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Sierra Club v. Clark: The Government Cries Wolf

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The eastern timber wolf, a species which once ranged throughout most of the eastern United States, has been hunted to near extinction. The few remaining wolves are located in Minnesota and are protected as a threatened species under the Endangered Species Act. Yet the government would allow the wolf to be hunted for sport. Relying on the policies of the Act and its legislative history, the Eighth Circuit, in Sierra Club v. Clark, limited a sport season on a threatened species to the extraordinary case where the species exceeds the population limits for its ecosystem.
INTRODUCTION

The wolf has long been depicted in story and song as a mysterious menace to man's very existence. This concept of the wolf has become engrained in our attitudes and approach toward the wolf. As a result, we have been driven by an ethic which would lead to the wolf's extinction. But Congress has now mandated that each person who would slay the wolf must stay his hand. When Congress took cognizance of the fact that thousands of species of plants and animals had disappeared in past decades, and undertook to curb that desecration, it declared that the wolf had a value as an individual species in danger of extinction.1

In Sierra Club v. Clark,2 the United States Court of Appeals for the Eighth Circuit recently ruled on a significant issue under the Endangered Species Act:3 In what circumstances may a governmental authority declare a sport season on a threatened4 species? In answering that question, the court of appeals explicitly limited the government's authority to declare a sport season to the extraordinary case5 where a threatened species exceeds the population limits of its ecosystem.6 This ruling is an important victory for Minnesota's eastern timber wolf, a species currently classified as threatened under the Act.7

Specifically at issue in Sierra Club were new federal Fish and Wildlife Service (FWS) regulations which allowed the Minne-
sota Department of Natural Resources (DNR) to declare a sport trapping season on the wolf. These regulations were promulgated without a showing by the government that the wolf was overpopulated. Several environmental groups brought suit challenging these new regulations in the United States District Court for Minnesota. The district court held the regulations invalid, ruling that, in allowing a sport season, the Secretary breached his statutory duty to conserve the wolf. On appeal, the Eighth Circuit affirmed the district court's ruling.

This Article first details the history of the wolf population in Minnesota. The Article then outlines the federal regulations that allowed a sport season on the wolf. Next, the district court and Eighth Circuit decisions, which declared the regulations illegal, are discussed. Finally, this Article proposes that stands not only as a significant victory for the wolf, but as an important affirmance of the protectionist goals of the Endangered Species Act—to be applied toward the preservation of all threatened species.

I. THE WOLF AS A THREATENED SPECIES

The eastern timber wolf is geographically limited to approxi-

8. Id. § 17.40(d)(2)(i)(C) (permitting the Minnesota Department of Natural Resources (DNR) to allow persons to take grey wolves in certain areas and under certain conditions). For a more detailed discussion of the wolf regulations, see infra notes 74-83 and accompanying text.


11. Id. at 785.

12. Id. at 789-90.

13. 755 F.2d at 620.

14. Sierra Club may already have had an effect on the manner in which governmental authorities approach the issue of a sport season on a threatened species. In Montana, environmental groups gave notice to state wildlife authorities that they objected to a proposed sport season on the grizzly bear, a species classified as threatened under the Act. The authorities recently informed the environmental groups that there would not be a sport season on the grizzly bear this summer. Letter from James W. Flynn, Director of Montana Dept. of Fish, Wildlife & Parks, to Brian B. O'Neill, Attorney for Sierra Club plaintiffs (Feb. 25, 1985).
mately one percent of its historic range in the contiguous United States.15 Approximately 1000 to 1200 wolves now remain in northern Minnesota.16 The Minnesota population is the only significant remnant of the wolf population that once ranged throughout most of the Eastern United States.17 Small populations exist in Michigan and Wisconsin.18

A. Minnesota's Past Attempts to Regulate the Wolf

Before passage of the Endangered Species Act, the wolf received little protection in Minnesota. Between 1849 and 1965, Minnesota offered a bounty for the killing of a timber wolf.19 Wolf depredation of livestock was a justification for this program.20 Under the bounty program, aerial hunting by private citizens substantially contributed to the apparent decline of the wolf population in the late 1940’s and 1950’s.21

In addition to the bounty program, until 1956 Minnesota employed hunters and trappers for the purpose of killing wolves.22 The total number of wolves killed in Minnesota from 1949 to 1956 averaged approximately 312 per year, which included animals taken under the bounty program and by state-employed hunters and trappers.23

17. See id.
18. Id. Approximately 25 wolves are found in Wisconsin, and only 14 on Isle Royale, Michigan. Id.
20. Id. “A $3.00 bounty was placed on timber wolves in 1849 and varying amounts were paid until the bounty was removed in 1965.” Section of Wildlife, Minn. Dept. of Natural Resources, Minnesota Timber Wolf Management Plan 3 (1980) [hereinafter cited as Minnesota Wolf Plan]. The Minnesota Legislature biennially authorized bounty payments. Id.
21. Minnesota Wolf Plan, supra note 20, at 3. The bounty program ended in 1965 when, despite considerable pressure and criticism, Governor Karl Rolvaag vetoed the legislature’s bounty appropriation. “No bounties have been paid on timber wolves in Minnesota since then.” Id.
22. Id.
23. Id.
From 1956 to 1969, no state wolf control program existed.\textsuperscript{24} In 1969, the Minnesota Legislature funded a new Directed Predator Control Program to reduce the number of coyote depredations on sheep in northwestern counties of Minnesota.\textsuperscript{25} The program was not intended to address widespread livestock depredations by wolves.\textsuperscript{26} Nevertheless, local trappers registered under the program removed coyotes, foxes, bobcats, lynxes, and wolves that were damaging domestic animals or wildlife.\textsuperscript{27}

\textbf{B. Regulation of the Wolf After Passage of the Endangered Species Act}

With the passage of the Endangered Species Act of 1973,\textsuperscript{28} the wolf became a protected animal and was classified as an endangered species in all of the lower forty-eight states.\textsuperscript{29} Wolves were thus completely protected from any taking in Minnesota, whether by private citizens or the state.\textsuperscript{30} From the outset, Minnesota opposed federal protection of the wolf. Minnesota initially disregarded the Act altogether and allowed the taking of wolves under certain circumstances.\textsuperscript{31} In response, the FWS informed the state that it was violating the terms of the Act and that the taking of wolves must be stopped.\textsuperscript{32}

Thereafter, the Minnesota DNR Commissioner petitioned the FWS to exclude Minnesota’s wolf population from the endangered range.\textsuperscript{33} The FWS postponed its decision on the pe-

\textsuperscript{24} FWS DEPREDATION STUDY, supra note 19, at 3. Any member of the public, however, could hunt wolves during this period. \textit{Id.}

\textsuperscript{25} Id.

\textsuperscript{26} Id. Controllers were paid $50 for each wolf taken and $35 for each coyote, bobcat, or lynx, and five dollars for each fox. \textit{Id.}

\textsuperscript{27} Id.


\textsuperscript{29} 50 C.F.R. § 17.40(d)(1); 16 U.S.C. § 1538(a)(1)(B). Section 1538(a)(1)(B) forbids any “taking” of an endangered animal. The term “take” is defined under the Endangered Species Act as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” See \textit{id.} § 1532(19).

\textsuperscript{30} FWS DEPREDATION STUDY, supra note 19, at 3.

\textsuperscript{31} See Letter from Lynn A. Greenwalt, Director, Fish and Wildlife Service to Robert L. Herbst, Commissioner, Department of Natural Resources (Sept. 5, 1974).

\textsuperscript{32} Id.

\textsuperscript{33} Sierra Club, 577 F. Supp. at 785; see also MINNESOTA WOLF PLAN, supra note 20, at 5.
tition pending a report by the Eastern Timber Wolf Recovery Team.\textsuperscript{34} In the meantime, wolf depredation control became the responsibility of the federal government.\textsuperscript{35}

C. The Federal Government Takes Over the Depredation Control Program

The FWS began its depredation control program in early 1975 and responded to complaints of wolf-livestock problems on or near problem farms.\textsuperscript{36} Because the Endangered Species Act prevented the killing of wolves, the FWS began live trapping and translocating captured wolves into remote areas of northern Minnesota.\textsuperscript{37} The FWS subsequently found that the translocated wolves left the release sites within a few days and eventually drifted back into or through areas containing livestock.\textsuperscript{38} Thus, relocation of the wolves did not adequately solve the depredation problem.\textsuperscript{39} To remedy the situation, the Eastern Timber Wolf Recovery Team recommended that the wolf be reclassified in Minnesota from endangered to threatened.\textsuperscript{40} Under this new classification, which was adopted by the FWS in 1978, authorized state or federal personnel could kill wolves that had committed “significant depredations on lawfully present domestic animals,”\textsuperscript{41} as long as such taking was done in a “humane manner.”\textsuperscript{42}

Federal wildlife experts believed that the new wolf classification would provide the flexibility required to carry out an effective depredation control program.\textsuperscript{43} It was also believed that the new classification would provide greater protection for

\textsuperscript{34} See FWS Depredation Study, supra note 19, at 3. The Eastern Timber Wolf Recovery Team consists of experts brought together by the FWS to develop a strategy for conservation of the wolf. The creation of such a recovery plan is mandated by the Endangered Species Act. 16 U.S.C. § 1533(f).

\textsuperscript{35} See FWS Depredation Study, supra note 19, at 3.

\textsuperscript{36} Id.

\textsuperscript{37} Id. 108 wolves were translocated under this program between 1975 and early 1978. Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} See id. at 3; Final Regulations Governing the Reclassification of the Grey Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9706 (1978) (to be codified at 50 C.F.R. Pt. 17) [hereinafter cited as 1978 Wolf Regulations].

\textsuperscript{41} 1978 Wolf Regulations, supra note 40, 43 Fed. Reg. at 9615.

\textsuperscript{42} Id.

\textsuperscript{43} See FWS Depredation Study, supra note 19, at 4.
farmers, reduce local opposition to wolves, and at the same time afford ample protection for wolves as required under the Act. Moreover, the taking of wolves was restricted to the individual wolf or wolves believed to be responsible for a particular depredation problem.

In the summer of 1978, a dispute arose between environmental groups and the FWS regarding the method by which wolves were being taken under the depredation program. In *Fund for Animals v. Andrus*, the groups charged that the FWS was not following its own regulations. Trappers were killing wolves as far away as five miles from problem farms. These wolves were not believed responsible for the particular depredation problems at those farms.

The *Fund for Animals* court concluded that the regulations were intended to allow the killing of wolves only after a significant depredation occurred. More importantly, the court limited the taking of wolves to the particular wolf or wolves reasonably believed to have committed the significant depredation. The court also limited the area in which federal officials could trap wolves to within one-quarter mile of the farm where the livestock was killed.

**D. Current Analysis of the Wolf-Livestock Problem**

Despite the decision in *Fund for Animals*, state officials continued to argue that the wolf-livestock problem in northern Minnesota creates an unbearable situation for local farmers. A recent study issued by the FWS, however, concludes that the wolf-livestock problem is exaggerated and, in reality, is a relatively minor one. The study suggests that livestock losses attributed to wolves are closely related to poor animal

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44. *Id.*
45. *See* 1978 Wolf Regulations, *supra* note 40, 43 Fed. Reg. at 9615 (authorities "may take a grey wolf without a permit in Minnesota if such action is necessary to remove . . . a grey wolf committing significant depredations").
46. 11 Env't Rep. Cas. (BNA) 2189 (1978).
47. *Id.* at 2191.
48. *Id.* at 2200.
49. *Id.* at 2200-01.
50. *Id.* at 2203. The court also prevented the trapping of wolf pups. *See id.* at 2202; *see also* FWS Depredation Study, *supra* note 19, at 4.
management practices, such as permitting livestock to calf in the woods, or disposing of livestock carcasses in or near pastures.\textsuperscript{53}

The study further indicates that the Federal Depredation Control Program successfully reduced livestock losses at most farms and, along with improved livestock management techniques, effectively resolved isolated incidents of livestock depredation.\textsuperscript{54} The FWS study also notes that many wolf packs actually lived near farms without any instances of livestock killing by wolves.\textsuperscript{55} Farmers who suffered livestock losses were compensated by the state for each animal killed or injured by wolves.\textsuperscript{56} As concluded in the FWS study, however, proponents of Minnesota’s Livestock Compensation Program generally overestimate the extent of the depredation problem.\textsuperscript{57}

\textbf{E. Minnesota Attempts to Regain Control of the Wolf}

Because of continued dissatisfaction with federal control of the wolf population, the DNR requested the FWS to transfer control of the wolf to Minnesota.\textsuperscript{58} As a prerequisite to such a transfer, the DNR demanded a sport season on the wolf. The DNR proposed a “harvest” of fifty wolves within the first year.\textsuperscript{59} Thereafter, the DNR would adjust the number of wolves taken according to the density of the wolf population.\textsuperscript{60}

In requiring transfer of management of the wolf population, DNR officials have made clear that they reject the entire notion that the wolf is or ever has been threatened or endangered in Minnesota.\textsuperscript{61} DNR officials instead consider as a top priority the task of maintaining and increasing Minnesota’s deer popu-

\begin{footnotesize}
\bibitem{53} See \textit{id.} at 5-6.
\bibitem{54} \textit{Id.} at 8-10.
\bibitem{55} \textit{Id.} at 7. Only two farms had regular annual problems since 1975. \textit{Id.} at 9.
\bibitem{56} \textit{MINN. STAT.} § 3.737 (1984).
\bibitem{57} FWS \textit{DEPREDATION STUDY, supra} note 19, at 4. A single sheep rancher received 66\% of the total compensation paid for 1977. A single cattle rancher received 42\% of the amount paid in 1978. That same rancher received 51\% of the amount paid for livestock losses in 1979. \textit{Id.}
\bibitem{59} \textit{MINNESOTA WOLF PLAN, supra} note 20, at 15.
\bibitem{60} \textit{Id.}
\end{footnotesize}
lution. Moreover, the DNR has announced that it is committed to "management" of the wolf as a fur bearer, as demonstrated in the following letter:

We do not believe that the wolf now or ever has been either endangered or threatened in [Minnesota]. We believe, as this administration does, that states can and must manage those resources that fall within their borders. We respectfully request the return of this program to the control of the State of Minnesota.

Our management objectives are as follows:
1) To maintain optimum wolf density and range,
2) To manage the wolf as a fur bearer with closely regulated harvest,
3) To provide adequate enforcement and information, and
4) To provide for population monitoring and research.

The FWS initially rejected the DNR's repeated proposals regarding management of the wolf population. Under the FWS's interpretation, the Endangered Species Act precluded a sport season on the wolf. The FWS also stated that the DNR's proposal would directly violate the Fund for Animals decision.

Under the Reagan Administration and the direction of Secretary of the Interior James Watt, the FWS reversed its position. This change of position undoubtedly arose partially from state political pressure. Public antagonism toward the wolf is of a long-standing nature, as evidenced by the illegal killing of approximately 250 wolves in Minnesota each year.

One reason for this public antagonism toward wolves is wolf depredation of livestock. Yet the wolf depredation problem is exaggerated, as conceded by the FWS. In addition, like man himself, the

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62. See MINNESOTA WOLF PLAN, supra note 20, at 13.
63. See 1981 DNR Comm'r Letter, supra note 61 (emphasis added).
64. See Letter from Harvey K. Nelson, Regional Director of FWS, to Joseph N. Alexander, DNR Commissioner (Aug. 6, 1980).
65. Id.
68. 577 F. Supp. at 790; see also Deposition of David Mech, at 9 (Oct. 25, 1983) (illegal take of between 25-30% of total wolf population in Minnesota).
69. FWS DEPREDA TION STUDY, supra note 19, at 4. Yet the wolf depredation problem is exaggerated, as conceded by the FWS. Id.; cf. Goldman-Carter, Federal
wolf is a predator which sometimes competes with man for the same food sources, such as the deer population. Moreover, as a result of long-established fears and superstitions, people are generally hostile toward the wolf. The public does not understand the wolf’s habits and ecology.70 Thus, the DNR continues to assert that one way to reduce public antagonism is to allow a sport season on wolves.71

In July of 1982, the FWS proposed regulations which returned control of the wolf to Minnesota and allowed a sport trapping season.72 Final wolf regulations were issued on August 10, 1983,73 which subsequently led to the federal court controversy in Sierra Club.

II. THE DECLARATION OF A SPORT SEASON ON THE WOLF

A. The Federal Regulations

The final wolf regulations promulgated by the Reagan Administration specifically allowed the State of Minnesota to declare a sport trapping season on the wolf.74 To implement the season, the FWS divided the state into five wolf zones.75 Wolf depredation control was allowed in zones two, three, four, and five, where the wolf-livestock problem was believed most significant.76 Trapping in zones two, three, and four was allowed depending on certain wolf density restrictions.77

Under these rules, no more than fifty wolves could be taken during the first year after enactment in zone four.78 Additional taking by federal or state employees would be allowed if the public trapping season did not exceed the taking limits, and if


70. See Goldman-Carter, supra note 69, at 70. For example, humans perceive that wolves destroy deer populations. See id. at 71; see also MINNESOTA WOLF PLAN, supra note 20, at 11. The DNR intends to reduce wolf populations to benefit the deer to the maximum extent possible. See Goldman-Carter, supra note 69, at 71.

71. 577 F. Supp. at 790; Deposition of David Mech, supra note 68, at 19-22.


74. 50 C.F.R. § 17.40(d)(c).

75. Id. § 17.40(d)(1).

76. Id. § 17.40(d)(2)(i)(B)(4).

77. Id. Any trapping in zone 3 was contingent on an average population density of not less than one wolf per ten square miles within the zone. Id. § 17.40(d)(2)(i)(C)(1).

78. Id. § 17.40(d)(2)(i)(C)(5).
the average population densities for zones three and four would not be reduced. 79

The new regulations also greatly modified the existing livestock depredation control program. The taking of wolves would not be limited to the individual predator wolf responsible for particular livestock losses. 80 The rules do not require that wolves be taken in a humane manner. 81 In addition, the trapping distance from a farm that alleged a number of depredations was increased from one-quarter mile to one-half mile. 82 The new regulations also allowed trading in wolf pelt s. 83

In opposition to the new regulations, several environmental groups brought suit against the federal government in *Sierra Club*. 84 The groups alleged that the regulations violated the terms of the Endangered Species Act and the federal court decision in *Fund for Animals*. 85

**B. The District Court Decision**

The primary issue before the district court in *Sierra Club* was whether the Secretary of the Interior breached his statutory duty to conserve the wolf within the meaning of the Act by allowing a sport season on the wolf. 86 The government did not contend that the wolf population had exceeded the population limits of its ecosystem. 87 Rather, the government presented the novel argument that a sport season on the wolf would reduce the level of public antagonism toward the wolf, thereby helping to conserve the wolf within the meaning of the Act. 88 Chief Judge Miles Lord soundly rejected this argument:

It is argued that the public in northern Minnesota sees the

79. *Id.* § 17.40(d)(2)(i)(D).
81. *See id.* § 17.40(d).
82. *Id.* § 17.40(d)(2)(i)(B)(4).
85. 11 Env’t Rep. Cas. (BNA) 2189 (D. Minn. 1978). In proceedings before Judge Miles Lord in *Sierra Club*, the government moved to reopen *Fund for Animals*. Judge Lord was asked to either clarify or dissolve the court’s prior order so that the new regulations would not conflict with that order. The plaintiffs also moved the court to reopen *Fund for Animals* on the ground that the court’s order in that case was in conflict with the new regulations. 577 F. Supp. at 785.
86. *See id.* at 787-89.
87. *Id.* at 789.
88. *Id.* at 790.
wolf as having little value. This is said to contribute to the estimated number of 250 illegal killings that afflict the wolf each year. While these illegal killings must be stopped, this can hardly be accomplished by allowing a sport season and creating a market in wolf pelts. An attempt to 'manage' the wolf in this manner is to treat the wolf as a furbearer, and not as a threatened species whose value is determined by its rightful place in nature.89

The Secretary also argued that the declaration of a sport season was within his discretion under the Act.90 The district court rejected this argument, relying on its interpretation of the term “conservation” as defined in the Act.91 The court concluded that the meaning of “conservation” prevented a sport season except in the “extraordinary” case where “population pressure within the animal’s ecosystem cannot otherwise be relieved.”92 Since the government conceded that the wolf population had been stable since 1975, the court found that the Secretary breached his statutory duty to conserve the wolf within the meaning of the Act.93 Moreover, the court held that, based on the language of the Act, the Secretary had an affirmative duty to increase the population of the wolf.94

89. Id.
90. See id. at 788. The Secretary based his argument on section 1533(d) of the Act. This section provides in part that to protect a threatened species “the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of the species.” 16 U.S.C. § 1533(d). The statute also provides that the Secretary may prohibit the taking of an endangered species. Id. § 1533(d), 1538(a)(1). Thus, the Secretary argued that he may or may not prohibit the taking of a threatened species. 577 F. Supp. at 788. The court stated that such a conclusion ignores congressional intent regarding the meaning of conservation under the Act. Id.; see infra text accompanying notes 101-12.
91. See 16 U.S.C. § 1532(1). The statute defines conservation as:
the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.
Id.; see infra notes 101-12 and accompanying text.
93. Id. at 789-90.
94. The court stated that:
From both a plain reading of the Act and research into its legislative history, this court concludes that the Secretary clearly has an affirmative duty to bring the wolf population to a point where the protections of the Act

http://open.mitchellhamline.edu/wmlr/vol11/iss4/3
C. Sierra Club v. Clark: The Eighth Circuit Decision

On appeal to the Eighth Circuit, the government again argued that the regulations allowing a sport season on the wolf were a permissible exercise of the Secretary's discretion. The Eighth Circuit treated this issue strictly as a question of statutory interpretation under the Endangered Species Act. Accordingly, the Eighth Circuit decision firmly upheld the district court opinion regarding its interpretation of the Act. Like the district court, the Eighth Circuit found that the Secretary breached his duty to conserve the wolf when he declared a sport season.

The Eighth Circuit adopted a plain-language reading of the Act and concluded that the definition of conservation under the Act explicitly limits a sport season to the extraordinary case where ecosystem population pressures cannot otherwise be relieved. The court found that for the Secretary to permit a sport season without such a finding would not be "an act of conservation under the Act and would fall without the scope of authority granted to the Secretary." The Eighth Circuit emphasized that Congress intended federal officers and agencies to strive to conserve all endangered and threatened species. According to the court, the Act underscores the significance of the term "conservation," which appears frequently in the Act. The court further found that to reject Congress' defini-

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...are no longer needed. To 'conserve' the wolf does not mean to 'manage' the wolf by declaring a public hunting season. For to do so, would be against the declaration of Congress that the number of wolves be increased. Id. at 789. In addition, Judge Lord ruled that the government's expansion of the wolf depredation program was done without explanation and was illegal under the Act. Id. at 790; see also supra note 30 and accompanying text.

95. Sierra Club v. Clark, 755 F.2d 608, 608 (8th Cir. 1985).
96. Id. at 612.
97. Id. at 618. The court stated that:

We view the issue before us as one primarily of interpretation of the statute. Much of the factual background concerning the wolf, a major part of the discussion in the briefs and of the oral arguments of the amicus parties, and much of the colorful language in the district court's opinion, although of substantial interest, simply do not reach the issue that we are required to decide.

Id.

98. See id. at 613.
99. Id. Additionally, the court stated that legislative intent can be ascertained from the definition of a word in different sections of the statute. Id.
100. Id. at 613.
102. 755 F.2d at 613.
tion of conservation would be to refuse to give effect to a crucial part of the law.\footnote{103}

The court of appeals refused to adopt several arguments made by the Secretary, which called for a lenient interpretation of the Secretary’s discretion under the Act. First, the Secretary argued that the district court’s holding nullified the Secretary’s broad discretion under specific provisions by relying on the Act’s general definition of conservation.\footnote{104} The Eighth Circuit ruled that “there is no nullification involved in utilizing Congress’s definition of ‘conservation.’ ”\footnote{105} Instead, the court concluded that “in applying the statutory definition of ‘conservation’ to all portions of the Act in which it appears, we have amplification and clarification of the meaning of the Act.”\footnote{106}

The Secretary also contended that the district court’s order effectively eliminated any distinction between the Secretary’s discretion in managing a threatened species, as opposed to an endangered species.\footnote{107} The Secretary relied on section 1533(d), which provides that the Secretary “may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife.”\footnote{108} Section 1538(a)(1) strictly prohibits the taking of several endangered species.\footnote{109} The Secretary argued that since he could not order the regulated taking of an endangered species, he could order a taking with regard to a threatened species.\footnote{110}

Again, the Eighth Circuit rejected the Secretary’s arguments based on the definition of conservation. The Eighth Circuit held that its decision did not destroy the two-tiered level of protection under the Act.\footnote{111} Rather, the court stated that the Secretary’s argument “simply ignores the language of the Act and the statutory definitions that Congress adopted.”\footnote{112}

In addition to the plain language of the Act, the Eighth Circuit found further support for this ruling in the Act’s legislative
The court noted that the Conference Report submitted with the Act clearly evidenced an intent to limit the circumstances under which the Secretary could permit a taking of a threatened species.\textsuperscript{113} The court placed great weight on this unambiguous\textsuperscript{114} language in the Conference Report which delineated the extreme circumstances under which a carefully controlled sport season might be allowed.

Despite the explicit language in the Conference Report, the Secretary argued that other legislative history supported a broader interpretation of the Secretary's discretion under the Act.\textsuperscript{115} The Secretary first pointed to a portion of the House Report which allowed the Secretary to authorize taking of a threatened animal as one of an "infinite number of options" which are available.\textsuperscript{116}

In reply to this argument, the Eighth Circuit noted that the remainder of the House Report limited the Secretary's discre-

\begin{quote}
In view of the varying responsibilities assigned to the administering agencies in the bill, the term [conservation] was redefined to include generally the kinds of activities that might be engaged in to improve the status of endangered and threatened species so that they would no longer require special treatment. The concept of conservation covers the full spectrum of such activities: from total 'hands off' policies involving protection from harassment to a careful and intensive program of control. In extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, this 'conservation' might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur—it is just to say that the authority exists in the unlikely event that it ever becomes needed.
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\end{quote}

\textsuperscript{114} 755 F.2d at 615 ("Because a 'conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent' ") (citing Dembey v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981)).

\textsuperscript{115} Id. at 616.

\textsuperscript{116} Id. The Secretary relied on the following language in the House Report:

\begin{quote}
The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to threatened species that have been listed in Section 9(a) [16 U.S.C. § 1538(a)(1)] as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species.
\end{quote}

tion to the exercise of options which "would serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act." 117 These options were supplied "to provide a means for protecting the ecosystems upon which we and other species depend." 118 The Eighth Circuit concluded that the House Report was consistent with the purposes of the Act in terms of the protection and conservation of threatened species. 119

The Secretary then relied on language found in the Senate version of the bill that explicitly authorized him to declare a sport season on a threatened species. 120 Under this bill, the Secretary could issue necessary regulations to provide for conservation and management of a species. 121 Conservation and management were defined as activities directed at "increasing and maintaining the number of animals within species and populations of endangered and threatened species at the optimum carrying capacity of their habitat." 122 It was further stated that these terms may include "regulation and taking necessary to these ends." 123

As pointed out by the Eighth Circuit, however, the Conference Committee rejected the Senate bill's definition of conservation and management. 124 The term "management" was completely deleted. 125 In defining conservation, the Conference Committee deleted the language "optimum carrying capacity" and inserted the present language "to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no longer nec-

117. 755 F.2d at 616 (citing H.R. REP. No. 412, 93d Cong., 1st Sess. at 11).
118. Id. (citing H.R. REP. No. 412, 93d Cong., 1st Sess. at 10).
119. Id. at 617.
120. Id. at 616. The Senate bill read:

Whenever the Secretary lists a species of fish or wildlife as a threatened species, pursuant to subsection (a) of this section, he shall issue such regulations as he deems necessary and advisable to provide for the conservation, protection, restoration, or propagation of such species. With respect to any threatened species, the Secretary may by regulation prohibit any act prohibited with respect to an endangered species under § 10(a) of this Act.

122. 755 F.2d at 616 (quoting S. 1983, 93d Cong., 1st Sess. § 3(1)).
123. Id. This amendment is apparently intended to minimize the federal preemption of state authority to regulate the taking of resident wildlife.
124. 755 F.2d at 616-17; see 1973 CONF. REP., supra note 113, at 3002.
The Conference Committee also stated that controlled taking of surplus members of a species should be limited to "extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way."  

In citing the Conference Report, the Eighth Circuit discussed whether or not the Secretary could ignore the explicit language in the Conference Report which rejected the Senate version of the bill. The Eighth Circuit determined that based on the Act's final definition of conservation, a sport season on the wolf could not be permitted absent an extraordinary case finding.

In his dissent, Circuit Judge Ross argued that the majority's interpretation of the Act was too narrow in limiting the Secretary's discretion. He also argued that the majority's decision did not serve to fulfill the purposes of the Endangered Species Act. Judge Ross suggested that the majority's decision would, in fact, prevent the conservation of a threatened species in certain circumstances. To illustrate this point, Judge Ross discussed a hypothetical scenario in which several members of a pack of wolves were afflicted with a highly contagious disease. Judge Ross argued that the majority's interpretation of conservation would not allow the Secretary to implement a regulated taking of the diseased wolves to prevent the spread of disease, since the situation would not constitute a "case where population pressures . . . could not

128. See 755 F.2d at 615-17.
129. Id. at 617. The court of appeals further held that the district court had not adequately addressed the government's reasons for changing the wolf depredation program. The court remanded the case to the district court for further findings on the government's reasons. Id. at 618-19.
130. Id. at 620-22 (Ross, J., dissenting).
131. Id. at 621. Specifically, Judge Ross relied on the "but are not limited to" language of the statutory definition, arguing that such language expanded rather than limited the Secretary's discretion with regard to the regulated taking of threatened species. Id.
132. Id.
133. Id.
134. Id.
otherwise be relieved." 135

As pointed out by the majority, however, a specific provision in the Act provides for the taking of depredating or diseased animals from a threatened species population when necessary. 136 The majority concluded that although a sport season required a specific extraordinary case finding, the Act would not similarly limit the taking of diseased members of a species. 137

III. ANALYSIS OF THE EIGHTH CIRCUIT DECISION

The Eighth Circuit’s decision in *Sierra Club* is significant for the wolf and far-ranging in terms of the limitation placed on the Secretary’s discretion to declare a sport season on a threatened species. The case of the wolf in Minnesota illustrates the problem of allowing localized control of a threatened species population. The declaration of a sport season on the wolf was not so much a question of biological science, but a sociological question concerning human attitudes toward the wolf. 138 Public antagonism brought to the forefront by local politicians undoubtedly played a significant role in the federal government’s willingness to allow a sport season. Ironically, it is perhaps these same pressures which led to the wolf’s original decline to the status of a threatened species in Minnesota.

The central question in *Sierra Club* was whether or not the Secretary would be allowed to return control of the wolf to a state that was intent on treating the wolf as a game animal, and which would allow a regulated harvest of the wolf. The Eighth Circuit concluded that Congress specifically rejected the notion that a sport season on a threatened species could be justified without a separate showing that population pressures within the animal’s ecosystem could not otherwise be relieved. The court’s decision is significant in terms of what the Secretary may consider when managing a threatened species. It will no longer be possible for the Secretary to bend to political or sociological pressures in conserving a threatened species. Instead, the Secretary is directed to take those steps that will ulti-

135. *Id.* (citing 16 U.S.C. § 1532(3)).
136. *Id.* at 614 n.8; see 16 U.S.C. § 1539(a)(1)(A).
137. 755 F.2d at 614 n.8.
mately bring the population of a threatened species to the point where the protections of the Act are no longer necessary.

A. The Court's Reliance on the Fundamental Policies of the Act

When Congress passed the Act in December of 1973, it declared that threatened and endangered species of fish, wildlife, and plants "are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people." Congress intended 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." A critical feature of the Act is to protect those species threatened with extinction. "It is far more sound to take the steps necessary to keep a species or subspecies from becoming endangered than to attempt to save it after it has reached the critical point." If Congress had granted the Secretary of the Interior such broad discretionary powers in allowing a sport season on threatened species, Congress would have run the risk of undermining this critical feature of the Act.

Prior to the federal court decision in *Sierra Club*, no court had specifically addressed the question of the extent of the Secretary's authority to allow a sport season on a threatened species. The court of appeals' decision makes clear that the Secretary has an affirmative duty to increase the numbers of a

139. 16 U.S.C. § 1531(3).
140. Id. § 1531(b).
141. Id.
143. Cf. *Defenders of Wildlife* v. Andrus, 428 F. Supp. 167 (D.D.C. 1977). In *Defenders of Wildlife*, the issue did not concern a sport season, but the permissible hour of migratory bird hunting. The court ruled that the regulations which allowed twilight hunting were invalid because they did not adequately protect certain protected species:

> It is clear from the face of the statute that the Fish and Wildlife Service, as part of the Interior, must do far more than merely avoid the elimination of a protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so. The Service cannot limit its focus to what it considers the most important management tool available to it . . . to accomplish this end . . . . [T]he agency has an affirmative duty to increase the population of protected species.

*Id.* at 170.
threatened species. Management of a threatened species is not simply a question of whether a given regulation will or will not "hurt" a particular species, but whether a given regulation will actually increase numbers of the species.

B. The Court's Interpretation of the Act's Legislative History

As pointed out by the Eighth Circuit, the legislative history of the Act fully outlines what discretion is given the Secretary in regulating a threatened species.144 Both the House and the Senate intended to improve the state of all fish and wildlife classified as threatened under the Act.145 In early testimony before the Senate, Nathaniel Reed, Assistant Secretary for the FWS, testified that the Secretary's authority to issue threatened species regulations was intended to provide a halfway house for those animals which have been restored to the point that they are no longer threatened with extinction, but have not yet responded to the point at which they are ready to be completely removed from the protective umbrella of the Endangered Species Conservation Act.146 Reed analogized the moving of a species from the endangered to the threatened category to "a hospital where the patient is transferred from the intensive care unit to the general ward until he is ready to be discharged."147

Early congressional debate points toward a view which allowed state or federal wildlife agencies considerable discretion to take threatened species.148 Yet as noted by the Eighth Circuit in Sierra Club, the Senate versions of the definitions of conservation and management were rejected when they reached the Conference Committee.149 The changes made by the Conference Committee narrowed the focus of conservation measures in favor of increasing the populations of threatened species. The committee rejected the notion that a threatened species population be maintained at an artificial "optimum car-

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144. See supra notes 113-29 and accompanying text.
145. See supra notes 116-23 and accompanying text.
147. Id.
148. See supra notes 116-23 and accompanying text.
149. 755 F.2d at 617; see also 1973 CONF. REP., supra note 113, at 3002; supra notes 121-30 and accompanying text.
rying capacity" within a particular ecosystem. Instead, the committee adopted the extraordinary case language relied on by the Eighth Circuit. 150

C. The Rejection of a Consumptive Ethic of Wildlife Management

The difference between the language of optimum carrying capacity and the ultimate definition of conservation adopted by the Conference Committee reflects two fundamentally different approaches toward management of a threatened species. Legal scholars assert that the optimum carrying capacity approach reflects the attitude of a consumption-oriented society. 151 Americans and western cultures generally view their natural resources, such as land, water, forests, and wildlife, as available for financial gain and physical comfort. As a result, these resources are not of value until they become usable as a product or device. Congress itself recognized this consumption ethic when it declared the need for protection of endangered and threatened animals as "a consequence of economic growth and development untempered by adequate concern and conservation." 152

The traditional approach toward wildlife management is to raise productivity of a particular species of fish or wildlife to increase the consumption of that species as a resource. 153 State and federal fish and wildlife agencies employ the majority of wildlife managers. 154 These agencies traditionally receive their financing from hunting and fishing license fees and equipment, taxes, and such items as duck stamp proceeds. 155 It is not unreasonable to assume that wildlife managers are sympathetic to the views of hunters and trappers.

The Endangered Species Act is a specific legislative mandate directed toward changing the attitude of our society from a more consumption-oriented ethic to a protectionist ethic by which the populations of endangered and threatened fish and wildlife will be increased. The controversy surrounding a

150. 1973 CONF. REP., supra note 113, at 3002; see also Goldman-Carter, supra note 69, at 74-75 (discussing Conference Committee's "extraordinary case" language).
151. Goldman-Carter, supra note 69, at 94-95.
152. 16 U.S.C. § 1531(1).
154. Id.
155. Id.
The sport season on the eastern timber wolf reflects the tension between the traditional, more consumption-oriented view of wildlife management and the protectionist goals found in the Endangered Species Act. Minnesota DNR officials consistently argue that the wolf should be treated as a fur bearer with a closely regulated harvest, despite the fact that the wolf is listed as a threatened animal under the Act.\textsuperscript{156}

The DNR's approach toward "management" of the wolf population is precisely the kind of wildlife management against which Congress intended to legislate. Moreover, the vulnerability of state and federal wildlife agencies to this consumption-oriented ethic is exactly the dilemma which prompted Congress to impose an explicit prohibition against sport seasons on threatened animals, except where the animal has become overpopulated. To "conserve" the wolf within the meaning of the Act does not mean to allow a sport season where no proof exists that the wolf has become overpopulated.

Without specific limitations on the management of a threatened species, it is possible that certain individuals in our society will succeed in reducing the magnificence of a threatened species, such as the wolf, to the level of a product to be manipulated by humans. As the Endangered Species Act now stands, this manipulation is prohibited. In Minnesota, however, state officials refuse to protect the wolf from illegal killing without first establishing a sport trapping season. This prerequisite to conserving the wolf ignores the terms of the Act and fails to recognize the wolf as an individual species in danger of extinction. Particularly appropriate are the words of Judge Lord in ruling that a sport season on the wolf would not be allowed:

Plaintiffs have urged that state and federal governments are doing little, if anything, to prevent the illegal killing of wolves. The court finds it very difficult to conclude otherwise when almost one quarter of the wolf population is illegally slaughtered each year. There is no evidence, at least in federal court, that anyone has been prosecuted for these killings. It is apparent that the manpower to enforce the law is there, the quid pro quo being the allowance of a hunting season. But the duty imposed by Congress to increase the wolf population does not hinge upon the existence of a

\textsuperscript{156} See supra notes 59-60 and accompanying text.

\url{http://open.mitchellhamline.edu/wmlr/vol11/iss4/3}
sport season. Every step must be taken to enforce the law as it stands.\textsuperscript{157}

\textbf{Conclusion}

Faced with an issue of first impression, the Eighth Circuit in \textit{Sierra Club} interpreted the statutory authority given to governmental authorities to declare a sport season on a threatened species. The court limited the circumstances under which a sport season could be allowed to cases where population pressures within the species' ecosystem cannot otherwise be relieved. Since there was no evidence that the eastern timber wolf had exceeded the population limits of its ecosystem, the court would not permit a sport season on the wolf.

\textit{Sierra Club} is particularly important in light of the public controversy which surrounds the management of a threatened species such as the timber wolf. In northern Minnesota, the wolf is the subject of great public antagonism stemming in part from depredation of livestock and conflicts between humans and wolves regarding the deer population. A general fear and hatred of the wolf prevails.

The controversy surrounding the eastern timber wolf in Minnesota illustrates the problem of managing a species which has become threatened due to long-standing environmental and sociological problems. This continuing problem only further evidences the need for a clear standard to be applied by governmental authorities engaged in the management of threatened animals. In \textit{Sierra Club}, the Eighth Circuit responded to this need by disallowing a sport season on the wolf. This decision upholds the purposes of the Endangered Species Act and furthers the preservation of all threatened species, as Congress originally intended.

\textsuperscript{157} 577 F. Supp. at 790.