEY L. REV. 647, 651 (1995).

23. *Id.* at 651.

24. *Id.*

25. *Wyoming Farm Bureau Federation v. Babbitt*, Nos. 94-CV-286-D, 95-CV-027-D, 95-CV-1015-D, 1997 WL 781027, at \*23 (D. Wyo. Dec. 12, 1997).

26. *Id.*

27. *Id.*

non-experimental populations of the same species.<sup>28</sup> Judge Downes stated that the legislative history of the ESA did not intend to allow the reduction of naturally occurring populations of wolves.<sup>29</sup> This Comment explores the ESA and the Public Trust Doctrine as potential answers to the district court's ruling that the reintroduction of the wolf in Yellowstone is illegal.

## II. THE ENDANGERED SPECIES ACT OF 1973

The ESA proclaims the purpose of providing “a means whereby the ecosystems upon which [the species] depend may be conserved.”<sup>30</sup> It accomplishes this by declaring a policy “that *all* Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act].”<sup>31</sup> The Act requires agencies to use “all methods and procedures” necessary to bring any endangered or threatened species back to a position where protection is no longer necessary.<sup>32</sup> Additionally, the ESA includes any member of the animal or plant kingdom in its definition of wildlife and plant species to eliminate a more stringent interpretation.<sup>33</sup>

### A. *Endangered Versus Threatened Species*

The ESA protects two groups of species: “endangered” and “threatened.”<sup>34</sup> An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.”<sup>35</sup> A threatened species is “any species which is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range.”<sup>36</sup> Additionally, the ESA provides for protection of a “critical habitat,” which it defined in 1978 as “a portion of the area occupied by a listed species, the entirety of the species’ occupied area, or even areas outside the currently occupied area.”<sup>37</sup> In every instance, it must be determined whether the area is “essential to the

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28. *Id.* at \*21.

29. *Id.* at \*20.

30. MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 199 (3d ed. 1997) (quoting 16 U.S.C. § 1531(a)(3) (1982)).

31. *Id.* at 199 (quoting 16 U.S.C. § 1531(b) (1982)) (emphasis added).

32. *Id.* (quoting 16 U.S.C. § 1531(c) (1982)).

33. *See id.* at 199-200.

34. *Id.* at 201.

35. *Id.* (quoting 16 U.S.C. § 1532(6) (1982)).

36. *Id.* at 201 (quoting 16 U.S.C. § 1532(20) (1982)).

37. *Id.* at 202.

conservation of the species.”<sup>38</sup> Critical habitat also includes areas into which future expansion of a listed species is vital to assure its survival or recovery.<sup>39</sup>

The Fish and Wildlife Service has an affirmative duty to use all methods and procedures which are necessary to bring any endangered or threatened species to a position at which ESA protection is no longer necessary.<sup>40</sup> In order to bring a species “back from the brink,” federal agencies must adopt “recovery plans,” which seek to attain population numbers where disease, inbreeding, and other factors no longer threaten the species.<sup>41</sup>

*B. Experimental Populations as an Exemption under the Endangered Species Act*

The ESA enables the Secretary of the Interior to permit acts that otherwise are prohibited “for scientific purposes or to enhance the propagation or survival of the affected species.”<sup>42</sup> These acts might include the “taking” or “harming” of a species in order to allow reintroduction of a predator in populated areas. However, the Secretary may only grant these permits if they will not disadvantage the protected species.<sup>43</sup> In 1982, the ESA was amended to add “experimental populations.”<sup>44</sup> These “experimental populations” allow fewer restrictions on endangered species than are usually required under the Act.<sup>45</sup> As an example, after reintroduction in the present situation, ranchers are allowed to kill experimental population wolves which are caught in the act of killing livestock.<sup>46</sup> Experimental population can be defined as “any population (including any offspring arising solely therefrom) authorized by the Secretary for release . . . but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.”<sup>47</sup> The definition further specifies that the Secretary may authorize a release of an endangered or threatened species outside of its current range if it “will further the conservation of the species.”<sup>48</sup> The Department of the Interior found that the release of Canadian wolves into

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38. *Id.*

39. *See id.*

40. *See* Strauch, *supra* note 7, at 48.

41. *See id.* at 49.

42. BEAN & ROWLAND, *supra* note 30, at 231.

43. *See id.*

44. *See id.* at 232.

45. *See id.*

46. *See* GREELEY, *supra* note 1, at 128-29.

47. Endangered Species Act, 16 U.S.C. § 1539(10)(j)(1) (1994).

48. *Id.* § 1539(10)(j)(2)(A).

the Yellowstone area would help to delist *canis lupus* from the endangered species list in North America.<sup>49</sup>

Before authorizing the release, the Secretary is required to identify whether the population is “essential to the continued existence of an endangered species or a threatened species.”<sup>50</sup> An experimental population is “non-essential” if loss of the population would not noticeably reduce the probability of species’ survival.<sup>51</sup> A population is “essential” if loss of the population significantly impacts the species’ chances for survival.<sup>52</sup> The Act further specifies that for non-essential populations, the species shall have full protection under the Act within the National Wildlife Refuge System or the National Park System, but not outside of the borders of these areas.<sup>53</sup> However, “essential” populations have full protection under the ESA.<sup>54</sup> Whether the experimental populations are labeled essential or non-essential, they are to be listed as a threatened species.<sup>55</sup>

Legislative history further clarifies the intent of the Act:

The language is unartful . . . but the legislative history is clear that it is the population itself, and not its individual members, that is to be treated as threatened. . . . Treating an experimental population as a separately listed species has an interesting consequence for the application of Section 7 to nonexperimental populations of the same species. When determining whether a federal action will jeopardize the continued existence of a listed species, the Secretary must evaluate the effects of the action solely on the nonexperimental populations, since the experimental populations are treated as separately listed ‘species.’ This seems to be the intended result, since nothing in the legislative history of the 1982 Amendments suggests that establishing an experimental population reduces Section 7 obligations toward naturally occurring populations of a listed species. Of course, if the establishment of an experimental population brings about the recovery of a species, then it may be appropriate to delist all populations.<sup>56</sup>

It is clear that the legislature intended that experimental populations must not interfere with the protection of naturally occurring species.

In 1995, the House voted to temporarily suspend all new listings of endangered species.<sup>57</sup> Senator Slade Gorton (R-WA) introduced legislation

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49. See Strauch, *supra* note 7, at 57.

50. 16 U.S.C. § 1539(10)(j)(2)(B).

51. Strauch, *supra* note 7, at 57.

52. See *id.*

53. See 16 U.S.C. § 1539(10)(j)(2)(C)(i).

54. See BEAN & ROWLAND, *supra* note 30, at 233.

55. See *id.*

56. *Id.* at 233 n.203 (citing H. R. CONF. REP. No. 97-835, 97th Cong., 2d Sess. at 34 (1992), reprinted in 1982 U.S.C.A.N. 2860, 2875).

57. See GREELEY, *supra* note 1, at 139.

which would reform the ESA.<sup>58</sup> His bill would require the Secretary of the Interior to set a “conservation objective” for every species that may require recovery.<sup>59</sup> Additionally, the ESA’s current requirement obligating the federal agencies to consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service regarding the potential impact of federal actions on species survival would no longer be a mandatory provision.<sup>60</sup> Fortunately, the bill was never passed.

### III. THE NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN

Wolf recovery efforts began in the 1970s when an interagency recovery team was established by the United States Fish and Wildlife Service.<sup>61</sup> A wolf recovery plan recommending the reintroduction of the wolf in Yellowstone was actually signed in 1980.<sup>62</sup> However, no action was ever taken on the 1980 plan.<sup>63</sup> Therefore, a revised plan was approved in 1987 which identified a recovery of the wolf population to include at least ten breeding pairs of wolves for three consecutive years in northwestern Montana, central Idaho, and the Yellowstone area.<sup>64</sup> The plan recommended the introduction of an experimental population in Yellowstone under Section 10(j) of the ESA and the natural recovery of the wolf in Montana and Idaho.<sup>65</sup> However, in 1987 and 1988, attempts to initiate the necessary environmental impact statements were hindered by opponents to the reintroduction plan in the Senate.<sup>66</sup> In 1993, an environmental impact statement was released which included five alternatives: (1) reintroduction of experimental populations; (2) natural recovery alternative (no action alternative); (3) a no wolf alternative (change laws to prevent wolf recovery); (4) wolf management committee alternative (establish legislation allowing states to implement wolf recovery and management without federal intervention); and (5) reintroduction of nonexperimental wolves (reintroduction with full

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58. *See id.*

59. *See id.*

60. *See id.*

61. *See* Kevin J. Madonna, *The Wolf in North America: Defining International Ecosystems vs. Defining International Boundaries*, 10 J. LAND USE & ENVTL. L. 305, 312 (1995).

62. *See* GREELEY, *supra* note 1, at 126.

63. *See id.*

64. *See* Madonna, *supra* note 61, at 312.

65. *See id.*

66. *See* GREELEY, *supra* note 1, at 127. The Department of the Interior actually released a 600 page report in 1990, entitled *Wolves for Yellowstone?* The report specified that it was possible to restore wolves with minimal impact on livestock, local economy, and other wildlife. The study further concluded that the reintroduction in the park would complete the ecological balance as it was before extirpation. *See id.*

protection for wolves under the ESA).<sup>67</sup> The proposal recommended the reintroduction of a non-essential experimental population of gray wolves in Yellowstone National Park and central Idaho.<sup>68</sup>

The Fish and Wildlife Service recommended that fifteen wolves be reintroduced in Yellowstone and in Idaho annually, commencing in 1994.<sup>69</sup> The Plan involved the release of ninety to one hundred and fifty wolves from Canada to Yellowstone and Idaho over a three- to five-year period.<sup>70</sup> The Plan would allow for the management of the wolves by both government agencies and the public to minimize conflicts over attacks on livestock.<sup>71</sup> The final version of the rules governing the reintroduction plan provided for full review of the reintroduction within three years and increased flexibility for private citizens to harass or even kill wolves caught in the act of killing livestock.<sup>72</sup> If all went as planned, the reintroduction would result in a recovery of ten breeding pairs of wolves for three successive years by the year 2002.<sup>73</sup>

However, when the first of the wolves were to be transported from Canada to acclimation pens in Yellowstone, two lawsuits were filed.<sup>74</sup> The American Farm Bureau, in conjunction with the State Farm Bureaus of Wyoming, Montana, and Idaho filed suit in the Federal District Court of Wyoming claiming that the Department of Interior failed to adequately analyze potential impacts on ranchers, wildlife, and public land use.<sup>75</sup> At the same time, the Sierra Club Legal Defense Fund gave notice of its intended lawsuit, arguing that the wolves already in Idaho would not be adequately protected because they currently have full protection under the ESA, and the introduction of the non-essential experimental population of wolves would diminish protection of the Idaho wolves.<sup>76</sup> Accordingly, the Fish and Wildlife Service agreed to delay transfer of the wolves from Canada until January 1, 1995.<sup>77</sup> On January 3, 1995, after the Farm Bureaus' request for preliminary injunction was denied, thirty Canadian wolves were on their way to Yellowstone.<sup>78</sup>

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67. See GREELEY, *supra* note 1, at 127.

68. See Madonna, *supra* note 61, at 314.

69. See Wyoming Farm Bureau Fed'n v. Babbitt, Nos. 94-CV-286-D, 95-CV-027-D, 95-CV-1015-D, 1997 WL 781027, at \*1 (D. Wyo. Dec. 12, 1997).

70. See *id.* at \*2.

71. See generally GREELEY, *supra* note 1, at 128-29.

72. See *id.*

73. See *id.* at 129.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*



The Farm Bureaus filed an emergency appeal in the Tenth Circuit to bar release of the wolves.<sup>79</sup> A forty-eight hour stay was granted and the wolves had to endure thirty-six additional hours in their crates.<sup>80</sup> On January 14, 1995, four wolves ran free in Idaho and within a week eleven more would follow.<sup>81</sup> By January 20, six more wolves were released into acclimation pens where they would stay until March 21, 1995.<sup>82</sup>

Since 1987, Defenders of Wildlife have established a system of compensation to reimburse ranchers in the Northern Rockies for verified livestock losses caused by wolves.<sup>83</sup> They raised \$100,000 from private donors to help eliminate the major political opposition to wolf recovery and to shift the economic burden of wolf recovery from livestock producers to those who support the reintroduction.<sup>84</sup> In 1992, the fund began to award \$5,000 to landowners who allowed wolves to raise pups to adulthood on their land.<sup>85</sup> Total payments from 1987 through September 1997 amounted to \$42,243, compensating forty-six ranchers for a total of sixty-two cattle and 141 sheep killed by wolves.<sup>86</sup>

By the end of 1997, the number of wolves in Yellowstone was between eighty-five and ninety.<sup>87</sup> It is expected that the number will exceed one hundred by spring 1998.<sup>88</sup> "The recovery of the wolf has been regarded as one of the great American conservation successes of the second half of the century."<sup>89</sup>

#### IV. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING: "THE WOLF REINTRODUCTION IS ILLEGAL"

On December 12, 1997, United States District Court Judge Downes held that the wolf reintroduction program was illegal and ordered that all reintroduced wolves and their offspring be removed from Yellowstone.<sup>90</sup>

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79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See* Defenders of Wildlife, *Wolf Compensation Trust* (visited Jan. 7, 1998) <<http://www.defenders.org/wolfcomp.html>>.

84. *See id.*

85. *See id.*

86. *See id.*

87. *See* Ralph Maughan, *History and Current Status of the Yellowstone Wolf Reintroduction* (visited on Jan. 8, 1998) <<http://www.poky.srv.net/~jjmrm/wpages/yell-o.htm>>.

88. *See id.*

89. *Id.*

90. *See generally* Wyoming Farm Bureau Fed'n v. Babbitt, Nos. 94-CV-286-D, 95-CV-027-D, 95-CV-1015-D, 1997 WL 781027 (D. Wyo. Dec. 12, 1997) (the reintroduction violated the ESA).

The Plaintiffs in the action included Wyoming, Montana, and Idaho Farm Bureau Federations.<sup>91</sup> The Farm Bureaus represent individuals who reside, farm, and ranch within the Yellowstone and Idaho areas.<sup>92</sup>

The Farm Bureaus asserted eleven claims contending, among other items, that the “Canadian” wolves were neither threatened or endangered and, accordingly, could not be reintroduced under Section 10(j) of the ESA.<sup>93</sup> The Plaintiffs also contended that Defendants implemented the reintroduction plan without consulting with affected private landowners and obtaining an agreement with those persons holding an interest.<sup>94</sup> They further argued that Defendants failed to consider and respond to their comments before implementation of the plan.<sup>95</sup> The court stated that the Fish and Wildlife Service had consulted with affected landowners and other interested members of the public and that legislative history does not require full agreement among the parties.<sup>96</sup> The court further held that the comments of the public were considered and implemented into the plan.<sup>97</sup>

Other Plaintiffs, James R. and Cat D. Urbigkits, residents of Pinedale, Wyoming, and researchers on naturally occurring and “allegedly genetically distinct wolves in the Yellowstone and Wyoming area,” asserted that the Fish and Wildlife Service failed to investigate the alleged existence of naturally occurring wolves in the Yellowstone area.<sup>98</sup> The court held that the Fish and Wildlife Service did not adequately investigate the alleged existence of the naturally occurring wolves in the area but came to a reasonable conclusion that there were none.<sup>99</sup>

Both Plaintiffs then argued that Defendants violated Section 10(j) of the ESA when they introduced a population of an endangered species within that species’ current range and that the experimental population area overlaps the existing current range of naturally occurring gray wolves.<sup>100</sup> The Plaintiffs further alleged that Defendants could not maintain an experimental population in the Yellowstone and central Idaho area because the experimental population is not “wholly separate geographically from nonexperimental populations of the same species”

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91. *See id.* at \*2.

92. *See id.*

93. *See id.* at \*3.

94. *See id.* at \*13.

95. *See id.* at \*14.

96. *Id.* at \*13.

97. *Id.* at \*14.

98. *Id.* at \*3.

99. *Id.*

100. *See id.* at \*18.

(the naturally occurring Montana wolf population).<sup>101</sup> Plaintiffs supported their argument by relying on the reported sightings of wolves in the Yellowstone and central Idaho areas (some sightings of naturally occurring wolves as well as some wolves filtering in from Montana).<sup>102</sup> Defendants countered by stating that there were no known “populations” of naturally occurring wolves within the Yellowstone and central Idaho areas.<sup>103</sup>

Defendants further argued that “population” includes “at least 2 breeding pairs of wild wolves successfully raising at least 2 young each for 2 consecutive years” and that lone sightings of wolves in the area do not constitute a “population.”<sup>104</sup> The court determined that Congress did not intend to “allow reduction of ESA protection to existing natural populations in whole or in part” when it enacted Section 10(j).<sup>105</sup> The court further held that when an

experimental population overlaps, in whole or in part, with natural populations of the same species, the introduced specimens can no longer be treated as an ‘experimental population’ separate from the non-introduced specimens and, therefore, full ESA protections must be afforded to all members of the species in the area of overlap.<sup>106</sup>

Although Defendants argued that this overlap should not apply to “lone dispersers,” the court reasoned that congressional history mandates that the overlap can occur between “individuals” and “specimens” of a particular species, as well as populations.<sup>107</sup> The court went on to state that “where non-introduced specimens intermingle with introduced specimens of the same species it would be impossible for law enforcement to effectively identify and treat the specimens separately.”<sup>108</sup> The court finally held that a population cannot be treated as experimental when separation occurs solely as a result of “random and unpredictable events” and not from “reasonably predictable” events.<sup>109</sup>

In its conclusion the court asserted that “where artificially introduced and naturally occurring wolves overlap, all of the overlapping animals (both introduced and non-introduced) must be accorded the full protections due them as members of an endangered species.”<sup>110</sup>

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101. *See id.*

102. *See id.*

103. *See id.*

104. *Id.* at \*19.

105. *Id.* at \*20.

106. *Id.*

107. *Id.* at \*21.

108. *Id.*

109. *Id.*

110. *Id.* at \*22.

Moreover, “the introduction of an experimental population cannot operate as a de facto ‘delisting’ of naturally occurring wolves.”<sup>111</sup> The National Audubon Plaintiffs had contended that the central Idaho reintroduction plan illegally denied full ESA protection for wolves naturally migrating to central Idaho, and the court agreed.<sup>112</sup> However, the court determined that since the plan was illegal, Defendants must remove the reintroduced wolves and their offspring from the Yellowstone and central Idaho areas.<sup>113</sup> Judge Downes stayed the judgment pending appeal.<sup>114</sup>

The National Audubon Society, another Plaintiff, intends to appeal the decision because it maintains that it did not challenge the Fish and Wildlife Service’s decision to use Section 10(j) for the reintroduction of the wolves to Yellowstone and Idaho; instead, it challenged the Fish and Wildlife Service’s proposal that the natural wolves recolonizing in Idaho be stripped of their full ESA protections as endangered species.<sup>115</sup> In other words, the Farm Bureaus challenged the actual reintroduction of the wolves into the Yellowstone area, while the National Audubon Society challenged the “de facto delisting of naturally occurring wolves in Idaho.”<sup>116</sup> The National Audubon’s position was further distinguished by the fact that the Farm Bureaus claimed that the Fish and Wildlife Service simply could not put Canadian wolves on the ground in Yellowstone and Idaho, while the National Audubon Society questioned what would happen to the naturally occurring wolves already in Idaho after the Fish and Wildlife Service put experimental wolves into the same area.<sup>117</sup>

Judge Downes seems to have allowed the “episodic wolf presence in a few areas to extend to the entire reintroduction zone.”<sup>118</sup> Additionally, he erred in “combining the analysis of when [the Fish and Wildlife Service] can initiate the experimental population rule (which does not involve the ‘wholly separate geographically’ requirement), with the analysis of when a population must lose its status as experimental (which does involve the ‘wholly separate geographically’ requirement).”<sup>119</sup> It is not clear how Judge Downes concluded that the whole reintroduction was illegal and thus the wolves must be returned to Canada. Canada made it

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111. *Id.* at \*23.

112. *See id.*

113. *Id.*

114. *Id.*

115. *See* Doug Hannold, *Earthjustice Legal Defense Fund: Synopsis of Judge Downes’ Wolf Ruling* (visited Jan. 16, 1998) <<http://www.poky.srv.net/~jjmrm/downes-synop.htm>>.

116. *Id.*

117. *See id.*

118. *Id.*

119. Hannold, *supra* note 115.

clear that the wolves were not to be returned. Therefore, removal could mean killing the wolves because zoos do not have enough room to take them.<sup>120</sup>

Defenders of Wildlife and the National Wildlife Federation have also appealed the Tenth Circuit decision. It is also expected that the United States Department of the Interior will appeal. Secretary of the Interior Bruce Babbitt is trying to find a way to extend full protection to all of the reintroduced wolves under the ESA.<sup>121</sup>

## V. BEYOND THE TENTH CIRCUIT: KEEPING THE WOLVES IN YELLOWSTONE

### A. *Further Exploring the Endangered Species Act*

The reintroduction of the wolf has been highly successful and it would be unfortunate to undo what many have worked years to achieve. The Interior Department regulations imply that where artificially introduced wolves overlap in an area inhabited by naturally occurring wolves, the ESA must afford both groups full protection as endangered species.<sup>122</sup> There have been some confirmed sightings of about ten to twenty wolves in Idaho over the years.<sup>123</sup> Judge Downes did not acknowledge the fact that the overlap occurs only in a partial area of the land used for reintroduction. He did not address the fact that in the region where the overlap occurs, both the reintroduced and the naturally occurring wolves should be granted full protection under the ESA. The reintroduced wolves would merely enjoy a status of higher protection. As stated above, when the experimental population evolves into an area that is no longer a “wholly separate geographical” area, then the population will lose its status as an experimental population and regain full ESA protection.<sup>124</sup> The Urbigkits, Plaintiffs in the Downes decision, argued additionally that the ESA requires the consideration of wolf subspecies.<sup>125</sup> Since the gray wolf, indigenous to the Yellowstone area, may be found in the Yellowstone area, and because this species of wolf is genetically distinct from the Canadian gray wolf, both should be afforded full ESA

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120. See Ralph Maughan, *Ralph Maughan's Wolf Report* (visited Jan. 16, 1998) <<http://www.poky.srv.net/~jjmrm/maughan.html>>.

121. Associated Press, *Babbitt Calls Wolf Project Large Success*, IDAHO STATESMAN, Dec. 21, 1997, at 10A.

122. See Wildlife & Fisheries, 50 C.F.R. § 17.80 (1998).

123. See Jennifer A. Heck, *Congressional Research Service Report for Congress: Reintroduction of Wolves* (visited Jan. 8, 1998) <<http://www.cnice.org/nle/biodv-13.html>>.

124. See Hannold, *supra* note 115.

125. See *Wyoming Farm Bureau Fed'n v. Babbitt*, Nos. 94-CV-286-D, 95-CV-027-D, 95-CV-1015-D, 1997 WL 781027, at \*15 (D. Wyo. Dec. 12, 1997).

protection because it would be impossible for an individual to tell the two apart. When the ESA lists a species as endangered, genetically distinct populations and subspecies may be preserved under that one heading.<sup>126</sup>

Judge Downes held that experimental population areas cannot be “outside the current range” of the gray wolf, and refused to interpret this wording to mean outside the “current territory of naturally occurring packs of such species.”<sup>127</sup> Reading this provision “outside the current range” could include most areas of the United States, considering wolves have a tendency to travel many miles over their lifetimes.<sup>128</sup> It is foreseeable that in years to come some wolves may migrate into the Yellowstone area. But as of now, it is unlikely that there has been any migration.

Additionally, the number of reintroduced wolves is close to the one hundred wolf goal in each area. Yellowstone currently has ninety wolves and Idaho has seventy-five.<sup>129</sup> This is a successful increase from the sixty-six wolves captured in Canada and released into Yellowstone and Idaho in 1995 and 1996.<sup>130</sup> Once the wolves reach the plan’s goal of one hundred wolves (or ten breeding pairs) in each area, they can be delisted as endangered under the ESA, allowing for more limited wildlife management regulations.

Finally, if the wolves were legally declared as endangered or threatened after removing their “non-essential experimental” designation, they would enjoy full protection under the ESA and thus would be non-transportable and untouchable.<sup>131</sup>

#### B. *The Public Trust Doctrine: The Nonessential Experimental Population and Compensation Programs Are Unnecessary*

The public trust doctrine “creates a legal obligation for the state to hold certain natural resources in trust for the people, and a duty for the state to protect and to preserve these resources.”<sup>132</sup> Some ranchers and private landowners argue that efforts to protect wildlife that restrict their

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126. See ESA, 16 U.S.C. § 1532(16) (1994). “Species” includes any subspecies of wildlife and any distinct populations of a species. See *id.*

127. Hannold, *supra* note 115.

128. See Brian N. Beisher, *Are Ranchers Legitimately Trying to Save Their Hides Or Are They Just Crying Wolf—What Issues Must be Resolved Before Wolf Reintroduction to Yellowstone National Park Proceeds?*, 29 LAND & WATER L. REV. 417, 428 (1994).

129. See Jeffrey Kluger, *The Big (Not So Bad) Wolves of Yellowstone* (visited Jan. 16, 1998) <[http://www.pathfinder.com/time/magazine/1998/dom/980119/nation.the\\_big\\_not\\_so\\_bad1.html](http://www.pathfinder.com/time/magazine/1998/dom/980119/nation.the_big_not_so_bad1.html)>.

130. See CNN Interactive, *Judge Says Wolf Reintroduction Program Is Illegal* (visited Jan. 17, 1998) <<http://cnn.com/EARTH/9712/13/wolf.ruling/index.html>>.

131. See 16 U.S.C. § 1539 (1994).

132. Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of “Takings” by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 358 (1996).

land usage or result in the increased risk of attacks on livestock constitute a “taking” of private property requiring compensation.<sup>133</sup>

The public trust doctrine allows for certain public resources to be enjoyed by everyone, and the state acts as trustee to prevent their abuse.<sup>134</sup> There are four key elements to a public trust.<sup>135</sup> First, there must be an object or a thing with which the trust is concerned.<sup>136</sup> This is “any wild element that cannot be owned individually,” such as wildlife.<sup>137</sup> Second, there must be a trustee responsible for acting in the best interests of the trust.<sup>138</sup> The state is the trustee in a public trust. The third element of a public trust is the beneficiary who is benefited by the trust.<sup>139</sup> In a public trust, the beneficiary is the public. Finally, there is the “settlor” of the trust, who is the “creator of the assets of the trust.”<sup>140</sup>

An important case which furthered the notion of wildlife as a public trust was *Barrett v. State*.<sup>141</sup> This case involved a suit by property owners against the state of New York for damage caused to their woodlands by beavers reintroduced to the area.<sup>142</sup> The New York Supreme Court held that the reintroduction of the beavers did not constitute a “taking” by the state due to private property damaged as a result of the reintroduction.<sup>143</sup> The court concluded that the state has a general right to protect wild animals and the preservation of these animals is a matter of public interest, therefore no one could complain of the incidental injuries that may result from such protection.<sup>144</sup> The United States District Court for the District of Wyoming has also stated, in *Clajon v. Petera*,<sup>145</sup> that it is “well-settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised as a trust for the benefit of the people.”<sup>146</sup>

Although some argue that damage caused by wildlife constitutes a physical taking, the government has stressed that it neither owns nor

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133. *See id.* at 359.

134. *See id.* at 361.

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *Id.*

141. 116 N.E. Rep. 99 (N.Y. 1917).

142. *See id.* at 100.

143. *Id.*

144. *Id.*

145. 854 F. Supp. 843 (D. Wyo. 1994).

146. *Id.* at 850 (quoting *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc)).

controls wildlife and cannot be responsible for any damage caused by wildlife to landowners.<sup>147</sup> By the same token, private landowners have never been understood to own the wildlife on their property, so nothing is taken from them when they are prevented from destroying or killing the animals.<sup>148</sup> “Since a private property owner’s land always has been subject to use by wildlife, driving the wildlife to extinction in an area should not result in compensation when efforts are made for its rehabilitation.”<sup>149</sup> “Wildlife . . . always has [] the prior, natural right to inhabit private land.”<sup>150</sup>

The reintroduction of the wolf in Yellowstone has been viewed as righting a past wrong: the extirpation of the wolf.<sup>151</sup> Ranchers, on the other hand, fervently disapprove. Therefore, the government sought to placate them by reintroducing the wolves into Yellowstone as “non-essential experimental” populations so that the ranchers may kill wolves attacking their livestock or be compensated for the death of their livestock.<sup>152</sup> As is apparent from the recent United States District Court of Wyoming’s decision, the efforts to compromise with the ranchers have been ineffective because ranchers still are not satisfied. The concept of “non-essential, experimental populations” has in this instance been ineffective, and is likely unnecessary.

The public trust doctrine’s protection of wildlife empowers the government with both the right to protect wolves and other endangered species and a duty to preserve them.<sup>153</sup> If the Fish and Wildlife Service removed the “non-essential experimental” population designation and dropped the compensation efforts, the public trust doctrine should apply and protect both the government and other wolf reintroduction proponents. This doctrine “should not be undermined by unnecessary compromises.”<sup>154</sup> The public trust doctrine asserts that private property rights never existed for the ranchers in the first place and, accordingly, nothing has been taken from them.<sup>155</sup> Wildlife, which naturally includes wolves, has arguably been incorporated into the public trust doctrine.<sup>156</sup> If wolves are within the public trust, ranchers cannot argue that attacks on their livestock by wolves are “takings.”

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147. See Caspersen, *supra* note 132, at 385.

148. See *id.* at 387.

149. *Id.*

150. *Id.*

151. *Id.* at 389.

152. See *id.* at 389-90.

153. See *id.* at 390.

154. *Id.*

155. See 5 FRANK GRAD, TREATISE ON ENVIRONMENTAL LAW § 10.05(6) (1997).

156. See *id.* § 12.04(4).



## VI. CONCLUSION

“The wolf is the embodiment of wildness, and Yellowstone is the symbol of wild places. It’s like returning the heartbeat to the heart.”<sup>157</sup> The recent district court decision will effectively sound the death knell for the wolves in Yellowstone. Canada will not take them back. The zoos are already beyond capacity. Therefore, government officials would most likely have to kill approximately 160 wolves in Yellowstone and Idaho and could run the risk of accidentally killing naturally occurring wolves in the area in violation of the ESA.

Conversely, some of the wolves may never be caught, thus relisting them as fully protected under the ESA. By the time the appeals actually are decided, the wolves in Idaho and Yellowstone will decisively increase in number because they have formed packs and are reproducing at a normal rate.<sup>158</sup> These wolves are also interbreeding with native wolves, and the pups produced will be fully protected under the ESA.<sup>159</sup> There has already been confirmed interbreeding in the Kelly Creek drainage area in Idaho County.<sup>160</sup> This would adversely effect the ranchers because they would not have the power to kill a wolf for attacking their livestock. Killing a fully protected endangered species results in huge fines and/or a jail sentence.<sup>161</sup> Ironically, ranchers also would not be compensated by Defenders of Wildlife for any livestock lost. Ranchers could virtually get the very thing they feared most – an increase in the wolf population without the compensation protection they now receive.

Furthermore, the wolves should not be removed; they should be relisted as fully protected under the ESA because these wolves have already been introduced, and their removal might require their extermination. The wolves could be relocated if caught killing livestock and ranchers could still be compensated by Defenders of Wildlife.

However, it really is not necessary to take these extra precautions for ranchers because the public trust doctrine applies to shield the government from any obligation to compensate the rancher for livestock attacks. The rancher has no right in the first place to kill or harm any wolf caught in the act of killing livestock because the property right over

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157. Cyberwest Magazine, *An Old Friend(?) Returns With a Howl* (citing Renee Askins of the Wolf Fund in Jackson, Wyoming) (visited Jan. 7, 1998) <<http://www.cyberwest.com/v1nwwst2.html>>.

158. See J. Robb Brady, *A Nightmare in the Making* (visited Jan. 16, 1998) <<http://www.idahonews.com/123197/opinion/11650.htm>>.

159. See *id.*

160. See *id.*

161. See generally 16 U.S.C. § 1540 (1994).

wildlife is not owned by anyone. The government has an affirmative right to preserve it for the benefit of future generations.

The decision of Judge Downes seeks to violate the very Act it sets out to protect. If the removal of the experimental wolf populations commences, it is likely that these species will be killed, and that even the native wolves, protected under the ESA's higher standard, may also become a fatality. If this occurs, wolves may never be removed from the endangered species list and might even become extinct, resulting in a second extirpation of the wolf in America. The wolf population around the world has substantially decreased. The only way to bring wolves "back from the brink" is to reintroduce them into a large territory which gives them room to move about as they once did in North America. If the wolf is not reintroduced into its previous habitat, the wolf might actually become legend and not reality.