United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Director, U.S. Fish and Wildlife Service

From: Solicitor

Subject: U.S. Fish and Wildlife Service Authority under Section 4(c)(1) of the Endangered Species Act to Revise Lists of Endangered and Threatened Species to "Reflect Recent Determinations"

I. INTRODUCTION

On February 8, 2007, the U.S. Fish and Wildlife Service (FWS) promulgated a Final Rule that revised the listing of the gray wolf under the Endangered Species Act (ESA or the Act).[1] 72 Fed. Reg. 6052 (2007). In the Final Rule, FWS determined that the wolves within the western region of the Great Lakes were a "distinct population segment" (DPS) of gray wolves generally and that they were not an endangered or threatened species. *Id.* FWS therefore revised the listing of the gray wolf to reflect that determination, as it was required to do by section 4(c)(1) of the Act.[2]

In *Humane Soc'y of the United States v. Kempthorne*, No. 07-0677 (PLF), 2008 U.S. Dist. LEXIS 74495 (D.D.C. Sept. 29, 2008) (*Humane Society*), which challenged the Final Rule, the plaintiffs argued that the ESA does not "authorize FWS to simultaneously designate and delist DPSs within broader listings—that is, to 'carve out' healthy sub-populations of otherwise endangered or threatened species and remove from [them] the protections of the Act." *Id.* at *21. FWS argued that the Act gave it unambiguous authority to revise the listing of the gray wolf to reflect its determination about the western Great Lakes wolves.[3] *Id.* at *23.

The court concluded that the Act was ambiguous with respect to the following "precise question":

> [W]hether the ESA permits FWS to use the DPS tool to remove the protections of the statute from a healthy sub-population of a listed species, even if that sub-

[1] Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.* (1973).

[2] The ESA grants authority to the Secretary of the Interior to administer its provisions. Because the Secretary has delegated that authority to FWS with respect to all determinations made under section 4(a)(1), we will refer throughout this memorandum to the authority of FWS rather than to the authority of the Secretary.

[3] Although FWS made that general argument, it did not fully brief the issue of whether it had unambiguous authority to the court. Therefore, this Memorandum will examine this issue in greater detail.

population was neither designated as a DPS nor listed as endangered or threatened beforehand.[4]

Id. at *24. Because the court determined that the Final Rule was "based on FWS' erroneous conclusion that the ESA is unambiguous on this point," the court remanded "the Final Rule to FWS to permit the agency to address the ESA's ambiguity in light of its expertise, experience and insight into the ESA's objectives." *Id.* The court stated that "[w]hen an agency wrongly concludes that its interpretation is mandated by the statute at issue, a court will not impose its own interpretation of the statute. Rather, a court will vacate the agency's action so the agency can 'interpret the statutory language anew[,]'" in light of the ambiguities found by the court. *Id.* at *18.

This memorandum is the Department of the Interior's (Department's) response to the court's remand and will also inform future decision-making by the Department on these issues. While the Department acknowledges that the ESA is arguably ambiguous on the "precise question" posed by the court, it notes that the court's question does not accurately describe what FWS did in the Final Rule. What FWS actually did, under the terminology employed by the Act, was first to determine, pursuant to section 4(a)(1), that gray wolves in the western Great Lakes area constituted a DPS and that the DPS was neither endangered nor threatened,[5] and then to revise the list of endangered and threatened species, pursuant to section 4(c)(1), to reflect those determinations.[6] FWS did not delist a previously unlisted species; rather, it revised the existing listing of a species (the gray wolf in the lower 48 States) to reflect a determination that a part of that species (the Western Great Lakes DPS) was healthy enough that it no longer needed the ESA's protections.

As explained below, FWS had clear authority to make these determinations and to revise the list accordingly. Moreover, even if FWS's authority was not clear, FWS's interpretation of its authority to make determinations under section 4(a)(1) and to revise the endangered and

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[4] FWS often uses the term "designation" as shorthand for the process of determining whether a group of organisms qualifies as a DPS under the discreteness and significance prongs of FWS's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy or Policy). *See* 61 Fed. Reg. 4722 (Feb. 7, 1996). "Designation" of a DPS does not mean that FWS necessarily adds the DPS to the lists of endangered and threatened species; rather, it refers to the identification of a DPS that may or may not be endangered or threatened. Once "designated," FWS must then revise the lists of endangered and threatened species, if appropriate, to reflect the DPS's conservation status by adding it to the lists, uplisting or downlisting it, or removing it from the lists. FWS also interchangeably uses the terms "identification," "recognize," and "establish" to describe the same process as "designation."

[5] This Memorandum uses "endangered" and "threatened" as shorthand in referring to determinations made in accordance with the Act's definitions of "endangered species" and "threatened species." *See* 16 U.S.C. § 1532(6), (20).

[6] The lists of endangered and threatened species are reproduced at 50 C.F.R. §§ 17.11(h), 17.12(h). The Code of Federal Regulations includes two lists, one for "endangered and threatened wildlife," *id.* at § 17.11, and the other for "endangered and threatened plants," *id.* at § 17.11. The separate lists of endangered and threatened species contemplated by section 4(c)(1) of the Act are merged in the two lists reproduced in the Code with the list of wildlife and the list of plants each containing a "status" column indicating whether the listed species is an "endangered species" or a "threatened species."

threatened species list to reflect those determinations under section 4(c)(1) is reasonable and fully consistent with the ESA's text, structure, legislative history, relevant judicial interpretations, and policy objectives.

II. FWS HAD CLEAR AUTHORITY TO IDENTIFY THE WESTERN GREAT LAKES GRAY WOLF DPS, DETERMINE ITS CONSERVATION STATUS UNDER SECTION 4(A)(1), AND REVISE THE GRAY WOLF LISTING UNDER SECTION 4(C)(1) TO REFLECT THAT DETERMINATION

The ESA authorizes and requires FWS to determine whether a "species" is "endangered" or "threatened" within the meaning of the Act. 16 U.S.C. § 1533(a)(1). This is sometimes referred to as a determination of its conservation status. FWS may make such a determination on its own initiative or in response to a petition by a third party. *Id.* § 1533(b)(3). If FWS determines that a species is "endangered" or "threatened," it must add that species to the published lists of all such species, *id.* § 1533(c)(1), and the species is thereafter subject to the protections provided by the Act. Once a species is determined to no longer be "endangered" or "threatened," and is removed from the lists, it is no longer subject to the protections of the Act. *See id.* § 1533(f), (g). The Act contains only one provision that authorizes FWS to revise its lists. That provision is section 4(c)(1). It provides that FWS must, "from time to time," revise the lists "to reflect recent determinations, designations, and revisions" made in the accordance with the provisions of the Act. *Id.* § 1533(c)(1). In essence, this provision requires FWS to keep the lists up to date as it makes determinations about the conservation status of species. A second provision, found in section 4(c)(2), is also relevant to FWS's list revision authority, but does not by itself authorize FWS to revise its lists. It requires FWS, at least once every five years, to conduct a review of all species that are on the lists to determine whether to remove them from the lists or have their conservation status on the lists changed. *Id.* § 1533(c)(2). If changes in the lists are warranted as a result of the review, they are made pursuant to section 4(c)(1).

"Species" is a defined term under the Act. The term "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). Thus, for purposes of the Act, a "distinct population segment," or DPS, of a larger group of organisms that is itself a species or subspecies is also a "species." There is no set of special rules in the ESA for DPSs. The rules that govern a determination of whether a DPS is "endangered" or "threatened," the listing of a DPS, and any list revision affecting a DPS, are the same for a DPS as for any other "species."

What FWS did in the Final Rule is as follows: On its own initiative, and in accordance with the provisions of section 4(a)(1), FWS determined that the gray wolves in the western region of the Great Lakes constituted a DPS—and therefore a "species" as defined by the Act—and that they were not endangered or threatened. Having made that determination, it then revised the listing of gray wolves, pursuant to the direction in section 4(c)(1), to reflect that determination, as it was required to do.

The court in *Humane Society* used a two-step analysis to examine FWS's contention that it had clear authority to revise the gray wolf listing. First, the court examined whether FWS had the authority under section 4(a)(1) to determine that the western Great Lakes gray wolves constituted

a DPS and then to determine whether they were endangered or threatened. *Humane Society*, 2008 U.S. Dist. LEXIS 74495, at *27. Section 4(a)(1) states, in relevant part, that the "Secretary shall by regulation ... determine whether any species is an endangered species or a threatened species because of any of" five listed factors. 16 U.S.C. § 1533(a)(1). The court concluded that section 4(a)(1) "could be read to mean ... that *when* it is appropriate to evaluate and/or revise the status of 'any species,' *then* the agency" can make a determination about the conservation status of the species. *Humane Society*, 2008 U.S. Dist. LEXIS 74495, at *27–28. We respectfully reject the court's conclusion because we can find no textual support for it. There is nothing in section 4(a)(1), or in any other provision of the Act, that suggests FWS must somehow pre-screen a group of organisms before undertaking the five-factor analysis of their conservation status set forth in section 4(a)(1). Nor are there any criteria provided in the Act on which FWS could base such a pre-screening exercise. All that section 4(a)(1) says is that FWS "shall ... determine whether any species is an endangered species or a threatened species because of any" of five listed factors. There is no qualifying or limiting language attached to that grant of authority to FWS. It does not say that FWS shall undertake such a five-factor evaluation only in appropriate (and undefined) circumstances. In allocating its resources, FWS must necessarily choose what determinations to make and in what order, but the Act does not in any way limit FWS's discretion in this regard.

The court's conclusion about section 4(a)(1) was the foundation for the next step of its analysis. Because that conclusion was in error, there is no basis for the court's conclusion in the second step of its analysis. In other words, if FWS had the authority to make the status determination, there is no question that it had the authority, indeed the obligation, under section 4(c)(1) to revise the list to reflect the determination.

Having found, in the first step of its analysis, that there might be circumstances in which a section 4(a)(1) evaluation should not be undertaken, the court searched the Act to see if it could determine what those circumstances might be. It concluded that section 4(c)(2)(B), which directs FWS to determine at least every five years whether a species should be removed from the list, "strongly suggests—consistent with common usage—that the *listing* of any species (such as the western Great Lakes DPS) is a precondition to the *delisting* of that species." *Id.* at *29. Because the court viewed FWS as having engaged in a delisting of the Western Great Lakes DPS, its conclusion about the language in 4(c)(2)(B) meant that there was an ambiguity in the Act that had to be resolved, and that FWS's assertion that it had clear authority for its action could not be sustained.[7]

We acknowledge that FWS may bear some responsibility for the apparent confusion on what it was doing in the Final Rule. FWS did describe its action in the Final Rule as a "delisting." Keying on that description, the court made the reasonable observation that, logically, for there to be a delisting there must first be a listing. *See id.* at *29. What follows from that observation, according to the court, is that FWS lacked clear authority to revise the gray wolf listing. *See id.*

[7] We discuss below why the court's reliance on section 4(c)(2)(B) is misplaced, as FWS was not acting under the authority of that section in promulgating the Final Rule.

However, FWS was not, in fact, "delisting" the Western Great Lakes DPS of gray wolves in the literal sense of the term suggested by the court.[8]

Instead, in promulgating the Final Rule, FWS acted under the authority granted it in sections 4(a)(1) and 4(c)(1). Section 4(c)(1) states that FWS "shall from time to time revise [its existing lists] to reflect recent determinations, designations, and revisions made in accordance" with the provisions of the Act. 16 U.S.C. § 1533(c)(1). The "determinations" referred to are the determinations made under section 4(a)(1) as to whether a species is endangered or threatened. In this case, having made a determination under section 4(a)(1) that the gray wolves in the western region of the Great Lakes were a DPS and that they were not endangered or threatened, FWS clearly had the authority and the obligation to revise its existing listing of the gray wolf "to reflect [that] recent determination[]." *Id.* It certainly was not free to withhold its determination from the public. Having made the determination, FWS was required to publish it. The plain language of section 4(c)(1) compels that interpretation. In contrast, the argument of plaintiffs in *Humane Society* has the effect of reading section 4(c)(1) as follows: FWS shall from time to time revise its list to reflect recent determinations, *unless* the determination is that a group of organisms that is part of a listed species is a DPS and is not endangered or threatened. But, as noted above, the Act contains no special set of rules for making DPS determinations or for revising the list to reflect those determinations.

The court also found that the Act "resists FWS' interpretation in other ways as well." *Humane Society*, 2008 U.S. Dist. LEXIS 74495, at *30. It noted that "Congress' definition of 'species' does not encompass DPSs of all organisms; rather, it includes only DPSs of 'vertebrate fish or wildlife.'" *Id.* The court then asserted that from this "definitional choice," it was not "implausible" to conclude that "Congress [had] expressed an intent—or at least revealed an assumption—that the DPS tool would be used only to *list* [DPSs] in the first instance," and that, unless a DPS was first listed, it could not be delisted or removed from the listing of the broader species of which it was a part. *Id.* at *31. We discuss below why, even if this were a plausible interpretation of the uses to which FWS can apply the DPS tool, it is not the only reasonable interpretation of Congress's intent, and is therefore not an interpretation that FWS must adopt.

III. THE FWS'S INTERPRETATION OF ITS LIST REVISION AUTHORITY UNDER SECTIONS 4(A)(1) AND 4(C)(1) IS REASONABLE

Even assuming that the plain language of sections 4(a)(1) and 4(c)(1) does not expressly authorize FWS to revise the gray wolf species listing, FWS's interpretation of those sections is

[8] The term "delist" is not defined, or even used, in the ESA. The implementing regulations do use the term extensively. *See, e.g.*, 50 C.F.R. § 424.11(d). Although the term could be interpreted merely as an action which deletes an entry from the lists of threatened and endangered species, and thus apply only if the entirety of a listed entity is removed, FWS does not use the term only in that sense. As used by FWS, "delisting" applies broadly to *any* action that revises the lists either to remove an already-listed entity from the appropriate list in its entirety, *or* to reduce the geographic or taxonomic scope of a listing to exclude a group of organisms previously included as part of an already-listed entity (as was the case with the Western Great Lakes DPS of gray wolves). The same reasoning applies to revisions to the lists that "uplist" and "downlist" species. For example, FWS may uplist to endangered status the entirety of a species already listed as threatened, or it may identify a part of that species (a subspecies or DPS) that now meets the definition of "endangered species" and uplist just that part of the species.

still entitled to judicial deference if it is a permissible construction of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–45 (1984) (*Chevron*). *Chevron* requires a court to accept an agency's reasonable construction of a statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Because the court concluded that the Act did not plainly grant FWS the authority to revise the gray wolf species listing, the court asked FWS to address how its interpretation: (1) conforms to the text, structure, and legislative history of the ESA; (2) is consistent with judicial interpretations; (3) serves the ESA's myriad policy objectives; and (4) could undermine any of those policy objectives. *Humane Society*, 2008 U.S. Dist. LEXIS 74495, at *40–41. We will specifically address the court's first, third, and fourth questions and discuss relevant judicial interpretations where appropriate.

A. The Text and Structure of the Act Support FWS's Interpretation of Its List Revision Authority

The text and structure of the Act support FWS's ability to revise a species listing to reflect the fact that a DPS of that species is no longer endangered or threatened. Neither of the two provisions cited by the court in *Humane Society*, nor any other of the Act's provisions, renders FWS's interpretation unreasonable.

1. Section 4(c)(2) Does Not Render FWS's Interpretation Unreasonable

As explained above, a plain reading of the Act as a whole demonstrates that section 4(c)(2) does not limit FWS's discretion to revise the lists of endangered and threatened species at any time to reflect determinations made under section 4(a)(1). Instead, reading section 4(c)(2) in the context of the Act as a whole supports FWS's interpretation in several ways.

First, FWS's discretion to change the endangered or threatened status of a species is not limited in context to the five-year reviews contemplated by section 4(c)(2). The purpose of section 4(c)(2) is to require the review of all listed species at least once every five years to determine if a change in status is necessary for each reviewed species. It would be illogical to interpret this requirement to preclude FWS from changing the status of a species at any other time, particularly given section 4(c)(1), which authorizes FWS to revise the lists of endangered and threatened species to reflect recent determinations made under section 4(a)(1). Therefore, the ESA clearly authorizes conservation status changes in cases where section 4(c)(2) is never triggered.[9]

[9] Even if one were to assume that section 4(c)(2) somehow prevents simultaneous identification and removal of recovered DPSs from broader species listings, FWS could achieve the same result by proposing to delist the entire species if it is no longer endangered or threatened over its entire range and simultaneously proposing to list any DPS or significant portion of its range where that species still remains endangered or threatened. Section 4(a)(1) of the Act, even under the court's interpretation, would allow FWS to delist the entity listed: the gray wolf species. Section 4(a)(1) and the definitions of "endangered species" and "threatened species" would require FWS to ascertain during such a delisting whether any significant portion of the gray wolf's range remained endangered or threatened and to keep such portions listed if so. FWS would also have the discretion under section 4(a)(1), the section 3(16) definition of "species," and the DPS Policy to identify and propose the listing of any DPS within that range that remained endangered or threatened.

Second, reading section 4(c)(2) to require the separate listing of a DPS for some unspecified period of time before it can be removed from the broader species listing upon recovery leads to absurd results in the case of a recovered DPS of a currently-listed species (*i.e.*, how can FWS continue to list a "species" that no longer meets the criteria for listing?). This untenable situation violates the canon of statutory construction against construing a statute to produce absurd or futile results, *see Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004). Further, reading section 4(c)(2) to require separately listing a DPS for some period of time before removal from the broader species listing could frustrate the petition management requirements of the ESA, *see* 15 U.S.C. § 1533(b)(3), by requiring FWS to reject any petition requesting removal of a recovered DPS from a broader species listing.

Finally, even if one could read section 4(c)(2) as somehow requiring FWS to initially list a DPS before later removing it when recovered, FWS impliedly lists any DPSs that are part of a larger species or subspecies listing. In practice, FWS lists the largest entity for which the conservation status is the same across its range and does not separately list any included DPSs that have the same status. If FWS lists an entire species, or a significant portion thereof, as endangered, it may be effectively listing several smaller and otherwise separately-listable entities within the range of that species (subspecies, DPSs, or significant portions of its range).[10] Therefore, when identifying and removing a DPS from a broader species listing, FWS is not identifying and delisting a new DPS, it is separately recognizing an already-listed entity for the first time because it now has a different conservation status than the whole.

The D.C. district court in *Humane Society*, however, reasoned that section 4(a)(1) may still require individual analysis of the threat factors for each DPS or significant portion of its range even if the species has the same status throughout its range. *See Humane Society*, 2008 U.S. Dist. LEXIS 74495, at *29, n.10. Despite this statement, the court also noted that the implied inclusion of any valid DPSs within the range of a species listed at the taxonomic level "may be a permissible reading of the statute." *Id.* As to the latter statement, the court is correct. The ESA does not require FWS to separately list populations when listing larger taxonomic entities that have the same conservation status merely to preserve the ability to separately remove them at a later date.

Preventing the removal of healthy DPSs could also prompt FWS to slow down the listing process for those species FWS has discretion to review under section 4(a)(1). If one reads the Act to require that FWS identify and list DPSs as separate "species" in the first instance, FWS may consume valuable time analyzing individual DPSs of a species that may be critically imperiled range-wide for fear that it could not later remove DPSs of that species should they recover sooner than the whole. One could also consider listing DPSs of a species with the same conservation status redundant, which would violate the canon of statutory construction to read

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[10] This view is supported by FWS's regulations:

> The listing of a particular taxon includes all lower taxonomic units. For example, the genus *Hylobates* (gibbons) is listed as Endangered throughout its entire range (China, India, and SE Asia); consequently, all species, subspecies, *and populations* of that genus are considered listed as Endangered for the purposes of the Act.

50 C.F.R § 17.11(g) (second emphasis added).

statutes to avoid redundancy. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). Finally, the congressional committee recommendation suggesting that FWS use DPSs "sparingly" counsels against a practice of separately listing DPSs of a larger taxon if they all have the same conservation status. *Cf. Friends of the Wild Swan v. U.S. Fish & Wildlife Serv.*, 12 F. Supp. 2d 1121, 1134 (D. Or. 1997) (holding that FWS must first look to the species' entire range to determine whether or not the species is endangered or threatened before examining individual DPSs).

2. The Limitation of the DPS Language to Vertebrates Does Not Compel a Conclusion that Congress Intended FWS to Apply the DPS Language Only to List Species in the First Instance

The limitation of the DPS language to vertebrate species does not undermine FWS's reasonable interpretation of the Act to authorize the removal of healthy DPSs from broader species listings.

The court in *Humane Society* referenced plaintiffs' argument that the limitation of the DPS tool to species that it deemed most valuable somehow evinced a congressional intent that the DPS language should only be used to list species in the first instance. *Humane Society*, 2008 U.S. Dist. LEXIS 74495, at *31. But, as explained above, that argument is illogical and finds no support in the legislative history of the Act.[11] While Congress's limitation of the DPS language to vertebrates may express a preference for protecting vertebrate species on a finer scale, allowing FWS to identify and remove a recovered DPS from a broader species listing would not undercut that intent.

The court also correctly noted that Congress may have excluded plant and invertebrate DPSs from the definition of species for other reasons (*e.g.*, identifying and managing distinct insect and plant populations may be "unwieldy" or perhaps Congress considered populations of non-vertebrates to be less important or significant). *Id.* at *31. Moreover, the reasons for including the DPS language are unclear from the legislative history of the 1978 amendments, especially when one considers that Congress left in place FWS's ability to specify as threatened or endangered a "significant portion" of the range of any "species" (*i.e.*, why limit FWS's ability to list populations of a species or subspecies when FWS retains the ability to list portions of the range of the same species or subspecies?). *See generally* Solicitor's Opinion, M-37013 (March 16, 2007), *available at* http://www.doi.gov/solicitor/ opinions.html. Therefore, any hypothesis of congressional intent—beyond the fact that Congress wanted to narrow the circumstances in which FWS could list a population of a species—is purely speculative. Plaintiffs' argument does not, therefore, preclude FWS's interpretation.

Moreover, FWS's interpretation is consistent with FWS's Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy or Policy). 61 Fed. Reg. 4722 (Feb. 7, 1996). The DPS Policy specifically contemplates the removal of healthy DPSs from the lists of endangered and threatened species.

[11] Section II explains why the plaintiffs' argument is illogical and section III.B.1 explains the legislative history referencing the DPS language.

The DPS Policy sets forth a two-step process: first, the Policy requires FWS to determine that a vertebrate population is discrete and significant; and second, if it passes these tests, the Policy requires a conservation-status determination to determine if it is endangered or threatened. *Id.* The conservation-status evaluation expressly allows FWS to "assign different classifications to different DPSs of the same vertebrate taxon." *Id.* at 4725. Therefore, because the status determination is part of the DPS identification and list revision process, the removal of a recovered DPS from a broader vertebrate taxon listing is perfectly consistent with the Policy. FWS subjected the DPS Policy to public review and federal courts have upheld the policy as a reasonable interpretation of ambiguous ESA language. *See, e.g., Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136 (9th Cir. 2007) (western gray squirrel).[12]

The Oregon district court also agreed that the DPS Policy allows conservation status changes for DPSs of broader-listed species and recited the following as examples: "if a distinct and significant population of an unlisted species is struggling while other populations are faring well, FWS may identify the struggling population as a DPS and list it as endangered. Likewise, FWS can downlist a DPS if that discrete and significant population is no longer endangered." *Defenders of Wildlife v. Sec'y, U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156, 1169 (D. Or. 2005) (reviewing the downlisting of an Eastern DPS and a Western DPS of the gray wolf).[13] Though the court did not expressly conclude that FWS may remove a recovered DPS of an already-listed species under the Act or the DPS Policy, the court's conclusion that it may downlist such a DPS is in tension with the court's holding in *Humane Society*.[14]

3. The ESA's Other Relevant Provisions Do Not Undermine FWS's Interpretation

Several other ESA provisions specifically or impliedly reference removal of healthy species from ESA protection including the following provisions: recovery planning in section 4(f); post-delisting monitoring in section 4(g); federal-State cooperation in conserving species under section 6; and designation of experimental populations in section 10(j). FWS's interpretation is consistent with these provisions.

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[12] FWS's interpretation does not reflect a change in position with respect to how FWS assesses the status of DPSs because it is in harmony with the requirements of the DPS Policy. Further, FWS also used its authority to remove the recovered Northern Rocky Mountain DPS from the gray wolf species listing, 73 Fed. Reg. 10,514 (Feb. 27, 2008), and the Greater Yellowstone Area DPS from the grizzly bear species listing, 72 Fed. Reg. 14,866 (Mar. 29, 2007).

[13] The court ultimately found that FWS's determination to downlist the Rocky Mountain DPS of the gray wolf improperly applied the DPS Policy and the ESA because the DPS designation incorporated geographic areas in which the wolf had not sufficiently recovered to justify the downlisting. *Defenders of Wildlife v. Sec'y, U.S. Dept. of the Interior*, 354 F. Supp. 2d at 1172-73.

[14] One other court has reviewed a similar removal of a DPS from a broader species listing and did not find it necessary to address the reasonableness of FWS's interpretation. *See Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008). FWS identified and removed the Northern Rocky Mountain DPS of the gray wolf from the broader gray wolf listing. *See* 72 Fed. Reg. 6106 (Feb. 8, 2007). The court appeared to read the ESA to authorize the removal, but enjoined the final rule because FWS had removed the DPS before an important goal of the recovery plan had been achieved and because the State of Wyoming's management plan was insufficient to justify removing ESA protections for wolves within that State. *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d at 1168, 1172.

a. Recovery Plan Requirements

Section 4(f) sets forth the requirements for recovery plans of listed species and requires the inclusion in each plan of "site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species" and "objective, measurable criteria which, when met, would result in a determination ... that the species be removed from the list." 16 U.S.C. § 1533(f)(1)(B). These requirements emphasize the importance of local, site-specific recovery actions.

In practice, FWS often divides recovery plan conservation efforts for wide-ranging species such as the wolf into recovery units. These recovery units often correlate to major populations of the species, which may also qualify as DPSs. If the recovery of the species proceeds more rapidly in one particular unit due to more effective conservation efforts, or other reasons, FWS's interpretation allows it to identify that population and assess whether it qualifies as a DPS and, if so, remove it from the broader species listing if it is no longer endangered or threatened. For example, FWS removed the Greater Yellowstone Area population of the grizzly bear, which FWS covered in a separate section of the recovery plan for the entire listed species. *See* 72 Fed. Reg. 14,866 (Mar. 29, 2007). As with the Western Great Lakes DPS of the gray wolf, FWS worked with affected States, other federal agencies, and environmental and other non-governmental organizations for more than 10 years to develop the conditions and protections necessary to recover and remove that grizzly bear population from the grizzly bear species listing. *See id.*

Moreover, section 4(f) strongly suggests that FWS should remove the Act's protections from a DPS or subspecies when objective, measurable criteria set forth in a recovery plan are met and after an analysis of the section 4(a)(1) listing criteria. FWS's interpretation allows it to remove healthy DPSs from within the range of a listed species while focusing its time and limited recovery funding on recovery efforts and recovery plan goals in other areas of the species' range where conservation efforts have been inadequate or less effective.

b. Post-Delisting Monitoring Plan Requirements[15]

Section 4(g) requires FWS to monitor for at least five years any species that has "been removed from either of the lists published under subsection (c)." 16 U.S.C. § 1533(g). At first blush, this requirement appears to reinforce an argument that section 4(c)(2) requires FWS to first separately list a DPS before it can later remove it when recovered. This is not, however, the proper reading of section 4(g). First, section 4(g) cross-references section 4(c) in its entirety, not section 4(c)(2) alone. Thus, any revision to the lists pursuant to FWS's authority under section 4(c)(1) to reflect a determination under section 4(a)(1) to remove a species would trigger the monitoring requirement under section 4(g). Second, "removed" need not and should not be

[15] FWS uses the term "post-*delisting* monitoring" when referring to the monitoring requirements of section 4(g), when section 4(g) in fact applies in a broader sense to all actions that remove any entity that qualifies as a species from the lists, including removal of a recovered DPS from a broader species listing. *See, e.g.*, 68 Fed. Reg. 67,697 (Dec. 3, 2003) ("Notice of Availability of the Post-Delisting Monitoring Plan for the American Peregrine Falcon"). FWS uses the term "delisting" as a term of art representing the broad spectrum of activities that fall under the umbrella of removing species from the list of endangered and threatened species as explained in note 8.

interpreted so narrowly as to support the argument that a species be separately listed prior to its removal from the lists. Such a narrow reading is not consistent with the fact that, when listing broad taxa such as the gray wolf, the species listing necessarily includes populations that are not separately identified until there is a need to change their status. When removing a recovered DPS, FWS alters the listing for the wider-ranging species to reflect that its range no longer includes the DPS that is being removed from the list. Therefore, FWS effectively removes the DPS from the overall species listing, which triggers section 4(g)'s requirement to monitor the DPS in cooperation with the States to ensure that it remains recovered.

c. Federal-State Cooperation under Sections 4 and 6

Section 6 sets forth several provisions whereby the federal government and States cooperate to protect and conserve listed species. *Id.* § 1535. Section 6(a) requires that FWS "cooperate to the maximum extent practicable with the States" in carrying out the Act's programs. Sections 6(b) and 6(c) establish the requirements for management and cooperative agreements designed to conserve (*i.e.*, recover) listed species and encourage cooperation in recovering species between State and federal agencies through such agreements and through the flexibility incorporated into the process for revising the list of endangered and threatened species. FWS's interpretation provides a crucial tool in fostering the cooperation between federal and State governments anticipated by the provisions of section 6. Revising an endangered or threatened species listing by downlisting or removing DPSs occurring in States that have worked with the government to successfully conserve them rewards those States by returning management authority over that species and improving federal-State cooperation in managing vulnerable species. Thus, section 6 provides additional evidence that FWS's interpretation is reasonable.

Further, State cooperation plays a large role in addressing the section 4(a)(1)(D) threat factor pertaining to the adequacy of existing regulatory mechanisms. *Id.* § 1533(a)(1)(D). Even if FWS finds that all other threat factors have been mitigated to the point where a species has recovered, in most situations, State cooperation is essential to ensure that existing regulatory mechanisms adequately assure the species' current and continued recovery, which is required before FWS may remove that species from the lists. In this way, section 4(a)(1)(D) encourages States to cooperate with FWS by revising their legal mechanisms to aid both in the conservation of listed species and their continued recovery after removal of the ESA's protections. Therefore, this provision encourages federal-State cooperation, is consistent with section 6, and reinforces FWS's interpretation in the same manner.

d. Experimental Populations Provisions

State cooperation is also crucial for the introduction of experimental populations under section 10(j). *Id.* § 1539(j). FWS may release experimental populations outside the current range of the species to improve that species' recovery potential. It is critical that FWS be able to downlist or remove a recovered experimental population to encourage State participation in reintroduction programs. If FWS cannot thereafter remove that population from the broader species listing and if it later becomes a DPS or part of a DPS that is no longer essential to species recovery, the States' incentive to work with FWS to introduce such populations is much reduced.

In conclusion, FWS's interpretation that the ESA authorizes the removal of recovered DPSs from broader-listed species is a reasonable interpretation of the Act's provisions and no specific provision renders that interpretation unreasonable or arbitrary or capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 706.

B. The Legislative History Demonstrates that FWS's Interpretation is Consistent with the Goals and Policies of the Act

There is little in the legislative history of the Act that directly and contemporaneously explains or discusses the addition of the DPS language through the 1978 ESA amendments. However, a congressional committee belatedly discussed the import and function of the DPS language in 1979. Further, the 1973 legislative history is informative regarding the context of the ESA's extension of protection to populations of species within the overarching policies and purposes of the Act, particularly in relation to delegating sufficient listing flexibility to FWS and federal-State cooperation.

1. 1978 and 1979

Congress added the DPS language as part of the 1978 Amendments to the Act. The new DPS language amended the previous definition of "species," which had included the phrase "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature" (proto-DPS language). Pub. L. No. 93-205 § 3, 87 Stat. 885 (1973).

Congress amended the 1973 definition to expressly exclude from the "species" definition both (1) taxonomic categories below the subspecies level and (2) distinct populations of non-vertebrates. H.R. CONF. REP. NO. 95-1804, at 17 (1978).[16] At the same time, Congress rejected an amendment that proposed limiting the 1973 "species" definition to taxonomic species, which would have eliminated subspecies and populations. 124 CONG. REC. 38,155 (Oct. 14, 1978). This amendment would have removed FWS's flexibility to individually list as a "species" any subspecies or population that has a different conservation status than the taxonomic species to which it belongs. In opposing the amendment, Representative Dingell noted that it would require the listing of the bald eagle in Alaska, even though the Secretary[17] had determined that the eagle was not endangered or threatened there, and surmised that the alligator would also have

[16] There is no express basis in the legislative history for the plaintiffs' proposal quoted by the court in *Humane Society* that Congress included the DPS language primarily to increase vertebrate species protection. 2008 U.S. Dist. LEXIS 74495 at *31. Plaintiffs cite to no legislative history as the basis for their position. Instead, they cite to a law review article, which does not even support plaintiffs' main proposal; rather it claimed that Congress added the DPS language in response to the controversy surrounding the protection of non-charismatic populations of species and the potential cost and impracticality of protecting insect populations. *See* Katherine Hausrath, *The Designation of "Distinct Populations Segments" under the Endangered Species Act in Light of Nat'l Ass'n of Homebuilders v. Norton*, 80 CHI-KENT L. REV. 449, 455–6 (2005). Instead, this statement suggests that Congress was more interested in decreasing ESA protection of non-vertebrates than vice versa. In any case, the law review article does not cite to any legislative history for these propositions either. The article merely cites to a 2004 email between two college professors and is therefore of little weight. *Id.* at notes 58–59.

[17] The ESA's legislative history generally refers to the authority of the Secretary to implement the Act's provisions, which the Secretary has since delegated to FWS as explained in note 2.

to be listed throughout its range, thereby preempting State management of hunting over the part of its range where it was not then listed. *Id.* The 1978 legislative history provides no further window into the congressional thought process behind amending the "species" definition to include the DPS language.

Congress also considered amending the definition of "species" in 1979, but chose not to do so. In response to a General Accounting Office Report advocating the removal of the new DPS language from the Act in favor of relying on the significant portion of its range language contained within the definitions of "endangered species" and "threatened species" for partial species listings, Congress chose to leave the DPS language in place. A Senate Report stated that "there may be instances in which FWS should provide for different levels of protection for populations of the same species," but also cautioned FWS "to use the ability to list populations sparingly and only when the biological evidence indicates that such action is warranted." S. REP. NO. 96-151 (May 15, 1979).

The history behind the incorporation of the DPS language into the Act weighs neither for nor against FWS's specific interpretation that the Act permits the removal of recovered DPSs from broader species listings. However, though the 1979 Senate Report is of limited use because it is not contemporaneous with the addition of the DPS language, it reflects Congress's intent that the ESA should continue to authorize the separate treatment of populations or portions of a species' range that differ in conservation status with the larger taxonomic unit to which they belong. Conversely, this history nowhere demonstrates that Congress intended to restrict FWS from revising the endangered and threatened species lists to remove recovered DPSs.

2. 1973

The 1973 Act's definition of "species" did not refer to "distinct population segments," but did permit listing groups of organisms below the taxonomic level of subspecies. Hence, the legislative history of the 1973 Act provides important context for the congressional intent behind protecting such subgroups under the Act.

Congress discussed two important policy objectives that shed light on the inclusion of groups of organisms below the subspecies taxonomic level for protection under the Act at some length in the 1973 legislative history. First, Congress wanted to give FWS sufficient flexibility in listing species to meet the varying policy goals of the Act, particularly protection and recovery. Second, Congress was clearly concerned with the level of federal preemption of the traditional State role of wildlife management required by the Act and intended that management responsibility should be returned to the States upon recovery of a listed species.

a. Listing Flexibility

Several excerpts from the 1973 legislative history demonstrate Congress's intent to delegate maximum listing flexibility to FWS both to improve species conservation and survival and to prevent unnecessary regulatory intrusion.

First, Congress intended that FWS should have sufficient discretion in "listing and delisting" species to provide "present protection to those species which are either in present danger of extinction or likely within the foreseeable future to become so endangered." S. REP. NO. 93-307,

at 3 (1973). This statement indicates Congress's concern that the endangered species legislation in effect at the time required listing species at the taxonomic level throughout their range with no flexibility to exclude local areas or populations where the species may be doing well. As an example, Senator Tunney stated that:

> Under existing law, a species must be declared 'endangered' even if in a certain portion of its range, the species has experienced a population boom, or is otherwise threatening to destroy the life support capacity of its habitat. Such a broad listing prevents local authorities from taking steps to insure healthy population levels.

119 CONG. REC. 25,669 (July 24, 1973) (statement of Senator Tunney).

To rectify this perceived shortcoming, Congress included provisions in the ESA, including the proto-DPS language, designed to require federal protection in areas where species are actually in danger of extinction while avoiding federal preemption of successful local conservation efforts.

The floor debate and hearings for the various endangered species bills presented in 1973 contain numerous examples demonstrating Congress's concern that species should only be protected where necessary, whether by authorizing FWS to list vertebrate populations of species or subspecies or to list significant portions of a species' range. *See, e.g.*, 119 CONG. REC. 25,669 (July 24, 1973) (statement of Senator Tunney explaining that under the ESA, the Secretary would have the discretion to list a species as threatened or remove it from the list in States where it is overpopulated while protecting it in States where it is threatened with extinction); 119 CONG. REC. 42,912 (Dec. 20, 1973) (colloquy between Representatives Bergland and Dingell explaining that wolves may be listed in all States except Minnesota).

The 1973 legislative history reflects Congress's concern that the ESA should grant FWS sufficient flexibility to list species only where they need the Act's protections. FWS's authority to remove recovered DPSs from broader species listings is not only consistent with this legislative intent, it realizes that intent by providing an important and necessary tool to ensure that the restrictions of the Act are not applied in areas where a species is not endangered or threatened.

b. Federal-State Cooperation

Congress included section 6 of the Act authorizing federal funding and cooperation between federal and State governments through several federal-State programs to assuage concerns over the federal preemption of State wildlife management authority (take prohibitions in previous endangered species statutes had been limited to National Wildlife Refuges and trade through the Lacey Act).

Congress declared that a major purpose of the Act was to promote cooperative management between the federal government and the States. *See* S. REP. NO. 93-307, at 1 (1973). This priority was also reflected in statements by Senator Tunney—section 6 is "perhaps the most important section" of the ESA, 119 CONG. REC. 25,668 (July 24, 1973, statement of Senator Tunney)—and Senator Stevens—section 6 is the ESA's "major backbone," 119 CONG. REC. 25,670 (July 24, 1973, statement of Senator Stevens).

A Senate report succinctly summarized the federal-State relationship Congress intended to create in the statute stating that:

> While the Federal Government should protect such species where States have failed to meet minimum Federal standards, it should not pre-empt efficient programs. Instead, it should encourage these [State programs], and aid in the extension or establishment of others, to facilitate management by granting regulatory authority and making available financial assistance to approved schemes. The reported bill is designed to meet these requirements.

S. REP. NO. 93-307, at 3 (1973).

The Conference Report for the 1973 Act reflected the same priorities:

> It should be noted that the successful development of an endangered species program will ultimately depend on a good working arrangement between the federal agencies, which have broad policy perspective and authority, and the state agencies, which have the physical facilities and the personnel to see that state and federal endangered species policies are properly executed.

H.R. CONF. REP. NO. 93-740, at 26 (1973).

More specifically, the following passage from a House committee hearing reflects a concern that a federal statute should not unnecessarily preempt effective State management programs demonstrated to protect species, particularly when those State programs are sufficient to fully recover species:

> Mr. Casey: ... Mr. Chairman, this record will stand close examination, and we just do not concur with the timber wolf being placed on the endangered species list. It is not endangered in Minnesota.
>
> Mr. Breaux: That is a good point, and I sympathize with you and point out that there is another provision of the bill which would allow the Secretary to designate the portion of the habitat or range of an endangered species.
>
> In other words, he might be able, under the law as I read it, to designate one State in which the timber wolf is indeed endangered, and maybe because of good sound management practices in your State he would designate it as not an endangered species as far as your State is concerned.
>
> * * *
>
> Mr. Breaux: And the problem that bothers me, and I agree that the States should have the primary and first responsibility in determining the management procedure for management of a species that is located within the State's boundaries, but what do we do from a national level with the States that do not have a good management practice.
>
> What do we do with States that have a bounty on the animal that is on the endangered species list? The States with good management practices are having to pay the penalty for the States that are not up to par.

Endangered Species: Hearings on H.R. 37 Before the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the H. Comm. on Merch. Marine and Fisheries, 93d Cong. 327 (1973) (statements of Mike Casey, Director, Minnesota Department of Natural Resources and Representative John Breaux).

Congress also emphasized the role of listing flexibility in rewarding good State management. For example, a Senate report declared that "while the Federal Government should protect such species where States have failed to meet minimum Federal standards, it should not pre-empt efficient programs." S. REP. NO. 93-307, at 3 (1973).

In light of this legislative history, it would be counter-intuitive to conclude that Congress intended to prevent FWS from removing ESA protections for a recovered DPS of a broader-listed species within a State that actively cooperated with FWS to successfully recover that population of the species. *See Elliot Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 17 F.3d 616, 631 (3d Cir. 1994) (discussing the "mischief rule," which directs courts to look to the mischief the statute was intended to cure when interpreting statutory language).

In 1973, the Act's legislative history makes plain that one of Congress's primary concerns was federal preemption of State management authority. To assuage this concern, Congress intended that the ESA would only preempt State management when absolutely necessary and would return species management to the States upon recovery. FWS's interpretation reflects this intent and implements the flexibility Congress incorporated into the Act through the DPS language by returning management of listed species to States in which successfully recovered populations occur. Thus, FWS's interpretation is consistent with the ESA's legislative history.

C. FWS's Interpretation is Consistent with the Policy Objectives of the ESA

Section 2 of the ESA sets forth the ESA's broad policy objectives. 16 U.S.C. § 1531. The primary objective is to protect and conserve (*i.e.*, recover) endangered and threatened species. *See id.* § 1531(c)(1); H.R. REP. NO. 93-740, at 23 (1973). Perhaps the most important secondary objective is federal-State cooperation in conserving listed species. *See* 16 U.S.C. § 1531(a)(5), (c)(2). Other policy objectives set forth in section 2 are the duty to take steps necessary to achieve the purposes of international treaties and conventions for wildlife protection, to provide federal financial assistance for meeting international commitments for wildlife protection and for State conservation programs, and to conserve the ecosystems upon which endangered and threatened species depend for survival. *See* 16 U.S.C. § 1531(a)(4)–(5), (b). The policy objective to maintain close cooperation between federal and State governments in particular bolsters FWS's interpretation allowing removal of recovered DPSs of currently-listed species.

1. Removing Federal Protection of Healthy DPSs from within Wider Species Listings is Consistent with the Statute's Policy Goal of Achieving Recovery through Close Cooperation Between State and Federal Agencies

In addition to section 6, multiple references in section 2 of the Act encourage State cooperation with the federal government in conserving listed species. Removing ESA protection for

recovered DPSs of listed species reinforces the strong public policy goal of federal-State cooperation in three ways.

First, removing recovered DPSs from broader species listings rewards States that actively cooperate with the federal government to protect and conserve listed species by turning management responsibility for that species over to the States in which the DPS occurs. State agencies can manage recovered populations more locally and effectively with laws and programs tailored to local circumstances. For example, State programs may provide incentives to landowners to avoid taking species and may pay farmers compensation for domestic animals taken by predatory species, such as the gray wolf.[18] State agencies can also provide more human resources in many cases for implementing management plans and enforcing species management regulations.

While the DPS Policy concludes that State boundaries are not in and of themselves appropriate for delineating the boundaries of DPSs, *see* 61 Fed. Reg. at 4723–24, individual State conservation efforts can contribute significantly towards recovering discrete and significant populations of species that occur wholly or partly within that State's borders.[19] Further, if the natural boundary between separate populations of a species should fall in the vicinity of a State boundary, there appears to be nothing in the Policy that would prevent FWS from using State boundaries to delineate that DPS for practical purposes.

Second, removing healthy DPSs of wider-ranging species avoids needless expenditure of federal resources in areas where the species is no longer endangered or threatened. The consultation requirements of section 7, the permit requirements of section 10, and the take prohibitions in section 9 all require significant expenditure of FWS resources and create potentially significant regulatory burdens on State, federal, and local agencies, Indian Tribes, and the regulated community. FWS needs to carefully ensure that the Act's requirements and prohibitions are not applied in areas where they are not necessary to protect endangered or threatened species. Returning management authority relieves State and local agencies, and private entities and individuals of those federal regulatory burdens. Moreover, a statute should be read to require federal preemption of State authority only when explicitly stated. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989). Therefore, FWS should preempt State management only when necessary and required and must return management authority of recovered species to the States when ESA protection is no longer necessary and the States have agreed to provide adequate protection to the recovered species.

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[18] The amicus brief of the National Wildlife Federation in *Humane Society* describes such programs in more detail and also discusses the policy implications of returning recovered species management to States. *See* Brief for Amicus National Wildlife Federation at 12, 15–16, *Humane Soc'y of the United States v. Kempthorne*, No. 07-0677 (PLF), 2008 U.S. Dist. LEXIS 74495 (D.D.C. Sept. 29, 2008).

[19] FWS's ability to list a species in a significant portion of its range also provides flexibility in listing and delisting populations with ranges covering several States. As an example, in the proposed rule to delist the Northern Rocky Mountain DPS of gray wolves, FWS stated that it would, in the alternative, consider keeping the gray wolf listed in the Wyoming portion of its range if the State of Wyoming should fail to provide adequate regulatory mechanisms to ensure the population would remain recovered. 72 Fed. Reg. 6106, 6117 (Feb. 8, 2007).

Third, removing healthy DPSs of wider-ranging species improves FWS's implementation of the ESA by allowing it to direct funding to species that are still in danger of extinction and require continuing conservation efforts rather than to those species that are healthy. Preventing FWS from removing ESA protections for such DPSs would require FWS to allocate time and resources to those DPSs no longer needing the protections of the ESA to the detriment of other species that continue to require broad-reaching federal protections. Such a counterintuitive result should not be read into the Act.

2. Removing Healthy DPSs from Wider Species Listings is Consistent with the Act's Other Policy Goals

FWS's interpretation is also consistent with the statute's policy goals in section 2 of recognizing and implementing international agreements, protecting and conserving species, and protecting ecosystems.

Protecting, conserving, and restoring endangered and threatened species is the primary goal of the Endangered Species Act. *See* 16 U.S.C. § 1531(c)(1); H.R. CONF. REP. NO. 93-740, at 23 (1973). Identifying and removing healthy DPSs from broader species listings is an important tool in protecting and recovering all listed species. For species composed of several distinct population segments that recover at different rates, removing recovered populations that qualify as DPSs allows the non-recovered populations to remain on the list and also allows FWS to focus conservation efforts on those populations. Removing such populations also benefits other species on the lists by diverting resources from those recovered populations to species that still require the Act's protections to achieve recovery.

Removing recovered DPSs of currently-listed species also fulfills the Act's policy objective of fostering international cooperation in protecting endangered and threatened species. *See* 16 U.S.C. § 1531(a)(4)–(5), (b). Removing such DPSs may encourage other countries to cooperate and conserve listed species in much the same way as with the federal-State relationship. Authorizing the removal of a DPS that occurs wholly or partly within a country may encourage close cooperation with the United States and speedier recovery efforts to protect and conserve listed species, particularly for species that may be economically important to that country. Upon removal of ESA protections for the DPS, the country may resume international trade in that species, which may be particularly important for game species, without endangering the species elsewhere in its range. Removal of the recovered DPS may also improve recovery efforts for the species as a whole. For example, allowing trade from a recovered DPS that occurs in one country may relieve illegal hunting pressure in other countries where that species is still endangered or threatened.

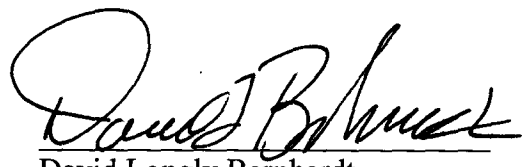
FWS's interpretation is also consistent with the Act's stated purpose of conserving ecosystems upon which endangered and threatened species depend. *See* 16 U.S.C. § 1531(b). Removing healthy DPSs from broader-listed species may encourage State conservation efforts if those efforts result in returning species management to those States. Many State and federal conservation efforts designed to protect and conserve listed species are also likely to protect and improve the ecosystem upon which those species depend. Moreover, improvement of the ecosystem to which a species belongs will be critical to recovering that species in many cases. A

recovered DPS indicates that the ecosystem on which that species depends is likely healthy and sufficiently protected. Therefore, the same policy goals that support FWS's ability to identify and remove healthy DPSs from broader-listed species are also likely to protect and improve the ecosystems that the species depends upon.

IV. CONCLUSION

After an extensive review, this Office has concluded that FWS has clear authority to determine, pursuant to section 4(a)(1), that gray wolves in the western Great Lakes area constituted a DPS and that the DPS was neither endangered nor threatened, and then to revise the list of endangered and threatened species, pursuant to section 4(c)(1), to reflect those determinations. Moreover, even if FWS's authority was not clear, FWS's interpretation of its authority to make determinations under section 4(a)(1) and to revise the endangered and threatened species list to reflect those determinations under section 4(c)(1) is reasonable and fully consistent with the ESA's text, structure, legislative history, relevant judicial interpretations, and policy objectives.

This opinion was prepared with the assistance of Larry Jensen, Deputy Solicitor, Barry Roth, Deputy Associate Solicitor for Parks and Wildlife, Michael Young, Assistant Solicitor for the Branch of Fish and Wildlife, Margot Zallen of the Rocky Mountain Regional Solicitor's Office, Benjamin Jesup and Philip Kline of the Branch of Fish and Wildlife, and Sharon Pudwill of the Twin Cities Field Solicitor's Office.



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