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Defenders of Wildlife v. Salazar

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

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ABSTRACT

The court in *Defenders of Wildlife v. Salazar* considered whether the U.S. Fish and Wildlife Service's 2009 Final Rule delisting the gray wolf in Montana and Idaho violated the Endangered Species Act (ESA). At issue was whether the language of the ESA permitted the agency to list or delist a portion of a distinct population segment of gray wolves. The court rejected the delisting decision, finding it was essentially a political solution that did not comply with the ESA.

I. INTRODUCTION

Since the gray wolf's reintroduction to the northern Rocky Mountains, competing interests have debated the management and protection paradigms afforded to this species under the Endangered Species Act (ESA).[91] The court in *Defenders of Wildlife v. Salazar* characterized the controversy surrounding wolves as "steeped in stentorian agitprop."[92] Despite the varied sentiment on the topic, the court largely avoided the political and scientific arguments, and instead focused primarily on the issue of statutory interpretation. The essence of the claim was whether or not the U.S. Fish & Wildlife Service (Service) may legally list only a portion of a distinct population segment (DPS) pursuant to the mandates of the ESA.[93] The court held that the northern Rocky Mountain gray wolf DPS must be listed or delisted as a complete unit, allowing consistent protection across the population.[94] The decision in this case has broad implications for species management under the ESA.

[91] The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006).
[92] *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1210 (D. Mont. 2010).
[93] *Id*. at 1211.
[94] *Id*. at 1228.

II. FACTUAL BACKGROUND

Though wolves were once abundant throughout most of North America, hunting and a government-sponsored eradication program resulted in their extirpation across most of their historic range.[95] By the 1930s, the wolf populations in Montana, Idaho, and Wyoming were eliminated.[96] Consequently, the northern Rocky Mountain gray wolf was listed as an endangered species in 1974.[97]

In 1987, the Service developed a wolf recovery plan with a goal of establishing at least ten breeding pairs and 100 wolves for three consecutive years in three core recovery areas: northwestern Montana, central Idaho, and the greater Yellowstone area.[98] A 1994 Environmental Impact Statement (EIS) found the plan to be "reasonably sound" and sufficient to "maintain a viable wolf population in the foreseeable future," but predicted long-term persistence could require at least thirty breeding pairs and more than 300 wolves with genetic exchange between subpopulations.[99]

After successful reintroduction efforts, the northern Rocky Mountain wolf population achieved the numeric recovery goal of thirty breeding pairs and 300 individuals starting in 2000 and continuing every year thereafter.[100] In light of the species' rapid recovery and growing population, the Service began the delisting process in 2007 by identifying the northern Rocky Mountain DPS.[101] This DPS included all of Montana, Idaho, and Wyoming, as well as portions of eastern Washington, eastern Oregon, and northern Utah.[102]

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[95] *Id*. at 1212.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*. at 1212-1213.
[101] *Id*. at 1213.
[102] *Id*.

The 2008 DPS designation and delisting was challenged by twelve environmental advocacy groups, all of whom are parties in the present action.[103] The court granted a preliminary injunction in July 2008 to enjoin implementation of the 2008 Rule, and later vacated and remanded it to the Service for further consideration.[104] The court found that the Service acted arbitrarily and capriciously in delisting the DPS without evidence of sufficient genetic exchange and in relying on Wyoming's 2007 wolf management plan, which failed to manage for fifteen breeding pairs and included a "malleable trophy game area."[105]

On remand, the Service reopened the comment period and issued a new Final Rule in April 2009.[106] The Final Rule included new data demonstrating genetic exchange between subpopulations and continued numerical sufficiency.[107] The Final Rule further noted that Montana and Idaho had the requisite laws, plans, and regulations to ensure a healthy population, while Wyoming's regulatory framework failed to meet ESA requirements.[108] Considering this, the Final Rule removed ESA protections throughout the northern Rocky Mountain DPS, except in Wyoming.[109] Subsequently, Montana and Idaho authorized public wolf hunts beginning in September 2009.[110]

III. PROCEDURAL BACKGROUND

In response to the 2009 Final Rule delisting the wolf in all of the DPS except Wyoming, Defenders of Wildlife sought judicial review under the Administrative Procedure Act[111] and the

[103] *Id*.
[104] *Id*. (discussing *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008)).
[105] *Id*. (citing *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008)).
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] *Id*. at 1213-1214.
[111] Administrative Procedure Act, 5 U.S.C. §§ 701-706.

ESA.[112] The Greater Yellowstone Coalition filed a similar challenge, and the two cases were consolidated on June 12, 2009.[113] The plaintiffs were joined by other environmental advocacy groups. Other parties, including the State of Montana and the State of Idaho, intervened in support of the Final Rule.[114]

Defenders of Wildlife listed nine separate reasons why the delisting violated the ESA: (1) it violated the statute by partially protecting a listed species; (2) it was based on outdated and unscientific recovery targets; (3) there was a lack of genetic connectivity to support the decision; (4) the regulatory mechanisms inadequately protected wolves without the protection of the ESA; (5) the Service failed to consider loss of historic range when determining whether the wolves were recovered; (6) the Service disregarded the status of gray wolves throughout the lower-forty-eight states; (7) the decision violated the ESA by delisting a previously unlisted population of wolves; (8) the DPS boundaries were defined contrary to the ESA and the Service's own policy; and (9) the decision impermissibly designated wolves in Wyoming as a "non-essential, experimental" population.[115]

Plaintiff Greater Yellowstone Coalition challenged the decision for violating the ESA on five counts: (1) the Service arbitrarily assessed current and future genetic connectivity; (2) the regulatory mechanisms were inadequate to assure genetic connectivity; (3) the decision violated the ESA by partially protecting a listed population; (4) the Service failed to consider loss of historic range; and (5) the decision impermissibly designated wolves in Wyoming as a "non-essential, experimental" population.[116]

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[112] *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d at 1211.
[113] *Id*. at 1213.
[114] *Id*.
[115] *Id*. at 1211.
[116] *Id*.

In August 2009, the plaintiffs' motions for a preliminary injunction to suspend the Montana and Idaho wolf hunts were denied because they failed to show irreparable harm given the limited number of wolves authorized for taking by hunting.[117]

IV. ANALYSIS

The principal argument in this case was the plaintiffs' claim that the plain terms of the ESA did not permit the Service to list only a portion of a DPS as endangered.[118] The plaintiffs argued that an agency-created sub-DPS taxonomy violated the ESA and was beyond Congress' authorization.[119] In reaching its decision, the court examined the plain meaning of the language, as well as the statutory construction and legislative history of the ESA.[120]

The court first examined the three step listing/delisting process.[121] First, the Service must identify the species taxonomically, and also recognize any subspecies or DPSs.[122] Next, the Service must decide whether to list a species as either threatened or endangered, or to delist the species.[123] The final step in the process is listing a species in the Federal Register and specifying the portion of its range where it is endangered or threatened.[124] After taking these steps, critical habitat must also be identified within the species' range.[125]

Through this process, the Service determined the northern Rocky Mountain gray wolf DPS was in danger of extinction throughout a significant portion of its range (Wyoming), but then only applied the ESA protections to that one geographic area of the DPS.[126] The plaintiffs argued that the whole northern Rocky Mountain DPS must be listed or delisted at the same

[117] *Id*. at 1213-1214.
[118] *Id*. at 1215.
[119] *Id*.
[120] *Id*. at 1215-1227.
[121] *Id*. at 1215.
[122] *Id*.
[123] *Id*. at 1216.
[124] *Id*.
[125] *Id*.
[126] *Id*.

management level.[127] The plaintiff's argument was supported by the Service's historical view that the ESA prohibited a legal taxonomy smaller than a DPS.[128] In order to rule on this, the court examined the 2009 Final Rule to determine whether its statutory interpretation of certain language was a permissible construction of the ESA.[129]

The plaintiffs also argued that an "endangered species" meant any species, subspecies, or DPS "in danger throughout a significant portion of its range."[130] Conversely, the defendants contended the phrase "endangered species" meant any species in danger of extinction throughout all or a significant portion of its range.[131] In addition, the defendants claimed that the language "significant portion of its range" suggested the ESA is ambiguous regarding what must be protected as endangered.[132] The court rejected the defendants' interpretation of the statutory language, finding the phrase "significant portion of its range" dictated *when* a species is endangered as opposed to *where* a species is endangered.[133] Furthermore, it held that interpreting "endangered species" to mean any wolf in the DPS that is in danger throughout a significant portion of the DPS went against the plain language of the ESA.[134] Pursuant to the statute, the court ruled the term "species" referred to the entity to be listed or delisted and the range that species, subspecies, or DPS occupied.[135]

The defendants next argued that the plaintiffs' reading of the statute rendered the word "or" in the phrase "in danger throughout all or a significant portion of its range" superfluous.[136] Such an interpretation would have allowed the Service to stop its analysis once it found danger

[127] *Id*.
[128] *Id*.
[129] *Id*. at 1216-1217.
[130] *Id*. at 1217.
[131] *Id*. at 1217-1218.
[132] *Id*. at 1218.
[133] *Id*.
[134] *Id*. at 1218-1219.
[135] *Id*. at 1219.
[136] *Id*.

across a significant portion of a species' range; thus, never having to determine if a species was in danger throughout all of its range.[137] Legislative history showed the language "or a significant portion of its range" was added in 1973 to allow for protection of a species even when not threatened with worldwide extinction.[138] In light of this history, the court found the plaintiffs' interpretation of the statute avoided rendering it superfluous or redundant.[139] The court also noted that different portions of a DPS could be weighted differently when determining whether to list an entire DPS, and that when a DPS is listed as threatened, protections can vary within that DPS.[140] However, none of the cases cited by the defendants supported the proposition that the ESA allowed for partial listings or protections of a statutorily defined DPS.[141]

The defendants next argued that the publishing requirements of Section 4(c)(1) of the ESA, requiring the Secretary to "specify with respect to each species over what portion of its range it is endangered or threatened," was ambiguous and allowed the Service to remove species protections from part of a DPS. [142] The court rejected the defendants' interpretation of the statute because it ignored the fact that the publishing requirement comes only after the Service determines the status of a species, and allowing a publishing requirement to alter a substantive determination under the ESA would be senseless.[143]

The publishing requirement provision required the Secretary to list the species' common and scientific names and include over what portion of the species' range it was endangered or threatened.[144] Without the listing of the species range there would be no way to identify if a

[137] *Id*.
[138] *Id*. (citing *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144 (9th Cir. 2001)).
[139] *Id*.
[140] *Id*. (discussing *Trout Unlimited v. Lohn*, 559 F.3d 946, 946-961 (9th Cir. 2009)).
[141] *Id*.
[142] *Id*. at 1220.
[143] *Id*.
[144] *Id*.

species was listed below its taxonomic level.[145] In the 2009 Final Rule, the Service included "Northern Rocky Mountain DPS" with the common name and listed Wyoming as the range in which the wolf was endangered.[146] The court found that including the DPS with the common name impermissibly allowed the Service to remove protections over a range smaller than the DPS.[147] The definition of "species" applies to all sections of the ESA and excludes distinctions below a DPS.[148]

Having determined that the ESA unambiguously prohibited the Service from listing or protecting part of a DPS, the court turned to whether the Service's decision deserved deference.[149] Deference can only exist when an agency changes policy in a reasoned fashion that is adequately justified.[150] The Service stated in previous Final Rules that delisting can occur only when a species (or subspecies or DPS) is recovered.[151] Additionally, the Service stated that DPS boundaries could not be subdivided and wolves could not be delisted on a state-by-state basis.[152] Since the approach taken in the 2009 Final Rule was clearly inconsistent with the Service's previous pronouncements, the "convenient switch" to its current interpretation was given little deference by the court.[153]

After refusing to give deference to the Service's abrupt change in policy, the court analyzed whether its interpretation was permissible under the ESA.[154] An interpretation will be upheld as reasonable if it "reflects a plausible construction of the statute's plain language and

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[145] *Id*. at 1220-1221.
[146] *Id*. at 1221.
[147] *Id*.
[148] *Id*.
[149] *Id*. at 1222. The court will defer to agency interpretation when a statute is ambiguous under the *Chevron* doctrine. *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984).
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] *Id*. at 1224.

does not otherwise conflict with Congress' expressed intent."[155] Plaintiffs challenged the reasonableness of the Service's interpretation of the ESA because it rendered the concept of the DPS superfluous, allowed for protection of plants and invertebrates in a manner explicitly against Congress' intent, and thwarted the overall purpose of the law.[156] In 1978, Congress amended the definition of "species" by removing taxonomic categories below subspecies in an effort to preserve the Service's ability to protect populations of the same species differently, while preventing listing a population at the level of a "city park."[157] If the Service were allowed to selectively apply protections to just part of a species, the DPS concept would be redundant.[158]

The Service's interpretation of the ESA produced a strained result when applied to carry out the purposes of the ESA.[159] The court therefore held the Service could not apply protection to wolves only in Wyoming and ensure that no portion of the DPS go extinct, despite adequate regulations in Montana and Idaho.[160]

The ESA's legislative history provided additional guidance.[161] In examining the definition of "species" under the ESA, it was clear that nothing in the history of the statute supported the contention that the Service was allowed to list a DPS, subdivide it, and then afford only part of the DPS the mandated protections.[162] Listing a DPS in three states, but only protecting it in one, is not supported by the ESA.[163] Therefore, the 2009 Final Rule did not comply with the law to the extent that it partially listed or only protected a portion of the DPS.[164]

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[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] *Id*. at 1225.
[160] *Id*.
[161] *Id*. at 1226.
[162] *Id*. at 1227-1228.
[163] *Id*.
[164] *Id*. at 1228.

Plaintiffs contended the 2009 Final Rule must be vacated and set aside, while the defendants sought a remand without vacating the Final Rule.[165] Montana argued that vacating the Final Rule was unnecessary, since the only difference between state and federal management was wolf hunts, and the 2009 hunt only reduced the population of wolves in Montana from 497 to 493; remand was therefore the appropriate remedy.[166] While the court noted the practical appeal of this argument, the court ultimately vacated the Final Rule because it unlawfully failed to list and protect the entire DPS.[167]

V. CONCLUSION

The court held that the northern Rocky Mountain DPS of the gray wolf must be listed or delisted as a complete unit, allowing consistent protection across the population.[168] Though it recognized the Service's solution as pragmatic and even practical, the court rejected the 2009 Final Rule delisting the wolf throughout Montana and Idaho, finding it was in essence a political solution that did not comply with the ESA.[169]

[165] *Id*.
[166] *Id*.
[167] *Id*.
[168] *Id*.
[169] *Id*.