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## Defenders of Wildlife v. Zinke

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***Defenders of Wildlife v. Zinke*, 849 F. 3d 1077 (D.D.C. 2017)**

**Jacob R. Schwaller**

Wyoming was the final holdout of protections for wolves under the Endangered Species Act, and a recent decision by the United States Circuit for the District of Columbia has finally overturned those protections. After years of court battles, this decision marks the final adjudication removing federal protections, and places the management of the wolves in the Greater Yellowstone Area back in the hands of the states surrounding Yellowstone National Park. Complete deference to state regulatory systems may be a new trend in the adjudication of cases under the ESA, and this case could have significant impacts on future deference given to state management plans.

I. INTRODUCTION

The appellants in this case were the United States Fish and Wildlife Service (the “Service”), the State of Wyoming, Safari Club International, and the National Rifle Association (“Appellants”). The appellees were various environmental groups led by Defenders of Wildlife (“Appellees”). This case arose from the Service’s delisting of the Northern Rocky Mountain gray wolf from protections under the Endangered Species Act (“ESA”) in Wyoming in 2012, in the Federal Register (hereafter the delisting will be called the “Rule”).<sup>1</sup> Environmental groups then sued, and the district court vacated the Rule because it found the Service’s determination that Wyoming had adequate “regulatory mechanisms” to keep the wolf population above the mandated minimum was arbitrary.<sup>2</sup> The district court upheld the other determinations made by the Service.<sup>3</sup> Appellants appealed the vacatur of the Rule.<sup>4</sup>

Appellants argued that the district court erred by “failing to defer to the Service’s reasonable interpretation of ‘regulatory mechanisms’” implemented by Wyoming that would adequately protect the wolf population from falling below the statutory minimum.<sup>5</sup> Appellees cross-appealed the other determinations of the district court.

II. FACTUAL AND PROCEDURAL BACKGROUND

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1 *Defenders of Wildlife v. Zinke*, 849 F. 3d 1077, 1079 (D.D.C. 2017) (citing Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population’s Status as an Experimental Population, 77 Fed. Reg. 55,530 (Sept. 10, 2012)).

2 *Id.* at 1079 (citing 16 U.S.C. § 1533(a)(1)(D) (2012)).

3 *Id.*

4 *Id.*

5 *Id.*

By the 1930s, the Northern Rocky Mountain gray wolf had been eradicated in Montana, Idaho and Wyoming.<sup>6</sup> In the 1980s, gray wolves began to colonize northwestern Montana, and in 1995 and 1996, they were reintroduced in Central Idaho and Yellowstone National Park.<sup>7</sup> The Service set recovery goals for all three states of at least ten breeding pairs and 100 wolves, for a total population of thirty breeding pairs and 300 wolves in the Northern Rocky Mountains.<sup>8</sup>

The Service listed wolves as endangered in 1973, protecting Wyoming's Greater Yellowstone Ecosystem ("GYE") wolves. In 2008, the Service designated the GYE wolves as a distinct population segment ("DPS").<sup>9</sup> In 2009, the Service proposed delisting of the DPS in Montana and Idaho,<sup>10</sup> which it eventually did in 2011.<sup>11</sup> The Service proposed delisting the wolves in Wyoming that same year.<sup>12</sup>

The Service's proposal to delist the wolves was based on cooperative federal and state efforts to develop a state regulatory framework and accounted for prior court decisions that had found prior plans submitted by Wyoming deficient.<sup>13</sup> The Service concluded that because a large portion of Wyoming's wolves lived outside of the State's jurisdiction, in either Yellowstone National Park or the Wind River Indian Reservation, "it would suffice for Wyoming to maintain 'at least' ten breeding pairs and 100 wolves in the parts over which Wyoming ha[d] jurisdiction."<sup>14</sup> The State then proposed a management plan to create a trophy area covering 15.2% of the State, where the majority of wolves live, and to expand the trophy area by another 1.3% to protect wolves migrating towards Idaho. The remaining area, covering 19% of the State's suitable wolf habitat, would be designated as a predator area, where wolves could be killed with little to no restrictions.<sup>15</sup> Wyoming did not include in the regulatory framework any obligation to maintain a buffer above the minimum management goals but instead stated that it *intended* to maintain an adequate buffer.<sup>16</sup>

The Service concluded that this plan under the Rule was adequate. Two lawsuits from environmental groups spurred the district court to uphold the management plan as adequate to ensure genetic connectivity between wolf subpopulations, and that the predator area did not constitute

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6 *Id.* at 1080.

7 *Id.*

8 *Id.*

9 *Id.* at 1081.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

a significant portion of the wolf's range.<sup>17</sup> However, the court also concluded that Wyoming's regulatory framework rendered the Service's determination inadequate, because of the lack of an obligation to maintain a buffer.<sup>18</sup> The district court subsequently vacated the Rule, and Appellants appealed the vacatur.<sup>19</sup> Appellees then cross-appealed the courts determinations regarding the issues of genetic connectivity and range.

### III. ANALYSIS

The ultimate question before the court was whether the rulemaking record demonstrated that the Service acted reasonably when it concluded that Wyoming's wolf management plan would adequately protect Wyoming's gray wolf population.<sup>20</sup> The Administrative Procedures Act provided the court's standard of review. The court analyzed whether the Service's determination was arbitrary under the standard *Chevron* two-step analysis.<sup>21</sup> This analysis asked two questions: (1) whether the applicable language was ambiguous because Congress did not directly speak to it, and if so, (2) whether the agency reasonably interpreted the application of the rule based on the record of decision.<sup>22</sup> Here, the court carefully walked through three methods of determining whether the Service maintained an adequate record and reasonably concluded that Wyoming's management plan would maintain wolf populations. First, it addressed the appellants' issue of the adequacy of a buffer in Wyoming's plan. Then it looked to the two issues raised by appellees to determine if the district court adequately granted summary judgment. Ultimately, the court found that the plan was adequate, which thereby lifted the ESA restrictions.<sup>23</sup>

#### A. Regulatory and Statutory Analysis

The court started with an analysis of the rules and the record, particularly, Wyoming's existing management plan.<sup>24</sup> Citing *Defenders of Wildlife v. Jewell*,<sup>25</sup> the court reasoned that the Service relied upon its experience with the management plans in Idaho and Montana, and that those plans also had non-legally binding terms to protect species.<sup>26</sup> As in

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17 *Id.*

18 *Id.*

19 *Id.* at 1082

20 *Id.*

21 *Id.* at 1082 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

22 *Id.*

23 *Id.* at 1093.

24 *Id.* at 1082.

25 *Defenders of Wildlife v Jewell*, 815 F.3d 1 (D.C. Cir. 2016)

26 *Defenders of Wildlife*, 849 F. 3d at 1079 (citing *Jewell*, 815 F.3d at 6-7).

*Jewell*, although these terms did not have the force of law, they were “crucial” terms landowners were willing to enter so that they would not be burdened by listing.<sup>27</sup> And because the Service had seen these plans operate in the adjacent states, it could reasonably believe that Wyoming would follow suit.<sup>28</sup> The precedent set forth in *Defenders of Wildlife* extended to the instant case, and the court ultimately found that the Service reasonably and adequately responded to concerns about the reliability of Wyoming’s management plan.<sup>29</sup>

Appellees then argued that Wyoming could not and would not maintain an adequate buffer in their plan.<sup>30</sup> The court determined that although the appellees disagreed with the Service’s conclusion that “Wyoming [could] be trusted to manage a buffer, that [was] a separate question.”<sup>31</sup> Instead, the court reasoned that the Rule could only be set aside if it was arbitrary, capricious, or an abuse of discretion not in accordance with the law.<sup>32</sup>

Appellees argued three more points. First, they argued that Wyoming’s lethal take statute failed to define the word “harassing.”<sup>33</sup> Next, they argued that the Service’s action was arbitrary for failing to ensure a regulatory commitment to suspend permits to maintain genetic connectivity.<sup>34</sup> Third, they argued that any buffer in the management plan would be “undermined” by Wyoming’s statute allowing for unlimited killing of wolves that damaged private property, incentivizing private landowners to bait and kill wolves.<sup>35</sup>

The court rejected all three arguments. First, it noted that even under a vague definition of “harassing,” Wyoming was legally bound to suspend permits compromising population minimums.<sup>36</sup> Next, the court looked through the record and found adequate evidence that “genetic health [was] strong,”<sup>37</sup> and Wyoming had other means of protecting genetic diversity.<sup>38</sup> Finally, the court determined that the threat of prosecution for baiting was adequate.<sup>39</sup> Similar private property protections existed in Montana and Idaho, in which wolf populations have

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27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* (citing *American Wildlands v. Kempthorne*, 530 F.3d 991 at 997 (citations omitted)).

33 *Id.* at 1086.

34 *Id.*

35 *Id.* at 1087 (citing Wyo. Stat. Ann. § 23-3-115 (2012)).

36 *Id.* at 1086.

37 *Id.*

38 *Id.*

39 *Id.* at 1088.

continued to grow.<sup>40</sup> The court's analysis then turned to the cross-appeal, and made findings based upon external genetic studies and the ESA.

*B. Determinations Drawn from External Studies*

Appellees first cross-appeal questioned the adequacy of the Service's determination that the genetic connectivity was not protected. The court pointed to two studies relied upon by the Service to determine that genetic connectivity is currently sufficient: the Jimenez Study conducted between 1992 and 2008 and the vonHolt study conducted between 1995 and 2004.<sup>41</sup> The court ultimately found that the Service satisfied the ESA standard that the Service rely upon the best scientific data available.<sup>42</sup>

The Jimenez Study assessed data from five radio-collared wolves that migrated into the Greater Yellowstone Area ("GYA").<sup>43</sup> The data showed the five wolves migrating into the area, with two successfully mating. The Service then inferred that, based on the Jimenez Study's estimate, 35% of migrants breed and that the Northern Rocky Mountain wolf population increased from 55 to more than 1,655 over the course of the study, that a large proportion of wolves had dispersed.<sup>44</sup> The vonHoldt Study simultaneously sampled genetic material of the Northern Rocky Mountain wolves between the time when the population was at 101 to when it had risen to 846.<sup>45</sup> The vonHoldt Study detected genetically effective dispersal among the three recovery areas and noted high levels of genetic variation and low levels of inbreeding.<sup>46</sup> The consensus was that it underestimated the number of effective migrants because only 30% of the population was sampled, and one paper went on to say that a co-author of the study, Daniel Stahler's, estimate was almost as low as half.<sup>47</sup>

Appellees contended that these two studies showed that the minimum requirement, that there be at least one effective migrant per generation, was not met, that much of the analysis was based on guesswork, and additional analysis was needed.<sup>48</sup> The court dismissed this argument stating that the Jimenez study alone could have satisfied the standard, and that the vonHoldt Study only reaffirmed the conclusions of the Jimenez study.<sup>49</sup>

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40 *Id.*

41 *Id.*

42 *Id.* at 1089 (citing 16 U.S.C. § 1533(b)(1)(A) (2012)).

43 *Id.* at 1088.

44 *Id.* at 1088, 89.

45 *Id.* at 1089.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

*C. Analysis Based on Range and Habitat Under the ESA*

Appellees challenged the Service's determination that the predator area in Wyoming's management plan was not a significant portion of the wolves' range, and was thus arbitrary.<sup>50</sup> The court cited Section 3 of the ESA, which defined an endangered species as one in danger of extinction throughout all or a significant portion of its range.<sup>51</sup> The court then continued to explore the implications of the Rule against the assertions of the appellees. Appellees argued that migrants would have to traverse the predator zone for genetic exchange, and that if they were killed it would have an adverse effect.<sup>52</sup> The court noted that the predator zone consisted of only 19% of the State's suitable habitat and (as of 2011) contained only 46 of 328 wolves in Wyoming.<sup>53</sup> The Service thus determined that even if every wolf in this area was killed, the remaining wolves would be sufficient to maintain a recovered population.<sup>54</sup>

The court finally looked to the challenged 2009 determination and concluded that the definition of "significant portion of its range" had changed, and that more recent scientific data had arisen that bolstered the Service's reliance on the vonHoldt and Jimenez Studies.<sup>55</sup>

#### IV. CONCLUSION

This decision consequentially aligns all three states in the Greater Yellowstone Area, and could allow for more interstate management programs of the gray wolf. The court noted that all three states have incentives to maintain greater-than-minimum populations of wolves as a means of avoiding federal reach, and therefore this could mitigate the concerns of Appellees. On the other hand, the court also addressed instances of "sleight of hand"<sup>56</sup> in how Wyoming chose to handle the delisting, so only time will tell.

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50 *Id.* at 1092.

51 *Id.* (citing 16 U.S.C. § 1532(6) (2012)).

52 *Id.*

53 *Id.* (citing Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 77 Fed. Reg. 55,530, 55,602 (Sept. 30, 2012)).

54 *Id.*

55 *Id.* at 1093.

56 *Id.* at 1085.