

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Dec 13 1 53 PM '03

National Wildlife Federation, Vermont
Natural Resources Council, Maine Wolf
Coalition, Environmental Advocates of
New York, and Maine Audubon Society

Plaintiffs,

vs.

Gale Norton, Secretary of the Interior,
United States Department of the Interior
and
Steven Williams, Director, United States
Fish and Wildlife Service,

Defendants.

Civil No. 1:03-cv-340

COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. The wolf once ranged throughout most of the North American continent. After decades of habitat loss and extirpation, the wolf can be found on just three percent of its historic range in the lower 48 states. Suitable habitat exists in the Northeast for wolf restoration, including habitat in New York, New Hampshire and Maine, and dispersal corridors in Vermont.
2. Defendants, in defiance of their legal obligations to conserve the gray wolf, have decided to terminate efforts to recover the gray wolf in the northeastern United States and have failed to address the recovery needs of the gray wolf across a significant portion of its range.
3. As discussed in detail below, when developing and promulgating the April 1, 2003, Final Rule To Reclassify and Remove The Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Coterminous United States (Final Rule) the United States Fish and Wildlife Service (FWS) violated the Endangered Species Act, 16

U.S.C. §§ 1531-1544 (ESA), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA).

4. This is a civil action for declaratory and injunctive relief. Plaintiffs seek a declaration from this Court that the United States Department of the Interior, through FWS, violated the Endangered Species Act, 16 U.S.C. §§ 1531-1544 and the Administrative Procedure Act, 5 U.S.C. §§ 553-559, 701-706. Plaintiffs also seek injunctive relief that will remand the portion of the Final Rule affecting the Northeast to FWS, thus preventing its implementation.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201 and the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(3)(A). A 60-day notice letter was served on the Defendants, pursuant to 16 U.S.C. § 1540(g)(2)(a).

6. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202 and 5 U.S.C. §§ 705 and 706.

7. Venue is proper in the United States District Court for the District of Vermont pursuant to 28 U.S.C. § 1391(e)(1) and 16 U.S.C. § 1540(g)(3)(A) because a substantial part of the events giving rise to the claim affect Vermont.

PARTIES

8. Plaintiff National Wildlife Federation (NWF) is the nation's largest member-supported nonprofit conservation advocacy and education organization. NWF has approximately one million individual members nationwide, and affiliate organizations in 46 states and territories, including Vermont, New York, New Hampshire and Maine. NWF is headquartered in Reston, Virginia, with field offices throughout the United States, including Vermont. The mission of NWF is to educate, inspire and assist diverse individuals and organizations to conserve wildlife and other natural resources and to protect the Earth's environment to achieve a peaceful, equitable and sustainable future.

NWF achieves this mission by raising awareness and engaging people of all ages in its fight to conserve and protect our environment. A major concern of NWF is the conservation of threatened, endangered and other imperiled species such as the gray wolf. NWF has been advocating for the conservation of all endangered and threatened species since its founding in 1936.

9. Plaintiff Vermont Natural Resources Council (VNRC) was founded in 1963 and is an affiliate of NWF. VNRC is Vermont's leader in protecting and restoring our natural resources. The mission of VNRC is to build coalitions, work together, and offer common sense solutions to achieve enduring environmental protection. Headquartered in Montpelier, Vermont, it has more than 5,000 members. VNRC members research, observe, and enjoy the gray wolf in the wild. VNRC members are harmed by the Final Rule because its implementation will result in the presence of fewer wolves in the northeastern United States than would exist if ESA recovery planning and implementation had not been abandoned in the Northeast,

10. Plaintiff Maine Wolf Coalition, Inc. (MWC) was founded in September 1994. MWC's mission is to support wolf recovery in Maine through research, education and protection. MWC is a grassroots organization of more than two hundred members. MWC's members are harmed by the Final Rule because its implementation will result in the presence of fewer wolves in the northeastern United States than would exist if ESA recovery planning and implementation had not been abandoned in the Northeast, and hinder wolf recovery efforts in Maine.

11. Plaintiff Environmental Advocates of New York (Advocates) was founded nearly thirty years ago. Advocates is New York State's premier environmental watchdog and works independently and through coalitions to ensure that New York enacts and implements the measures needed to protect its natural resources and environmental health, and that the public is informed of, and participates in, important environmental policy debates. Advocates is a 501(c)(3) nonprofit organization with over 7,000

individual members and 130 organizational members. Advocates is an affiliate of NWF. Advocates's members are harmed by the Final Rule because its implementation will result in the presence of fewer wolves in the northeastern United States than would exist if ESA recovery planning and implementation had not been abandoned in the Northeast.

12. Plaintiff Maine Audubon Society (Audubon) is a 501(c)(3) nonprofit organization dedicated to environmental education and advocacy. Audubon has over 10,000 member households and works to protect wildlife and conserve Maine's outstanding natural resources, connect people and nature through hands-on experiential learning, and build community through members and chapters. Audubon's members are harmed by the Final Rule because its implementation will result in the presence of fewer wolves in the northeastern United States than would exist if ESA recovery planning and implementation had not been abandoned in the Northeast, and hinder wolf recovery efforts in Maine.

13. Defendants Gale Norton, Secretary of the Interior, United States Department of the Interior, and Steven Williams, Director of the United States Fish and Wildlife Service, are charged with the administration of the Endangered Species Act. Defendants are responsible for protecting and restoring species listed as endangered or threatened under the ESA. They are sued in their official capacities.

STATUTORY AND REGULATORY BACKGROUND

The Endangered Species Act 16 U.S.C. §§ 1531-1544.

14. Congress enacted the ESA in 1973 to provide "a means whereby the ecosystems on which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species" 16 U.S.C. § 1531(b).

15. The ESA is the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon, 515 U.S. 687, 698 (1995) (quoting Tenn. Valley Auth. v.

Hill, 437 U.S. 153, 180 (1978)).

16. A principal goal of the ESA is to return listed species to a point at which protection under the Act is no longer required. 16 U.S.C. § 1531(b); 50 C.F.R. § 424.11(d)(2).

17. In enacting the ESA, Congress declared its 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 chapter.” 16 U.S.C. § 1531(c)(1).

18. The Act assigns the lead roles for administering the law to the Secretary of the Interior and the Secretary of Commerce. With respect to terrestrial species like the gray wolf, the Secretary of the Interior (Secretary) has delegated her duties to the FWS. See 50 C.F.R. § 402.01(b).

19. The ESA requires the Secretary to review all programs administered by her and utilize those programs in furtherance of the Act’s purposes. The ESA also mandates that the Secretary carry out programs for the conservation of endangered and threatened species. Id. § 1536(a)(1).

20. Section 4 of the ESA, id. § 1533, requires the Secretary to list species of wildlife or plants determined by her to be endangered or threatened with extinction. Id. § 1533(c)(1). The listing regulations, and the lists of the species themselves, are contained in 50 C.F.R. Part 17.

21. Section 3 of the ESA defines “conserve,” “conserving,” and “conservation” as “to use and the use of *all* methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3) (emphasis added).

22. A species is “endangered” if it is in danger of extinction throughout all or a significant portion of its range. . . .” Id. § 1532(6).

23. A species is “threatened” if it “is likely to become an endangered species within

the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20).

24. A “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” Id. § 1532(16).

25. FWS and the National Marine Fisheries Service promulgated the Vertebrate Population Policy to determine whether a grouping of vertebrate fish or wildlife constitutes a distinct population segment (DPS) for purposes of listing species as endangered or threatened species under Section 3 of the ESA. 61 Fed. Reg. 4,722, 4,725 (1996).

26. For purposes of listing or changing the listing status of a species, a significant portion of a species’ range includes areas where the species was once present, regardless of the species current presence in those areas.

27. The Secretary is required to determine whether any species is endangered or threatened due to any of the following factors set forth in Section 4(a) of the ESA:

- a. the present or threatened destruction, modification, or curtailment of its habitat or range;
- b. overutilization for commercial, recreational, scientific, or educational purposes;
- c. disease or predation;
- d. the inadequacy of existing regulatory mechanisms; or
- e. other natural or manmade factors affecting its continued existence.

Id. § 1533(a).

28. The Secretary is required to make initial determinations regarding the listing or change in listing of species utilizing the best scientific and commercial data available. Id. §§ 1533(b)(1)(A), 1533(c)(2); 50 C.F.R. § 424.11(d).

29. Once a species is listed, the Secretary must develop and implement a “recovery plan” for the “conservation and survival” of the listed species. 16 U.S.C. § 1533(f)(1).

30. Each recovery plan must include a description of site-specific management actions necessary to achieve the recovery “plan’s goal for the conservation and survival of the species.” Id. § 1533(f)(1)(B)(i).

31. The FWS has defined recovery to mean “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.” 50 C.F.R. § 402.02.

32. Recovery of a species is not attained until the threats to the species, as analyzed under section 4(a)(1) of the Act, have been removed. 51 Fed. Reg. 19,926 at 19,935 (1986).

33. The Secretary must make any alteration in listing with respect to an endangered or threatened species “*solely* on the basis of the best scientific and commercial information regarding a species status, without reference to possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b) (emphasis added).

34. A species may be delisted or downlisted only if the best scientific and commercial data available indicate that it is neither endangered nor threatened because the species has either become extinct, or recovered, or in the case of downlisting, that the best available scientific and commercial data warrants its designation as threatened based on the five Section 4(a)(1) listing factors. 50 C.F.R. § 424.11(d).

35. Under the ESA, “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A).

The Administrative Procedure Act.

36. The APA provides for judicial review of agency actions, such as FWS’s promulgation of the Final Rule. Agency actions, findings or conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” are prohibited and may be overturned by a district court. 5 U.S.C. § 706(2)(A).

37. The FWS is a federal agency subject to the APA. When the FWS issued its Final Rule, it performed an “agency action” subject to judicial review under the APA.
38. Plaintiffs are “persons” within the definition of 16 U.S.C. § 1532(13).
39. Plaintiffs and their members derive scientific, recreational, and aesthetic benefit and enjoyment from the existence of the gray wolf in the wild. The actions and inactions of Defendants will adversely affect Plaintiffs and their members’ opportunities to observe, photograph, study and enjoy the gray wolf.
40. The interests of Plaintiffs are, and will continue to be, adversely affected by the Defendants’ violation of the ESA and the APA, because Defendants’ violations are impeding the conservation of the gray wolf.
41. If the relief requested is granted, the injuries to Plaintiffs’ interests caused by Defendants’ actions will be redressed.

FACTS

A Brief History of the Gray Wolf

42. The gray wolf historically ranged across most of North America, Europe and Asia. Due to the wide range of the wolf on the North American continent—from the Arctic to Mexico—there is considerable variation in size and pelt color across its range.
43. The only parts of the contiguous United States that apparently lacked gray wolves since the last glacial events are most of California and the Gulf and Atlantic coastal plain south of Virginia, as well as the extremely arid regions and mountaintops of the western United States.
44. European settlers arriving in North America brought with them superstitions and fears of wolves, which led to rampant persecution of the gray wolf.
45. By the beginning of the eighteenth and continuing into the twentieth centuries, private citizens and local and state governments authorized and funded bounties intended to exterminate the wolf throughout the United States. These activities succeeded in extirpating this once widespread species from more than 95 percent of its range in the

lower 48 states.

46. Surviving wolf populations in the eastern half of the United States were largely eliminated by bounties, and by 1900, no wolves existed in the northeastern United States.

47. By the 1970s, fewer than one thousand gray wolves remained in the eastern half of the United States, and those were primarily found in northeastern Minnesota.

48. Currently, there are approximately 3,600 gray wolves in the coterminous United States, living in eight states. This number pales in comparison to the nearly 400,000 wolves that once ranged throughout the coterminous U.S. Occupied wolf habitat in the conterminous U.S. amounts to merely three percent of the wolf's historic range.

Wolf Biology

49. Gray wolves are the largest wild members of the *Canidae*, or dog, family, with adults ranging from 40 to 175 pounds.

50. Wolves are mobile animals and can travel up to 120 miles in a day, although they usually travel between 10 to 15 miles per day. Wolves' acute hearing and exceptional sense of smell enable them to adapt well to their surroundings and locate prey.

51. Wolves prey primarily on wild ungulates such as deer, elk, moose, caribou, bison and musk oxen. When necessary, they also eat smaller prey such as snowshoe hare, beaver, rabbits, opossums and rodents. Some wolves also occasionally prey on livestock, although this often occurs in circumstances in which natural prey species have been eliminated or greatly diminished.

52. Wolves are social animals and wolf pups are dependent upon viable family units, or packs, for their survival. Wolf packs range in size from four to 20 members. The pack usually consists of a dominant pair, their pups and several other subordinate or young animals. The dominant female and male are the pack leaders, breeding, tracking and hunting prey, choosing den sites, and establishing the pack's territory. The bond between the breeding pair is often permanent, thereby contributing to overall pack and population stability.

53. Wolf pups often remain with their parents for at least the first year of life, while they learn to hunt. During their second year of life, some pups—called sub-adults—spend periods of time away from the pack and often return in the autumn to spend their second winter with their birth pack.

54. By the time wolves are two years old, some wolves leave the pack permanently to find mates and territories of their own. This process is called dispersal. The ability of wolves to disperse is essential to the viability of wolf populations by providing for genetic interaction over a large area. Some wolves have been known to disperse up to 500 miles, although generally wolves travel a shorter distance before running into a suitable mate. Dispersing wolves play an integral role in wolf recovery, as it is through dispersers that new packs are created and the population of wolves expands into new regions.

55. Wolves that do not disperse are called biding, or non-dispersing, wolves. Biding wolves play an integral role in wolf stability and maintenance of long-term wolf territories they inherit in a functioning ecosystem.

56. The longevity of a wolf greatly depends on its experiences in the first years of life. Biologists have determined that only one or two of every five wolf pups live to the age of 10 months, and only about half of the remaining wolves survive to the time of dispersal. Adult wolves, unlike pups, have fairly high rates of survival absent human caused mortality. A seven-year old wolf is considered fairly old, and the maximum life span of a wolf is about 12 to 13 years.

The Wolf's Ecological Role

57. The ecological benefits of wolf populations have long been seen in areas in which gray wolves have been recovered or reintroduced. As an apex predator, the presence of gray wolves improves the health of the entire ecosystem. In the Yellowstone ecosystem, wolves have changed the grazing behavior of ungulates along waterways, allowing for an expansion of canopy cover, which provides habitat, food and shelter for populations of

beaver and songbirds and simultaneously enhancing the rivers and streams abilities to provide healthy trout habitat.

58. Another benefit accrues to scavenger species such as bears, badgers and eagles, which are provided a more reliable food source on a year-round basis from the leftovers of wolf kills. Foxes are still another beneficiary, because they are killed by coyotes, which in turn are killed by wolves.

59. The totality of these and other benefits from the presence of wolves in the ecosystem illustrates the important role wolves play in the conservation of ecosystems—one of the fundamental purposes of the ESA.

Federal Wolf Protection

60. The gray wolf was one of the first species to receive federal protection under the conservation laws that served as precursors to the Endangered Species Act. The eastern timber wolf subspecies of the gray wolf was first classified as an endangered species on March 11, 1967 under the Endangered Species Preservation Act of 1966. 32 Fed. Reg. 4001 (1966). After passage of the Endangered Species Act in 1973, various subspecies of wolves were protected under that Act: the Eastern Timber Wolf (*Canis lupus lyacon*) in August 1974; the Northern Rocky Mountain wolf (*Canis lupus irremotus*) in 1973 (38 Fed. Reg. 14,678); the Mexican Gray wolf (*Canis lupus baileyi*) in 1976 (41 Fed. Reg. 17,740); and the Texas Gray wolf (*Canis lupus monstrabilis*) also in 1976 (41 Fed. Reg. 24,064)).

61. Eventually, FWS moved away from protection of wolves at the subspecies level and decided in favor of protection at the species level. On March 9, 1978, FWS listed the entire species of wolves, *Canis lupus*, as endangered throughout the coterminous 48 states and Mexico, with the exception of Minnesota, where wolves were listed as threatened. 43 Fed. Reg. 9607 (1978). FWS, however, remained committed to making recovery plan and management decisions at the subspecies level, recognizing that subspecies distinctions were important to overall wolf recovery. Id.

62. Protection under the ESA provided the first barrier in over half a century to unrestrained federal killing of wolves.

63. Under the protection afforded by the ESA, the wolf population in northeastern Minnesota grew and wolves dispersed into northern Wisconsin and Michigan. This dispersal resulted in an increase in wolf packs throughout the upper Great Lakes region. Currently, there are approximately 2,500 individual wolves in northeastern Minnesota, 350 in Wisconsin and 321 in Michigan.

64. Even today, with the full protection of the ESA intact, human actions, both legal and illegal, intentional and accidental, remain the primary cause of gray wolf deaths in the Great Lakes states of Minnesota, Wisconsin, and Michigan.

65. The wolf has recently begun to reappear in the northeastern United States. For example, in 1993 a bear hunter shot and killed a female gray wolf in western Maine. In 1996, another wolf, or wolf-like canid, was trapped and killed in central Maine. In the winter of 2000, a coyote hunter in upstate New York shot and killed an animal that was much larger in size than a typical coyote. FWS took this animal for testing and the results are still unknown. In January 2002, a wolf was trapped in southern Québec, just 15 to 25 miles from the United States border. In addition, there have been a growing number of observations and signs of large, unidentified canids in Maine during the recent years, which has led to speculation that wolves are dispersing from Québec.

The 2000 Proposed Rule

66. On July 13, 2000, FWS published a proposed rule regarding the status of the gray wolf in the coterminous United States (Proposed Rule). 65 Fed. Reg. 43,450. The Proposed Rule set forth FWS's proposals with respect to the gray wolf throughout the 48 coterminous United States.

67. FWS acknowledged in the Proposed Rule that conflicts continue over wolf taxonomy at the subspecies level; therefore, FWS intended to focus its recovery efforts not on any particular subspecies, but rather on geographic areas that hold promise for

wolf recovery “regardless of the subspecific affiliation of current or historical gray wolves in those areas.” FWS announced that it was “focusing recovery efforts across a large expanse of the species’ range in order to recover and retain as much of the remaining genetic variation as is feasible.” Id. at 43,451-52.

68. The Proposed Rule contained four distinct population segments of gray wolves. They were: the Northeastern DPS (comprising Maine, New Hampshire, Vermont, and New York); the Western Great Lakes DPS (comprising Michigan, Wisconsin, Minnesota, and North and South Dakota); the Western DPS (comprising Washington, Oregon, Montana, Idaho, Wyoming, Utah, Colorado, northern New Mexico and northern Arizona); and the Southwestern DPS (comprising the southern two-thirds of Arizona and New Mexico and western Texas, as well as part of Mexico).

69. In addition, the Proposed Rule called for downlisting of the gray wolf’s status from endangered to threatened in the following states: Wisconsin, Michigan, New York, New Hampshire, Vermont, Maine, Wyoming, Idaho, North and South Dakota, Montana, Washington, Oregon, Colorado, Utah, parts of northern New Mexico, and northern Arizona.

70. In the Proposed Rule, FWS specifically envisioned that wolves would be reintroduced into the Northeastern DPS. 65 Fed. Reg. 43,485-86. To this end, the Proposed Rule contained specific guidelines for state and Tribal entities within the Northeastern DPS for developing statewide/Tribal-wide wolf conservation plans. Id.

71. In creating the Northeastern DPS, FWS recognized the existence of large areas of potentially suitable wolf habitat and prey resources in parts of New England, the possibility that wolves may already exist in remote parts of Maine, and the presence of wolf populations in neighboring areas of eastern Canada. Id. at 43,473; 43, 477.

72. In addition, FWS stated that gray wolves in the northeastern United States are separated from other gray wolves in other regions of the United States “by large areas that are not occupied by, and may not be suitable for, breeding populations of resident

wild gray wolves.” Id. at 43,473.

73. FWS believed “that the existing geographic isolation of wolf populations between these four areas [the four proposed DPSs] fully satisfies the Vertebrate Population Policy’s criterion for discreteness of each DPS.” Id.

74. FWS looked to the facts that (a) suitable gray wolf habitat exists in Northern New York and New England; (b) “the possibility that wild wolves may exist in remote areas of Maine; and (c) the presence of wolf populations in neighboring areas of eastern Canada” to form the basis for the Northeastern DPS. Id.

75. Pursuant to the Vertebrate Population Policy, FWS also determined that the wolves in Maine are *discrete* from wolves found in other states. Id. at 43,477.

76. Finally, FWS “determined that a population of gray wolves in this portion [the Northeast] of the lower 48 states is *significant* and will contribute to the overall restoration of the species.” Id. (emphasis added).

77. FWS established the Northeastern DPS in the Proposed Rule with an understanding that “without viable wolf populations in these four geographic areas [Western Great Lakes, Southwest, West and Northeast] the recognized range of the species within the 48 coterminous States would have *extensive and significant gaps*, possibly broader than the dispersal distance of the species.” Id. at 43, 473(emphasis added).

The 2003 Final Rule

78. On April 1, 2003, FWS published its Final Rule To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous [sic] United States (Final Rule). This Final Rule appeared in the Federal Register at 68 Fed. Reg. 15,804.

79. The Final Rule departs substantially from the Proposed Rule.

80. The Final Rule completely eliminates the Northeastern DPS. Under the Final

Rule, this geographic region is now combined with what was the Western Great Lakes DPS under the Proposed Rule. The combined region created in the Final Rule is denominated the Eastern DPS.

81. The Eastern DPS stretches from the Dakotas in the West to Maine in the East. The north-south range of the Eastern DPS stretches from the Canadian border to Oklahoma and Arkansas, following the Mason-Dixon line towards the East.

82. The best scientific and commercial data, however, demonstrates that the wolf populations that occur in Minnesota are discrete from the population of wolves that will disperse into northern Maine, New Hampshire, Vermont and New York from Ontario and Québec. Therefore, these two wolf populations cannot properly be considered to be a single DPS under FWS's Vertebrate Population Policy because the Eastern DPS, which stretches from the Dakotas in the West to Maine in the East, does not represent a single, discrete population segment.

83. FWS does not retract any of the statements it made in the Proposed Rule concerning the significance of the Northeast region to gray wolf recovery. In fact, it notes that two apparent wolf sightings and killings had occurred in Vermont and just north of New Hampshire since the time of the Proposed Rule. 68 Fed. Reg. 15,814.

84. FWS also notes that "of those who specifically commented on it, all peer reviewers supported the proposed establishment of a separate Northeastern DPS." *Id.* at 15,820.

85. FWS bases its decision to abandon the Northeastern DPS solely upon the long-term viability of the Western Great Lakes metapopulation. *See Id.* at 15,824.

86. In addition to abandoning the Northeastern DPS, FWS also terminates the overall

federal goal of recovering wolves in the Northeast. FWS declares that the newly-created Eastern DPS has met its population targets for recovery due to the successes of the Western Great Lakes metapopulation, and thus purports to remove any legal obligation to pursue wolf restoration in the Northeast.

87. In abandoning the Northeastern DPS and terminating Northeast wolf recovery, FWS focuses solely on the needs of the Eastern Timber wolf. Nowhere in the Final Rule does FWS discuss the number and location of wolf populations that may be needed to achieve recovery at the species level, *i.e.*, to achieve recovery of the gray wolf. FWS does not analyze whether Northeast wolf restoration is needed to achieve gray wolf recovery.

Proposal to Remove All Federal Protection

88. On the same day that FWS issued the Final Rule, it also issued an Advanced Notice of Proposed Rule Making regarding the status of the gray wolf in the Eastern and Western DPS. In this notice, FWS states its intention to propose delisting the gray wolf in the Eastern DPS. 68 Fed. Reg. 15,876 (Apr. 1, 2003).

89. The promulgation of the Final Rule, coupled with FWS's simultaneous announcement that it plans to delist the wolf in the majority of the United States in the near future, further demonstrates that FWS intends to terminate wolf recovery in the newly created Eastern DPS.

CLAIMS

90. The plaintiffs restate and reallege the foregoing allegations.

First Claim: Illegal Termination of Gray Wolf Recovery

91. ESA section 3(6) defines the term "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

92. ESA section 4 requires that the Secretary develop a recovery plan to restore the endangered gray wolf in every significant portion of its historic range. *Id.* § 1533(f)(1).

93. The Northeast, as defined by FWS in 2000, is a significant portion of the historic range of the gray wolf.

94. The gray wolf remains in danger of extinction in the Northeast and in other significant portions of its range.

95. The Secretary unlawfully determined that the gray wolf has “recovered” to the point that it should be delisted (pending development of state management plans), notwithstanding the fact that FWS did not analyze objective, measurable criteria for recovery and notwithstanding the fact that the gray wolf remains endangered within significant portions of its range, including the Northeast.

Second Claim: Illegal Application of “Distinct Population Segment” Listing Authority

96. ESA section 3 (16) defines the term “species” to include “any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

97. In the Proposed Rule, the Secretary proposed the creation of the Northeastern DPS, a proposal that generated strong support within the community of wolf biologists.

98. In the Final Rule, the Secretary eliminated the Northeastern DPS, incorrectly asserting that she lacked authority to designate a DPS in the region simply because there was no documented breeding population of wolves in the Northeastern U.S.

99. The Secretary violated the ESA and APA by interpreting her authority as precluding the creation of a Northeastern DPS.

100. The Secretary also violated the ESA and APA by arbitrarily failing to consider for inclusion in the Northeastern DPS the population of wolves immediately across the border of the United States in Québec and also in Ontario, which could serve as a source

population for recovery in the Northeastern U.S.

**Third Claim: Failure to Take Affirmative Steps
to Restore the Gray Wolf to the Northeast**

101. The ESA imposes a mandatory duty on the Secretary to use all of her authorities to conserve the gray wolf and the ecosystems upon which it depends. 16 U.S.C. § 1536(a)(1).

102. ESA section 3(3) defines “conserve” to mean “to use and the use of all methods and procedures which are necessary to bring an endangered species to the point at which the measures provided pursuant to this Act are no longer necessary.” *Id.* § 1532(3). This provision further states that “[s]uch 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. . . .” *Id.*

103. The Secretary breached her conservation duty by failing, *inter alia*, to conduct a census of wolf populations in the Northeast, to explore cooperative agreements with Canada to facilitate natural recolonization, and to consider reintroduction of wolves from Québec and Ontario.

Fourth Claim: Failure to Use the Best Available Science

104. ESA section 4(b) requires that listing determinations be made “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b).

105. The Secretary failed to use the best available science in promulgating the Final Rule by, among other things:

- a. Failing to consider recovery needs of the gray wolf species as a whole;
- b. Concluding that the wolf population in Wisconsin and Michigan is viable on its own;
- c. Creating an Eastern DPS that includes more than one area that is

ecologically significant;

- d. Creating an Eastern DPS that is not based upon a population that is discrete in relation to the remainder of the species;
- e. Ignoring the advice of the scientific peer reviewers who unanimously recommended designation of a Northeastern DPS; and
- f. Failing to consider inclusion of wolves from Québec and Ontario in a Northeastern DPS.

RELIEF REQUESTED

Plaintiffs seek a judgment from this Court against Defendants as follows:

- A. A declaration that the Final Rule violates the Endangered Species Act;
- B. A declaration that the Department of the Interior and the Fish and Wildlife Service were arbitrary and capricious in issuing the Final Rule, because the Final Rule violates the Administrative Procedure Act;
- C. An order vacating the Final Rule and remanding it to the Fish and Wildlife Service to address the deficiencies of the Final Rule with respect to the Northeastern U.S.
- D. An order that the Plaintiffs herein recover their costs, including reasonable attorneys fees, incurred in connection with this action, as provided for under the Act, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable law; and
- E. Such other and further relief as the Court may deem just and proper.

Dated: December 18, 2003

Respectfully Submitted,



Mark A. Sinclair, VT # 1977
Conservation Law Foundation
15 E. State Street
Montpelier, VT 05602
(802) 223-5992

Patrick A. Parenteau, NE # 13219
Julia LeMense Huff, MN # 0277605
Environmental and Natural Resources Law
Clinic
Vermont Law School
Chelsea Street
South Royalton, VT 05068
(802) 831-1000

John Kostyack, D.C. #415484
M. Randolph Sargent, D.C. #471907
National Wildlife Federation
1400 16th Street, N.W., Suite 501
Washington, D.C. 20036-2266
(202)797-6879

Attorneys for Plaintiffs