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Wolves in the West: The Triumph of Section 10(j) of the Endangered Species Act

Brian Bramblett*

Only the mountains have lived long enough to listen to the howl of the wolf objectively.

Aldo Leopold

I. INTRODUCTION

The Final Rule of the Northern Rocky Mountain Wolf Recovery Plan (Recovery Plan)¹ submitted in 1994, was the driving force behind the reintroduction of the gray wolf to the Rocky Mountain West. The litigation between the Department of Interior (DOI) and the ranching community following the introduction of experimental wolf populations to Yellowstone National Park (Yellowstone) and central Idaho led the United States District Court of Wyoming (district court) to conclude the Recovery Plan was based on an impermissible construction of Section 10(j) of the Endangered Species Act (ESA).² Therefore, in *Wyoming Farm Bureau v. Babbitt (Wyoming Farm Bureau I)* the district court ordered the removal of the experimental population of wolves from the reintroduction area.³ On appeal, the Tenth Circuit Court of Appeals (court of appeals) reviewed the Recovery Plan *de novo*.⁴ In *Wyoming Farm Bureau v. Babbitt (Wyoming Farm Bureau II)*, the court of appeals found Congress failed to clearly express its intent concerning individual members of a species as opposed to a population under Section 10(j) of the ESA, thereby giving broad discretion to the Secretary⁵ in implementing reintroduction plans.⁶ Accordingly, the court of appeals reviewed the Recovery Plan to determine if the United States Fish and Wildlife Service's (FWS) interpretation of Section 10(j) was permissi-

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1. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 60,252 (Nov. 22, 1994)(to be codified at 50 C.F.R. pt. 17).

2. *Wyoming Farm Bureau v. Babbitt*, 987 F. Supp. 1349, 1376 (D. Wyo. 1997).

3. *Id.* at 1376.

4. *Wyoming Farm Bureau v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). *De novo* review requires a court to follow the unambiguous intent expressed by Congress in the ESA. If the intent is not apparent, and Congress delegated authority concerning the subject matter to the administrative agency, the court must defer to the agency's construction of the statute, so long as it is contextually consistent with the purpose and policy of the ESA, and the construction is neither unreasonable nor impermissible. *Arco Oil & Gas Co. v. EPA*, 14 F.3d 1431, 1436 (10th Cir. 1993).

5. Secretary refers to the Secretary of the DOI, who is responsible for overseeing the activities of the FWS. In this particular case, the Secretary referenced was Bruce Babbitt. For the purposes of this case note, Secretary, FWS and Agencies are interchangeable.

6. *Wyoming Farm Bureau II*, 199 F.3d at 1234.

ble. The court relied upon house reports, the policy and goals behind the ESA, application of the ESA, and FWS scientific findings in holding the Recovery Plan was permissible under the ESA.

This case note will discuss the court of appeal's review of the Recovery Plan. In doing so, it will discuss the purpose of the ESA and the use of Section 10(j) as a tool for achieving the ESA's goals. This note concludes that the decision in *Wyoming Farm Bureau II* is a victory for the wolf and the legitimacy of Section 10(j) experimental populations, yet despite this victory, the future of experimental populations of large predators remains unclear.

II. BACKGROUND

A. History of the Gray Wolf in the Northern Rockies

Historically, the gray wolf (*Canis lupus*) has been depicted as a vicious, cunning, and evil beast. A bounty on wolves existed even before the birth of Christ.⁷ By the mid-1800s, the wolf had been eliminated from most of Europe and Asia.⁸ Beginning in the late nineteenth century, in response to the expansion of settlers into the West, the U.S. Government launched a campaign to exterminate the wolf.⁹ Mass poisonings and bounties paid for dead wolves led to the rapid extrication of the wolf from the West.¹⁰ By the mid-1900s, wolf populations no longer existed in Colorado, Washington, and Wyoming.¹¹ Wolves were effectively eliminated from ninety-five percent of their original range in the United States before the middle of the twentieth century.¹² In 1978, the gray wolf became an endangered species in the contiguous United States, with the exception of Minnesota where it remains a threatened species.¹³

As an endangered species, the ESA affords the gray wolf certain protections to: 1) prevent the species from becoming extinct; 2) promote reestablishment of viable populations of the species; and 3) bring the species numbers to the point where delisting is possible.¹⁴ In 1992, Congress di-

7. Daniel R. Dinger, Comment, *Throwing Canis Lupus to the Wolves: United States v. Mckittrick and the Existence of the Yellowstone and Central Idaho Experimental Wolf Popultions Under a Flawed Provision of the Endangered Species Act*, 2000 BYU L. REV. 377, 384 (2000).

8. *Id.* at 384-85.

9. John A. Zuccotti, Comment, *A Native Returns: The Endangered Species Act and Wolf Reintroduction to the Northern Rocky Mountains*, 20 COLUM. J. ENVTL. L. 329, 330 (1995).

10. Inga H. Causey, Comment, *The Reintroduction of the Wolf In Yellowstone: Has the Program Fatally Wounded the Very Species It Sought To Protect?* 11 TUL. ENVTL. L.J. 461, 462 (1998).

11. Dinger, *supra* note 7, at 385.

12. Causey, *supra* note 10, at 462.

13. *Wyoming Farm Bureau I*, 987 F Supp. 1349, 1353 (D. Wyo. 1997).

14. Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1994).

rected the FWS to prepare an Environmental Impact Statement (EIS) considering all alternatives on wolf reintroduction and indicating the preferred method of reestablishment in compliance with the ESA.¹⁵ The Draft EIS (DEIS) produced by the FWS effort, resulted in over 160,000 comments by individuals, organizations and government agencies.¹⁶ Many of the comments were addressed in the Final EIS (FEIS), where the FWS sought to resolve concerns expressed during the public comment period.¹⁷ The DEIS considered five alternatives in addressing wolf recovery: 1) reintroduction of an experimental population; 2) natural recovery; 3) no wolves; 4) wolf management committee recommendations; and 5) reintroduction of non-experimental wolves.¹⁸ The FWS considered all relevant scientific data on wolves, in addition to specific data concerning the gray wolf in the West, both past and present.¹⁹ The FWS acknowledged the existence of disperser wolves in the FEIS,²⁰ but dismissed the presence of such individuals as random occurrences which consisted of unsustained activity.²¹ In 1994, the FWS submitted the Final Rule for the Northern Rocky Mountain Wolf Recovery Plan, concluding a population of approximately 300 wolves was necessary for the species to recover in the areas of the western United States from which it had been eradicated.²² The Recovery Plan called for the in-

15. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. at 60,253 (Nov. 22, 1994)(to be codified at 50 C.F.R. pt. 17).

16. *Id.*

17. *Id.* at 60,254; Mimi S. Wolok, *Experimenting With Experimental Populations*, 26 ENVTL. L. REP. 10018, 10027-28 (1996) (Livestock owners voiced their resistance to the release of fully protected wolves because they feared a conflict between wolves and livestock leading to losses due to wolf predation. Furthermore, the livestock industry expressed concerns that it might face access restrictions to public lands in favor of predator reintroduction. Some of these fears were addressed through a private compensation program for livestock killed by wolves. The FWS also addressed these issues with the nonessential designation. The designation of a population as nonessential allows for greater flexibility in areas of law enforcement and management. Specifically, the designation under the Recovery Plan allows for the taking of a wolf that is threatening humans or in the process of killing livestock. The nonessential designation was challenged by the Plaintiffs on the grounds that the experimental population designation lessened the protection for naturally occurring disperser wolves that might wander into the reintroduction area. While many concerns were voiced, the majority of public comment supported the reintroduction of wolves to the areas designated in the Recovery Plan).

18. 59 Fed. Reg. at 60,254.

19. *See generally id.* at 60,252.

20. Individual disperser wolves have been known to travel for hundreds of miles in search of new territory and new mates. As a result it is possible to find a wolf passing through or temporarily occupying a geographic region outside of its usual territory. *Id.* at 60,259, 60,261.

21. *Wyoming Farm Bureau II*, 199 F.3d. 1224, 1229 (10th Cir. 2000); 59 Fed. Reg. at 60,256 (Sightings of lone wolves and pairs had been reported in Montana, Idaho and Wyoming, but no evidence supported a breeding population existed within the proposed reintroduction areas); Zuccotti, *supra* note 9, at 329, 332 (In 1992, a wolf was shot and killed in the Teton Wilderness, just south of Yellowstone).

22. *Wyoming Farm Bureau I*, 987 F. Supp. 1349, 1353-54 (D. Wyo. 1997).

roduction of Canadian gray wolves, designated as an experimental population, into selected areas of central Idaho and Yellowstone National Park.²³

B. *The Endangered Species Act and Section 10(j)*

The ESA is considered by many commentators to be “the most comprehensive legislation for the preservation of endangered species ever enacted.”²⁴ Congress amended the ESA in 1982, enacting Section 10(j)²⁵ which specifically addresses the use of experimental populations as a tool for the reintroduction of endangered species to their original habitat.²⁶ The amendment gives the Secretary the authority to implement reintroduction projects using the experimental population designation where it will further aid in the conservation of such species.²⁷ Under Section 10(j), experimental populations can be either classified as threatened or nonessential species.²⁸ The nonessential designation gives the Secretary and FWS law enforcement authorities more flexibility in dealing with problems that arise between humans and wolves.²⁹ For instance, a land owner can kill a nonessential wolf if it is caught taking livestock, whereas a threatened or endangered wolf could not be taken.³⁰ To protect naturally occurring populations and prevent law enforcement difficulties,³¹ Section 10(j) requires that experimental populations be “wholly separate geographically” from naturally occurring species and not within the “current range” of naturally occurring populations.³²

23. 59 Fed. Reg. at 60,253.

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

25. Endangered Species Act, 16 U.S.C. § 1539(j) (1994).

26. See generally Wolok, *supra* note 17.

27. 16 U.S.C. § 1539(j)(2)(A).

28. *Id.* § 1539(j)(2)(B).

29. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, Fed. Reg. at 60,255-57 (Nov. 22, 1994)(to be codified at 50 C.F.R. pt. 17). The nonessential designation is one of the most significant tools provided by Section 10(j). It allows for the FWS to use a more flexible management approach than previously permitted by the ESA in dealing with large predator reintroductions. *Id.*

30. Wolok, *supra* note 17, at 10028.

31. The potential for naturally occurring populations to lose their full protection under the ESA posed the greatest law enforcement concern. It would be difficult for the FWS to determine which populations were fully protected and which wolves were experimental. Regulating the experimental populations under the ESA becomes difficult when the distinction between nonessential and naturally occurring populations cannot be drawn. *Wyoming Farm Bureau II*, 199 F.3d 1224, 1233 (10th Cir. 2000).

32. 16 U.S.C. § 1539(j)(1) (The FWS interpretation of “wholly separate geographically” is at the center of the legal battle in both *Wyoming Farm Bureau* cases).

C. *The United States District Court of Wyoming Ruling*

In 1994, as the first wolves of the Recovery Plan were transported from Canada to central Idaho, the Wyoming Farm Bureau (Farm Bureau Plaintiffs), the National Audubon Society, Predator Project, Sinapu, and Gray Wolf Committee (Audubon Plaintiffs), and James R. and Cat D. Urbigkit (Urbigkit Plaintiffs) filed suit against Bruce Babbitt (in his capacity as the Secretary of the DOI), the FWS, the National Park Service, the Department of Agriculture, and the United States Forest Service (Agency Defendants) alleging National Environmental Policy Act (NEPA) and ESA violations.³³ In response to the filing of this complaint, the district court postponed the release of the wolves for thirty-six hours, before allowing the FWS to release four wolves in Idaho on January 14, 1995.³⁴ The release of more wolves followed, and the litigation surrounding the Reintroduction Plan moved forward.

In 1997, the district court held that the Recovery Plan violated Section 10(j) of the ESA.³⁵ The holding was based on the following conclusions: (1) the Recovery Plan violated Section 10(j) of the ESA because the experimental populations were not wholly separate geographically or outside of the current range of naturally occurring individuals of the same species; (2) the treatment of all wolves as nonessential within the experimental population areas was contrary to the law;³⁶ and (3) these violations lessened the protection of individuals, thereby operating as a *de facto* delisting of naturally occurring wolves which clearly violated Congressional intent as expressed in Section 10(j).³⁷ The Recovery Plan's conclusions stated that the wolves reported to be present, or capable of entering the experimental population area, were disperser wolves and did not constitute a population.³⁸ Despite the Recovery Plan's conclusion, the district court ordered that the experimental populations, which had reached over 100 wolves, had to be removed.³⁹ However, the judgment was stayed pending appeal.⁴⁰

The Agency Defendants appealed, arguing their interpretation of the statute was permissible under the *Chevron* standard of review,⁴¹ and that the district court acted outside of its authority in failing to give proper def-

33. *Wyoming Farm Bureau I*, 987 F. Supp. at 1349, 1354-58 (D. Wyo. 1997).

34. Causey, *supra* note 10, at 468-69.

35. *Wyoming Farm Bureau I*, 987 F. Supp. at 1376.

36. *Wyoming Farm Bureau II*, 199 F.3d at 1228.

37. *Wyoming Farm Bureau I*, 987 F. Supp. at 1375.

38. *Wyoming Farm Bureau II*, 199 F.3d at 1233-34.

39. *Wyoming Farm Bureau I*, 987 F. Supp. at 1376.

40. *Id.* at 1376.

41. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).

erence to the Agency's interpretation.⁴² Defendants claimed Section 10(j) applied to populations not individuals.⁴³ The Audubon Plaintiffs filed an amicus brief in support of the Agency Defendants and the Recovery Plan, effectively ending their affiliation with the remaining Plaintiffs.⁴⁴

D *The Tenth Circuit Court of Appeals*

The court of appeals held: (1) the possibility that individual wolves from naturally occurring populations could enter the experimental population areas did not violate the "wholly separate geographically" requirement of Section 10(j) of the ESA;⁴⁵ (2) the Agency's interpretation of current range based on population rather than individuals was not a violation of the ESA;⁴⁶ and (3) the Agency reasonably exercised its authority in defining the experimental wolf population by location.⁴⁷ The court of appeals thus reversed the district court's holding and vacated the order mandating removal of the experimental population.⁴⁸

III. REVIEW OF THE RECOVERY PLAN BY THE TENTH CIRCUIT COURT OF APPEALS

A. *Standard of Review*

In 1982, Congress amended the ESA in an attempt to further the goal of protecting listed species. The amendments included Section 10(j), which specifically addresses the use of experimental populations as a means of reintroducing threatened or endangered species to their historical range.⁴⁹ Section 10(j) of the ESA provides the rules that must be followed when reintroducing experimental populations.⁵⁰ Ambiguity in the language of Section 10(j) became the focus of the litigation over the Recovery Plan.

42. *Wyoming Farm Bureau II*, 199 F.3d at 1234-36.

43. *Id.* at 1233-41.

44. *Id.* at 1229.

45. *Id.* at 1236.

46. *Id.*

47. *Id.* at 1237.

48. *Id.* at 1241.

49. Endangered Species Act, 16 U.S.C. § 1539(j) (1994).

50. *Id.* (Section 10(j) provides the following guidelines for using experimental populations: (1) experimental populations authorized by the Secretary for release under paragraph 2, but only when the population is wholly separate from nonexperimental populations of the same species. (2)(A) The Secretary may authorize the release of any population of an endangered or threatened species outside of the current range of that species if the release will further the conservation of the species. (2)(B) Before the release of an experimental population, the Secretary shall by regulation identify the population and, using the best available information, determine whether the experimental population is essential to the continued existence of the species. (2)(C) Each member of the experimental population shall be treated as a member of a threatened species under the ESA [subsection (2)(B)(i), (2)(B)(ii), and (3) omitted]).

The court of appeals in *Wyoming Farm Bureau II* reviewed the Recovery Plan and the district court's decision *de novo*. *De novo* review is used by an appellate court when reviewing a lower court's decision regarding administrative rules.⁵¹ *De novo* review, in cases of statutory interpretation, requires a court to evaluate a federal agency's interpretation of the ESA in light of Congress' clear intent.⁵² Where Congress has not directly addressed an issue, the court must consider the relevant statutory scheme illustrated by the law as a whole, including its objectives and underlying policy.⁵³ In *Wyoming Farm Bureau II*, the court of appeals relied on the plain language of Section 10(j), house reports, the ESA, and ESA applications concerning other species in its analysis of the Recovery Plan.

As previously mentioned, courts follow the *Chevron* standard when reviewing a federal agency's interpretation of federal law.⁵⁴ In *Chevron*, the appellate court applied its own definition of the term "stationary source" in place of the Environmental Protection Agency's (EPA) construction of the term.⁵⁵ In reviewing *Chevron* on writ of certiorari, the Supreme Court stated that where Congress failed to provide a definition of a term in the Clean Air Act (CAA), the reviewing court was required to defer to the agency's construction of the term, so long as that construction is permissible within the context of the Act.⁵⁶ The existence of contradictory evidence, or other plausible interpretations, does not permit the reviewing court to overturn a federal agency's administrative construction of a statute or term.⁵⁷ The Supreme Court applied the *Chevron* standard to EPA's interpretation of the term "stationary source" and found EPA's construction permissible in the context of the plain language, legislative history, statutory objectives and policy of the CAA.⁵⁸ This standard is applied in other cases addressing the construction of the ESA, and the court of appeals ap-

51. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (No deference is given to the lower court under *de novo* review. Where the district court improperly applies the standard of review, the appellate court may vacate, remand or independently review the evidence on its own, following the standard of review proscribed for the trial court).

52. *Wyoming Farm Bureau II*, 199 F.3d at 1231; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 838 (1984).

53. *Wyoming Farm Bureau II*, 199 F.3d at 1231; *Arco Oil & Gas Co. v. EPA*, 14 F.3d 1431, 1434-45 (10th Cir. 1993) (court consults multiple records and authorities to discern what Congress intended in the meaning and scope of a term).

54. *Chevron*, 467 U.S. at 866 (EPA regulation treating all pollution emitting devices in a single "bubble" was based on a permissible construction of the term "stationary source" found in the Clean Air Act).

55. *Id.* at 841-42.

56. *Id.* at 842-44.

57. *Id.* at 843-44.

58. *Id.* at 845.

plies it properly in reviewing *Wyoming Farm Bureau II*.⁵⁹

B. Population vs. Individuals

In applying the *Chevron* standard, the court of appeals began by reviewing the plain language of the statute. Section 10(j) states the Secretary may authorize experimental populations “but only when, and at such times as, the population is wholly separate geographically from the nonexperimental populations of the same species.”⁶⁰ Because the ESA offers no definition of population, the FWS definition of population is used in the context of Section 10(j). The FWS defines a population as a “potentially self-sustaining group of a species within a common spacial arrangement that are capable of interbreeding.”⁶¹ In applying this definition to the plain language of the statute, the court of appeals concluded that individual disperser wolves, which enter the experimental population area, do not violate the plain language of Section 10(j).⁶² The court of appeals reasoned that Section 10(j) addresses the overlap of populations, and the presence of individual wolves does not constitute a population.⁶³ Populations, as defined by the FWS, is founded on the basis that disperser wolves do not constitute a reproducing population and consequently are not considered to be viable populations. Therefore, since a population is not present in the recovery area, the court of appeals reasoned no Section 10(j) violation existed.⁶⁴

Arguably, the appeals court could have ended its review here.⁶⁵ According to the court, the plain language of Section 10(j) clearly defines the standards the Secretary must follow when introducing experimental populations.⁶⁶ Under *Chevron*, review of an agency decision is only necessary

59. *Arco Oil & Gas Co. v. EPA*, 14 F.3d 1431, 1434 (10th Cir. 1993) (*Chevron* standard applied to determine if EPA construction of the term “natural gas” was permissible in respect to the legislative history, statutory context, objectives and policies behind the governing act); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690-95, 704-08 (1995) (Interpretation of terms “harm” and “take” reviewed in light of legislative history to determine if permissible. Policy and goals of the ESA are examined to put terms in context of the aim of the Act).

60. *Wyoming Farm Bureau II*, 199 F.3d 1224, 1232 (D. Wyo. 1997); Endangered Species Act, 16 U.S.C. § 1539(j)(1) (1994).

61. *Wyoming Farm Bureau II*, 199 F.3d at 1234. The Recovery Plan applies an even more specific definition for wolves, defining a population as, “at least two breeding pairs of gray wolves that each successfully raise at least two young yearly for two consecutive years” *Id.* at n.3.

62. *Id.* at 1234.

63. *Id.* at 1234-35.

64. *Id.* at 1334-36.

65. *United States v. McKittrick*, 142 F.3d 1170, 1179 (9th Cir. 1998) (O’Scannlain, J., concurring) (stating that judicial review was unnecessary because the clear language of the statute only refers to populations, and “a single straggler does not a population make”).

66. *Id.* at 1179; Endangered Species Act, 16 U.S.C. § 1539(j)(1) (1994).

when Congress has not clearly addressed an issue.⁶⁷ The language used by Congress in Section 10(j) refers only to populations. Therefore, it is reasonable to find the requirements of Section 10(j) apply to populations only, not individuals. If Congress intended for Section 10(j) to apply to individuals, it would have included individuals in the statute.

In *Wyoming Farm Bureau II*, the court reviewed the legislative history and the ESA in its entirety to determine if the Agency acted reasonably and conformed to the requirements of the ESA.⁶⁸ The court interpreted Congress' failure to mention individuals in the statute as Congress not speaking clearly to the issue.⁶⁹ Both the district court and the court of appeals relied on the following language from House Report 567 discussing Section 10(j):

“[T]he [House] Committee carefully considered how to treat introduced populations that overlap, in whole or in part, natural populations of the same species in the case of an introduction of individuals of a listed fish species into a portion of stream where the same species already occurs, the introduced specimens would not be treated as an ‘experimental population’ ”⁷⁰

Based upon this language, the district court agreed with the Plaintiffs and concluded that this excerpt demonstrates that Congress intended naturally occurring individuals to be wholly separate geographically from experimental populations.⁷¹ The district court focused on the use of the word individual in the House Report, and found that the sole use of the term population in interpreting the intent behind geographic separation is an impermissible construction of Section 10(j).⁷² However, the court of appeals disagreed with the district court's interpretation, finding their review too narrow.⁷³ The appeals court found that use of the term “individual” in the context of the House Report only suggests the need to consider individuals within the context of a population, it does not state individuals must be considered independently.⁷⁴ More importantly, the existence of a conflicting interpretation does not mandate a court to vacate a federal agency's permissible

67. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984).

68. *Wyoming Farm Bureau II*, 199 F.3d at 1234-39.

69. *Id.* at 1234.

70. *Wyoming Farm Bureau I*, 987 F. Supp. 1349, 1372-73 (D. Wyo. 1997) (citing H.R. REP. NO. 97-567, at 33 (1982)), reprinted in 1982 U.S.C.C.A.N. 2807, 2833.

71. *Id.* at 1373.

72. *Id.* at 1373-75 (citing H.R. REP. NO. 97-567, at 33).

73. *Wyoming Farm Bureau II*, 199 F.3d at 1237.

74. *Id.* at 1234-35.

construction of a statute.⁷⁵

The court of appeals looked beyond House Report 567 and reviewed the ESA as a whole, searching for Congressional intent in compliance with *Chevron*.⁷⁶ The definition of "species" in the ESA refers to any distinct population segment of any species of fish or wildlife which interbreeds when mature.⁷⁷ This definition implicitly recognizes that a species is comprised of more than isolated individuals. The term "species" requires a population capable of interbreeding when mature, which necessarily requires the presence of more than one member of the species.⁷⁸ The court of appeals found the Recovery Plan's definition of "population" and the Agency's interpretation of "wholly separate geographically" is consistent with the use of the term "species" as defined in the ESA.⁷⁹ The ESA consistently uses the term species when referring to the listing and regulation of threatened and endangered wildlife.⁸⁰ The legislative history reflects that the central objective of the ESA is to conserve species, not just individuals.⁸¹ Furthermore, Section 10(j) uses the term "individuals" once and "specimens" twice, while the terms "population" and "species" are used consistently throughout the ESA.⁸² This usage illustrates that the concern for populations of a species is far greater than the concern for individuals.⁸³

The ESA's primary goal is to protect and conserve threatened and endangered species.⁸⁴ "Conservation" under the ESA means taking necessary actions and measures to bring a species to the point where it no longer needs protection.⁸⁵ Section 10(j) specifically gives the Secretary broad discretion and flexibility to take action and develop regulations that best address the needs of a particular experimental population.⁸⁶ The Secretary's discretion includes the authority to define the method by which experimental populations are to be identified.⁸⁷ The method used to define experimental populations must provide notice as to which populations of endan-

75. *Id.* at 1241.

76. *Id.* at 1234-36.

77. Endangered Species Act, 16 U.S.C. § 1532(16) (1994).

78. *Wyoming Farm Bureau II*, 199 F.3d at 1234-35.

79. *Id.* at 1234-35.

80. *Id.*

81. *Id.* at 1235 (citing *McKittrick*, 142 F.3d at 1174).

82. *United States v. McKittrick*, 142 F.3d 1170, 1175 (9th Cir. 1988).

83. *Wyoming Farm Bureau II*, 199 F.3d at 1235.

84. Endangered Species Act, 16 U.S.C. § 1531(b)-(c) (1994).

85. *Id.* § 1532(3).

86. H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

87. *Id.*

gered or threatened species are experimental.⁸⁸ Identification of a population can be based on migration patterns, location, or any other means the Secretary deems appropriate for that particular species or population.⁸⁹ The court of appeals relied upon the language in the House Report to determine whether the FWS construction was reasonable, finding the Secretary acted within the scope of his authority⁹⁰ Congress clearly intended to give the Secretary the power to make decisions and implement actions that would reestablish listed species.⁹¹ Nothing requires the Secretary to take each individual of a species into consideration when making decisions pertaining to the reintroduction of threatened or endangered species.⁹²

C. *Geographic Separation and Prior Application of the ESA*

The application of the ESA to other species gave further credence to the FWS's interpretation. The amicus brief submitted by the Environmental Defense Fund in support of the Recovery Plan cited multiple examples which illustrate that the status of an individual of an endangered species may change as it crosses geographic and political boundaries.⁹³ For example, a gray wolf in Wisconsin is fully protected under the ESA as an endangered species, but if an individual wolf crosses the border into Minnesota, it becomes a threatened species and loses full protection.⁹⁴ The above example is analogous to a naturally occurring wolf entering the experimental population area in Yellowstone and Idaho.⁹⁵ Gray wolves are protected by the ESA based on where they are found, not where they originate.⁹⁶ Relying on this evidence, the court of appeals found the FWS's construction of Section 10(j) permissible within the context of the ESA as illustrated by its application.⁹⁷

IV THE PRACTICAL APPLICATION OF THE ENDANGERED SPECIES ACT THROUGH SECTION 10(j)

Although the court of appeals may not have been required to apply such an in-depth analysis to the Recovery Plan because the plan language

88. *Id.* at 33-34.

89. *Id.*

90. *Wyoming Farm Bureau II*, 199 F.3d 1224, 1234-35 (10th Cir. 2000).

91. *Id.* at 1237.

92. *Id.*

93. *Id.* at 1235 n.4.

94. *Id.*

95. *Id.*

96. *United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998) (O'Scannlan, J., concurring).

97. *Wyoming Farm Bureau II*, 199 F.3d at 1237.

of Section 10(j) refers only to populations, the court's review of the law clarified the Secretary's authority in implementing plans for the introduction of experimental populations under Section 10(j).⁹⁸ *Wyoming Farm Bureau II* created an opportunity to apply Section 10(j) in a practical manner, true to the goals of the ESA.

It is clear Congress left the executive aspects of ESA implementation to the discretion of federal agencies through explicit language found in the House Report concerning Section 10(j).⁹⁹ Though the evidence produced by the Farm Bureau provided a conflicting interpretation of Section 10(j), the district court abused its discretion in holding that the FWS's interpretation violated the ESA. The presence of conflicting information is not sufficiently compelling to invalidate an agency's interpretation of the law where the agency's interpretation is both reasonable and permissible.¹⁰⁰ The court of appeals reviewed the ESA and its history, applied the proper standard, and reached the correct conclusion.

Congress enacted the ESA in 1973 to protect and conserve threatened wildlife resources in the United States.¹⁰¹ Congress gave the Secretary extensive power to develop regulations and programs to achieve the goals of the ESA.¹⁰² The authority given to the Secretary is echoed throughout the legislative history and plain language of the Act.¹⁰³ Congress enacted Section 10(j) of the ESA in 1982 to give the Secretary more flexibility in implementing programs and regulations which would utilize experimental populations to aid in species recovery. The Recovery Plan clearly falls within the scope of Section 10(j) and the purpose for which it was enacted.¹⁰⁴

To hold that the protection of individual members of species is more important than the conservation of the species as a whole is not only erroneous, it directly contradicts the purpose of the ESA. After over a decade of research, the FWS found no reproducing pairs of wolves were present in the prospective reintroduction area. The FWS acknowledged the random occurrence of individual disperser wolves, but an individual does not constitute a population. However, the district court found any naturally occurring wolf present in the reintroduction area would violate Section 10(j), imposing its interpretation of the scientific record in place of the FWS interpreta-

98. *McKittrick*, 142 F.3d at 1179.

99. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-44 (1984), H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

100. *See Chevron*, 467 U.S. at 844.

101. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994).

102. *Id.*

103. *Id.*, H.R. REP. NO. 97-567, at 33.

104. H.R. REP. NO. 97-567, at 33.

tion. Under the district court's holding, the event of a single wolf passing through a geographic region would suffice to bring recovery efforts to a halt. Indeed, this was the exact result of the district court's decision.

The purpose of the ESA and Section 10(j) is clear. The ESA protects species from becoming extinct, with the higher goal of bringing species population numbers to a level where protection is no longer needed.¹⁰⁵ Section 10(j) provides a means through which the Secretary can accomplish the goals of the ESA. Like any rule of law, interpretation and adaptation for practical application is often necessary. The Recovery Plan is the largest reintroduction program of its kind to be implemented in the United States. In interpreting Section 10(j), the FWS provided definitions for certain statutory terms Congress failed to define. The FWS used over a decade of scientific research to determine how the "wholly separate geographically" requirement should apply to both individual wolves and wolf populations.

The Recovery Plan reasonably reaches the conclusion that abandoning efforts to reintroduce the gray wolf in the West to accommodate lone disperser wolves would not be true to the goals of conserving the species as a whole. Appropriately, the court of appeals deferred to the FWS's expertise in species conservation because the court's area of expertise lies in the proper application of the law, not in the introduction of experimental populations.

V CONCLUSION

Congress enacted the ESA to provide for the protection of flora and fauna in an attempt to reestablish species facing extinction. The Secretary of Interior is charged with implementing the regulations of the ESA to further its purpose and goals. *Wyoming Farm Bureau II* reinforces the Secretary's discretion in implementing Section 10(j) reintroduction programs. Section 10(j) of the ESA is a vehicle for reestablishment of listed species in their original habitat. The discretion and flexibility given to the Secretary in implementing Section 10(j) reintroduction creates a practical tool for establishing viable populations of listed species. This flexibility further gives the Secretary the authority to create practical management tools to address the concerns of public and private interest groups who perceive the reintroduction of endangered species as a threat to their way of life.

Experimental populations of wolves are now present in Arizona, central Idaho, North Carolina, New Mexico, and Yellowstone National Park.¹⁰⁶ Delisting the gray wolf as a threatened species in the Rocky Mountain West

105. 16 U.S.C. § 1531.

106. Elizabeth C. Brown, Comment, *The "Wholly Separate" Truth: Did the Yellowstone Reim-*

is now being considered by FWS, attesting to the overwhelming success of the Recovery Plan.¹⁰⁷ Furthermore, due in part to the Recovery Plan's success, the Bitterroot Mountains of Montana and Idaho may be selected in the future for the introduction of an experimental grizzly bear population.¹⁰⁸ Similar to the wolf, individual bears have been rumored to occupy the proposed reintroduction areas. Despite this, the grizzly bear reintroduction plan has not been challenged on these grounds indicating the court of appeals' decision has established the legality of Section 10(j) flexibility. In this sense, large predators and supporters of predator reintroduction have won a major battle.

However, the war is far from over. Now that the court battle in *Wyoming Farm Bureau II* has concluded, a new one has arisen. Three wolves from the Mexican-wolf reintroduction program were killed in Arizona.¹⁰⁹ As a result, FWS officials now find themselves fighting to protect the wolf in the field. Enforcement of reintroduction program regulations may be a more difficult battle to win. Many who oppose reintroduction of large predators believe the solution to the problem is to "shoot, shovel, and shut-up"¹¹⁰ Therefore, while the *Wyoming Farm Bureau II* litigation may have ended in favor of the gray wolf, the future of experimental populations remains unclear. If people choose to ignore the law, the gray wolf's struggle to survive in the United States has just begun.

The court of appeals followed decades of precedent by ultimately deferring to the FWS in *Wyoming Farm Bureau II*, leaving decisions about the reestablishment of threatened and endangered species in the hands of the experts. The return of the wolf to the West invokes great emotion and change. Elk herds in Yellowstone are now more active, migrating like wild game rather than grazing like domestic cattle. Coyotes keep one eye on the horizon as they travel and hunt. Humility has returned to westerners as they move through the woods, passing a fresh kill, realizing all is not theirs for the taking. The howl of the wolf echos through the western night once again, breaking decades of silence.

roduction Violate Section 10(j) of The Endangered Species Act? 27 B.C. ENVTL. AFF. L. REV. 425, 465 (2000).

107. Bettina Boxall, *California and the West; Gray Wolf May Lose Endangered Status*, L.A. TIMES, July 12, 2000, at A3.

108. See generally 50 C.F.R. §§ 17.80-84 (2000).

109. Lowry McAllen, *Freed Wolves Find a Precarious Home in the Wild*, ALBUQUERQUE TRIBUNE, Sept. 9, 2000, at A6.

110. Zuccotti, *supra* note 9, at 332.