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## Comments

### **Are Ranchers Legitimately Trying to Save Their Hides or Are They Just Crying Wolf—What Issues Must Be Resolved Before Wolf Reintroduction to Yellowstone National Park Proceeds?**

#### INTRODUCTION

The main division in the controversy over wolf reintroduction is between those who want wolves restored, wolf advocates, and those who do not, ranchers.<sup>1</sup> The primary points of contention stem from a seemingly innocuous activity—the wolf's need to eat. Wolves prey on livestock as well as native game species. A wolf does not know that it is politically acceptable for him to eat weak and sick elk but not politically acceptable to eat sheep. This propensity of wolves to kill livestock is cause for concern among ranchers who have heard tales of the bad old days<sup>2</sup> when wolves freely roamed the West as well as contemporary stories of how wolves affect livestock operators in the Canadian provinces and Minnesota.<sup>3</sup> Most of the tales are exaggerated, as are the ensuing reactions; but, the loss of any livestock to wolves when

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1. The wolf advocate group includes a wide spectrum of individuals with varying views; preservationists, conservationists, sportsmen, and even some ranchers support wolf reintroduction. The rancher group includes whoever supports the rancher's views at the time: possibly outfitters, hunters, state wildlife agencies, and some wolf advocates. The groupings are not mutually exclusive and an individual may advocate wolf reintroduction while supporting ranchers and their concerns. Not all wolf advocates share the same views, and a preservationist's view may be materially different from that of a hunter for example.

2. See VERNON BAILEY, WOLVES IN RELATION TO STOCK, GAME AND THE NATIONAL FOREST RESERVES 8-26 (U.S. Department of Agriculture, Forest Service Bulletin No. 72, January 19, 1907); see also ROY T. MCBRIDE, THE MEXICAN WOLF — A HISTORICAL REVIEW AND OBSERVATIONS OF ITS STATUS AND DISTRIBUTION: PROGRESS REPORT TO THE U.S. FISH AND WILDLIFE SERVICE (March 1980); see also GARY LEE NUNLEY, THE MEXICAN GRAY WOLF IN NEW MEXICO (Division of Animal Damage Control, 1977).

3. See TROY R. MADER, WOLF REINTRODUCTION IN THE YELLOWSTONE NATIONAL PARK: A HISTORICAL PERSPECTIVE, (1988) (Mader is the Research Director of the Abundant Wildlife Society of North America and the President of the Common Man Institute); see also ABUNDANT WILDLIFE, (Published by the Abundant Wildlife Society of North America, Special Wolf Issue); see also Jack Atcheson, Sr., *A Wolf in Sheep's Clothing*, PETERSEN'S HUNTING, Oct. 1991, at 47 (Atcheson is an outfitter/hunting consultant located in Montana).

they are reintroduced will certainly be greater than that presently experienced in the state of Wyoming.

If one were to listen only to the fringe of both groups, the situation would appear hopeless.<sup>4</sup> Presently, there is a distinct possibility that wolf reintroduction will turn out to be nothing more than an experiment characterized by problems and strife. However, wolf reintroduction may succeed if wolf advocates, ranchers, and the public in general are educated concerning the true implications of the control, compensation, and funding aspects of wolf recovery, as well as the experimental nature of this reintroduction process and the need to resolve potential disputes before the first wolf is released in the Yellowstone area. Wolf advocates assert overwhelming support for wolf reintroduction by the general public and most surveys illustrate this public support.<sup>5</sup> However, the general public is not aware of the problems of wolf reintroduction or the specific impacts wolf reintroduction will have on ranchers or the state and federal agencies charged with wildlife management.<sup>6</sup>

The objective of this comment is to explain the many interrelated and often confusing issues regarding wolf reintroduction with the purpose of illustrating the true problems wolf reintroduction is sure to cause and the necessity of safeguarding ranchers' interests before wolves are reintroduced. This comment will clear up the many misconceptions the general public has about wolf reintroduction, and it will also prove that there is no easy solution to the wolf reintroduction controversy. This comment will illustrate that no matter which route is taken or which alternative is chosen some segment of the ranching community or wolf advocate group will not be satisfied. It will also illustrate the reasons why the controversial issues of management, compensation, and funding must be concretely resolved prior to actual wolf reintroduction. This comment will discuss how these issues have been handled in the past, how an equitable settlement might be reached, and what the settlement should involve.

Success or failure of wolf reintroduction will not be marked solely by either the reestablishment or denial of reintroduction of the wolf to Yellowstone National Park. Success will be measured by whether a har-

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4. "Despite our efforts to direct wolf recovery along a rational course, political pressure groups from some interest groups and some members of Congress have paralyzed those agencies charged with managing wolf recovery under the Endangered Species Act." Thomas M. France, Statement of the National Wildlife Federation to the U.S. Senate Committee on Energy and Natural Resources regarding S.2674, Sept. 19, 1990, at 4 [hereinafter *Statement of NWF*] (France is the director and counsel for the Northern Rockies National Wildlife Federation) (on file with author).

5. See *infra* note 304.

6. See *supra* notes 317-341 and accompanying text.

monious, nondamaging, viable population of wolves is permanently established throughout the Western United States without unfairly compromising any group's interests.

### *Background of Reintroduction*

The roots of the controversy surrounding wolf reintroduction can be traced to the Yellowstone Park Act of 1872<sup>7</sup> which created Yellowstone National Park.<sup>8</sup> The Act directs the Secretary of the Interior to provide against the wanton destruction of game.<sup>9</sup> The National Park Service Organic Act of 1916 also commanded the Park Service to conserve the scenery, the natural and historic objects, and the wildlife.<sup>10</sup> More recently in 1973, the park promulgated its Master Plan<sup>11</sup> with the stated goal of perpetuating the park's natural ecosystem by restoring, where adequate habitat exists, natural species extirpated by humans.<sup>12</sup>

The development with the greatest impact on the wolf reintroduction controversy occurred in 1973 when the Endangered Species Act (ESA)<sup>13</sup> was passed. The congressional findings, listed in the ESA, illustrate a concern to save species from extinction.<sup>14</sup> The stated purposes of the Act

7. 16 U.S.C. §§ 21 (1988).

8. The Yellowstone National Park act states: "Such public park [Yellowstone National Park] shall be under the exclusive control of the Secretary of the Interior . . . . He shall provide against the wanton destruction of the fish and game found within the park . . . ." 16 U.S.C. § 22 (1988).

9. *Id.*

10. National Park Service Organic Act of 1916, 16 U.S.C. § 1 (1988).

11. YELLOWSTONE NATIONAL PARK ET AL., WOLF RECOVERY IN YELLOWSTONE NATIONAL PARK 1 (Sept. 29, 1992) [hereinafter WOLF RECOVERY] (copies available from Norman A. Bishop, Research Interpreter, P.O. Box 168, Yellowstone National Park, Wyoming 82190).

12. *Id.* at 1.

13. The Endangered Species Act of 1973, Pub. L. No. 93-205, 81 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1985 & Supp. 1991)). The ESA was amended by the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3571, and the Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411. In 1988, the ESA was reauthorized by Congress. H.R. CONF. REP. NO. 1467, 100th Cong., 2d Sess., CONG. REC. H82449-58 (1988); S.R. CONF. REP. NO. 1467, 100th Cong., 2d Sess., CONG. REC. S12557-61 (1988).

14. Congressional findings in the ESA state:

The Congress finds and declares that — (1) various species of fish, wildlife, and plants in the United States have been rendered extinct . . . ; (2) other species of fish, wildlife, and plants . . . are in danger of or threatened with extinction; (3) these species of fish, wildlife, and plants are of . . . value to the Nation and its people; (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction . . . ; (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs . . . is a key to meeting the Nation's international commitments and to better safeguarding . . . the Nation's heritage in fish, wildlife, and plants.

16 U.S.C. § 1531(a) (1984).

are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and to provide a program for the conservation of such endangered and threatened species.<sup>15</sup> In the ESA, an endangered or threatened species is defined as a species which is in danger of or threatened with extinction throughout all or a significant portion of its range.<sup>16</sup>

It was subsequently determined that the wolf was absent from a significant portion of its range and, pursuant to the ESA, the wolf was listed as endangered in the lower forty-eight states.<sup>17</sup> Once the wolf was listed as endangered the ESA then required the Secretary of the Interior to promulgate a recovery plan for the conservation and survival of the species.<sup>18</sup> Federal agencies must also carry out conservation programs for endangered and threatened species.<sup>19</sup> The ESA places an affirmative duty on the United States Fish and Wildlife Service (FWS) to conserve both endangered and threatened species.<sup>20</sup> The ESA also requires that species proposed for listing as endangered, although not officially designated as endangered or threatened, receive some protection as well.<sup>21</sup>

15. The stated purposes of the ESA are as follows:

The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C. § 1531(b) (1984).

16. "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . ." 16 U.S.C. § 1532(6) (1984). "The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range . . ." 16 U.S.C. § 1532(20) (1984).

17. 38 Fed. Reg. 14,678 (1973) listed as endangered *Canis Lupus irremotus*, the Northern Rocky Mountain Wolf, which is believed to be the subspecies of wolf that inhabited the Yellowstone region. 43 Fed. Reg. 9,612 (1978) listed the entire species *Canis lupus* as endangered, except in Minnesota where it was listed as threatened. 43 Fed. Reg. 9,607 (1978).

18. "The Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species listed pursuant to this section . . ." 16 U.S.C. § 1533(f)(1) (1984 & Supp. 1993).

19. Some requirements imposed on Federal agencies by the ESA are as follows:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such an agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . .

16 U.S.C. § 1536(a)(2) (1988).

20. 16 U.S.C. §§ 1532(3), 1536(a)(1) (1988).

21. 16 U.S.C. § 1536(a)(3) (1988).

In 1982 an amendment to the ESA<sup>22</sup> was passed which allows for experimental populations of endangered species to be reintroduced while allowing greater control of the reintroduced species than is permitted under the ESA in general.<sup>23</sup> Congress specifically mentioned that predators like the wolf were possible benefactors of this modification to the ESA.<sup>24</sup> Before designating a population as experimental the Secretary must determine if the population is essential or non-essential.<sup>25</sup> This amendment *may* allow control of wolves by citizens on private lands to prevent livestock depredations.<sup>26</sup> This 1982 modification also states that the amendment applies only if reintroduced species are wholly separate geographically from non-experimental populations of the same species.<sup>27</sup>

A draft of the first recovery plan to officially propose the reintroduction of wolves to Yellowstone National Park was produced in 1982 for comment and revision,<sup>28</sup> but the final draft of this plan—the Northern

22. Endangered Species Act Amendments of 1982, 16 U.S.C. § 1539(j) (1988).

23. 16 U.S.C. § 1539(j) (1988). "[T]he term 'experimental population' means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under [16 U.S.C. § 1539(j)(2)], but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j)(1) (1988).

The 1982 amendment to the ESA states in part:

(2)(A) The Secretary may authorize the release of any population of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species. (B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

16 U.S.C. § 1539(j)(2) (1988).

24. The Senate Committee on the Environment and Public Works reported to Congress, "The Secretary is granted broad flexibility in promulgating regulations to protect the threatened species. These regulations may even allow the taking of threatened animals . . . . Where appropriate, the regulations may allow for the direct taking of experimental populations of predators . . . ." S. REP. NO. 418, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807.

25. 50 C.F.R. § 17.81 (1990). An experimental population is non-essential if loss of the population would not appreciably reduce the likelihood of a species' survival. 16 U.S.C. § 1539(j)(2)(C)(i) (1988). If outside national parks or national wildlife refuges, non-essential experimental populations are treated as species proposed to be listed. *See supra* note 21 and accompanying text. Congress intended that most experimental populations would be considered non-essential. H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. 33-34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2874-75.

26. The Senate Committee on the Environment and Public Works stated that *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985), would not apply to an experimental population, thus keeping the hope alive that public hunting and trapping to control wolves would be allowed irrespective of the holding in *Sierra Club* that expressly does not allow private control of endangered or threatened species. S. REP. NO. 240, 100th Cong., 1st Sess. (1987), *reprinted in* 1988 U.S.C.C.A.N. 2700-18, 2705.

27. "For purposes of this subsection, the term 'experimental population' means any population authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j) (1988).

28. Harry R. Bader, *Wolf Conservation: The Importance of Following Endangered Species Recovery Plans*, 13 HARV. ENVTL. L. REV. 517, 523 (1989).

Rocky Mountain Wolf Recovery Plan (Wolf Recovery Plan)<sup>29</sup>—was not approved until August 3, 1987.<sup>30</sup> The Wolf Recovery Plan selected three wolf recovery areas<sup>31</sup> and called for the experimental population designation allowed by the 1982 amendment to the Endangered Species Act.<sup>32</sup> The United States Fish & Wildlife Service (FWS) and Yellowstone National Park's Alternative Scoping Brochure<sup>33</sup> summarized the plan stating:

Wolves within the experimental population areas would be treated as a threatened species under special rules with liberal management to address human concerns and potential conflicts. An experimental rule might allow wolves to be relocated by the federal and State agencies and, under certain conditions, by the public for livestock depredations. Compensation for livestock losses would be paid by a private group.<sup>34</sup>

In 1988, Congress authorized studies concerning wolf reintroduction, and in May of 1990, the Department of the Interior released *Wolves for Yellowstone*.<sup>35</sup> This report supported the Wolf Recovery Plan of 1987 and the management flexibility of an experimental population.<sup>36</sup>

In November of 1990, Congress commanded the Secretary of the Interior to appoint a Wolf Management Committee to develop a wolf rein-

29. FISH AND WILDLIFE SERVICE IN COOPERATION WITH THE NORTHERN ROCKY MOUNTAIN RECOVERY TEAM, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1987) [hereinafter WOLF RECOVERY PLAN].

30. *Id.*

31. The Wolf Recovery Plan listed three areas meeting the criteria for wolf recovery areas and listed these as: the Selway-Bitterroot Mountains/Salmon River Breaks ecosystem in central Idaho, the Bob Marshall ecosystem in northwestern Montana, including Glacier National Park and the Bob Marshall Wilderness area, and the Greater Yellowstone Area, including Yellowstone National Park. *Id.* at 22-26.

32. *Id.* at 25-27.

33. FISH AND WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, WOLF RECOVERY IN YELLOWSTONE NATIONAL PARK & CENTRAL IDAHO: ALTERNATIVE SCOPING BROCHURE 5 (1992) [hereinafter Alternative Scoping Brochure] (copies available from Yellowstone N.P. & Central Idaho, Gray Wolf EIS, P.O. Box 8017, Helena, MT 59601). The ALTERNATIVE SCOPING BROCHURE is compiled and distributed so that the general public is introduced to the Gray Wolf EIS planning process, and has an opportunity to provide input. *Id.* at 1. This public input is important under the National Environmental Policy Act (NEPA) because the purpose of NEPA is to ensure that decision makers and the public have quality information on the impacts of a wolf reintroduction proposal and the EIS prior to Congress' making a decision concerning wolf reintroduction. *Id.* at 9.

34. *Id.*

35. YELLOWSTONE NATIONAL PARK ET AL., WOLVES FOR YELLOWSTONE?: A REPORT TO THE U.S. CONGRESS (1990) [hereinafter WOLVES FOR YELLOWSTONE] (copies available from the Yellowstone Association, P.O. Box 117, Yellowstone National Park, Wyoming 82190). This document is the final report on the studies Congress had authorized in 1988.

36. See generally WOLVES FOR YELLOWSTONE, *Id.*

roduction and management plan so that Congress could further study the issue of wolf reintroduction.<sup>37</sup> A ten-member committee was appointed.<sup>38</sup> The committee voted eight to two to accept a plan<sup>39</sup> to present to Congress with the wolf advocates casting the two opposing votes.<sup>40</sup> The plan called for allowing ranchers and state wildlife agencies greater control than that permitted by the ESA in the management of reintroduced wolves.<sup>41</sup> Included in the plan were provisions to designate reintroduced wolves an experimental population,<sup>42</sup> relax ESA standards to allow ranchers to kill any wolf killing or harassing livestock,<sup>43</sup> delegate primary management authority to the state agencies,<sup>44</sup> and allow federal compensation for livestock losses as well as federal funding for the entire recovery effort.<sup>45</sup> This compromise, approved by the majority of the committee, was staunchly opposed by the two wolf advocates.<sup>46</sup> Although this compromise proposal was submitted to Congress, it was reportedly "dead on arrival,"<sup>47</sup> and the House Interior Appropriations Committee ignored this proposal and directed the Wolf Recovery Plan of 1987 to be implemented in 1992 Interior appropriations legislation.<sup>48</sup>

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37. Pub. L. No. 101-512, § 218 (Nov. 5, 1990).

38. The committee was composed of representatives of the FWS, National Park Service and U.S. Forest Service; directors of the wildlife agencies of Montana, Idaho and Wyoming; a representative of the livestock industry, a representative of the hunting/outfitting interests and two representatives of the wolf advocate community (Tom Dougherty of National Wildlife Federation and Hank Fischer of Defenders of Wildlife). WOLF MANAGEMENT COMM. REPORT, 101st Cong., 2d Sess. (1991).

39. WOLF MANAGEMENT COMM. REPORT, *supra* note 38. This proposed plan is embodied in alternative number 4 in the draft EIS. Fish and Wildlife Service, U.S. Dep't of the Interior, THE REINTRODUCTION OF THE GRAY WOLF TO YELLOWSTONE NATIONAL PARK & CENTRAL IDAHO: SUMMARY: DRAFT ENVIRONMENTAL IMPACT STATEMENT 15 (1993) [hereinafter DEIS].

40. Hank Fischer, *Discord Over Wolves*, DEFENDERS, July/Aug. 1991, at 37 (Fischer is the Northern Rockies Representative of Defenders of Wildlife).

41. WOLF MANAGEMENT COMM. REPORT, *supra* note 38, at 12-13.

42. *See generally* WOLF MANAGEMENT COMM. REPORT, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.* at 15, 19.

46. Fischer, *supra* note 40, at 37. The wolf advocates believed that the experimental population designation included too broad an area which was not geographically separate from the range of naturally repopulating wolves in northwestern Montana. The other eight members of the committee thought this wolf population was excluded by their stipulating that Glacier National Park and an area west of the park were not included in the experimental population designation. The wolf advocates also objected to the private control allowed by the plan. They believed the private control violated the ESA, which requires that control be based on the best available biological information derived from professionally accepted wildlife management practices. The other individuals on the committee thought the private control measures were necessary to protect the ranchers' interests in their private property. *Id.*

47. "Some say it [the Wolf Management Comm. Report] is dead on arrival and I [Wyoming Representative Craig Thomas] suspect that is the case." *Wolf Plan May Be Dead*, GREAT FALLS TRIBUNE, June 15, 1991, at 6C.

48. H.R. 2686, 102d Cong., 1st Sess. (1991); *see also supra* notes 29 and 31.



In April and May of 1992, the public identified issues that they wanted addressed in the environmental impact statement (EIS)<sup>49</sup> concerning wolf reintroduction, and the FWS compiled the Alternative Scoping Brochure<sup>50</sup> which described five different alternatives<sup>51</sup> suggested by the public as ways to manage wolf recovery in Yellowstone National Park and central Idaho. The alternatives were presented in the Alternative Scoping Brochure with the intent that they would be further analyzed in the draft EIS.<sup>52</sup>

On July 9, 1993 the FWS released a draft EIS,<sup>53</sup> and, as ordered by Congress in 1991, it covers a broad range of management alternatives.<sup>54</sup> The July 9th draft EIS lays out five possible options regarding wolf restoration,<sup>55</sup> and the FWS has indicated that its preferred alternative involves reintroducing wolves to Yellowstone and central Idaho as an "experimental population" as defined by the ESA.<sup>56</sup> The FWS is presently completing the final EIS as directed to do so by Congress in 1992. Congress also directed the FWS to designate at the time the final EIS is presented the alternative that the FWS intends to pursue.<sup>57</sup> Congress further stated that it expected the preferred alternative to conform to existing law.<sup>58</sup> The draft EIS and the FWS's preferred alternative have circulated publicly and the public comments received are being evaluated in the preparation of the final EIS which should be completed in the spring of 1994.<sup>59</sup>

49. EIS's are required by NEPA before decisions are made on major Federal actions. 42 U.S.C. §§ 4321-4370 (1988 & Supp. 1991).

An EIS is a logical step by step approach. It identifies the problem, defines what information is required to make an informed decision to solve the problem, lists the significant issues that need to be resolved, provides a reasonable range of alternatives that represent different approaches to solve the problem, and recommends the proposed action that will best solve the problem. This process requires full public review and participation . . . . The final EIS allows decision makers to look at all alternatives so they can make an informed decision after the EIS is completed.

Fish and Wildlife Service, U.S. Dep't of the Interior, GRAY WOLF EIS 3 (1992) (copies available from: Yellowstone N.P. & Central Idaho, Gray Wolf EIS, P.O. Box 8017, Helena, MT 59601).

50. ALTERNATIVE SCOPING BROCHURE, *supra* note 33, at 1; *see discussion supra* note 33.

51. The five alternatives are: the no wolf alternative, the Wolf Management Committee alternative, the 1987 Wolf Recovery Plan alternative, the natural recovery alternative, and the accelerated wolf recovery alternative. *Id.* The alternatives are explained in the ALTERNATIVE SCOPING BROCHURE available from: Yellowstone N.P. & Central Idaho, Gray Wolf EIS, P.O. Box 8017, Helena, MT 59601.

52. ALTERNATIVE SCOPING BROCHURE, *supra* note 33, at 1.

53. DEIS, *supra* note 39.

54. CONF. REP. NO. 256, 102d Cong., 1st Sess. 16-17 (1991).

55. DEIS, *supra* note 39 at 10-19. The alternatives are explained in the DEIS available from: Yellowstone N.P. & Central Idaho, Gray Wolf EIS, P.O. Box 8017, Helena, MT 59601.

56. DEIS, *supra* note 39, at 1.

57. *Id.* at 6.

58. *Id.*

59. David Hackett provides some insight on the EIS process:

Ed Bangs, the coordinator of the interagency EIS team, said Thursday's hearing was the 86th

To be successful and equitable, any alternative chosen must address three very important issues regarding wolf reintroduction: management, compensation, and funding. Management and compensation are integrally related to funding, because without proper funding neither will be successful in the long run.

### MANAGEMENT

The management issue necessarily involves the controversial action of killing wolves.<sup>60</sup> The ESA allows little management flexibility and restricts the taking<sup>61</sup> of any endangered or threatened species such as wolves,<sup>62</sup> and some wolf advocates are quick to ensure enforcement of the ESA through the courts.<sup>63</sup> Congress attempted to address this problem of restrictive control measures with the 1982 amendment to the ESA and its experimental population designation.<sup>64</sup> However, the potential use of this modification for the management of wolves reintroduced to Yellowstone is now in doubt.<sup>65</sup>

In addition to the problems associated with the experimental population designation,<sup>66</sup> the main difficulty concerns the fact that three broad groups could potentially control wolves: private individuals, state agen-

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public meeting he has attended on wolf reintroduction. Bangs said a team of analysts will be assembled to analyze the thousands of comments which have poured into his office on the draft EIS. Bangs said he expects the final EIS to be completed no later than next spring.

David Hackett, *Environmentalists Dominate Last Hearing on Wolf Reintroduction Plan*, CASPER STAR-TRIBUNE, October 1, 1993, at B1.

60. "All wolf control is recognized as controversial." NATIONAL PARK SERVICE & FISH AND WILDLIFE SERVICE, *YELLOWSTONE WOLF QUESTIONS - A DIGEST 7 (1990)* [hereinafter *WOLF QUESTIONS*] (Extracts from *WOLVES FOR YELLOWSTONE? A REPORT TO THE UNITED STATES CONGRESS*) (copies available from Yellowstone National Park, Wyoming 82190).

61. The ESA makes it illegal for any person to "take" an endangered species. 16 U.S.C. § 1538(a)(1)(B) (1988). "Taking" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1988). The Secretary, however, may authorize an otherwise prohibited taking "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (1988).

62. 16 U.S.C. § 1531 (1988).

63. Anyone is allowed to bring suit to ensure enforcement of the ESA: "[A]ny person may commence a civil suit on his own behalf—(A) to enjoin any person . . . who is alleged to be in violation of any provision of this [Endangered Species] Act or regulation issued under the authority thereof . . ." 16 U.S.C. § 1540(g) (1988). Some wolf advocates are poised to make use of 16 U.S.C. § 1540(g): "O'Neil [a lawyer and Defenders of Wildlife Board Member] says he will sue if anyone other than a federal agent is allowed to kill wolves outside Yellowstone." Jeffrey P. Cohn, *Endangered Wolf Population Increases*, *BIO-SCIENCE*, Oct. 1990, at 632 (Cohn is a Washington, D.C.-based science writer specializing in conservation). See also *infra* notes 325 and 350 and accompanying text.

64. 16 U.S.C. § 1539(j) (1988).

65. See *infra* notes 93-103 and accompanying text.

66. *Id.*

cies, and the federal government. Although private and state control are future possibilities, presently only the federal government is allowed management powers.<sup>67</sup> If wolves are reintroduced as an endangered species, no killing would be allowed and the government would be restricted to livetrapping and translocation as the only methods of control.<sup>68</sup> But, if the reintroduced wolves are labeled threatened<sup>69</sup> or are treated as an experimental population then, although restricted, the killing of wolves would be allowed.<sup>70</sup> A deep division separates wolf advocates and ranchers regarding which of these groups and accompanying management measures are needed to effectively control reintroduced wolves without inhibiting their successful reestablishment. In order to fully understand the wolf management issue, one must understand the wolves' propensity to travel and the spatial limits of the proposed wolf recovery area.<sup>71</sup>

### *The Recovery Area*

Some individuals may incorrectly assume that wolves are going to be reintroduced to repopulate only Yellowstone National Park. Due to the wolves' natural habits<sup>72</sup> and the migratory nature of the prey species in

67. "Under the Endangered Species Act . . . [wolf] control [is] allowed only by the U.S. Fish and Wildlife Service and authorized agents. Proposed experimental population status for Yellowstone wolves would allow more options for management . . ." WOLF QUESTIONS, *supra* note 60, at 8.

68. 16 U.S.C. § 1531 (1988).

69. *Fund for Animals v. Andrus*, 11 *Env'tl. Rep. Cas. (BNA)* 2189 (D. Minn. 1978) (held that the ESA permits taking of depredating wolves listed as threatened); *Sierra Club v. Clark*, 755 F.2d 608, 617-618 (8th Cir. 1985) (held that the ESA permits taking of depredating wolves listed as threatened).

70. 16 U.S.C. § 1539(j) (1988). *See also supra* notes 22-27 and accompanying text.

71. "Yellowstone is an island. It's an ecological anachronism surrounded by 20th century America." Bob Meinecke, *Roaming Park Wolves Will Curtail Hunting*, CODY ENTERPRISE, November 6, 1991. "[Joe] Helle [a Dillon, Montana sheep rancher and former president of the Montana Woolgrowers Association] and other ranchers worry that the [reintroduced] wolves won't stay in Yellowstone." *Woolgrowers 'Disturbed'*, BILLINGS GAZETTE, April 18, 1992.

72. Wolves' natural habits include:

The wolves breed mainly below the edge of the forest reserves [National Forest and Park Service land] or on the reserves only where partly open foothill country is included. In talking with hunters, trappers, ranchmen, and forest rangers who have been much in the northern mountains in winter I have not found one who ever saw wolf tracks in the mountains during the breeding season or knew of a wolf den above the foothills. All agree that the wolves leave the mountains when the cattle come down in the fall, and return only when the cattle are driven into the mountains again in June, just as they originally followed the migrations of buffalo. The fact that the wolves are abundant in the valleys in winter also supports the migration theory, but their continued presence in the valleys in summer would indicate that not all follow the cattle into the mountains even then . . . Wolves depend on cattle for food far more than on game, and, like all wild animals, their distribution depends largely on food supply.

BAILEY, *supra* note 2, at 6-8. "Wolves breed much earlier than is usually supposed . . . In the Green River and Wind River basins the following breeding dates were obtained, showing that wolf pups are usually born in March or early April . . ." *Id.* at 23.

Yellowstone National Park,<sup>73</sup> wolves will undoubtedly leave the park.<sup>74</sup> Wolves will inhabit the larger area of the Yellowstone Ecosystem and the states of Wyoming, Montana, and Idaho in general.<sup>75</sup>

If wolves once reintroduced would remain in Yellowstone National Park, no reason would exist to deny ranchers and state agencies as much control as they desire because these groups do not seek to control wolves within park boundaries.<sup>76</sup> The reason for this is that no private stock enters the park and the state agencies have no discretion within Yellowstone. However, wolf advocates intend to protect the wolf within the Yellowstone Ecosystem.<sup>77</sup> At first glance this minor alteration in title, Yellowstone Park to Yellowstone Ecosystem, appears insignificant; but, it is a major difference. Yellowstone National Park's 3,410 square miles comprise only eleven percent of the Yellowstone Ecosystem, while private land makes up twenty-four percent of the area.<sup>78</sup> Significant private land holdings and personal property within the wolves recovery zone of the Yellowstone Ecosystem will be impacted by wolf reintroduction.<sup>79</sup>

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73. "[According to WOLVES FOR YELLOWSTONE, *supra* note 35, at 2-5.] [s]ummering elk spent an average of 138-160 days in the park, or about 38%-43% of the year." Letter to Ed Bangs, the FWS biologist in charge of writing the EIS on wolf reintroduction, from Larry J. Bourret, Executive Vice President of the Wyoming Farm Bureau Federation, April 15, 1992, at 12. "In winter, wolf packs will hunt mostly elk on elk winter ranges at lower elevations . . ." WOLF QUESTIONS, *supra* note 60, at 4.

During the winter in Yellowstone the snow can get to be 4-7 feet deep. Elk, deer, and wild sheep cannot dig through that kind of snow to find food. Therefore, they head to the lower elevations where the snow is not as deep or perhaps there is no snow in the area at the time. Since wolves eat these animals, they must also head to lower country where elk, deer, and other animals are. The wolves breed in early spring and have their pups in late spring. They must stay in the lower country and den to raise the pups. They do not migrate during this time. Thus wolves stay out of the higher elevations, i.e. Yellowstone.

Matt Wallischek, *There's No Logic in Wolf Transplant to Yellowstone*, CASPER STAR-TRIBUNE, June 29, 1992.

74. See discussion *supra* notes 72 and 73.

75. See *id.*; see also *infra* notes 80-83 and accompanying text. The entire state of Wyoming is included in the proposed experimental population area of the FWS's preferred alternative. DEIS, *supra* note 39, at 12.

76. A rancher expressing his view concerning wolves leaving Yellowstone National Park stated: 'Our official position is we're opposed to any activity that would restrict existing or future multiple use opportunities,' said Brad Little, an Emmett [Idaho] sheep producer from the Idaho Woolgrowers Association. 'It doesn't necessarily mean we're opposed to wolves in Yellowstone National Park or central Idaho wilderness exclusive to livestock grazing, if they'll stay there. That's what's the problem.'

Joan Barron, *Wolf Plan Draws Crowd*, CASPER STAR-TRIBUNE, September 28, 1993, at A8.

77. "The GYC [Greater Yellowstone Coalition] is a coalition of several environmental groups who view the Yellowstone Park area as a single ecosystem that does not begin or end with park boundaries." Hugh Jackson, *Noranda: We Can Protect Area*, CASPER STAR-TRIBUNE, April 4, 1993, at A1.

78. Larry Bourret, *View of the Wyoming Farm Bureau*, WYOMING WILDLIFE, Jan. 1992, at 11 (Bourret is the Executive Vice President of the Wyoming Farm Bureau).

79. See *supra* note 78 and accompanying text; see *infra* notes 80-84 and accompanying text.

This sheds new light on the issue of control: "Putting wolves in Yellowstone is really putting wolves in Wyoming and Montana. Yellowstone Park is only thirty miles from its center to its boundary, and wolves easily travel fifty miles a day. One radio-collared wolf traveled over 500 direct miles."<sup>80</sup> Such travel distances are not uncommon. Wolves dispersing from Denali National Park and Preserve in Alaska have ended up 250 miles from the park.<sup>81</sup> The average territory a wolf pack occupies in Denali Park is 463 square miles with an upper estimate of 1,693 square miles.<sup>82</sup> At that rate it would not take many packs to fill up Yellowstone National Park's 3,410 square miles and cause a spill-over into other areas.

The wolf population in Montana has not filled its range, and yet Montana's wolves have traveled great distances to Wyoming.<sup>83</sup> A wolf killed in northwestern Wyoming in the fall of 1992 came from Montana;<sup>84</sup> this means that the wolf had to travel over two hundred miles, a journey wolf experts previously determined wolves would not likely make.<sup>85</sup>

### *Experimental Population Designation*

The 1982 amendment to the ESA<sup>86</sup> which allows the experimental population designation<sup>87</sup> is important to the management issue because greater control is permitted under the amendment than is allowed by the ESA in general.<sup>88</sup> Under this amendment,<sup>89</sup> reintroduced wolf populations are to be treated like the experiments they are, not as a species on the verge of extinction as required by the ESA prior to the 1982 amendment.<sup>90</sup> In addition, the restrictive ruling in *Sierra Club v. Clark*<sup>91</sup> does not apply to experimental populations.<sup>92</sup> However, the

80. Atcheson, *supra* note 3, at 47.

81. L. David Mech, *Denali Park Wolf Studies: Implications for Yellowstone*, Trans. 56th N.A. Wildl. & Nat. Res. Conf., 1991, at 87 (Mech is a biologist for the FWS).

82. *Id.*

83. *Wolf Incident Means Little Antagonists Say*, CASPER STAR-TRIBUNE, March 22, 1993, at B1 [hereinafter *Wolf Incident*].

84. *Id.*

85. "[G]enetic tests proved the animal killed near Yellowstone last October was a wild wolf, probably from northwestern Montana. Experts had predicted it might take decades for wolves to migrate naturally to the Yellowstone area." *Yellowstone May Have More Undiscovered Wolves*, THE LARAMIE DAILY BOOMERANG, March 23, 1993, at 8.

86. 16 U.S.C. § 1539(j) (1988).

87. See *supra* notes 22-27 and accompanying text.

88. See *supra* note 23 and accompanying text.

89. 16 U.S.C. § 1539(j) (1988).

90. See *supra* notes 24-26.

91. 755 F. 2d 608 (1985). See also *infra* notes 127 and 128 and accompanying text.

experimental population designation has not been applied as successfully as earlier anticipated due to the requirement of geographical isolation from the presence of naturally repopulating species.<sup>93</sup>

The recommendation of the Wolf Management Committee<sup>94</sup> in 1991 was opposed by wolf advocates due, in part, to the fact that the Yellowstone Ecosystem, designated as an experimental population area, included naturally repopulating wolves in northwestern Montana.<sup>95</sup> Although the Committee specifically omitted the areas of primary wolf concentrations, wolf advocates still asserted that the geographic isolation requirement was violated.<sup>96</sup>

The use of the experimental population designation is also in doubt due to the killing of a wolf near Yellowstone National Park in Wyoming in the fall of 1992.<sup>97</sup> Some pro-wolf and anti-wolf factions have stated that the confirmation of this wolf kill will not affect the possibility of using an experimental population designation.<sup>98</sup> The following facts, however, do not support this view. The individual that shot the wolf reported that it was part of a pack and park rangers who investigated the shooting reported seeing a group of five or six wolf-like animals in the same area.<sup>99</sup> Biologists also believed the wolf was a yearling, and according to biologists wolves rarely strike out on their own at that age.<sup>100</sup> These facts suggest that the wolves in Yellowstone are not mere transients; rather, they may be an established, breeding pack.

The FWS's preferred alternative in the recent draft EIS attempts to address this problematic issue by asserting that the confirmation of two packs in the Yellowstone area is necessary before a present wolf population may frustrate the experimental population designation by being considered a "naturally recurring population."<sup>101</sup> However, the legality of such an assertion or position has not been supported, and presently, some wolf advocates are poised to challenge any experimental designation in court.<sup>102</sup> Because of these complications, the use of the experimental

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92. S. REP. NO. 240, 100th Cong., 1st Sess. (1987), reprinted in 1988 U.S.S.C.A.N. 2700-18, 2705.

93. See *supra* note 27.

94. See *supra* notes 37-48 and accompanying text.

95. Fischer, *supra* note 40, at 37. See also *supra* note 46.

96. Fischer, *supra* note 40, at 37.

97. See *infra* notes 98-103.

98. *Reports of Wolves Overstated*, LIVINGSTON ENTERPRISE, Oct. 9, 1992, at 2.

99. *Id.*

100. *Id.*

101. DEIS, *supra* note 39.

102. Wolf advocates Jim and Cat Urbigkit believe that wolves never were completely extirpated from the Yellowstone area and have previously filed suit to block wolf reintroduction. *Wolf Advocates*

population designation for the Yellowstone Park area is in doubt.<sup>103</sup>

Whether or not the experimental population designation is permitted, some system of management will be necessary to control reintroduced wolves.<sup>104</sup> The primary question relating to management is who will be allowed the power to control wolves: private individuals, state agencies, or the federal government.

### *Private Control*

Private control, which would be carried out primarily by ranchers and sportsmen, directly conflicts with the ESA<sup>105</sup> and some wolf advocates' ideologies.<sup>106</sup> 16 U.S.C. § 1538(a)(1) states that "with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—. . . (B) take any such species . . ."<sup>107</sup> In addition, private killing of wolves probably violates 16 USC § 1537a(c)(2) which requires control of wolves by the best available biological information derived from professionally accepted wildlife management practices.<sup>108</sup> 16 U.S.C. § 1539(a)(1)(A) allows the Secretary to permit otherwise prohibited takings "to enhance the propagation and survival of the affected species."<sup>109</sup> However, permits may not be offered to private individuals; only federal, state, or tribal personnel may be awarded a permit under 16 U.S.C. § 1539(a)(1)(A).<sup>110</sup> Allowing private parties the unsupervised right to kill wolves at will certainly is not allowed by the ESA.<sup>111</sup>

Although the experimental population designation may include control of wolves by citizens on private land to prevent livestock depreda-

*Appeal Agency's Decision on Wolf Sightings*, LARAMIE DAILY BOOMERANG, Mar. 13, 1993, at 7 [hereinafter *Wolf Advocates*]. "Doug Honnold, a Sierra Club [Legal Defense Fund] attorney in Bozeman, Mont., . . . said the wolf shot in the Teton Wilderness can be considered an existing population, making an experimental population illegal. 'I think you can have a population of one,' he said." *Sierra Club: Wolf Shooting Nixes Plans*, CASPER STAR-TRIBUNE, Apr. 3, 1993, at B1.

103. "Confirmation of wolves in the area, [Ed] Bangs said, could prevent wolves reintroduced to the park from being designated an 'experimental population.'" *Reports of Wolves Overstated*, *supra* note 98.

104. Even "most [conservationists] agree that wolves that prey on livestock should be moved or killed as quickly, effectively and humanely as possible." Fischer, *supra* note 40, at 39. "Wolf recovery and wolf management go hand in hand." *Statement of NWF*, *supra* note 4, at 4.

105. See *infra* notes 107 and 108 and accompanying text.

106. See *infra* note 355.

107. 16 U.S.C. § 1538(a) (1988).

108. 16 U.S.C. § 1537 (1988).

109. 16 U.S.C. § 1539(a)(1)(A) (1988).

110. WOLVES FOR YELLOWSTONE, *supra* note 35, at 1-29.

111. 16 U.S.C. § 1531 (1988).

tion,<sup>112</sup> no private killing on public land is allowed under the experimental population designation.<sup>113</sup> This is important because the vast majority of the land on which cattle graze in the Yellowstone Ecosystem is BLM or Forest Service land.<sup>114</sup>

### *State Agencies*

State control also presents some problems.<sup>115</sup> The Wyoming Game and Fish Department (WGF) is reluctant to assume responsibility for wolf management.<sup>116</sup> The greatest concerns to the WGF are the inflexibility of the allowable control measures,<sup>117</sup> funding,<sup>118</sup> and the effect on ungulate populations, hunters, and ranchers.<sup>119</sup> The WGF does not want to fund the expensive management of wolf reintroduction from its

112. 16 U.S.C. § 1539 (1988).

113. *Id.*

114. 65% of the land in the Yellowstone Ecosystem is either Forest Service, Bureau of Land Management or state land. Bourret, *supra* note 78, at 11.

115. State control is permitted under the ESA if the state enters into an involved cooperative agreement with the federal government and fulfills the six requirements outlined in 16 U.S.C. § 1535(c)(1)(A)-(E). 16 U.S.C. § 1535(c)(1) (1988).

116. Norman Bishop stated that once a viable population of wolves was established control would be turned over to the WGF. Telephone Interview with Norman A. Bishop, Research Interpreter, Yellowstone National Park, Wyoming (Feb. 2, 1993). Past plans and proposals regarding the reintroduction of wolves have inferred or expressly stated that the state wildlife agencies would be responsible for or else share the duty of managing wolves even in the early stages of wolf reintroduction — the Wolf Recovery Plan of 1987, the proposal of the Wolf Management Committee, and the FWS's preferred alternative are three examples. *See supra* notes 29, 38, and 56.

117. The Montana counterpart to the WGF has expressed similar concerns:

State officials have complained that under the Endangered Species Act, the state would have little management flexibility and no assurance of adequate federal funding in wolf recovery efforts . . . . 'We even made an offer to the U.S. Fish and Wildlife Service to accept funding and support reintroduction with the caveat that it could not be done under the Endangered Species Act. That did not work.' [said Arnold Dood, a biologist with the Department of Fish, Wildlife, and Parks, Montana's Game and Fish Department] . . . . The main point of contention between the U.S. Fish and Wildlife Service, which is charged with recovering endangered species, and the state is the restrictions of the Endangered Species Act.

*Montana Wary of Wolf Recovery Plan*, CASPER STAR-TRIBUNE, January 21, 1993, B1.

118. "Another concern [of the WGF in regard to wolf reintroduction] is cost." Chris Madson, *Wolves for Yellowstone?*, WYOMING WILDLIFE NEWS, Vol. 3, Issue 2, September/October 1993, at 7. 16 U.S.C. § 1535(d) authorizes the Secretary to provide financial assistance to any state which has entered into a cooperative agreement pursuant to 16 U.S.C. § 1535(c) to assist in the state's development of conservation programs for endangered species, and up to 75% of the program costs may be subsidized. However, "Montana state officials argue although ESA section 6 [16 U.S.C. § 1535(d)] funds are available, relying on such funds is 'risky' because the funds are typically inadequate." Timothy B. Strauch, *Holding the Wolf by the Ears: The Conservation of the Northern Rocky Mountain Wolf in Yellowstone National Park*, 27 LAND AND WATER L. REV. 33, 78, n.335 (1992). [Strauch received this information from a telephone interview with Jim Posewitz, Special Assistant to the Director, Resource Assessment Unit, Mont. Dep't of Fish, Wildlife & Parks (July 26, 1991)].

119. Madson, *supra* note 118, at 7.



coffers.<sup>120</sup> The WGF is also hesitant to assume management responsibility if their accepted control practices, private hunting and other flexible agency measures, are excluded by the ESA.<sup>121</sup>

Although reluctant, the WGF is not diametrically opposed to returning wolves to the wilds of Wyoming. The WGF has supported wolf reintroduction proposals like the 1987 Wolf Recovery Plan<sup>122</sup> "which minimized conflicts with other user groups and ensured that other wildlife management objectives were not compromised."<sup>123</sup> But, the WGF is hesitant to willingly accept and facilitate the ESA and its restrictive management requirements.<sup>124</sup> The WGF's preferred management method is to allow private individuals to harvest limited numbers of the designated species.<sup>125</sup> If the experimental population designation is used and the State ensures that any private harvest on private land is biologically supportable<sup>126</sup> the ESA might not be violated by private killings. Regardless, even in Minnesota, which has a stable and threatened (not endangered) population of wolves, wolf advocates brought a lawsuit when the state wildlife agency tried to implement a control program which advocated limited private harvest of wolves.<sup>127</sup> The court in that case prohibited the state's attempt to institute limited sport trapping by private individuals of wolves classified as threatened.<sup>128</sup> The Ninth Circuit has been equally restrictive of wolf management under the ESA, and has held that the ESA

120. "Even if state agencies were able to absorb several million dollars a year in wolf management expense, the effort would cripple a host of other vital conservation efforts." *Id.*

121. See *supra* notes 104-114 and accompanying text. See also *infra* notes 130-137. State game management programs historically focused on the sport hunting industry. George C. Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 68-71 (1981).

122. See *supra* note 29.

123. John Talbott, *View of the Wyoming Game and Fish Department*, WYOMING WILDLIFE, Jan. 1992, at 21 (Talbott is the assistant Chief Game Warden for the Wyoming Game and Fish Department).

124. "The way the Endangered Species Act (ESA) reads, you have to show that the population pressure is so extra ordinary that it can't be reduced by any other means before you can trap and hunt them. And that is a biological impossibility." Dr. Charles E. Kay, *Wolf Recovery in Yellowstone*, ABUNDANT WILDLIFE, Special Wolf Issue, at 5 (condensed from Dr. Kay's lecture to the Wyoming Public Lands Counsel on August 23, 1991) (Dr. Kay is a Ph.D. Wildlife Ecologist).

125. Troy Mader lists some of the advantages of private harvest of wildlife:

[H]unting and trapping are some of the best wildlife management tools. Hunter's harvest can be limited through bag limits, length of seasons, and specification of sex of the animal harvested. Thus, only the surplus of a[n] ungulate population is generally hunted. If the need arises that an ungulate population needs reduction, it is easily accomplished by allowing an 'any sex' hunt. Additionally, hunters will pay for the opportunity to hunt which in turn pays for wildlife management. Wolves do none of the above.

Troy R. Mader, *Wolves and Hunting*, ABUNDANT WILDLIFE, Special Wolf Issue, at 3.

126. 16 U.S.C. § 1531 (1988).

127. *Sierra Club v. Clark*, 577 F. Supp. 783 (D. Minn. 1984).

128. *Id.*

procedures must be closely adhered to when proposed agency action might affect natural recovery of wolf populations.<sup>129</sup> In these cases the courts strictly read the provisions of the ESA, giving insight to future court rulings on this issue.

The WGF will also be unable to use its other customary management measures<sup>130</sup> and will likely be hampered by the same type of restrictions the courts in Minnesota have enforced in their interpretation of the ESA.<sup>131</sup> In Minnesota, the wolf population was reclassified from endangered to threatened in 1978.<sup>132</sup> Only then were federal officials authorized to kill livestock-depredating wolves, and then only after the wolves had committed "significant depredations on lawfully present domestic animals" and "only if the taking [was] done in a humane manner."<sup>133</sup> Later in 1978, wolf advocates filed suit against the FWS disputing the nature and extent of the wolf control program.<sup>134</sup> The federal district court in Minnesota reiterated the ESA's restriction of killing wolves only after significant depredations and further limited control by requiring that trapping be restricted to within one-quarter mile of the depredated farms.<sup>135</sup> Acting in the same capacity expected of the WGF biologists and wildlife managers, the Minnesota Department of Natural Resources' animal population manager Blair Joselyn stated that his state's hands are tied even if the wolf population survey shows a marked increase.<sup>136</sup> The discretion and customary management practices of the WGF will be limited if similar restrictions are applied to Wyoming. The WGF is hesitant to support a plan that will limit it in this way.<sup>137</sup> Instead the WGF seeks to

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129. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985).

130. The situation presently affecting ranchers in the Togwotee Pass area of Wyoming is a case in point where the WGF is severely limited due to the restrictions of the ESA. This area is considered "Situation 1" grizzly bear habitat where all bear/human conflict is to be resolved in favor of the bears. *Grizzly Bears Take Toll on State Cattle Operations*, CASPER STAR-TRIBUNE, September 20, 1993, at B1 [hereinafter *Grizzly Bears Take Toll*]. At this time the grizzly bears in this area are listed as threatened, not endangered under the ESA. *Grizzlies Kill Cattle Near Togwotee Pass*, CASPER STAR-TRIBUNE, September 2, 1993, at B3. Yet, Dave Moody of the WGF Department's Lander district said that there is not much his agency [WGF] can do unless the Yellowstone ecosystem subcommittee of the Interagency Grizzly Bear Committee classifies a bear as a nuisance. That group has been reluctant to take such action in Situation 1 habitat he said. *Grizzly Bears Take Toll*, *supra*, at B1.

131. *See supra* note 127. *See also infra* note 134.

132. *See supra* note 17.

133. John Weaver, *Of Wolves and Livestock*, WESTERN WILDLANDS, Winter 1983, at 38 (Weaver is an Endangered Species Biologist for the FWS).

134. *Fund for Animals v. Andrus*, Civil No. 5-78-66 [11 *Env'tl. Rep. Cas.* (BNA) 2189] (D. Minn. 1978).

135. *Id.*

136. J. Myers, *Wolves' Killing of Livestock Preys on Damage-Control Funds*, DULUTH NEWS-TRIBUNE, June 14, 1990, at 1A.

137. *See infra* notes 143-161 and accompanying text.

ensure prior to wolf reintroduction that effective management methods will be allowed in Wyoming.

Some wolf advocates question the WGF's hesitation to wholeheartedly support wolf reintroduction.<sup>138</sup> They point to the WGF's statutory duty to "provide an adequate and flexible system for control, propagation, management, protection, and regulation of all Wyoming wildlife."<sup>139</sup> This duty requires the WGF to encourage and assist in the reintroduction of wolves because they are Wyoming wildlife. If the WGF is not allowed what it considers to be adequate management flexibility, wolf reintroduction may indeed have effects which are contradictory to the WGF's statutory duty under Wyoming Statute § 23-1-103.<sup>140</sup> The WGF will be unable to "provide an adequate and flexible system"<sup>141</sup> of protection and management for all of Wyoming's wildlife as is statutorily required if it has relatively little control over the wolf.<sup>142</sup> For example, the prey species of the wolf will be subject to unchecked depredation by the free-ranging wolf.<sup>143</sup> The WGF risks being hauled into court by the Rocky Mountain Elk Foundation for instance if the WGF cannot adequately protect and manage this group's favored species from wolf depredations.

The WGF is also concerned about funding for wolf reintroduction and possible detriment to its faithful constituents.<sup>144</sup> The WGF has been accused of being interested only in providing targets for hunters;<sup>145</sup> this is not surprising since the WGF is primarily funded through hunting and

138. "Despite the [WGF] department's mission statement and legislative mandate [WYO. STAT. § 23-1-103], wolf recovery remains a project that is imposed upon the state rather than an action undertaken by them as part of their affirmative duties in managing all wildlife." Rene Askins, *View of the Wolf Fund*, WYOMING WILDLIFE, January 1992, at 17 (Askins is a wildlife biologist and serves as executive director of The Wolf Fund, Moose, WY).

139. WYO. STAT. § 23-1-103 (1977). "For the purposes of this act, all wildlife in Wyoming is the property of the state. It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife." *Id.*

140. *Id.*

141. *Id.*

142. One concerned Wyoming resident speaking out for the wildlife of Wyoming wrote: Now we must have grizzly bears and wolves. We hear the plea of the rancher, the hunter, and the environmentalist, but who is speaking in defense of the beautiful calves of elk, deer, buffalo, and mountain sheep who will be torn apart in a senseless slaughter . . . . Who will be standing by to save the young animals in Yellowstone?

Clayton E. Chantrill, letter to the editor published in the CASPER STAR-TRIBUNE, September 9, 1993, at A9.

143. "[Under the FWS's preferred alternative] [t]he service would not allow wildlife managers to kill wolves that were threatening to reduce a big game population drastically." Wyoming Game and Fish Staff, *Impact of the Pack*, WYOMING WILDLIFE, October 1993, at 22-23.

144. "Wyoming Game and Fish biologists are concerned about the accuracy with which the effects on ungulate populations and hunters can be predicted." Madson, *supra* note 118, at 7.

145. *Id.*

fishing license fees.<sup>146</sup> License fees generate close to eighteen million dollars in revenue annually for the WGF,<sup>147</sup> and most wolf advocates do not donate any funds to the state agency. Hunters have shown how important their sport and the wildlife of the state are to them by willingly accepting license fees and increases in fees,<sup>148</sup> and the WGF is interested in accommodating this group.<sup>149</sup>

Funding is an important factor in any equation considered by the WGF.<sup>150</sup> The Director of the WGF, Pete Petera stated, "I don't think the state's hunters and fishermen should pay the cost of [wolf] management. It's going to be expensive."<sup>151</sup> According to John Talbott, Assistant Chief Game Warden for the Wyoming Game and Fish Department:

The additional costs to be incurred by the states for managing wolves and the loss of revenues from reduced hunting opportunity [are] much disputed topic[s] between the states and some wolf proponents . . . .<sup>152</sup> Two issues of importance to the Wyoming Game and Fish Department . . . involve 'ungulate enhancement' and funding for wolf recovery. Both issues involve the source of funds to monitor and manage the [wolf reintroduction] program and the necessary monies needed to increase big game objectives [to attempt to make up for the decrease in human harvest due to wolf kills] so that hunter opportunity and management objectives are not compromised as a result of wolf predation.<sup>153</sup>

The costs of WGF management of wolves will come from the coffers filled by hunters and fishermen, not the majority of wolf advocates from the far reaches of the country. As a result, the WGF is re-

146. WYOMING GAME AND FISH DEPARTMENT, HOW YOUR WILDLIFE DOLLARS COME AND GO (1990).

147. WYOMING GAME AND FISH DEPARTMENT, WYOMING GAME AND FISH DEPARTMENT'S ANNUAL REPORT (1992).

148. "Hunter numbers may be down in some states but not in Wyoming. This year [1993], demand for nonresident . . . licenses in the state rose sharply . . . [even though] 1992 was the first year of a license fee hike." Tom Reed, *Big-Game Hunter Numbers Up in Wyoming*, OUTDOOR LIFE, October 1993, at 10.

149. See *infra* note 152-154 and accompanying text.

150. See *supra* note 147 and accompanying text. See also *infra* notes 151-154 and accompanying text.

151. Kathryn Gress, *Petera: Wolf Reintroduction Is Inevitable*, THE WYOMING EAGLE, March 21, 1991 (Gress is a staff writer for the Wyoming Eagle).

152. Talbott, *supra* note 123, at 21.

153. *Id.* at 23.

luctant to use these funds to support a program that will deplete the natural resources important to its constituents.<sup>154</sup>

However, hunters are not callously opposed to helping non-game species. In fact, a majority of hunters support wolf reintroduction<sup>155</sup> and are willing to forego *some* lost hunting opportunities associated with wolf reintroduction.<sup>156</sup> Most hunters recognize the need for effective and flexible control strategies to accompany wolf reintroduction and oppose severely limited control measures.<sup>157</sup>

Another problem the WGF faces is the risk of alienating ranchers. The WGF depends on ranchers because ranchers own a significant portion of Wyoming's wildlife habitat.<sup>158</sup> If the WGF does not compensate for wolf depredation, ranchers are likely to vent their frustration at the losses on the WGF and not cooperate with the WGF on future programs or deny recreational access.<sup>159</sup> The WGF does not want to further strain their already tenuous relationship with ranchers.

The WGF supports wolf reintroduction. However the WGF prefers not to endorse any plan that does not allow what it considers adequate and

154. See *supra* notes 148, 151-154 and accompanying text.

155. "Poll after poll has demonstrated solid hunter support for wolf recovery. A 1986 survey of hunters in northwestern Montana showed that 58% hope that wolves would continue to inhabit the area, while only 24% hope they would not." P. TUCKER, ATTITUDES OF HUNTERS AND RESIDENTS TOWARDS WOLVES IN NORTHWESTERN MONTANA (1988).

156. It is uncontroverted that wolves will compete with hunters and cause a decrease in the number of hunting permits available. *No-Wolf Keeps Up Information Blitz*, CODY ENTERPRISE, April 1, 1992; WOLF QUESTIONS, *supra* note 60, at 7; Bourret, *supra* note 78, at 13; Mader, *supra* note 125, at 3.

157. "While we are confident that hunters as a group favor wolf recovery, the National Wildlife Federation recognizes that this support is contingent on a program of wolf management in accordance with sound principles of wildlife management." *Statement of NWF*, *supra* note 4, at 3.

158. The WGF relies on the substantial private land holdings across the state which account for approximately 52% of the total land area for hunting and fishing access, wildlife feeding, habitat improvement, etc. Wyoming U.S. Senator Alan Simpson noted "nearly half of Wyoming is owned by the federal government." *Delegation Pushes Federal Land Limits*, CASPER STAR-TRIBUNE, February 6, 1992. "To paraphrase Aldo Leopold: 'The future of wildlife conservation lies with private lands.'" Marion H. Scott, letter to the editor published in the CASPER STAR-TRIBUNE, August 29, 1993, at A13.

159. "Pete Petera is particularly concerned about the budget problems that could arise from wolf depredation on livestock . . . [H]e is concerned that the Defenders fund might not be large enough or long-lived enough to cover wolf damage over twenty or thirty years." Madson, *supra* note 118, at 7.

In the fall of 1993, three cattle companies closed hunting on over 150,000 acres of private land within the Cumberland Grazing Allotment in Southwest Wyoming after conflicts with hunters and the BLM concerning the ranchers' land management. Katharine Collins, *Private Lands Closed on Cumberland*, CASPER STAR-TRIBUNE, September 29, 1993, at A1. WGF biologist Bill Rudd said, "Obviously we'd prefer to have the hunter access . . . . But if that's what the ranchers are going to do, we can't force them to do it differently." *Id.*

flexible control measures and which will require the state agency to assume the burden of funding wolf reintroduction. These issues are important to the WGF because it is the entity that will inherit<sup>160</sup> from the federal government and wolf advocate groups the problems of funding, management and livestock losses that wolf reintroduction is sure to cause. WGF Department director Francis "Pete" Petera has stated: "We don't want to end up with a plan that's so inflexible, it ties our hands and keeps us from doing a good job of managing wildlife."<sup>161</sup>

### *Federal Government*

Federal management of wolves is preferred by most wolf advocates and is mandated by the ESA.<sup>162</sup> However, history has proven that reliance on the federal government's control programs as carried out by the USDA's Animal Damage Control Program (ADC) and the FWS to be problematic.<sup>163</sup>

The federal government is restricted by the inflexible management restrictions of the ESA enforced by the courts.<sup>164</sup> Present FWS regulations concerning wolf management conform to the decisions of the Minnesota courts.<sup>165</sup> The federal government, like the state agencies, cannot kill wolves labeled endangered and may kill wolves labeled threatened only if significant depredations on livestock occur and only if the depredating wolves are killed in a humane manner.<sup>166</sup> Under FWS regulations no public harvest of wolves is allowed.<sup>167</sup> This causes a problem because the

160. See *supra* note 116.

161. Steve Merritt, *Wolf Update a Brief Status Report*, WYOMING WILDLIFE NEWS, Vol. 3, Issue 4, January/February 1994, at 13.

162. See *supra* note 20 and accompanying text.

163. In commenting on ranchers' reluctance to rely on government programs, the American Farm Bureau Federation stated:

But ranchers are primarily skeptical about government promises of protection because those promises have in the past proven to be hollow. The same promises that we are now hearing were made when the wolf was first protected in Minnesota. They lasted only until ranchers began experiencing losses. Instead of 'protecting' the interests of ranchers in northern Minnesota, the government steadfastly refused any relief from depredating wolves . . . . Nor is this problem merely one of an elusive animal evading government trappers. Rather it is one of attitude of federal officials. Ranchers have learned that once a species is introduced, government interest in their depredation problems ends.

AMERICAN FARM BUREAU FEDERATION, COMMENTS OF THE AMERICAN FARM BUREAU FEDERATION ON A PROPOSAL TO INTRODUCE WOLVES INTO YELLOWSTONE PARK (Scoping Document) 7 (1993) [hereinafter AFBF COMMENTS] (on file with author).

164. See *supra* notes 127-128 and 134 and accompanying text.

165. 50 C.F.R. § 17.40 (1992). See *supra* notes 127 and 134 and accompanying text.

166. 50 C.F.R. § 17.40 (1992).

167. *Id.*

FWS will be unable to use effective management methods to control reintroduced wolves.

The management issue is integrally related to funding because ineffective control methods lead to increased funding requirements. An example of this is the fact that FWS and ADC agents were responsible for a \$41,000 expenditure which resulted in the capture of six wolves in Montana.<sup>168</sup> This excessive cost resulted from the agents being restricted to inefficient live-trapping methods.<sup>169</sup> Costs of wolf management will be significant<sup>170</sup> and will only increase in magnitude if the present ineffective and inefficient control methods are the only means of management allowed.

Federal funding for wolf management has also proven to be unreliable. The ADC program in Minnesota was seriously compromised in 1989 due to budgetary constraints.<sup>171</sup> “[In 1990] control activities were curtailed sharply from mid- to late August when a lack of program funds forced appointments of two trappers to be terminated early,” notes William J. Paul, ADC district supervisor. Trapping was discontinued at several farms due to a lack of manpower, and a number of complaints were not serviced . . . .”<sup>172</sup> That makes William Paul, a wolf biologist for the U.S. Department of Agriculture, question the logic of beginning new reintroduction projects without solid operational and compensation budgets in place.<sup>173</sup> Even when federal funds are allocated, they do not always reach the intended destination. Even though wolf reintroduction is currently a very hot topic, Senator Conrad Burns, R-Mont., recently persuaded the Senate to shift \$330,000 from wolf studies to road and building maintenance in Yellowstone National Park.<sup>174</sup>

168. Myers, *supra* note 136, at 1A.

169. *Id.*

170. “About \$95,000 a year is spent to manage and research just the four wolf packs on the western edge of Glacier National Park.” *No Need to Fear Yellowstone Wolves, Expert Says*, ROCKY MOUNTAIN NEWS, April 8, 1991. “Presently, the total federal budget for wolf recovery in Montana runs about \$260,000 annually.” Ed Bangs, *Return of a Predator: Wolf Recovery in Montana*, WESTERN WILDLANDS, Spring 1991, at 11. The Wolf Management Committee determined budget estimates of seven million dollars per year after implementation to manage wolves reintroduced into Yellowstone. Bourret, *supra* note 78, at 13.

171. “A record number of livestock killed by timber wolves has bankrupted federal wolf control and state reimbursement programs for farmers . . . .” Myers, *supra* note 136, at 1A.

172. American Farm Bureau, *Experience With Problematic Wolves in Minnesota Worst Ever in 1989*, PARK RIDGE, July 5, 1990.

173. Diane Eastridge, *Wolf Damage Program Out of Money*, JACKSON HOLE GUIDE, June 20, 1990. “Paul said he finds it ‘ironic’ that while the wolf-control program in Minnesota is suffering, efforts are afoot to fund a reintroduction program in Yellowstone.” *Id.*

174. *Senator Tries to Stop Wolf Study Funds*, CASPER STAR-TRIBUNE, September 16, 1993, at B1.

Another matter of concern is the continued funding of ADC programs presently used to control other predators. One rancher expressed her concern: "We must be guaranteed that current programs to protect our livestock and wildlife will not be adversely affected . . . , that funds dedicated to these programs will not be shifted to address wolf programs, . . . and that funding will be available . . . to reimburse our Animal Damage Control program . . . ." <sup>175</sup> In 1990, Congress addressed this concern by providing additional funds for predator control activities for endangered and threatened species in the northern Rocky Mountains. <sup>176</sup>

The strain of wolf management costs on the ESA budget may adversely impact the ESA program in general. "The attention and resources focused on the wolf compete and drain the limited federal dollars and energy needed to keep truly endangered species from extinction." <sup>177</sup> The Wolf Management Committee estimated that seven million dollars per year would be needed to manage wolves reintroduced to Yellowstone; presently, the entire ESA budget is about thirty to forty million dollars per year. <sup>178</sup>

Given the present political climate in this country toward government cut-backs in spending, future funding for control programs as well as endangered species protection is a legitimate concern for ranchers and wolf advocates alike. <sup>179</sup> The unanswered question re-

175. Cynthia Siddoway, Testimony presented before the Senate Committee on Energy and Natural Resources regarding S.2674, Sept. 19, 1990, at 2 (Siddoway is a representative of Idaho Wool Growers Association) (S.2674 was a bill providing for the reestablishment of the gray wolf in Yellowstone National Park and Central Idaho considered by the Subcommittee on Public Lands, National Parks and Forests of the Senate Committee on Energy and Natural Resources) (on file with author).

176. "The funds relieved livestock producers' concerns about whether the costs of wolf control might affect other ADC programs like coyote removal." Bangs, *supra* note 170, at 10.

177. K. L. Cool, Testimony presented before the Senate Committee on Energy and Natural Resources regarding S.2674, Sept. 19, 1990, at 1 (Cool is the Director of the Montana Department of Fish, Wildlife and Parks) (on file with author). The gray wolf is legally, not biologically, threatened or endangered. Viable populations are found in Alaska, Minnesota, and across Canada. "There are upwards of 50,000 gray wolves in Canada and Alaska, and many thousands of captive and hybrid wolves across the United States. Introduction is, therefore, not critical for the survival of the wolf." Ed Bangs, CASPER STAR-TRIBUNE, July 15, 1992 (Ed Bangs is a FWS biologist and is the coordinator of the interagency EIS team).

178. WOLF MANAGEMENT COMM. REPORT, *supra* note 38; Bourret, *supra* note 78, at 13. Bourret asks, "Is it reasonable to spend \$7 million on a species which is really in no danger of becoming extinct?" *Id.* "Gray wolf recovery will cost the taxpayers a minimum of \$40 million dollars. This is in addition to \$13 million for further recovery of the eastern timber wolf . . ." No-Wolf Option Committee, NEWS RELEASE 1 (March 25, 1992).

179. An example of the problems related to receiving funds from the Federal government is as follows:

State and local recreational facilities are deteriorating because Washington virtually stiffes states on matching grants from the Land and Water Conservation Fund, Wyoming Gov.



mains: How much of the governments finite funds should be spent on a species like the grey wolf which is in no danger of extinction?<sup>180</sup>

### COMPENSATION

Management and funding for the control measures are not the only problems facing wolf reintroduction. Also in dispute is which group should bear the burden of compensating ranchers for livestock killed by wolves: the federal government, state agencies, wolf advocates, or the ranchers themselves. Many people assume the federal and state governments are obvious sources of funds for compensation. However, neither entity has demonstrated a willingness in the past to compensate for wildlife depredation, and both are fairly well insulated by case law from any forced, unwilling payments.<sup>181</sup> Wolf advocates are a possible source of compensation funding, and a wolf advocate group, Defenders of Wildlife (DOW), is in fact presently paying for wolf depredations in Montana.<sup>182</sup> But, DOW has not made a legally binding promise to continue payment, making this source unreliable.<sup>183</sup> Ranchers could be required to personally assume the loss, but ranchers feel that it is unfair to require that they run the risk of bearing the disproportionate cost of wolf depredations.

It is not disputed that, if reintroduced to Yellowstone National Park, wolves will kill livestock.<sup>184</sup> Overall losses will most likely appear insignificant to people living outside the Yellowstone region.<sup>185</sup> For example, only three out of a thousand Minnesota farms suffer confirmed losses to wolves each year,<sup>186</sup> and in Alberta's Simonette

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Mike Sullivan said Monday . . . [B]urdensome administrative requirements attached to the money Washington does provide from the fund further diminish the program's effectiveness . . . the fund has steadily declined as have the states' share . . . In fiscal 1990 when Wyoming received \$141,597 from the fund, Sullivan said, the state spent more than \$69,000 in administrative costs.

David Hackett, *States' Share of Park Fund in Sharp Decline, Sullivan Says*, CASPER STAR-TRIBUNE, February 2, 1992.

180. See *supra* note 168-174 and accompanying text.

181. See *infra* notes 194-260 and accompanying text.

182. See *infra* note 262.

183. See *infra* note 264 and accompanying text.

184. "[W]e cannot deny that some [livestock] losses will occur." Hank Fischer, Supply Side Environmentalism: A Private Compensation Fund for Livestock Killed by Wolves in the Northern Rockies, Defenders of Wildlife Presentation to the Greater Yellowstone Ecosystem Land and Resource Management Symposium (April 21, 1989) (transcripts of Fischer's speech are available from the Defenders of Wildlife).

185. See *infra* notes 186-189 and accompanying text.

186. Bangs, *supra* note 170, at 10.

River area ranches average about thirteen confirmed kills per one thousand cattle per year.<sup>187</sup> These statistics make it appear that ranchers will not be impacted too adversely by wolf reintroduction. Even if one factors in the maulings<sup>188</sup> and disregards the statistical practice of counting only *confirmed* kills,<sup>189</sup> the losses overall seem *de minimis*.

But if one were to consider the aggregate monetary loss to the states and provinces or the impact of kills on the individual ranchers who suffer the depredation, the losses are not as easily dismissed.<sup>190</sup> In 1982, Alberta paid out \$115,296 to compensate ranchers for depredation.<sup>191</sup> In 1991 a single Minnesota farmer was compensated \$11,988 for losses to wolves during that year.<sup>192</sup> Although these numbers represent the extreme end of the spectrum, they are proof that considerable losses can and do occur. The impact on the individual is further evidence that losses to wolves are not as *de minimis* as they seem; the loss of only one cow to a hard-pressed rancher can mean the difference between feeding his family or losing money for the year.<sup>193</sup> Ranchers are bound to lose stock if wolves are reintroduced, but who will be required to bear the burden of these

187. Weaver, *supra* note 133, at 38.

188. *Id.* In the Simonette River area of Alberta confirmed kills were 16 and maulings were 51 during a five year period. *Id.*

189. "Actual kills and confirmed kills are two entirely different things. Animal Damage Control officers state that confirmed kills are often as low as 10% or less. That means, rancher, you are never going to be compensated for 90% of the losses you suffer to wolves." Troy R. Mader, *Realities of Wolf Recovery*, ABUNDANT WILDLIFE, Special Wolf Issue, at 7.

190. "Wolves do not normally seek out livestock as prey, but they do attack livestock on occasion, and losses to individual owners can be significant if nothing is done." Bangs, *supra* note 170, at 10. "Although most producers lost no animals to wolves, some individual livestock producers were severely affected by persistent or large losses." NORMAN A. BISHOP, YELLOWSTONE WOLF ANSWERS - A SECOND DIGEST 14 (1992) (copies available from Yellowstone National Park, Wyoming 82190). Texas Judge, O.W. Williams, who lived in the era of the wolf said:

Of all the predators which prey upon our herds and flocks, the lobo [wolf] inflicts the most damage, and causes stockmen the most trouble. It is not that it causes any sudden, large loss, but it is a constant, steady source of loss. It is not a calamity, such as hordes of locusts and grasshoppers which have devastated the West a few times. It is more like a grievous tax that is laid on year by year, which must be borne with patience, and is counted every year as an entry in the volumes of profit and loss.

Mader, *supra* note 189, at 7.

191. MICHAEL J. DORRANCE, ALBERTA LIVESTOCK PREDATOR COMPENSATION PROGRAM APPROVED CLAIMS FOR PREDATION 1980-1990 1 (1991) (Dorrance is the Section Head of Problem Wildlife, Plant Pathology & Apiculture for Alberta, Canada).

192. WILLIAM J. PAUL, WOLF DEPREDATION ON LIVESTOCK IN MINNESOTA ANNUAL UPDATE OF STATISTICS 1 (1991) (Paul is the District Supervisor for USDA, APHIS, ADC in Minnesota).

193. "[T]he death of even one [cow, sheep, horse, etc.] can be plenty serious to the hard pressed farmer . . . ." Douglas H. Chadwick, *Manitoba Wolves: A Model for Yellowstone?*, DEFENDERS, Mar/Apr. 1987, at 34 (Chadwick is a wildlife biologist from Montana).

losses? Four possible alternatives exist: the federal government, state government, wolf advocates, and ranchers.

### *Federal Government*

Although states initially claimed and were conceded ownership of wildlife,<sup>194</sup> the federal government has since asserted preemptive rights over the states in certain areas of the wildlife management arena. In 1920, the Court in *Missouri v. Holland*<sup>195</sup> upheld the Migratory Bird Treaty Act<sup>196</sup> which allowed federal interference in the traditionally state-dominated field of wildlife management. *Hunt v. United States*,<sup>197</sup> which followed in 1928, marked the first successful exercise of the federal property power over wildlife in which state regulations were preempted. That case arose because the federal government ordered a reduction in the deer herd on federal lands in Arizona, and the state challenged this assertion of power by the federal government.<sup>198</sup> Then *Kleppe v. New Mexico*<sup>199</sup> upheld the Wild, Free-Roaming Horses and Burros Act (WHB),<sup>200</sup> and thereby expanded the federal property power by declaring wild horses and burros components of the public land.<sup>201</sup> The Court in *Kleppe* held that public lands no longer had to be affected for federal regulation of wildlife since the wild horses and burros were components of the public lands.<sup>202</sup> The Court in *Kleppe* basically asserted that wild horses and burros could not be controlled by the state or private property owners unless the federal government granted them the power to do so because of the language of the WHB Act.<sup>203</sup> Like *Kleppe*, *Palila v. Hawaii Department of Land and Natural Resources*<sup>204</sup> determined that no federal land need be affected for the federal government to involve itself in the management of wildlife. However, the Court in *Palila* used the ESA rather than the property clause used by the Court in *Kleppe*. The court in *Palila* stated that the ESA protects resources which are so important that a federal property

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194. *Geer v. Connecticut*, 161 U.S. 519 (1896) (holding the state owned the wildlife within its borders - first assertion of the state ownership doctrine); *Abbey Dodge v. U.S.*, 223 U.S. 166 (1912) (holding that the state ownership doctrine barred the federal government from regulating wildlife).

195. 252 U.S. 416 (1920).

196. 16 U.S.C. §§ 703-712 (1988 & Supp. 1993).

197. 278 U.S. 96 (1928).

198. *Id.* at 100.

199. 426 U.S. 529 (1976).

200. 16 U.S.C. §§ 1331-1340 (1988).

201. *Kleppe*, 426 U.S. at 541.

202. *Id.*

203. *Id.* at 540-541.

204. 471 F. Supp. 985 (D. Haw. 1979).

interest is created.<sup>205</sup> Finally in 1979, *Hughes v. Oklahoma*<sup>206</sup> expressly overruled *Geer v. Connecticut*<sup>207</sup> and the state ownership doctrine.

The federal government has firmly established its preemptive right as the premier regulator of wildlife in this country. The federal government has also claimed a federal property interest in endangered species.<sup>208</sup> Regardless of these rights and interests, the federal government has maintained a position of nonliability concerning wildlife depredation.

Federal denials of liability for depredation caused by wildlife began in 1950 with *Sickman v. United States*.<sup>209</sup> Federal nonliability in *Sickman* was based on the common law concept of *ferae naturae* which requires reduction to possession for ownership.<sup>210</sup> Since the federal government does not have the individual animal or bird in its actual possession, it claims ownership has not vested and so neither has liability. In 1984, relief was denied again based on the theory of *ferae naturae* in *American Farm Bureau Federation v. Block*.<sup>211</sup> That case involved a claim stemming from the expansion of a prairie dog population from federally administered lands onto private property. The American Farm Bureau Federation claimed the federal government was negligent in its conservation and protection of the wildlife involved.<sup>212</sup> The court ruled that compensation for depredation of grass by the prairie dogs was not due because the prairie dogs were not reduced to possession by the federal government.<sup>213</sup> The nonliability stance was strengthened two years later in *Mountain States Legal Foundation v. Hodel*,<sup>214</sup> where it was shown that, even when the federal government was under a duty to control the depredating wildlife, no compensation was owed.<sup>215</sup> In that case, wild horses and burros protected under the Wild Free-Roaming Horses and Burros Act had caused extensive damage to private lands, but the court refused to award compensation for the depredation. In so doing, the court stated, "Neither state nor federal authority over wildlife is premised upon any technical 'ownership'

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205. *Id.* at 995.

206. 441 U.S. 322 (1979).

207. 161 U.S. 519 (1896).

208. *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979).

209. 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).

210. *Id.* at 618.

211. 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20765, 20766 (D.S.D. May 14, 1984).

212. *Id.*

213. *Id.* at 20765.

214. 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

215. *Id.* at 1428, 1430.

of wildlife by the government."<sup>216</sup> Although the federal government claims that it owns the wildlife of the country, it does not compensate for depredation by wildlife.<sup>217</sup>

Under the Fifth Amendment to the United States Constitution, the federal government is required to compensate private individuals if governmental entities take their private property. The Fifth Amendment states, "[N]o person shall be . . . deprived of . . . property, without due process of the law; nor shall private property be taken for public use without just compensation."<sup>218</sup> Even though constitutionally required to justly compensate for private property taken by federal entities, the federal government has refused to compensate for wildlife depredations under the takings clause.<sup>219</sup>

The court in *Mountain States Legal Foundation v. Hodel*<sup>220</sup> denied compensation based on the traditional takings tests of deprivation of economically viable use<sup>221</sup> and permanent invasion.<sup>222</sup> This illustrated the court's reluctance to find a compensable taking even if government control of wildlife is established and even if the damage is considered significant.<sup>223</sup>

A recent Supreme Court case involving questions of Fifth Amendment takings, *Lucas v. South Carolina Coastal Council*,<sup>224</sup> reiterated the strict view regarding compensation for governmental takings. Although the Court did find a possible taking in *Lucas* and remanded the case for further consideration, it actually strengthened the restrictive approach of the government. *Lucas* paid a substantial sum for two seaside lots in 1986 for the purpose of erecting houses, but state legislation in 1988 effectively denied *Lucas* the right to exercise this option. The Court found a possible compensable taking only because all economically viable uses of *Lucas*' property had been denied by the legislation.<sup>225</sup> Given the fact that once a cow is killed by a wolf all economically viable uses concerning that animal cease,<sup>226</sup> a rancher could attempt to formulate a takings argument

216. *Id.* at 1426.

217. *See supra* notes 209-216 and accompanying text.

218. U.S. CONST. amend. V.

219. *See infra* notes 220-233 and accompanying text.

220. 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

221. *Id.* at 1430.

222. *Id.* at 1428.

223. *Id.* at 1428-30.

224. 112 S. Ct. at 2886 (1992).

225. *Id.* at 2901-02.

226. There is no market for cows killed by wolves. Telephone Interview with Monte Snook, Representative for Superior Livestock Auction, Brush, Colorado/ Fort Worth, Texas, and Cattle Rancher, Hulett, Wyoming (March 21, 1994).

based on the loss of livestock to wolves. However, based on the reluctance of the court to find a taking in *Hodel*, it is unlikely that any court would find that depredation by wolves would warrant compensation under the Constitution. In addition, given the court's strict stance in *Lucas*, it is also unlikely that repeated losses of livestock to wolves which bankrupts a ranching operation would frustrate what the court considers all economically viable uses of ranch property because, for example, a rancher could still sell the land. So, although it may be possible to argue a Fifth Amendment taking, any argument of that nature regarding wolf depredations is likely to fail.

The *Lucas* Court briefly mentioned the consideration of investment-backed expectations advocated in *Penn Central Transportation Co. v. New York City*.<sup>227</sup> In *Penn Central*, a landmark preservation restriction was passed which limited the height of buildings in the vicinity of a historic train station.<sup>228</sup> The court in *Penn Central* refused to find a takings in part because the property owner was still able to use the property in the same capacity as before and the only harm was that the restriction limited the owner's ability to construct an addition in the airspace above the business and thus increase the value of the property. The court in *Penn Central* rejected the argument that in this case, as in *Pennsylvania Coal Co. v. Mahon*,<sup>229</sup> there was a frustration of distinct investment-backed expectations warranting the finding of a taking; however, the court did legitimize this test as viable in rejecting the argument.<sup>230</sup> If a purchaser of land expected to be able to raise livestock on the property, and wolves caused him enough losses to put him out of business, then it may be possible to show a frustration of investment-backed expectations.

The only other situation in which courts allow compensation is where a government-sanctioned physical invasion of the private property occurs.<sup>231</sup> *Mountain States Legal Foundation v. Hodel*<sup>232</sup> found that depredation by wildlife is not considered a permanent governmental invasion, rejecting the argument that wild horses were instrumentalities of the federal government whose presence constituted permanent governmental

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227. 438 U.S. 104 (1978) (holding as long as landmark preservation is carried out as part of a comprehensive scheme, development of individual landmarks may be curtailed without effecting a taking even though returns on plaintiff's investment may not be as large as initially expected due to the restrictions imposed by the landmark preservation scheme).

228. *Id.* at 115.

229. 260 U.S. 393 (1922) (holding that a state statute forbidding the mining of coal on certain property so totally frustrated the distinct investment-backed expectations of the holder of a mineral interest in the land as to amount to a taking).

230. *Penn Central*, 438 U.S. 104 (1978).

231. *Lucas*, 112 S. Ct. 2893 (1992).

232. 799 F.2d 1423, 1426 (1987).

invasion.<sup>233</sup> Thus, depredation by wolves will not be considered a permanent government invasion, because the federal government is likely to reject the contention that wolves, like wild horses, are instrumentalities of the federal government whose presence constitutes permanent governmental invasion.

Through an analysis of past case law it is apparent that the federal government is unwilling to compensate ranchers for depredation caused by wildlife. Additionally, the federal government has not made any offer in any plan or proposal related to wolf reintroduction to be a source of compensation. This stance, coupled with the federal government's and the courts' strict approach towards compensation under the Fifth Amendment in general, gives the impression that it is highly unlikely that the federal government will voluntarily compensate or be compelled to compensate for wolf depredation.

### *State Agencies*

It is also unlikely that the state can be compelled to compensate ranchers for depredations by wolves. Historically, claims against the states for compensation due to depredation by wildlife have not met with success.<sup>234</sup> As early as 1917, the court in *Barrett v. State*<sup>235</sup> asserted that the state has the right to protect wild animals as a matter of public interest and as a result acquires immunity from liability for any incidental injuries caused by species under state protection. *Barrett* was followed by other cases in which the courts upheld states' denials of state liability for wildlife depredations; *Platt v. Philbrick*<sup>236</sup> in 1935, *Cook v. State*<sup>237</sup> in 1937, and *Leger v. Louisiana Department of Wildlife and Fisheries*<sup>238</sup> in 1975, all denied state compensation for losses due to wildlife depredation.

The courts that have found states not liable for wildlife depredations have relied on principles of nonownership.<sup>239</sup> However, the Wyo-

233. *Id.* at 1428.

234. *See infra* notes 235-259 and accompanying text.

235. 116 N.E. 99 (1917) (upholding state refusal to compensate for damage done to property owners by reintroduced beavers in the Adirondacks of New York regardless of the fact that the beavers were extirpated and then reintroduced).

236. 47 P.2d 302 (1935) (upholding state refusal to compensate for damage done to vegetable garden by "predatory" birds).

237. 74 P.2d 199 (Wash. 1937) (holding losses sustained when muskrats drained skating rink not compensable because the owners had the power to control and trap offending muskrats).

238. 306 So. 2d 391 (La. Ct. App. 1974), *writ of review denied*, 310 So. 2d 640 (La. 1975) (holding loss of potato crop to wild animals not compensable by state).

239. Stephen Tan, Comment, *The Watchtower Casts No Shadow: Nonliability of Federal and State Governments for Property Damage Inflicted by Wildlife*, 61 U. COLO. L. REV. 427, 437 (1990).

ming State Legislature asserts that "all wildlife in Wyoming is the property of the state."<sup>240</sup> If the State of Wyoming is in fact rejecting by statute the nonownership findings of courts in the past, it follows that the state should not be able to use these court findings to reject compensation for animal depredations. But, the Wyoming Supreme Court has recently rejected state liability and did not compel the WGF to compensate for certain damage caused by wildlife.<sup>241</sup>

The WGF willingly compensates for certain damage to private property caused by wildlife in the state,<sup>242</sup> and Wyoming Statute § 23-1-901 outlines the compensable injuries. Recently, however, the Wyoming Supreme Court in *Parker Land & Cattle Co. v. Wyoming Game & Fish Commission*<sup>243</sup> found that Wyoming Statute § 23-1-901 subsection (c) requires that the WGF compensate only for livestock damaged or killed by a trophy game animal.<sup>244</sup> The court followed by holding, "This legislative action unmistakably reveals a clear intention to limit the claim coverage to livestock damaged or killed by a trophy game animal, viz., black bear, grizzly bear, and mountain lion."<sup>245</sup>

The court also stated that "[i]f the agency's decision is found to be supported by substantial evidence, we cannot substitute our judgment for that of the agency; rather we are required to uphold its findings upon appeal,"<sup>246</sup> and "we will give deference to that agency's interpretation unless it is clearly erroneous."<sup>247</sup> In so holding, the Wyoming Supreme Court upheld the WGF's findings of facts and conclusions of law in its denial of Parker's damage claim. In Appendix 1 to the court's decision<sup>248</sup> the WGF gave its reasons for denying Parker's damage claim. The WGF stated that "W.S. 23-1-901 is not intended to be a waiver of the state's immunity for claims arising out of every kind of damage or injury caused by wildlife,"<sup>249</sup> and that "the injuries enumerated in W.S. 23-1-901 are of a kind

240. WYO. STAT. § 23-1-103 (1977). See also *supra* note 139.

241. See *infra* notes 242-254 and accompanying text.

242. The WGF is statutorily mandated to compensate for damage caused to ranchers by big and trophy game animals: "The department shall consider the claims based upon a description of the livestock damaged or killed by a trophy game animal . . ." WYO. STAT. § 23-1-901(c) (1991).

243. 845 P.2d 1040 (Wyo. 1993) (rejected Parker's contention that the state of Wyoming was required to compensate Parker for cattle allegedly infected with brucellosis by wild bison and elk).

244. *Id.* at 1049-1050.

245. *Id.* at 1065-1066. "'Trophy game animal' means black bear, grizzly bear or mountain lion." WYO. STAT. § 23-1-101(a)(xii) (1991).

246. *Parker*, 845 P.2d at 1066 (1993).

247. *Id.* at 1045.

248. *Id.* at 1068-69. Appendix 1 to the Court's decision is titled *Findings of Fact, Conclusions of Law and Order Denying Claim*.

249. *Id.* at 1076.



commonly associated with interference of big or trophy game animals . . . with agricultural operations . . . .”<sup>250</sup> The WGF also stated, “It is apparent . . . that the legislature does not intend that W.S. 23-1-901 should apply to allow compensation for losses to livestock caused by predatory animals like coyotes . . . . Compensating landowners for injuries done by those animals would be extraordinarily difficult and expensive.”<sup>251</sup> The WGF also found:

Since W.S. 23-1-901 is a statute in derogation of sovereign immunity, it must be strictly construed in favor of the State. The State’s right to immunity from claims against it may not be diminished except where the express terms of a statute disclose a clear intent by the legislature to waive that immunity. Where there is any doubt as to the meaning or intent of a statute, it must be given the effect which makes the least, rather than the most, change in sovereign immunity.<sup>252</sup>

Wolves are not included in Wyoming Statute § 23-1-101’s definition of big or trophy game,<sup>253</sup> rather, wolves are presently listed as predators.<sup>254</sup> If the wolf is not expressly included among the big or trophy game animals for which compensation is mandated, it is unlikely that ranchers will recover any compensation for wolf depredation from the WGF. Finding the statute clear and unambiguous, the Wyoming Supreme Court in *Parker* refused to give effect to anything besides the clear language of the compensation statute, and it is likely to hold similarly in the future. Any suit brought to recover from the WGF for wolf depredation is certain to fail under Wyoming Statute § 23-1-901 in light of *Parker* and the WGF’s strict stance on compensation.

Wolf depredation is also unlikely to rise to the level of a Fifth Amendment taking which would constitutionally require compensation.<sup>255</sup> Wyoming cases dealing with governmental taking issues closely parallel the federal stance on this issue.<sup>256</sup> *Cheyenne Airport Board v.*

250. *Id.*

251. *Id.* at 1077.

252. *Id.*

253. “‘Big game animal’ means antelope, bighorn sheep, deer, elk, moose or mountain goat.” WYO. STAT. § 23-1-101(a)(i) (1991).

254. WYO. STAT. § 23-1-101(a)(viii) (1991). “‘Predatory animal’ means coyote, jackrabbit, porcupine, raccoon, red fox, wolf, skunk or stray cat.” *Id.*

255. See *infra* notes 256-259 and accompanying text.

256. As explained earlier, the federal government rarely finds compensable governmental takings. See *supra* notes 219-233 and accompanying text.

*Rodgers*<sup>257</sup> reiterates the main taking themes which require physical governmental possession,<sup>258</sup> near-complete frustration of investment-backed expectations, or total absence of a reasonable economic use.<sup>259</sup> Again, wolf depredation is unlikely to infringe on a rancher's rights to as great an extent as is needed to warrant a Fifth Amendment taking.<sup>260</sup>

The WGF is not likely to compensate for wolf depredation willingly through its present wildlife depredation programs. Nor can the state be held accountable for compensation by case law or under a Fifth Amendment taking analysis.

### *Wolf Advocates*

Wolf advocates have recognized that wolf depredation occurs and losses to individual ranchers can be significant.<sup>261</sup> Realizing this problem, DOW has established a private fund to compensate Montana ranchers for present depredation by wolves and this program will cover losses to wolves reintroduced to Yellowstone as well.<sup>262</sup> Hank Fischer, DOW's Northern Rockies regional representative, admits the advantages of privately supported wolf compensation:

First, it avoids the need for government funds, putting financial responsibility directly in the hands of wildlife supporters. Second, it reduces the potential for fraud or false claims, a common problem with government compensation programs. Finally, having conservationists pay for livestock losses will make them more sensitive to the need for effective control of problem animals.<sup>263</sup>

However, wolf advocate compensation is subject to problems. The primary deficiencies of privately funded compensation are the longevity and reliability of such programs. DOW has not made a legally binding promise to continue compensation indefinitely. In fact, these private funds are admittedly temporary.<sup>264</sup> Even if DOW were to make a legally binding

257. 707 P.2d 717 (Wyo. 1985).

258. *Id.* at 729; *see also* *Sheridan Drive-In Theatre v. State*, 384 P.2d 597 (Wyo. 1963).

259. *Cheyenne Airport*, 707 P.2d at 731; *see also* *Penn Central Transportation Co. v. New York City*, 438 U.S. at 127-137 (1978).

260. *See supra* notes 219-233 and accompanying text.

261. *See supra* notes 184 and 193.

262. "[DOW] developed a program to compensate ranchers in the Northern Rockies for all verified livestock losses to wolves." Hank Fischer and John Boden, *A Carrot-Stick Approach to Save Wolves*, IDAHO FALLS POST REGISTER, Aug. 16, 1992.

263. Hank Fischer, *Restoring the Wolf*, DEFENDERS, Jan/Feb. 1989, at 9.

264. Telephone Interview with Norman A. Bishop, Research Interpreter, Yellowstone National Park, Wyoming (Feb. 2, 1993). "Defenders have specified the program will be in effect until the

promise to continue this fund, there is no assurance of the organization's continued existence; lack of funding or lack of interest may in the future lead to the demise of DOW itself.

Privately funded depredation recovery programs present some advantages. However, without a legally binding promise of compensation from a self-sustaining fund, ranchers are reluctant to rely on compensation programs.<sup>265</sup>

### *Ranchers*

Presently, Wyoming ranchers personally assume the cost of livestock losses to predators like coyotes with no compensation paid to them by the federal or state government, and ranchers will not receive any governmental compensation in the future for depredation by wolves.<sup>266</sup> Some individuals believe that ranchers should be required to accept the wolves and costs of livestock losses that accompany them.<sup>267</sup> A number of justifications for this view are advanced: losses to wolves would simply be an extra cost of doing business for the rancher, the federal government already provides "financial assistance" to ranchers by leasing federal land for below market value, and ranchers never paid the public for extirpating the wolf in the first place. These assertions are difficult for ranchers to rebut except with equity arguments.<sup>268</sup>

Ranchers find the assertion that loss to wolves would be just part of a rancher's cost of doing business<sup>269</sup> an unfair and unmeritorious argument.<sup>270</sup> Increased costs of doing business can put a rancher or any businessman out of business, and it is difficult to determine how much loss to a rancher is too much of a burden.<sup>271</sup>

wolf is removed from the Endangered Species List." Abundant Wildlife Society of North America, *Fact Sheet - Wolf Reintroduction in Yellowstone National Park*, at 4.

265. See *supra* note 163. See also *infra* note 298.

266. See *supra* notes 194-260 and accompanying text.

267. George Wuerthner, a renowned grazing activist, wrote:

[W]olves just don't eat enough livestock to provide effective regulation of the livestock scourge that plagues the West . . . . While anti-cow proponents are searching for a more effective control mechanism, one has to question why we are spending so much money trying to protect domestic animals from predators.

George Wuerthner, letter to the editor in the CASPER STAR-TRIBUNE, September 22, 1993, at A9.

268. See *infra* notes 269-281 and accompanying text.

269. "[Loss to predators] has historically been 2 to 3 to 5 percent loss, and the livestock operator accepts that loss. That's a recognized cost of doing business," McMahan said." (Bill McMahan is the environmental specialist for the BLM's Rock Springs District) Tom Mast, *Officials Say to Expect Predation on Public Lands*, CASPER STAR-TRIBUNE, October 18, 1993, A1, A10.

270. "Paul Walton, a rancher who has run cattle for 38 years on the Bridger-Teton National Forest near Togwotee Pass, said no predator loss is acceptable." *Id.* at A1.

271. Losses of \$11,988 a year are a bit too much for a rancher to bear for the "greater good." See *supra* note 192 and accompanying text.

Ranchers also dismiss the contention that ranchers already receive financial assistance from the government in the form of below-cost Forest Service and Bureau of Land Management grazing permits and leases<sup>272</sup> and that this should somehow compensate ranchers for losses to wolves.<sup>273</sup> The grazing issue is too intricate to fully explain here, but some points may enlighten the discussion. Ranchers do indeed lease public lands for less than market value; to what extent the decreased fee reflects some of the discrepancies between relative costs and investments<sup>274</sup> in private versus public land is in dispute.<sup>275</sup> However, grazing fees on public lands are going to rise in the near future; Secretary of the Interior Bruce Babbitt and Congress are presently deciding what plan will work best.<sup>276</sup> How much the fees will rise or how stable this cost hike will remain in the future is unknown. Using this argument in the wolf equation is of questionable merit due to the impending change in philosophy and rates.

Another assertion is that ranchers never paid the public for extirpating the wolf and, as the driving force behind extirpation, should be required to bear the burden of wolf reintroduction to Yellowstone and the surrounding area.<sup>277</sup> Ranchers counter by pointing out that this argument overlooks the fact that at the time of extirpation the majority of the country was in support of the anti-wolf policy,<sup>278</sup> and that at one time every

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Bob Budd, executive Director of the Wyoming Stockgrowers Association, said while 'risk is inherent in any business,' some risks assumed by livestock producers should be reflected in such things as terms and conditions of grazing leases . . . . Precise levels of 'acceptable' predation loss are related to place and producer, but in general, 'anytime you're in double digits, you're in trouble,' Budd said.

Mast, *supra* note 269, at A10. "Animal Damage Control District Supervisor Merrill Nelson . . . said expectations of 'acceptable' losses are related to the financial circumstances of individual operators: 'If a guy is financially strapped, any loss out there at all is a definite problem . . . .'" *Id.* "But, in the absence of predator control, he [McMahan] said, losses might soar 'to as high as 30 percent, and that . . . would drive them [ranchers] out of business.'" *Id.*

272. "There has been a lot of rhetoric lately about public land grazing fees being such a subsidy to the livestock producer." H. F. Coates, letter to the editor published in the CASPER STAR-TRIBUNE, September 2, 1993, at A9.

273. Robin Goose, *What is a Fair Federal Grazing Fee?*, CASPER STAR-TRIBUNE, October 12, 1993, at A6.

274. "Overall, public lands ranchers incur greater expenses for transportation, herding, and lost animals, as well as for range improvements and amenities such as water, salt, fencing, supplemental feeding, and veterinary care. And more often than not, forage on the public range is lower in quality than on private land." *Id.*

275. *Id.*

276. "Babbitt wants grazing fees raised across 16 Western states . . . ." Ted Gup, *The Land Lord*, TIME, March 8, 1993, at 38. See also Goose, *supra* note 273.

277. "Since stockmen killed wolves, stockmen get tab." George Wuerthner, letter to the editor published in the CASPER STAR-TRIBUNE, August 19, 1993, at A9.

278. "In the early 1900s, wolves were regarded much the same as the rat is today—only with more vehemence. This led to the official wolf extermination program of that era. By the late 1930s and early 1940s, however, predators were being seen in a new light." L.D. Mech, *Returning the Wolf*

part of the country was inhabited by wolves<sup>279</sup> and once these areas were settled the wolves disappeared. Thus, ranchers contend that the whole country is responsible for wolf extirpation.

Ranchers assert that it is simply unfair to force upon them a disproportionate share of the depredation losses in order to advance a cause which most ranchers do not support.<sup>280</sup> Hank Fischer, a wolf advocate leader, sums up the ranchers lament by stating that "instead of imposing the costs of species survival broadly upon the millions of people who favor wildlife recovery, the law sometimes places recovery costs rather narrowly upon those who own the wildlife habitat."<sup>281</sup> Ranchers own most of the private land in the Yellowstone ecosystem and they alone will suffer the livestock losses to wolves for a cause that the vast majority of ranchers do not support.<sup>282</sup>

### *Inadequacies of Compensation Programs*

In general, wildlife damage compensation programs are considered inadequate by ranchers.<sup>283</sup> Although compensation programs appear to make ranchers whole, the problems associated with confirmation of kills, the bureaucracy of recovery, and the increased protective measures which are necessary ensure that ranchers are not now, and probably never will be, fully compensated for their losses even if a program for recovery is in place.<sup>284</sup>

Accurately determining the cause of stock deaths could be a difficult problem in the Yellowstone Ecosystem due to the style of ranching practiced in the area.<sup>285</sup> Unlike stockgrowers in farming regions, ranchers in

*to Yellowstone*, THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 310 (Robert B. Keiter & Mark C. Boyce, eds.). "By 1926 the last wolf had been trapped in Yellowstone National Park, although a few held on into the mid-thirties." *Id.* at 309.

279. "[The wolf's ability to adapt] allowed wolves to occupy a wide variety of habitats in almost every part of North America north of Mexico City." Bangs, *supra* note 170, at 7.

280. "While many people argue that endangered species recovery has priceless value, such value accrues to society-at-large, not to individual private landowners. For the typical private landowner, market forces - not ethics or esthetics - determine how he manages his land." Fischer, *supra* note 262. "Why should we be the ones to run the risk of having wolves in Yellowstone?" asks Jerry Jack, executive director of the Montana Stockgrowers Association in Helena. "We are not in the livestock business to raise animals so predators can kill them." Cohn, *supra* note 63, at 632.

281. Fischer, *supra* note 262.

282. *See infra* note 316.

283. Tan, *supra* note 239, at 448.

284. *See infra* notes 285-298 and accompanying text.

285. There are many difficulties associated with determining and finding wolf kills, and some of the problems relating to this issue are explained as follows:

Confirming a wolf kill can be done by examining the carcass noting areas attacked, bite marks, possible tracks, etc. However, this is difficult due to certain natural processes.

Wyoming necessarily turn their stock out to very large pastures to graze for the summer where they are left to their own devices until round-up time in the fall.<sup>286</sup> Although a rancher regularly checks on his stock, rarely does he see every animal in the herd, and it is virtually impossible to make accurate counts.<sup>287</sup> Even if the rancher moves cattle throughout the summer and has the opportunity to keep track of his stock, most missing animals would be difficult to find if dead somewhere on the large, rough pastures common in the Yellowstone Ecosystem.<sup>288</sup>

Another characteristic of ranching in Wyoming is the great number of animals the ranchers raise.<sup>289</sup> With no large predator like the wolf with which

1. Carcass not found—totally eaten. Wolves are opportunists, meaning they kill whatever is easiest. Wolves are well known to kill the young, both of wild animals and domestic stock. If a young calf or lamb is killed by a wolf, most, if not all, of the animal is eaten so that you simply cannot find the carcass. 2. Decay rapidly eliminates evidence concerning death, especially in hot weather. A couple of hot days can eliminate much evidence detailing the cause of death. 3. Terrain—heavy vegetation, such as timber and undergrowth hide the carcass. There are thousands of acres of heavy timber in the western states. A carcass can be easily overlooked . . . Animal Damage Control Officers have told us confirmed kills are often 10% or less of what a predator actually kills, meaning that 90% of the livestock lost to wolves will never be compensated under this program [Defender's of Wildlife compensation fund] or any program similar to it.

ABUNDANT WILDLIFE SOCIETY OF NORTH AMERICA, FACT SHEET - WOLF REINTRODUCTION IN YELLOWSTONE NATIONAL PARK 4 [hereinafter AWS FACT SHEET].

286. "Unlike in the Midwest, the factors of western topography, open range and low human population density combine to make it much more difficult to control wolf predation." Senator Alan Simpson, Testimony Presented to Senate Committee on Energy and Natural Resources regarding S. 2674, Sept. 19, 1990, at 16 (Sen. Simpson is a U.S. Senator from the state of Wyoming) (on file with author).

Agricultural practices also have much to do with the [low] level of conflict with wolves. By comparison with U.S. ranches, which often stretch across thousands of acres and incorporate many additional acres of leased federal land for grazing, these Manitoba outfits are tiny. Most produce both crops and livestock on less than two hundred total acres . . . animal movements are closely controlled.

Chadwick, *supra* note 193, at 34.

287. Terry Schram is a cowboy responsible for about 1,000 head of cattle owned by two Jackson ranches which graze in the Togwotee Pass area, and some of the problems he faced in regard to depredation of his stock by predators were highlighted in the CASPER STAR-TRIBUNE:

Since June, he has found the carcasses of 23 calves that have been verified as having been killed or mortally injured by grizzlies in the Bridger-Teton National Forest's vast Blackrock grazing allotment. Because of the size of the area—it covers 130 square miles of mountainous terrain—Schram suspects grizzlies have claimed more animals. He won't know for sure until he's finished trailing cattle out of the mountains later this fall.

*Grizzly Bears Take Toll*, *supra* note 130, at B1. This is true even though "[h]e has spent much of the time guarding the animals and documenting kills." *Id.*

288. "Some environmental groups have proposed a compensation scheme [see *supra* note 262] to take care of this problem [depredation]. However, it is very difficult, if not impossible to prove wolf predation, especially if an animal carcass is not discovered immediately." Simpson, *supra* note 286, at 17.

289. "A rule of the cattle thumb is that you need 500 head to make a minimal living ranching." Hugh Sidey, *Don't Fence Us In*, TIME, March 8, 1993, at 39.

to contend, this ranching strategy works quite effectively.<sup>290</sup> But, enter the wolf and the rancher can no longer raise his cattle or sheep as he had before without risking more uncompensated losses than previously experienced.

DOW's Northern Rockies representative, Hank Fischer, admitted that the "compensation fund has a built-in limitation: At best, it can only make the economic impact of wolf recovery on private landowners neutral."<sup>291</sup> The compensation program in Alberta, Canada, illustrates that ranchers are not even made neutral as a result of depredation programs. Confirmed kills are compensated up to eighty percent, while probable kills are awarded only up to fifty percent, and missing animals are not compensated.<sup>292</sup> The Alberta government stopped paying for missing animals in 1990, raising doubts about the longevity of compensation programs in general.<sup>293</sup> Presently, DOW is compensating for wolf depredations allowing one hundred percent for confirmed losses to wolves.<sup>294</sup>

Even if compensated one hundred percent for all losses whether confirmed or not, ranchers still lose due to wolf reintroduction because compensation programs do not take into account increased precautionary measures ranchers must take to guard against depredation.<sup>295</sup> The rancher must protect and monitor his stock more closely to prevent depredation if wolves are on the range.<sup>296</sup>

Furthermore, even if all losses to wolves are confirmed, ranchers are awarded full market value for the lost stock, and ranchers take no extra

290. Certain characteristics of wolves make them a much greater threat to stock than other predators in Wyoming, such as lions, bears, and coyotes. Unlike coyotes, bears, and lions, wolves hunt in packs. Wolves are also much larger than coyotes and are better suited for killing large prey. None of these other predators are as prone to and as able to surplus kill like the wolf. Unlike lions and coyotes, the wolf is protected by the ESA and its restrictive control provisions. Wolves are much different and more feared than other predators. See Mader, *supra* note 190.

291. Fischer, *supra* note 262. See also *infra* notes 295-296 and accompanying text.

292. Letter from Michael J. Dorrance, Section Head, Alberta Agriculture Problem Wildlife, Plant, Pathology and Apiculture, to Norman A. Bishop, Research Interpreter, Yellowstone National Park (June 13, 1991) (on file with author).

293. *Id.*

294. Bangs, *supra* note 170, at 10.

295. Simpson, *supra* note 286, at 18.

296. Some suggestions concerning increased protections which a rancher can take to reduce losses to wolves are the use of guard dogs, more frequent patrols of herds, keeping stock closer to the ranch, and other measures which would increase expenditures of time and money for the rancher; the Diamond G ranch runs cattle in the Togwotee area of the Bridger-Teton National Forest (see also *supra* note 130), and the Diamond G uses a number of methods to avoid confrontation with the grizzly bears there. "Grizzlies are 'baited to keep them away from buildings at key times,' [ranch manager John] Robinett said. Some days, 'we have five to six riders out trying to verify bear kills,' he added." *Grizzly Bears Take Toll*, *supra* note 130, at B1. Terry Schram who also watches over cattle in this area has spent much extra time guarding animals and verifying kills, and he says, "It's made a tough job impossible . . . you can't raise livestock in a herd of grizzly bears." *Id.*

precautionary measures to guard against wolf depredation, compensation programs still do not fully compensate ranchers. "[L]oss of breeding females might have significant impacts to a herd or flock that go beyond the worth of the individual animal."<sup>297</sup> Ranchers will also have to deal with the bureaucracy of recovering for depredations.<sup>298</sup>

Compensation programs generally do not award full market value for confirmed losses and many losses are unconfirmed and thus uncompensated. But, even if compensation programs operated in utopian settings where all losses were confirmed, any such program still would not put the rancher in the same position he is in now. Compensation programs do not make the rancher whole.

#### ANALYSIS - FEASIBILITY OF COMPROMISE

The law supports the wolf advocates' point of view, while the equities may lie with the ranchers. It is time for compromise. This is easier said than done due to the strict stance each group has taken on some integral issues,<sup>299</sup> coupled with the strong will of both groups. Neither group wants to give in to the other because each feels that its cause is the "right" one. One group forcing its will on the other is no way to ensure the lasting reintroduction of the wolf. Each group must feel that any implemented plan is fair to its interests before the wolf will become a lasting reality in the Yellowstone Ecosystem. Ranchers have a tangible property interest at stake, while wolf advocates have a somewhat speculative existence value interest at risk.<sup>300</sup> Since ranchers' have the greatest tangible interest to lose, wolf reintroduction should proceed only if these interests of ranchers are safeguarded. This can be done by developing a legally binding compensation program that adequately compensates ranchers and a flexible management scheme which cannot be challenged later by wolf advocates.

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297. AFBF COMMENTS, *supra* note 163, at 7.

298. "The problems with government compensation programs is illustrated by the experience with the Minnesota wolf compensation program. Ranchers say that this program has so much red tape with considerable delays in payment, if there are any funds at all, that most affected ranchers do not even apply for compensation." RICK KRAUSE AND JOHN DOGGETT, AMERICAN FARM BUREAU FEDERATION, STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE U.S. FISH AND WILDLIFE SERVICE WITH REGARD TO WOLF REINTRODUCTION IN YELLOWSTONE NATIONAL PARK 3 (September 30, 1993) [hereinafter AFBF STATEMENT] (Doggett is the Director of the Governmental relations Division of the American Farm Bureau Federation) (on file with author).

299. See *infra* notes 349-355 and accompanying text.

300. See *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). See also William D. Schulze et al., *The Economic Benefits of Preserving Visibility in the National Parklands of the Southwest*, 23 NAT. RESOURCES J. 149 (1983).



The law and the majority of United States citizens support wolf reintroduction and enforcement of the ESA. Not every law is correct, however, and public support is often fickle and based on misinformation or ignorance. Segregation laws were but one example of this. As will be shown, popular support should not be the guiding factor in wolf reintroduction. Rather a whole host of factors need to be addresses before reintroduction proceeds.

### *Popular Support and the Preferred Alternative*

Wolf advocates are quick to point out the popular support for reintroduction of wolves to Yellowstone,<sup>301</sup> and this public support is understandable. The majority of people in this country will not be adversely affected by wolves, and direct monetary costs to the average citizen for wolf reintroduction will be little, if anything.<sup>302</sup> Additionally, wolf reintroduction is an appealing symbolic gesture for the nation as a whole. Most importantly, though, the ESA mandates wolf reintroduction to Yellowstone, making the return of the wolf the law.<sup>303</sup>

Surveys show overwhelming support for the wolves nationwide,<sup>304</sup> and more residents in Wyoming support reintroduction rather than oppose it.<sup>305</sup> However, wolf advocate pollsters do not delve into the specifics of wolf reintroduction or the problems wolves will cause, and it has been asserted that the surveys do not necessarily reflect the true opposition toward wolf reintroduction.<sup>306</sup> Nor do wolf advocate pollsters include qualifying statements of

301. "Gloria Klein, who worked for a conservation group's education booth near Yellowstone, said that once the rhetoric is bypassed the 'overwhelming majority of people' support the recovery plan proposed by the federal agency." Barron, *supra* note 76, at A8.

302. Even \$7 million (*see supra* note 170) per year divided among the millions of United States taxpayers results in a very small contribution per citizen.

303. 16 U.S.C. § 1531 (1988).

304. "Every opinion poll or attitude survey ever taken on the issue of wolf restoration in Yellowstone . . . shows a majority of the American public to be strongly pro-wolf for Yellowstone." Norman A. Bishop and John D. Varley, *Are Wolves Montana's Newest Growth Industry?*, ENDANGERED SPECIES, Fall 1991, at 6.

305. ALLSTAIR BATH, STATEWIDE SURVEY OF THE WYOMING GENERAL PUBLIC ATTITUDE TOWARDS WOLF REINTRODUCTION IN YELLOWSTONE NATIONAL PARK (1987) (Bath conducted the surveys in relation to completing a masters thesis at the University of Wyoming).

306. In questioning the validity of the polls touting support for wolf reintroduction, Troy Mader wrote:

Recently I made the statement that the citizens of Idaho, Wyoming, and Montana were opposed to wolf recovery. In all my travels and lectures, I've met few people in the three states who are in favor of wolves, especially when they realize their impacts. Furthermore, Idaho's and Wyoming's Legislatures are on record opposing wolf recovery. A majority of Montana's legislators have signed a petition opposing wolf recovery. Obviously, elected officials don't stay elected if they take a position against the wishes of their constituency . . . . As expected, the wolf lovers say I'm wrong. They use surveys, often with biased

those polled, or ask more in-depth questions regarding concerns.<sup>307</sup> Most Wyoming and Montana residents qualify their statements to include a desire to control the wolves<sup>308</sup> and compensate ranchers for losses to wolves.<sup>309</sup> Most people living in the resident states, Wyoming, Montana, and Idaho, are aware of the implications of uncontrolled or ineffectively controlled wolf populations<sup>310</sup> and would like to see the issues of control and compensation adequately addressed before wolf reintroduction proceeds.

The farther away from Yellowstone people live, the more likely it is that they will support wolf reintroduction.<sup>311</sup> A recent independent survey in Montana concluded that the majority of residents were opposed to wolf reintroduction.<sup>312</sup> A survey of Wyoming residents in counties around the park resulted in fifty-one percent opposing wolf reintroduction,<sup>313</sup> while a statewide survey resulted in only forty-two percent of those expressing an opinion opposing reintroduction.<sup>314</sup> On the other hand, comparable surveys resulted in a showing of very few individuals from outside the Wyoming/Montana region opposed to wolf reintroduction.<sup>315</sup> It is much easier to say "yes" when the decision does not directly affect the respondent's livelihood or personal well-being.<sup>316</sup>

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sample bases, to support their claim. It's well known that you can obtain the comments desired by the way a survey is worded (or, by who you ask). This works especially well when you have an issue, such as wolf recovery, where people have no firsthand knowledge.

Troy R. Mader, letter to the editor published in the CASPER STAR-TRIBUNE, September 3, 1993, at A9.

307. To the wolf advocate pollsters, a "yes" helps their cause and there is no benefit to them in reporting qualifying statements — polls and surveys can be tailored to elicit any response the pollster seeks and to reflect the surveyor's desired response.

308. "The majority is willing to have wolves, but only if they are controlled." Atcheson, *supra* note 3, at 47.

309. 62.6% of Wyoming residents polled supported compensation for livestock losses. WYOMING GAME & FISH DEPARTMENT, ATTITUDES OF WYOMING RESIDENTS ON WOLF REINTRODUCTION AND RELATED ISSUES (April 5, 1991).

310. *See discussion supra* notes 72 and 73.

311. "Supporters of reintroduction tended to . . . live farther from Yellowstone than opponents . . ." *Researchers: Wolf Reintroduction Will Work*, WYOMING STATE TRIBUNE, March 26, 1991, at 5.

312. This survey of Montana voters was conducted by Marketing Research Institute (MRI) of Jackson, Mississippi, and the results evidenced that 46.5% stated opposition to wolves, while only 39.4% were in favor of wolf reintroduction. [Marketing Research Institute Report Executive Summary, P.O. Box 13866, Jackson, MS 39236-3866]. "No Wolves" For Montanans, ABUNDANT WILDLIFE — SPECIAL WOLF ISSUE, at 11.

313. BATH, *supra* note 305, at 3.

314. *Id.*

315. Bishop, *supra* note 304, at 6.

316. Members of the Wyoming Stock Growers Association voted ninety-one percent against reintroduction. BATH, *supra* note 305, at 2.

It is also easier to say "yes" to wolf reintroduction if the respondent is not aware of the true implications of wolf reintroduction or is misled into believing that wolf reintroduction is not as problematic or injurious to ranchers as it will be. The plans and proposals publicly circulated by wolf advocate groups and the FWS are generally misleading to the public which is not aware of the intricacies of wolf reintroduction.<sup>317</sup> These plans and proposals fail to mention the inherent uncertainty and unavoidable problems associated with wolf reintroduction, so it is very easy for the public to support such a plan or proposal.

For example, when viewed by the unsuspecting public, the FWS's preferred alternative<sup>318</sup> appears to cover all the issues satisfactorily. This proposal is important in the respect that this plan is the one that the FWS, the agency responsible for wolf reintroduction, advocates and thus is very likely to be implemented. However, a careful and informed reading of the plan illustrates why its readers must not take for granted what appears to be fact in this and other proposed plans or preferred alternatives.<sup>319</sup> The FWS's preferred alternative states:

The [FWS] proposes to establish an experimental population rule and reintroduce gray wolves into Yellowstone National Park and central Idaho, if 2 naturally recurring wolf packs can not be located in either area before October 1994. The rule would allow liberal management of wolves by government agencies and the public to minimize conflicts over public lands, effects on domestic animals and livestock, and impacts on ungulate (deer, elk, etc.) populations. There will be no land use restrictions for wolves. State and tribal wildlife agencies are encouraged to lead wolf management outside national parks and national wildlife refuges. Reintroduction would result in wolf population recovery . . . in and around Yellowstone National Park and in central Idaho by 2002.<sup>320</sup>

Included in the FWS's preferred alternative is the provision for compensation as follows: "There would be no federal compensation program, but compensation from existing private funding sources would be encouraged."<sup>321</sup> The preferred alternative further clarifies the compensation issue by stating, "Compensation for livestock killed by wolves would be paid from an already established private fund."<sup>322</sup>

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317. See *infra* notes 320-340.

318. DEIS, *supra* note 39, at 1.

319. *Id.*

320. *Id.*

321. *Id.* at 11.

322. *Id.* at 13. See also *supra* note 262 and accompanying text.

In so stating, the preferred alternative implies that an experimental population is definitely going to be used and that this designation allows liberal management to address human concerns and potential conflicts. It asserts that this liberal management will allow problem wolves to be removed by federal, state and private parties. The plan also claims that compensation will be provided by a private group. The plan appears to adequately address the problems associated with wolf reintroduction and is likely to garner public support.<sup>323</sup> However, the FWS's preferred alternative does not provide what the reader might assume is guaranteed.

First, the use of the experimental population designation is in doubt<sup>324</sup> and problematic.<sup>325</sup> The wolf killed in the area of Yellowstone National Park in the fall of 1993 and the known presence of naturally repopulating Montana wolves will likely preclude the use of the designation due to concerns of violating the geographical separation requirement.<sup>326</sup> Although some officials down-play the presence of wolves in the Yellowstone area,<sup>327</sup> certain interest groups are sure to challenge an experimental population designation which might affect the naturally repopulating wolves.<sup>328</sup> An experimental population designation definitely cannot be relied on in the wolf reintroduction proposal.

Second, the plan states that there will be liberal management. It can be asserted that what many people consider liberal management has not been permitted by the ESA, the 1982 amendment, or the courts in Minnesota in the past.<sup>329</sup> Even if the measures previously allowed by the ESA are not considered restrictive, they certainly cannot be considered liberal.<sup>330</sup>

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323. The FWS's preferred alternative advanced in May 1993 is very similar to the 1987 Wolf Recovery Plan in most respects and the Wolf Recovery Plan was favored by eighty-five percent of the visitors to Yellowstone National Park polled. WOLF RECOVERY, *supra* note 11, at 5.

324. *See supra* notes 93-103 and accompanying text.

325. In questioning the usage of the experimental population designation, one Wyoming resident wrote:

The [Wolf Management] committee chairman indicated that there would be 'flexibility' in this 'experimental' introduction. Such flexibility simply doesn't exist. Historically, 'experimental population' designation requires that each member of the population be treated as a threatened species. Failure to do so will guarantee court battles from environmental activists. In addition, the same activists will demand that case law be adhered to in the management of experimental population. Guess where case law stands? . . . . It will be interesting to watch the environmental community, having now tasted blood, fiercely attack so-called flexible management.

J.A. Chandler, letter to the editor published in the CASPER STAR-TRIBUNE, April 17, 1991, at A9.

326. *Id.* *See also supra* note 97-103 and accompanying text.

327. *See supra* note 101 and accompanying text.

328. *See supra* note 102 and accompanying text.

329. *See supra* notes 60-68 and accompanying text.

330. *See supra* notes 124, 127-129, and 133-136 and accompanying text.

Third, it is still uncertain which groups will be allowed management powers.<sup>331</sup> The preferred alternative asserts that the federal government, state, and private individuals will be permitted to control wolves while ignoring the past, present, and future problems each presents. Although potentially problematic, the federal government is the only entity presently permitted to control wolves.<sup>332</sup> The state of Wyoming has yet to assume the responsibility, and private control is considered violative of the ESA.<sup>333</sup>

Fourth, the plan mentions that compensation will be paid by a private group to ranchers for losses caused by wolves.<sup>334</sup> The connotations are obvious: do not worry about compensation—it is being provided; ranchers are being made whole and the federal government<sup>335</sup> (i.e., tax payers) will not be required to foot the bill. The inherent problems of private compensation, however, are ignored by the plan.<sup>336</sup> The plan likewise fails to mention the inadequacies of compensation programs in general.<sup>337</sup>

Finally, the proposal does not consider the costs or the source of funding for the wolf reintroduction program. This preferred alternative will be expensive.<sup>338</sup> The fact that wolves will compete with truly endangered species for limited monetary resources is not mentioned,<sup>339</sup> nor is the unreliability of past funding addressed.<sup>340</sup>

The FWS's preferred alternative is but one example of how plans, surveys, and public support can be misleading.<sup>341</sup> Wolf reintroduction is much more problematic than the preferred alternative insinuates. It is easy to understand why the public supports wolf reintroduction, but, the public

331. See *supra* notes 60-180 and accompanying text.

332. See *supra* note 67 and accompanying text.

333. See *supra* notes 105-121 and accompanying text.

334. See *supra* notes 321-322 and accompanying text.

335. See *supra* note 321 and accompanying text.

336. See *supra* notes 264-265 and accompanying text.

The Draft EIS promises protection for ranchers, but those promises are empty. For example, promises of compensation for livestock losses do not come with an enforceable mechanism for claims. The private fund for compensation of losses is at the whim of proponents of wolf introduction, and there is no guarantee that the fund will continue once introduction occurs.

AFBF STATEMENT, *supra* note 298, at 3.

337. See *supra* notes 283-298 and accompanying text.

338. "The Fish and Wildlife Services estimates that its preferred alternative would cost about \$6 million over nine years. According to the DEIS, the 'state management' alternative would cost \$129 million over twenty years." Madson, *supra* note 118, at 7.

339. See *supra* notes 177-178 and accompanying text.

340. See *supra* notes 171-174 and accompanying text.

341. See also *supra* note 26 and the Wolf Recovery Plan of 1987. See also *supra* note 38 and the proposal of the Wolf Management Committee.

may be surprised later when faced with the inevitable problems of wolf reintroduction they never knew existed.

*Top Priority—Protecting Those Tangibly Affected*

In a democratic society it is necessary to protect the minority from harm dealt by the majority.<sup>342</sup> In the case of wolf reintroduction the minority, ranchers, have a legitimate interest in their business.<sup>343</sup> They have a right not to be unduly compromised even if the majority wants to interfere. It is not equitable for the majority to force its will on the minority without regard for the consequences. Ranchers will be damaged by wolf reintroduction, and they should be allowed effective control measures and just compensation for their losses. If the majority desires wolf reintroduction and if wolf reintroduction is important for the nation as a whole, then the majority should willingly pay for the benefits received.<sup>344</sup> Senator Malcolm Wallop of Wyoming sagely states that “besides majority rule, America is also built on another tenet—protection of the minority from the tyranny of a majority, especially a majority that is unaffected by the action, except sentimentally.”<sup>345</sup>

Given the far-reaching implications of wolf reintroduction, we must proceed cautiously. Wolves are not in danger of extinction; rather, viable populations of wolves thrive in the United States and Canada. The gray wolf is “legally but not biologically threatened or endangered.”<sup>346</sup> There is no reason why this experiment<sup>347</sup> of wolf reintroduction to Yellowstone must succeed the first time. Another group of wolves can be brought to Yellowstone for a second attempt, or even infinite attempts, until reintroduction is assured of proceeding properly. If reintroduction is successful, wolves and the problems they inevitably create will be here forever.

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342. *United States v. Carolene Products Co.*, 304 U.S. 144, 147, n.4 (1938). Footnote 4 raises the question whether prejudice against discrete and insular minorities may be a special condition, which tends to curtail the operation of political processes ordinarily relied upon to protect minorities and which may call for a more searching judicial inquiry. A test has subsequently developed to ensure that individuals of minority status, whose minority status is readily apparent by race or national origin for example, are given greater protection in the court system to combat the inequities of the political process. If only Stetson hats were considered indicators of ranchers' minority status in the same way as race and national origin, then ranchers might be able to use this distinct and insular minority designation instead of toothless equity arguments to protect their interests in regard to wolf reintroduction.

343. See *supra* note 280.

344. *Id.*

345. Bishop, *supra* note 304, at 5.

346. Cool, *supra* note 177, at 1.

347. “While we can try and predict where wolves will go, the wolves themselves may have other ideas. The 1987 wolf recovery plan established a wolf recovery area in the Bob Marshall/Glacier Park wilderness complex. Wolves have appeared virtually everywhere in western Montana but the Bob Marshall wilderness.” *Statement of NWF*, *supra* note 4, at 6.

Therefore, if mistakes are possible in this experiment of wolf reintroduction, those in charge must be sure to err on the side of caution and control. If wolf advocates are concerned that popular support may wane with the passage of time and successive attempts may not receive enough backing to persist, then they are admitting to the weakness and trendy propensity of their constituency. If public support cannot be counted on for the future, reestablishment must not proceed.

L. D. Mech best sums up the major points of wolf reintroduction:

Yes, wolves have an appropriate place. But the only way we'll achieve wolf recovery is if we do it in a way that doesn't threaten people who live near the recovery area . . . . Once wolves are restored to Yellowstone, it will probably be forever. Prudence dictates that the residents of the region should be protected from possible ill effects . . . . With adequate management, however, wolves can be kept out of areas where they may be unwanted. Such management must be agreed upon before any wolves are released and wolf advocates must not challenge such management when it is implemented.<sup>348</sup>

Realistic compromise is the key to quelling the wolf reintroduction conflict. Now is the time to ignore the outer fringe of both groups and reach a reasonable settlement. Certainly some combination of management and compensation, although not ideal to either group, will be satisfactory to both. But management and compensation programs require extensive funding. If wolf advocates are truly interested in the harmonious reintroduction of wolves to the West, they must permanently commit themselves to the cause by pledging continued support that is legally binding. By collecting sufficient donations to create a self-sustaining trust fund that generates enough interest to pay for the yearly depredations without depleting the principal, an adequate compensation source could be created. Given the fact that once wolves are reestablished ranchers are permanently involved, wolf advocates need to reassure the ranching community that they are willing to be permanently involved as well. Monetary support is possibly the best way for wolf advocates to help support and illustrate their commitment to wolf reintroduction while addressing the ranchers' major concerns.

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348. Mech, *supra* note 278, at 312-14. Mech stated what adequate management might mean: "[I]f necessary . . . I favor a program allowing wolves to be killed everywhere outside of the designated establishment area." *Id.* at 315. No definition of the designated establishment area was mentioned by Mech.

Funding, however, is of little significance if a management and compensation plan satisfactory to both groups cannot be found. Herein lies the main point of contention between wolf advocates and ranchers: ranchers want the ESA amended<sup>349</sup> to protect their interests and insulate them from potential problems prior to wolf reintroduction,<sup>350</sup> whereas, wolf advocates are opposed to compromising the ESA.<sup>351</sup> Ranchers perceive as essential a change in the ESA<sup>352</sup> to allow private control and what they consider effective management methods,<sup>353</sup> but wolf advocates are unlikely to support a change in the ESA<sup>354</sup> or private control.<sup>355</sup> Congress, in the position of mediator, must come forward and safeguard the ranchers' interests by amending the ESA and its uncompromising nature.<sup>356</sup> In return ranchers must accept the uncompensated loss and inconvenience wolf reintroduction is sure to cause.

349. In evaluating the ESA's effect on ranchers and landowners, one landowner/conservationist stated:

[A]pocalyptic environmentalists have distorted a federal law [the ESA] into a weapon that actually punishes a private landowner for controlling some of the habitat of a creature so rare and presumably precious that society is prepared to pay for monumental efforts to preserve it . . . . In fact, as the Endangered Species Act is presently structured and enforced, such a presence is a curse.

John Wootters, *The Endangered Species Act: Hunters' Friend or Foe?*, PETERSEN'S HUNTING, November 1993, at 38. "One element specifically missing from the Act and all the proposals for its 'improvement' is any incentive for private landowners to cooperate in managing and preserving endangered-species habitat on their property." *Id.* at 40.

350. "Let me suggest to you that the first rancher who kills a wolf is going to have a legal bill the length of his arm because (federal authorities) will want to see wool in its fangs before they believe it was attacking," [Wyoming GOP Senator Malcolm] Wallop said." Hackett, *Wolf Plan: 'Big Step' Draws Mixed Reviews*, CASPER STAR-TRIBUNE, July 2, 1993, at B1.

[Carolyn] Paseneaux [executive director of the Wyoming Wool Growers Association] said she prefers to see the plan [the preferred alternative in the draft EIS of May 1993] enacted through legislation rather than the administrative rulemaking process . . . . If we are really going to do this [reintroduce wolves] we had better put it into law because (otherwise) the first time somebody kills a wolf . . . the whole thing will come to a halt.

*Id.* at B1.

351. Fischer and Dougherty's primary objection to the Wolf Management Committee proposal was that "the recommendation would require precedent-setting changes in the Endangered Species Act." Fischer, *supra* note 40, at 37. Fischer also noted that the change would set a "dangerous precedent." *Id.* at 38.

352. "There is only one answer to this dilemma [wolf reintroduction]—specific amendments to the Endangered Species Act itself. Until that happens, any promise of government 'protection' can only be viewed as empty." AFBF COMMENTS, *supra* note 163, at 7-8.

353. The compromise suggested by the Wolf Management Committee is an example of this. See *supra* notes 37-48 and accompanying text.

354. See *supra* note 351.

355. "[Some conservationists] object to any wolf-killing by private citizens." Fischer, *supra* note 40, at 38. "Some individuals and conservation/wolf advocates groups seem inherently to oppose most control of wolves (especially at the hands of the public) even when the impact on the wolf population may be negligible." WOLVES FOR YELLOWSTONE, *supra* note 35, at 1-12.

356. However, Congress is unlikely to amend the ESA or support a plan that compromises the ESA. Congress soundly rejected the Wolf Committee Report that advocated such a compromise. See *supra* notes 47 and 48 and accompanying text.



## CONCLUSION

The public attitude in the country has changed in regard to the wolf since its earlier days of governmental extermination.<sup>357</sup> The population of the country is more urban, removed from the troubles experienced by their forefathers, and much more activist. Wolf reintroduction is a symbolic gesture favored by a majority of the nation's citizens. Since wolf reintroduction is favored by the public and mandated by law, which theoretically should reflect the will of the population,<sup>358</sup> returning the wolf to the Yellowstone Ecosystem will likely proceed.

However, just because wolf reintroduction is the law and the public supports the cause is not a justification in itself for returning wolves and the accompanying problems to Yellowstone and the West. An analysis of the law itself and its stated purposes must first be made,<sup>359</sup> then a study of present populations of wolves on the North American Continent is necessary.<sup>360</sup> Historic wolf habitats must be reviewed and societies evolution since those times must be analyzed; just because wolves can biologically live in a certain areas of Wyoming or Massachusetts does not mean that they belong there now.<sup>361</sup> The motivations and interests of wolf advocates must be studied,<sup>362</sup> then a close look must be taken at what ranchers stand to lose.<sup>363</sup> An analysis of the information upon which wolf advocates and ranchers have based their opinions must be made,<sup>364</sup> then a study of the reality of the situation should be done.<sup>365</sup> The merits of the polls touting support for wolf reintroduction should be considered,<sup>366</sup> then a look at clarifying statements and facts must be taken.<sup>367</sup> The ease of responding *yes* to a cause which is morally right must

357. See *supra* note 278 and accompanying text.

358. "A poll released by an environmental group the Defenders of Wildlife indicates that 73 percent of Americans supported the Endangered Species Act." *Poll Indicates Support for Species Protection*, CASPER STAR-TRIBUNE, Mar. 29, 1993, at A1.

359. See *supra* notes 13-15 and accompanying text.

360. See *supra* note 177 and accompanying text.

361. "I want them [wolf advocates] to prove to me they can control them [wolves] in their yard before they insist on having them in my yard. That way they will have a good idea of what the cost in dollars and human suffering will be . . ." James E. Dobson, letter to the editor published in the CASPER STAR-TRIBUNE, September 3, 1993, at A9.

362. "There is a moral and aesthetic argument for wolves as well, and we have to confess, it is the argument we like best." Bishop, *supra* note 304, at 6. "Saving wolves is a principle!" Gilles Dubois, letter to the editor published in the CASPER STAR-TRIBUNE, September 23, 1993, at A7.

363. See *supra* notes 271 and 280 and accompanying text.

364. See *supra* notes 301-341 and accompanying text.

365. *Id.*

366. *Id.*

367. *Id.*

be considered,<sup>368</sup> and a close study of what is really at stake for those who respond *no* is necessary.<sup>369</sup> A comprehensive study of the management, compensation, and funding aspects of wolf recovery must also be done. Not everything is what it may seem to be, and no true benefit is derived from uninformed or blind support of a law or a cause.

Due to the equities, or inequities, involved, both sides must agree on an equitable plan. This plan must protect the ranchers because they have an important tangible interest at stake. Some ranchers will be seriously, adversely impacted by wolf reintroduction. Wolf advocates and the government must ensure that safeguards and compensation are available for ranchers, not just until wolves are reestablished, but for as long as wolves roam the West. Any management scheme must be safe from court challenge and revocation, and any compensation program must be legally binding and permanent. Ideally this would involve making changes to the ESA. In return, ranchers must assume for the greater good the loss and inconvenience that is sure to accompany wolf reintroduction. Compromise of this nature may bring the wolf home to Yellowstone.

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368. *Id.*

369. *See supra* note 271.