

2016

# Lessons from the Wolf Wars: Recovery v. Delisting Under the Endangered Species Act

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## Recommended Citation

Martha C. Williams, *Lessons from the Wolf Wars: Recovery v. Delisting Under the Endangered Species Act*, 27 Fordham Envtl. L. Rev. 106 (2016),

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**LESSONS FROM THE WOLF WARS: RECOVERY V.  
DELISTING UNDER THE ENDANGERED SPECIES ACT\***

*Martha Williams<sup>1</sup>*

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**INTRODUCTION**

*“The gray wolf, like the bald eagle and grizzly bear, has become a symbol of endangered species, but perhaps more than other such species, the gray wolf is also a lightning rod for controversy.”<sup>2</sup>*

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1. \* Assistant Professor of Law, Alexander Blewett III School of Law at the University of Montana and former Deputy Solicitor, Parks and Wildlife, U.S. Department of the Interior and Agency Counsel Montana Department of Fish, Wildlife and Parks. Thanks to Stacey Gordon, Larry Howell, and Robert Lane for comments and suggestions, and to Hannah Cail and Thomas McMeans for research assistance.

2. *Humane Soc’y v. Jewell*, 76 F. Supp. 3d 69, 69 (D.D.C. 2014), *appeal docketed*, No. 15-5061 (D.D.C. Feb. 19, 2015).

As climate change and the dynamic nature of our human and natural world place mounting pressure on species and their habitats, we need the Endangered Species Act (ESA) now more than ever.<sup>3</sup> Yet the ESA faces renewed efforts at amendment and repeal.<sup>4</sup> Because it is seen by some to lie at the intersection of preservation and progress, the ESA becomes the focus of controversy in the debate over the role of environmental regulation and many types of development. Further, as the debate over the ESA roils, there is a misplaced focus on using the number of species that are delisted as a way to measure the success of the ESA.

This article uses the fundamentals of the ESA to remind us why Congress passed the ESA. It applies those fundamentals and their focus on recovery of species in peril, to the wolf wars, the decades long legal battles over the reintroduction, recovery, and delisting of wolves culminating in two cases, *Defenders of Wildlife v. Jewell*<sup>5</sup>

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3. See Dale D. Goble, *The Endangered Species Act: What We Talk About When We Talk About Recovery*, 49 NAT. RES. J. 1, 5 n.11 (2009) (“Ecologists have increasingly recognized that ecosystems are not static, but ‘rather are complex systems that are dynamic and unpredictable across space and time.’”); see generally Holly Doremus, *The ESA: Static Law Meets Dynamic World*, 32 WASH. U. J. L. & POL’Y 175 (2010).

4. The 114th Congress has considered the following legislative measures: S. 1036, S. 855, S. 736, S. 468, S. 292, and S. 112, all of which are bills addressing the ESA. *Fish and Wildlife Service: The President’s FY2016 Budget Request for the Fish and Wildlife Service and Legislative Hearing on Endangered Species bills: Hearing before the S. Comm. on Environment and Public Works*, 114th Cong. (2015). Many of these bills focus on the relatively small number of species that have been delisted. *Id.*; see also, e.g., *Oversight of Litigation at EPA and USFWS: Impacts on the U.S. Economy, States, Local Communities and the Environment: Hearing before the S. Comm. on Environment and Public Works*, 114th Cong. (2015); *Oversight Hearing on ‘Federal Agencies’ Selective Enforcement of ESA Consultation*, 114th Cong. (2015); *Empowering State Management of Greater Sage Grouse: Hearing Before the H. Comm. on Natural Resources*, 114th Cong. (2015).

5. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d 193 (D.D.C. 2014), appeal docketed, No. 14-5313 (D.D.C. Dec. 17, 2015).

(*Wyoming case*) and *Humane Society of the U.S. v. Jewell*<sup>6</sup> (*Western Great Lakes case*). Applying the ESA's focus on species recovery to the wolf wars demonstrates where the disconnect between recovery and delisting occurs. The lessons learned from the wolf wars suggest that we change the way we talk about the ESA, shifting our focus and ensuing rhetoric from delisting to species recovery. This focus on recovering species can benefit species conservation, develop a more logical way to achieve delisting, and ultimately pave the way for more delistings. While it requires an intermediary step from listing to delisting, placing more responsibility on states, municipalities and individuals, it also shifts the dialogue from delisting battles to what we mean by recovery under the ESA, how much recovery we require as a society, where we require it, who undertakes it, and how.<sup>7</sup>

Part 1 of this article sets out the fundamentals of the ESA, paying particular attention to Section 4, the actions of listing and delisting, and the process of recovery. Refocusing on the ESA's findings, purposes, and policy reminds us of its larger purpose. As we learn more about how nature helps our brains, and how the opportunity to be awed makes us better people, the iconic ESA remains a vital tool to keep our world a place worth living.<sup>8</sup>

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6. *Humane Soc'y v. Jewell*, 76 F. Supp. 3d 69, *appeal docketed*, No. 15-5061 (D.D.C. Feb. 19, 2015).

7. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1973).

8. See, e.g., Florence Williams, *This is Your Brain on Nature*, NATIONAL GEOGRAPHIC MAGAZINE, Dec. 8, 2015; Florence Williams, *Take Two Hours of Pine Forest and Call Me in the Morning*, OUTSIDE MAGAZINE, Nov. 28, 2012, <http://www.outsideonline.com/1870381/take-two-hours-pine-forest-and-call-me-morning>; Gretchen Reynolds, *How Walking in Nature Changes the Brain*, N.Y. TIMES: THE WELL BLOG (July 22, 2015, 5:44 AM), [http://well.blogs.nytimes.com/2015/07/22/how-nature-changes-the-brain/?\\_r=0](http://well.blogs.nytimes.com/2015/07/22/how-nature-changes-the-brain/?_r=0); see generally THE BIOPHILIA HYPOTHESIS (Stephen R. Kellert & Edward O. Wilson eds., 1993); STEPHEN R. KELLERT, THE VALUE OF LIFE: BIOLOGICAL DIVERSITY AND HUMAN SOCIETY (1996); Paul K. Piff et al., *Awe, the Small Self, and Prosocial Behavior*, 108 J. OF PERSONALITY & SOC. PSYCHOL. 883 (2015).

The ESA's primary goal remains valid: to conserve imperiled species and the ecosystems upon which they depend.<sup>9</sup> There is no question that it has helped species in peril stabilize and improve.<sup>10</sup> However, only a small percentage of species have been delisted, meaning they recovered to the point that they have been taken off the list of endangered or threatened species because they no longer need the ESA's protections.<sup>11</sup> The increasing number of species listed as endangered and threatened, and the depressingly low number of species taken off the list only demonstrates how the ESA turns out to be too good at providing a critical backstop to preventing species extinction.<sup>12</sup> This is not to say that there is not a need for other

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9. See U.S. FISH & WILDLIFE SERV., *ESA BASICS: 40 YEARS OF CONSERVING ENDANGERED SPECIES* (2013), available at [https://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf); see also J.B. Ruhl, *The Endangered Species Act's Fall From Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 496 (2012) ("While few species listed for protection under the ESA have fully recovered, the statute is credited with preventing the extinction of the vast majority of listed species.").

10. The USFWS keeps an updated list of endangered and threatened species of animals and plants both in the United States and internationally; this list is known as the "boxscore." See U.S. FISH & WILDLIFE SERV., SUMMARY OF LISTED SPECIES LISTED POPULATIONS AND RECOVERY PLANS, ENVTL. CONSERVATION ONLINE SYS., [https://ecos.fws.gov/tess\\_public/pub/Boxscore.do](https://ecos.fws.gov/tess_public/pub/Boxscore.do) (last updated October 25, 2015, 1:11 GMT). As of October 28, 2015, there were 694 listed animals in the United States and 898 plants listed in the United States with 651 animals listed internationally and 3 plants listed internationally, with a total of 2,246 endangered and threatened species around the world. *Id.*

11. The USFWS also compiles a delisting report that provides the original listing date, species, delisting date, and reason for delisting. U.S. FISH & WILDLIFE SERV., DELISTING REPORT, ENVTL. CONSERVATION ONLINE SYS., [https://ecos.fws.gov/tess\\_public/reports/delisting-report](https://ecos.fws.gov/tess_public/reports/delisting-report) (last visited Aug. 9, 2015). To date, the USFWS has delisted 59 species: 30 because they recovered and no longer need the protections of the Act, 19 because the original data was erroneous, such as new taxonomic information or new information about the species was discovered, and 10 have gone extinct. *Id.*

12. See, e.g., Holly Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation*, 30 ENVTL. L. REP. 10, 434 (2000); Goble, *supra* note 6, at 44 (noting the irony of the ESA in that "it is a powerful statute that can bring a species back from the brink of extinction, but the strength of the Act in

conservation tools and room for improving how we use, implement, and interpret the ESA.<sup>13</sup> Ideally, once threats facing a species can be eliminated, the population recovers and can ultimately come off the list like the peregrine falcon, bald eagle, and Aleutian Canada goose.<sup>14</sup> For many species, it is not that simple.<sup>15</sup> For example, for a species such as wolves whose primary threat is humans, even when its population reaches a certain level, without the ESA's protections that threat remains unless replacement regulatory mechanisms fill the ESA's void to allow that species to continue to thrive. With the ESA's detractors fixating on delisting while courts hold that even robust species are not ready for delisting, changing the discussion from one of delisting as an end result to the process of species recovery better fulfills the goal of the ESA, and ultimately paves the way for potential delistings.

In Part 2, this article uses the *Wyoming* and *Western Great Lakes* cases to demonstrate how the difficulty of delisting a species can mask the success of the ESA in facilitating a species' recovery. A number of able commenters have fleshed out what the ESA means by "recovery."<sup>16</sup> This article builds on their efforts, using the wolf wars

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preventing extinction also becomes a deterrent to delisting a species because to do so will frequently remove the protection needed to conserve it, and thus lead to a downward spiral that would necessitate relisting.”).

13. See generally Jessica Owley, *Keeping Track of Conservation*, 42 *ECOLOGY L. Q.* 79 (2015). We have the tools to address wildlife conservation at all levels: local, state, national, and international. Climate change will likely force our hand to do so and challenge our ability to do so effectively.

14. The American peregrine falcon and bald eagle benefited from pesticide controls yet retained the advantages of federal protection under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, respectively. See Federico Cheever, *The Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without Winning the War*, 31 *ENVTL. L. REP.* 11, 302 (2001).

15. Goble, *supra* note 3 at 23 (noting that “[u]nfortunately, most species are not like peregrine falcons – they cannot be securely delisted based only on the protection provided by general statutes such as the [Migratory Bird Treaty Act].”).

16. See, e.g., Cheever, *supra* note 14, at 302; see generally U.S. FISH & WILDLIFE SERV., *supra* note 15; Doremus, *supra* note 12; Goble, *supra* note 3;

to further illustrate the need to focus on recovery of a species, especially for those species that are biologically recovered, but require ongoing management and oversight to continue on their recovery trajectory. The *Wyoming* and *Western Great Lakes* cases demonstrate how challenging the mechanics of listing and delisting can be, not because the ESA is poorly drafted or implemented, but because our natural world is dynamic and species aren't easily confined to political boundaries. Further, while the science of extinction and recovery are developing rapidly, we have much to learn about many species and their habits.<sup>17</sup>

Part 3 of this article poses lessons learned from the wolf wars. The cases demonstrate that the dialogue around delisting detracted from the actual recovery of the species and what's required for continued recovery of the species over time. By shifting the dialogue and thus the legal analysis from delisting to recovery as the ESA intended, the courts can finally tackle the question of recovery for the benefit of the conservation of the species and the impact on interested parties. For example, by focusing on recovery, the parties can reframe the dialogue around where the species needs to recover, what actions they need to take or not take to allow the recovery to continue, and who needs to be involved.

As part of the lessons learned, part 3 examines the USFWS and the National Marine Fisheries Service (NMFS) (collectively "Services") recently adopted policy interpreting the phrase "significant portion of its range" ("SPR Policy").<sup>18</sup> The SPR phrase has a long history in litigation and will only garner more attention and controversy as

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Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L. Q.* 1 (1996).

17. See U.S. FISH & WILDLIFE SERV., REPORT TO CONGRESS ON THE RECOVERY OF THREATENED AND ENDANGERED SPECIES: FISCAL YEARS 2011-2012, (Oct. 2014), [http://www.fws.gov/Endangered/esa-library/pdf/Recovery\\_Report\\_FY2011-2012.pdf](http://www.fws.gov/Endangered/esa-library/pdf/Recovery_Report_FY2011-2012.pdf); see also Goble, *supra* note 3, at 11 ("Extinction is a complex, poorly understood, probabilistic process.").

18. 79 Fed. Reg. 37578, Final Policy on Interpretation of the Phrase "Significant Portion of its Range" in the Endangered Species Act's Definition of "Endangered Species" and "threatened Species" (July 1, 2014).

climate change challenges species' survival in a way that we have not seen in our lifetimes.<sup>19</sup> As if the science of extinction is not challenging enough, interpretation of the phrase SPR raises the larger question of what Congress intended the ESA to do and whether it can adapt to a changing world. SPR represents the geographical as well as the normative challenges of how much of species' range we want to protect, whether protecting a species to a certain level of viability is enough, and whether species that require conservation actions to ensure their viability qualify as recovered as the ESA envisioned.<sup>20</sup> As litigation over the new policy will inevitably ensue, the Services' interpretation of the phrase will draw discussion on how much we as a society are willing and able to recover species that may have had wide historic ranges. Indeed, the phrase demonstrates the conundrum of applying the ESA's protections to a species that thrives in a significant portion of its range but not all of its range, or a species that thrives in one small area but not its historic range.<sup>21</sup> Further, as the *Western Great Lakes* case demonstrates, courts' interpretation of the phrase can be technical and miss the larger concept of recovery.

Part 3 recognizes the difficulty of delisting a species like wolves: once listed, delisting is hard. The ESA requires that we continue to recover listed species, but can also encourage collaborative efforts and formal conservation agreements to help keep a species off the list

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19. *Defenders of Wildlife v. Salazar*, 721 F. Supp. 2d 1207 (D. Mont. Aug. 5, 2010); *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010).

20. Goble, *supra* note 3 at 2 n.3 (2009) (noting that Congress linked recovery to conservation).

21. The recent NMFS proposed rule regarding the status of the humpback whale demonstrates the challenge of protecting a species that is doing well in some population segments and not as well in others. NMFS proposes to divide the globally listed endangered species into fourteen distinct population segments: listing two as endangered, two as threatened, and not listing the remaining ten. Endangered and Threatened Species; Identification of 14 Distinct Population Segments of the Humpback Whale (*Megaptera novaeangliae*), 80 Fed. Reg. 2203 (Apr. 21, 2015) (to be codified at 50 C.F.R. pts. 223, 224).



to begin with.<sup>22</sup> Some of the creativity and shared responsibility that has allowed the USFWS to not list a species should apply to delisting as well. To date, these tools have not been as helpful in decisions to delist a species. By focusing on how these tools aid the recovery of a species, their use can become more mainstream. Finally, if states, municipalities, and interested parties stepped up their responsibility during recovery, the jump from listing to delisting would be less stark. If interested parties including the states provided an intermediary step from listing to delisting, assuring that certain regulatory measures were in place, the transition to delisting would be less dire.

### I. GROUND GAME: THE FUNDAMENTALS OF THE ESA

*"When I hear of the destruction of a species, I feel just as if all the works of some great writer have perished." (President Theodore Roosevelt)*

The fundamentals of the ESA lay the foundation for understanding the nuances between recovery and delisting and the lessons we can learn from the *Wyoming* and *Western Great Lakes* cases. So often, major federal statutes are a product of a perceived crisis.<sup>23</sup> The ESA

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22. *See generally* Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (proposed June 19, 2012) (to be codified at 50 C.F.R. pt. 17); *Defenders of Wildlife v. Jewell*, 70 F. Supp. 3d at 183 (upholding the rule). Similarly, robust conservation efforts precluded the need to list the Upper Missouri Distinct Population Segment of the Arctic Grayling. *See* Endangered and Threatened Wildlife and Plants; Revised 12-Month Finding on a Petition To List the Upper Missouri River Distinct Population Segment of Arctic Grayling as an Endangered or Threatened Species, 79 Fed. Reg. 49,384 (Aug. 20 2014) (to be codified at 50 C.F.R. pt. 17) [hereinafter Arctic Grayling Petition]; *see also* Withdrawal of Proposed rule to List Bi-State DPS of Greater Sage Grouse, 80 Fed. Reg. 22,829 (April 23, 2015) (noting key factor in decision not to list was development of Bi-State Action Plan developed over last 15 years with at least \$45 million in secured funding).

23. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972) (responding to burning of the Cuyahoga); Wild Free Roaming Horse and Burros Act of 1971, 16 U.S.C. §§ 1331-40 (1971) (responding to horse killings); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1972) (responding to smog in London and Los Angeles); *see also*

is no different.<sup>24</sup> The passage of the ESA signified a national environmental movement that stemmed from a growing awareness of environmental problems, including species extinction.<sup>25</sup> Concerned with precipitous drops in numbers of species, Congress passed the ESA in 1973, adopting the conference committee report unanimously in the Senate and with only four votes against it in the House.<sup>26</sup> At the signing ceremony, President Nixon noted that “[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed.”<sup>27</sup> The ESA’s

Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 471-73 (1999).

24. *See id.* at 464.

25. RACHEL CARSON, *SILENT SPRING* (Paul Brooks ed. 1962) (warning of the threats pesticides posed to wildlife).

26. Petersen, *supra* note 17, at 466 (“Wildlife occupies a unique place on the American landscape and in the American mind. It is both a protected as a cherished treasure and exploited like many other resources...Wildlife is a public resource. Even our literature and our art embody this belief... Air, water, and wildlife are all resources of the commons.”); Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 87 (1995).

27. President Nixon’s Statement on Signing the Endangered Species Act of 1973, 374 Pub. Papers 1027, 1027-28 (Dec. 28, 1973).

This important measure grants the Government both the authority to make early identification of endangered species and the means to act quickly and thoroughly to save them from extinction. Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans. I congratulate the 93d Congress for taking this important step toward protecting a heritage, which we hold in trust to countless future generations of our fellow citizens. Their lives will be richer, and America will be more beautiful in the years ahead.

*Id.*

Congress first adopted the 1966 Endangered Species Preservation Act as a means to list. While it authorized and funded some habitat acquisition and consolidated

scope is far-reaching; it covers plants, fish, and wildlife both domestically and internationally.<sup>28</sup> The United States Supreme Court has recognized the ESA as the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation in the world.”<sup>29</sup>

For a major federal environmental statute, the ESA is straightforward and unequivocal. Its objective is the conservation of endangered and threatened species, and the ecosystems upon which they depend.<sup>30</sup> The findings, purposes, and policies help explain how the ESA works to conserve threatened and endangered species.<sup>31</sup> In its findings, Congress found and declared that:

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untampered by adequate concern and conservation;

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and expanded the National Wildlife Refuge system, it did not address wildlife commerce. The class of 67 was the first list of endangered species, consisting of 14 species of mammals, 36 species of birds, 6 species of reptiles and amphibians, and 22 species of fish – at the time only vertebrates could be included. In 1969, Congress enacted the Endangered Species Conservation Act, adding protection to species in danger of worldwide extinction, prohibiting export and sale of these species, and expanding the Lacey Act’s ban on interstate commerce to include mammals, reptiles, amphibians, crustaceans, and mollusks, also calling for meeting international meeting to adopt an international convention or treaty, which would become the Convention on International Trade of Endangered Species of Wild Fauna and Flora (“CITES”). Citing the inadequate level of protection for species at the time, President Nixon asked Congress to enact more comprehensive endangered species legislation. President Nixon’s Statement on Signing the Endangered Species Act of 1973, 374 Pub. Papers at 1027-28. Also see Petersen’s *Comment: Congress and Charismatic Megafauna* for a helpful analysis of the ESA’s legislative history.

28. Endangered Species Act §§ 1537-1539.

29. *Humane Soc’y v. Jewell*, 76 F. Supp. 3d at 76 (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978)).

30. Endangered Species Act § 1531(b).

31. *Id.* § 1531(a)-(c).

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific 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, pursuant to [treaties, conventions, and other international agreements]; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nations heritage in fish, wildlife, and plants.<sup>32</sup>

(b) Purposes

The purposes of this chapter 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 to take such steps as may be appropriate to achieve the purposes of the treaties and conventions as set forth in subsection (a) of this section.<sup>33</sup>

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize

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32. *Id.* § 1531(a).

33. *Id.* § 1531(b). Implementing the Act has proved far more complex. In part, this reflects the fact that the Act itself has altered our understanding of species conservation. Goble, *supra* note 6, at 5 n.11 (noting also that ecologists have increasingly recognized that ecosystems are far from static...”).

their authorities in furtherance of the purposes of this chapter.”

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.<sup>34</sup>

The ESA’s definitions flesh out and further support the goal of conserving ecosystems upon which threatened and endangered species depend. Congress defined “conserve” and “conserving” as to use “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.”<sup>35</sup> The 1973 Act was so groundbreaking in part because it requires not only the conservation of species, but also conservation of the ecosystems upon which they depend.<sup>36</sup> To achieve that goal, it sets out a two-tiered framework of endangered species and threatened species, defining “endangered species” as “any species is in danger of extinction throughout all or a significant portion of its range...” and “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>37</sup> The ESA further defines species to include

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34. Endangered Species Act § 1531(c)(2).

35. *Id.* § 1532(3). The definition of “conserve” and “conserving” recognizes that the methods and procedures to bring species to the point at which ESA protection is no longer needed may include and 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.*

36. Endangered Species Act § 1531(b).

37. *Id.* §§ 1532(6)(16), (20). In part, the two-tiered system of protection, one for endangered species and one for threatened species, distinguishes the need for protection in a temporal way, endangered as one of likelihood of extinction now and threatened as one of likelihood of extinction in the foreseeable future.

“any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”<sup>38</sup> These definitions become important in how the Services implement the ESA, where, and to what extent.<sup>39</sup> In summary, the ESA’s findings, purposes, policy, and definitions support the notion that its central focus is on providing a mechanism to conserve and recover species in peril.<sup>40</sup>

Regarded as the “pitbull” of environmental law, the ESA is relatively short and concise in how it sets out several core programs aimed at achieving its central purpose of conserving endangered and threatened species and the ecosystems upon which they depend.<sup>41</sup>

The ESA’s provisions recognize that conservation is a process, a continuum from identifying species in need, to listing them in order to afford them the ESA’s protections, and ultimately through affirmative conservation efforts recovering the species to the point that they no longer require the protections of the ESA.<sup>42</sup> The Secretary of the Interior has the primary responsibility for terrestrial and freshwater species and the Secretary of the United States Department of Commerce has the primary responsibility for marine

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38. *Id.* § 1532(6)(16). The ESA takes a broader view of “species” than the traditional taxonomic definition; it includes not only species, but also subspecies, varieties, and distinct population segments throughout all or a significant portion of its range.

39. The definitions in the ESA take on added weight considering other key terms are not defined. For example the ESA does not define, “recovery,” “delisting,” “distinct population segment,” or “significant portion of its range.”

40. *Id.*

41. Ruhl, *supra* note 9, at 495 (citing Steven P. Quarles, *The Pit Bull Goes to School: The Endangered Species Act at 25: What Works?*, 15 ENVTL. F. 55, 55 (1998) (discussing the origin of the ESA’s reputation)); *see also Tennessee Valley Authority v. Hill*, 437 U.S. at 180 (“[The ESA is] the most comprehensive legislation for preservation of endangered species ever enacted by any nation.”).

42. 92 Stat. 3766 (1978).

species and anadromous fish.<sup>43</sup> Those Secretaries have delegated their responsibilities under the ESA to the Services.<sup>44</sup>

#### A. *The Action of Listing*

The ESA's protections apply to species the Services determine through rulemaking to be endangered or threatened.<sup>45</sup> The first step in determining whether a species is endangered or threatened within the meaning of the ESA is a threshold one: the organism must be a species or subspecies of fish, wildlife, or plant, or be a distinct population segment of vertebrate fish or wildlife that interbreeds when mature.<sup>46</sup> Because the ESA does not define "subspecies" or "distinct population segment," the Services adopted what is known as

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43. Endangered Species Act § 1532(15). See Reorganization Plan No. 4 of 1970, 3 C.F.R. 202 (1971), reprinted in 84 Stat. 2090-93 (1970), and in 35 Fed. Reg. 15627-30 (1970), and reprinted with amendments in 5 U.S.C. app. at 1557-61 (1994).

44. See, e.g., 50 C.F.R. § 402.01(b); Endangered Species Act § 1533(a)(1). Pursuant to Reorganization Plan No. 4 of 1970, which established the National Oceanic and Atmospheric Administration ("NOAA"), NOAA implements the ESA as "pertaining to wildlife and plants under the jurisdiction of the Secretary of Commerce." As a practical matter, USFWS has jurisdiction over the vast majority of listed species and species being considered for listing. Unlike USFWS, NMFS has not faced an extreme mismatch between resources and responsibilities with respect to Section 4 of the ESA. See CANDIDATE AND PROPOSED SPECIES UNDER THE ENDANGERED SPECIES ACT (ESA), NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/species/esa/candidate.htm> (last updated Aug. 11, 2015).

45. 16 U.S.C. § 1533 (a)(1) requires the Services' to promulgate classifications of endangered and threatened species by regulation. The status review of a species becomes a keystone decision because it determines whether or not the species falls within the protections of the ESA. See, Doremus, *supra* note 12, at 10,436. The ESA's Protection applies to any endangered or threatened species of wildlife or plant nationally and internationally. Endangered Species Act § 1533(a). Designation as a threatened species affords more flexibility for state management through 4(d) rules.

46. The Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(5), 92 Stat. 3751 (adding the phrase "distinct population segment of any vertebrate fish or wildlife which interbreeds when mature."); see also *Humane Soc'y v. Jewell*, 76 F. Supp. 3d at 76.

the Distinct Population Segment (“DPS”) policy to clarify its interpretation of the phrase and how they apply it.<sup>47</sup>

When evaluating the status of a species, the ESA requires the Services to evaluate five factors:

- damage to or destruction of a species habitat;
- overutilization of the species for commercial, recreational, scientific, or educational purposes;
- disease or predation;
- inadequacy of existing regulatory mechanisms; and
- other natural or manmade factors that affect the continued existence of the species.<sup>48</sup>

These same five factors apply in a decision to list a species, reclassify the status of the species from threatened to endangered or endangered to threatened, or remove the species from the list of endangered or threatened species. Thus to understand delisting, one must first understand listing. In making their determination of whether or how to classify a species, the Services may rely solely on the biological status and threats to the species’ existence.<sup>49</sup>

There are two ways to list a species: the Services may initiate a listing determination or citizens can petition the Services to list a species.<sup>50</sup> The USFWS initiates proposed listings through its candidate assessment program, through which it evaluates species for which it has enough information that warrants listing the species but

47. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722 (Feb. 7, 1996) (50 C.F.R. § 424.11 (c)-(d)).

48. Endangered Species Act § 1533(a)(1). The ESA directs the USFWS to make its critical habitat designations based on the best scientific data available and to consider economic as well as other impacts. *Id.* § 1533(a)(3)(A).

49. This is in contrast to the Services designating critical habitats on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact. *Id.* § 1533(b)(2).

50. *Id.* § 1533(b); *see also* U.S. FISH & WILDLIFE SERV., THE PETITION PROCESS: FOR REQUESTS TO LIST A SPECIES AS THREATENED OR ENDANGERED UNDER THE ENDANGERED SPECIES ACT (Sept. 2001), *available at* <http://www.fws.gov/home/feature/2006/petitionprocess.pdf>.



is precluded from doing so by higher listing priorities.<sup>51</sup> The USFWS reviews the status of a species and makes listing decisions on the basis of the best available scientific and commercial data, taking into account protective efforts of state and local governments as well as conservation measures in place.<sup>52</sup> It assigns priority to the species based on three factors: the magnitude of threats to the species, the urgency of those threats, and the taxonomic uniqueness of the species.<sup>53</sup>

Regardless of the trigger for listing, candidate species assessment or citizen petition, Section 4 of the ESA sets out specific timelines the USFWS must follow in its listing process. For example, when the USFWS proposes to list a species, it must do so within a year of publishing the proposed rule.<sup>54</sup> Publishing the proposed rule listing a species gives interested parties, local governments, and states one year to get conservation measures and agreements in place to

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51. *See* Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098 (Sept. 21, 1983). Within 90 days of a citizen petitioning to list a species or reclassify the status of the species, the USFWS makes a preliminary determination on the status of the species and publishes a “90-day finding” in the Federal Register. If USFWS determines that the petition presents “substantial information” that listing may be warranted, USFWS must initiate a review of the status of the species. If not, the petition process is concluded. When the USFWS initiates a status review, it must within 12 months of receipt of the petition, issue a “12-month finding” determining whether listing the species is warranted, not warranted, or warranted but precluded. A “warranted-but-precluded finding” requires that USFWS also find that it is making expeditious progress in adding and removing species from the list. When USFWS makes a warranted-but-precluded finding, it assigns the species a listing priority number and adds it to the candidate list. Thereafter, USFWS must annually reconsider the species until USFWS either makes a not-warranted finding or proposes the species for listing. Section 4 also requires the USFWS to monitor the status of warranted-but-precluded species.

52. Endangered Species Act § 1533(b)(1)(A); *see also* Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,114 (Mar. 28, 2003).

53. Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098 (Sept. 21, 1983).

54. Subject to a six-month extension. Endangered Species Act § 1533(b)(6)(B)(i).

demonstrate how those conservation measures preclude the need for a final rule listing the species.<sup>55</sup> If conservation measures can ameliorate threats to a species when the fear of listing looms, the ESA's listing timelines help push those conservation efforts to fruition.<sup>56</sup>

Environmental plaintiffs have used Section 11's citizen suit provision to force the USFWS to adhere to listing petition deadlines.<sup>57</sup> The USFWS entered settlements with these parties setting out timelines for species review until 2018.<sup>58</sup> The settlements included a review of greater sage grouse, with a deadline for the proposed listing rule of September 2015. While these settlements have caused great consternation for some, they represent a creative way of addressing vexing budget and timing issues and have allowed the USFWS to focus on recovering species as opposed to litigating deadlines.<sup>59</sup>

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55. Endangered Species Act § 1533(a)(6)(A). For a helpful diagram on the petition process see USFWS: <http://www.fws.gov/home/feature/2006/petitionprocess.pdf>.

56. *Supra* note 22; *see also* *Overview*, SAGEGROUSEINITIATIVE.COM, <http://www.sagegrouseinitiative.com/sagebrush-community/the-bird> (last viewed Oct. 25, 2015, 10:04 AM).

57. Endangered Species Act § 1540(g).

58. *See* U.S. FISH & WILDLIFE SERV., 2013-2018 LISTING WORKPLAN (2013), *available at* [http://www.fws.gov/endangered/improving\\_ESA/listing\\_workplan\\_FY13-18.html](http://www.fws.gov/endangered/improving_ESA/listing_workplan_FY13-18.html) (listing deadlines from multi-district litigation (MDL) and other settlements).

59. For a thorough discussion of the timeline/listing wars, see Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, 14 VT. J. ENVTL. L. 327 (2013). As part of a court-approved multi-district litigation settlement, the USFWS committed to publish certain listing actions, including petition findings, listing determinations, and critical habitat designations for fiscal years 2013-2018. The agreement significantly reduces timeframe for litigation and allows the Agency to focus its resources on the species most in need of ESA protection. It has also drawn the ire of Congress and those entities that were not parties to the settlement. *Oversight of Litigation at the EPA and USFWS: Impacts on the U.S. Economy, States, Local Communities and the Environment: Hearing Before the Senate Environment and Public Works Subcomm. on Superfund, Waste Management, and Regulatory Oversight*, 114<sup>th</sup> Cong. (2015).

Section 4 also requires that the Services designate critical habitat for a listed species when prudent and determinable.<sup>60</sup> Critical habitat includes geographic areas that contain the physical or biological features that are essential to the conservation of the species and that may need special management or protection.<sup>61</sup> There is much confusion and disagreement on the impacts of critical habitat designations, however, in Section 7, the ESA requires federal agencies to avoid destruction or adverse habitat modification in designated critical habitats.<sup>62</sup> The requirement for Section 7 consultation does not apply to private or state actions.<sup>63</sup>

### B. Delisting

Both procedurally and substantively, delisting is supposed to be the converse of listing.<sup>64</sup> The 1966 Endangered Species Preservation Act, the first precursor to the ESA as we know it now, neither made reference to removing species from the list, nor defined conservation.<sup>65</sup> The legislative reports and hearings contain no mention of delisting.<sup>66</sup> The 1969 Endangered Species Conservation Act added a provision requiring the Services to conduct five year status reviews and provided a mechanism for reclassifying species

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60. Endangered Species Act § 1533 (4)(a)(3)(A).

61. Endangered Species Act § 1532 (5)(A)(definition of “critical habitat.”).

62. Endangered Species Act § 1536 (a)(2); *see generally, e.g.*, Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141 (2012) (explaining what critical habitat designation does and does not do); David J. Hayes et al., *A Modest Role for a Bold Term: “Critical Habitat” Under the Endangered Species Act*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10,671(2013).

63. *Id.* § 1533 (a)(3)(B)(i); *see generally, e.g.*, Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141 (2012); David J. Hayes et al., *A Modest Role for a Bold Term: “Critical Habitat” Under the Endangered Species Act*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10,671 (2013).

64. Doremus, *supra* note 12, at 10,437. Yet, as the wolf wars demonstrate the path to listing is not the same as the path to delisting, or as Dale Goble aptly noted, “the path up is not the same as the path down.” Goble, *supra* note 3, at 16.

65. Endangered Species Preservation Act of 1966, Pub. L. 89-669 § 1(a), 80 Stat. 926.

66. *See, e.g.*, H.R. REP. 89-1168 (1973).

and removing them from the list; however it did not mention delisting.<sup>67</sup>

In 1973 when Congress enacted the ESA, delisting got little attention; instead the role states play in endangered species conservation and the addition of a threatened classification as a second tier of protection were more widely debated issues.<sup>68</sup> The ESA does not have a provision specific to delisting or reclassifying the status of a species. In fact, the term “delist” is not in the ESA. The House report on the 1978 amendments to the ESA briefly mentions authorizing delisting “in much the same manner as the initial listing.”<sup>69</sup> This simplicity reflects the notion at the time that Congress passed the ESA that potential extinction and recovery of species was a linear process, and that once threats were identified and ameliorated, all would be fine. And yet, while there has since been a dramatic increase in knowledge about the science of extinction, there is still much to learn about the habits and needs of specific species.<sup>70</sup> For example, not only do we lack information on basic life history traits of at risk species, but often, our knowledge of the factors that may lead to extinction is also incomplete.<sup>71</sup>

By requiring a status review of a species before it may be reclassified to another status, Section 4 implicitly recognizes that a species status may change.<sup>72</sup> Further, the House report from the 1982 amendments to the ESA noted that the amendments to Section 4 were intended to “clarify that delisting should be based on the same criteria and conducted according to the identical procedures as listing

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67. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, § 3(a), 83 Stat. 275.

68. *See Endangered Species Act of 1973: Hearing Before the S. Subcomm. on the Environment of the S. Comm. on Commerce*, 93d Cong. 52 (1973).

69. H.R. REP. No. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.

70. Goble, *supra* note 6, at 4.

71. *Id.*

72. Endangered Species Act §§ 1533 (a)(2)(C), (c)(2)(A)-(B). The provision that directs the USFWS to publish in the Federal Register a list of species determined to be endangered or threatened also sets out a mandatory five-year review of the species and their status, recognizing a need to reclassify species and delist them. *Id.* § 1533(c).

a species.”<sup>73</sup> Procedurally, the same timelines apply to petitions to delist.<sup>74</sup>

Substantively, the Services apply the same five criteria to determine if a species no longer qualifies as “threatened” or “endangered.”<sup>75</sup> The USFWS delists a species for one of three reasons: it is extinct, the original data relied on were erroneous or have changed, or the species has recovered to the point it no longer qualifies as threatened or endangered.<sup>76</sup> Achieving the criteria of a recovery plan informs a court of a species’ recovery, but does not guarantee delisting.<sup>77</sup>

### C. Process of Recovery

Working with partners, Federal agencies, states, local governments, Tribes, NGO’s, and other parties, the USFWS uses a number of tools to “recover” an endangered or threatened species to ensure that they are able to survive on their own in the wild. These tools can include restoring and acquiring habitat, removing invasive species, conducting surveys, monitoring individual populations, breeding species in captivity and releasing in their native range, and determining causes of mortality.<sup>78</sup>

Congress recognized that conservation of species is part of a continuum, and thus included recovery planning as an important part of the listing process.<sup>79</sup> Identifying species in need of the ESA’s

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73. Doremus, *supra* note 12, at 10,437 (citing H.R. REP. 97-567, at 12).

74. Endangered Species Act § 1533(b)(3)(A).

75. 50 C.F.R. §§ 424.11(c)-(d) (2015).

76. *Id.* § 424.11(d). *See also* U.S. FISH & WILDLIFE SERV., REPORT TO CONGRESS ON THE RECOVERY OF THREATENED AND ENDANGERED SPECIES: FISCAL YEARS 2011-2012 (Oct. 2014), [http://www.fws.gov/Endangered/esa-library/pdf/Recovery\\_Report\\_FY2011-2012.pdf](http://www.fws.gov/Endangered/esa-library/pdf/Recovery_Report_FY2011-2012.pdf).

77. Doremus, *supra* note 12, at 10,438 (citing *Fund for Animals v. Babbitt*, 565 F. Supp. 2d 1160 (D.C.C. 1995)).

78. *See generally* Rachel Muir & J. Michael Scott, *A Natural Connection: USGS and Endangered Species Research*, 33 ENDANGERED SPECIES BULLETIN 4 (2008) available at [https://www.fws.gov/endangered/news/pdf/bulletin\\_fall2008.pdf](https://www.fws.gov/endangered/news/pdf/bulletin_fall2008.pdf).

79. Endangered Species Act § 1533(f).

protections requires understanding what those species need to recover to the point that they no longer require the protections of the ESA.<sup>80</sup> Specifically, recovery is the process that stops the decline of an endangered or threatened species by removing or reducing threats to the species.<sup>81</sup> Sometimes, it is an easier fix than at other times. Recovery planning is one way the Services, along with many cooperating partners, may adhere to their affirmative duty to conserve threatened and endangered species.<sup>82</sup> Section 4(f) requires the Services to develop and implement recovery plans and “to give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be in conflict with construction or other development projects or other

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80. 92 Stat. 3766 (1978). The ESA has laudable goals, but its language says little about recovery and delisting. Instead, its provisions provide much more insight into listing. For example, when enacted in 1973 the ESA did not have the section on recovery planning. Endangered Species Act § 1532(3). The Services first introduced concept of recovery in 1978 through regulations promulgated to implement Section 7 consultation. Doremus, *supra* note 12, at 10,443. It wasn't until 1988 that Congress added an explicit link between recovery planning and delisting. *Id.* at 18, 1044 (citing *Endangered Species Reauthorization, Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong. 211 (1987) (Statement of Micheal J. Bean, Environmental Defense Fund) (The ultimate goal of the Endangered Species Act is to bring about the recovery of the species it protects. To date, there have been a few notable successes in which listed species have recovered to the extent that they could be moved from the endangered list to the less imperiled threatened list or removed altogether from either list.)).

81. U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES RECOVERY PROGRAM (June 2011), available at <http://www.fws.gov/endangered/esa-library/pdf/recovery.pdf>.

82. Endangered Species Act §§ 1531(c), 1536(a)(1). The 1978 amendments to the Act added the recovery planning provision and more detailed direction, contemplating “a balanced approach [and] suggesting that recovery planning might function to ensure the survival of species as well as [provide] for their conservation.” Cheever, *supra* note 16, at 35 n.169 (citing H.R. REP. NO. 95-1625, at 19 (1978), reprinted in 1978 U.S.C.C.A.N. 9453).

form of economic activity....”<sup>83</sup> Based on guidelines the Services follow, the USFWS assigns each listed species a recovery priority number from 1-18 according to the degree of threats, recovery potential, and taxonomic distinctness.<sup>84</sup> In addition, the USFWS assigns a “C” to indicate that it is, or may be in, conflict with construction or other projects or forms of economic activity.<sup>85</sup>

Recovery plans should and can be problem solving tools and guide consultation, take, and recovery actions.<sup>86</sup> They describe the steps needed to restore a species to ecological health.<sup>87</sup> Biologists write these plans with species experts, other Federal, State, and local agencies, Tribes, NGO’s, scholars, and stakeholders.<sup>88</sup> The ESA requires the USFWS to report to Congress every two years on the status of its recovery efforts<sup>89</sup> and in its most recent Report to Congress on the Recovery of Threatened and Endangered Species, the USFWS noted that “recovering species is complex and challenging work, often requiring substantial time, and resources to help increase the population, decrease threats, and adapt to additional factors like invasive species and climate change.”<sup>90</sup>

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83. Endangered Species Act § 1533(f)(1)(A) (noting that a 2002 Society of Conservation Biologists Study of USFWS Recovery Plans showed that species with recovery plans in place for longer time periods show more improvement in status).

84. Endangered Species Act § 1533(h)(3); Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098 (Sept. 21, 1983) (updated, 2006, 2007, and 2010).

85. Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098 (Sept. 21, 1983) (updated, 2006, 2007, and 2010).

86. Cheever, *supra* note 16, at 30.

87. *Id.*; Endangered Species Act § 1533(f)(1)(B).

88. *See, e.g.*, Muir & Scott, *supra* note 78.

89. Endangered Species Act § 1533(f)(3).

90. National Marine Fisheries and United States Fish and Wildlife Service, Recovering Report to Congress on Recovery of Threatened and Endangered Species: FY 2013-2014 Report to Congress (2015), 2011-2012, *available at* [http://www.nmfs.noaa.gov/stories/2015/05/docs/noaa\\_recoveringspecies\\_report\\_web.pdf](http://www.nmfs.noaa.gov/stories/2015/05/docs/noaa_recoveringspecies_report_web.pdf)[http://www.fws.gov/Endangered/esa-library/pdf/Recovery\\_Report\\_FY2011-2012.pdf](http://www.fws.gov/Endangered/esa-library/pdf/Recovery_Report_FY2011-2012.pdf) (also reporting that by 2012, 85% of listed species had recovery plans in place and committing to put more recovery plans in place).

In the *Interim Endangered and Threatened Species Recovery Planning Guidance*, the Services recognized that “recovery planning has evolved considerably over the years as we have learned more about the root causes of endangerment and what it takes to recover a species.”<sup>91</sup> Notably, the 2010 Guidance encouraged an ecosystem approach to recovery planning and directed that where possible, recovery plans should “focus on the broader view of species health by working to ensure the health of its habitat and ecosystem functions rather than the narrower view of looking at the species only.” The report concluded that conserving ecosystems upon which species depend are more likely to ensure the species’ long term viability.<sup>92</sup>

This recognition of the increased long-term gain in conserving habitat and ecosystem function demonstrates an evolution of how to best conserve species. Recovery planning—making sure a species has representation, resiliency, and redundancy—provides the kind of challenge that demands creative problem-solving and pushes the varied interests of state and federal agencies, NGOs, industry, landowners, and communities to work toward the same goal.<sup>93</sup> Recovery planning also provides the opportunity for the Services and these interest groups to focus on habitat and ecosystem functions by providing a broader view of recovery under the ESA.

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91. U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *INTERIM ENDANGERED AND THREATENED SPECIES RECOVERY PLANNING GUIDANCE*, Version 1.3, 1.0-1 (June 2010).

92. *Id.* at 1.3-1.

93. Interested parties benefit from taking steps to recover species and keep the species recovered over time so that the species do not need the protections of the ESA. Those conservation actions that can be used in a decision not to list a species, should be applicable to its long term recovery as well. See, Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15110 (March 28, 2003) (hereinafter “PECE Policy”). A recovery PECE Policy would provide incentive for long-term recovery of species.



*D. Supporting Conservation Programs*

Sections 5 and 6 of the ESA get overlooked as they are rarely fundamental to litigation, yet these sections provide for much needed collaboration and focus on habitat. Section 5 directs the Secretaries of the Interior and Agriculture to establish and implement a program to conserve fish, wildlife, plants and use land acquisition and other tools such as purchase, donation, and interests in land other than fee acquisition.<sup>94</sup>

Section 6 also directs the Services to cooperate with States, provides authority to enter management and cooperative agreements, and allocate funds.<sup>95</sup> Conservation agreements with states and other partners provide assurances with some degree of flexibility and so far, are most effectively used to prevent the need to list a species.<sup>96</sup>

Section 7, consultation or interagency cooperation is considered by many to be the heart of ESA because it provides a mechanism to ensure that all federal agencies conserve species.<sup>97</sup> Section 7, requires all federal agencies to consult with the Services to ensure that the actions they carry out, fund, or authorize do not jeopardize the continued existence of listed species or adversely modify their habitat, which includes designated critical habitats.<sup>98</sup> After the

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94. Endangered Species Act § 1534.

95. Endangered Species Act § 1535.

96. See Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34,275 (July 1, 1994) and current regulatory reform aimed at updating this provision. See also Endangered and Threatened Wildlife and Plants: Revisions to the Regulations for Petitions, 80 Fed. Reg. 29,286 (May 21, 2015).

97. Endangered Species Act § 1536; U.S. FISH & WILDLIFE SERV. and NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING SECTION 7 CONSULTATIONS AND CONFERENCES (1998).

98. Ruhl, *supra* note 9, at 488. As Holly Doremus notes, it imposes both an affirmative duty and a negative one. Doremus, *supra* note 12, at 10,435 (“[A]ffirmatively, it requires all federal agencies to design and implement programs for the conservation of listed species. Negatively, it forbids federal agencies from undertaking, funding, or permitting actions that are likely to

agency undertaking an action consults with the Services, the Services issue a biological opinion or concurrence letter regarding that action.<sup>99</sup> If through the consultation process the Services determine that the proposed action is likely to jeopardize the continued existence of a listed species, the Services offer reasonable and prudent alternatives to the proposed action to avoid jeopardy to the listed species.<sup>100</sup>

Section 8 of the ESA reaches internationally by authorizing the USFWS to provide financial assistance for development or management of programs necessary or useful for the conservation of endangered species or threatened species, enter agreements, assign personnel, and assist with international investigations.<sup>101</sup> Section 8 essentially implements U.S. participation in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), which prohibits import and export of species listed in any of the three appendices of species, except as allowed by permit.<sup>102</sup>

Section 9 of the ESA protects endangered and threatened species and their habitats by prohibiting “take” of listed animals and by prohibiting interstate and international trade in listed plants and animals, including their parts and products (except under certain federal permits allowed for conservation and scientific purposes).<sup>103</sup> The ESA defines “take” as “to harass, harm, pursue, capture, or collect, or to attempt to engage in any such conduct.”<sup>104</sup> Regulations further define harm as “an act which actually kills or injures fish or wildlife” and can include significant habitat modification or degradation that kills or injures wildlife by significantly impairing

jeopardize the continued existence of listed species or destroy their critical habitat.”); *see also* Endangered Species Act § 1536(a)(2).

99. *Id.* § 1536(b).

100. *Id.* § 1536(d); *see e.g.*, 50 C.F.R. 402; *see generally* Owen, *supra* note 62.

101. Endangered Species Act § 1537.

102. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3rd, 1973, 993 U.N.T.S. 243 [hereinafter CITES]; *see also* 50 C.F.R. pt. 23 (implementing CITES through regulations).

103. Endangered Species Act §§ 1538(a)(1)(A), (D), (2)(A), (C), (D).

104. *Id.* § 1532(19).

essential behavioral patterns including breeding, feeding, or sheltering.<sup>105</sup> The take prohibitions do not apply to plants, although it is illegal to collect or maliciously harm listed plants on federal land.<sup>106</sup>

Section 10 authorizes certain acts otherwise prohibited by Section 9. Section 10 allows for limited exceptions and requires permits for limited take for scientific purposes, as allowed under an incidental take permits that can result from Section 7 consultation, Habitat Conservation Plans, Safe Harbor Agreements, and take allowed with experimental populations such as wolves reintroduced in Yellowstone.<sup>107</sup>

Section 11 sets out strict civil penalties, criminal violations, and enforcement policies, and also provides for citizen suits.<sup>108</sup> These sections of the ESA work together to conserve species once listed – whether through consultation, preventing take, enforcement of civil fines or criminal penalties, protecting habitat, designating critical habitat, and of course cooperation with many partners in federal government, states, local governments, and interested parties. The fundamentals of the ESA give context to the challenges of understanding what recovery means under the ESA.

## II. THE WOLF WARS

*“Wolves are the subject of heated disputes, with those on every side of the issue offering heartfelt arguments as to how best to*

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105. Endangered and Threatened Wildlife and Plants: Definition of “Harm,” 64 Fed. Reg. 60,727 (Nov. 8, 1999) (to be codified at 50 C.F.R. pt. 222); Interagency Policy for ESA Section 9 Prohibitions, 59 Fed. Reg. 34,272, (Nov. 8, 1999).

106. Endangered Species Act § 1538(a)(2)(B).

107. See 50 C.F.R. § 402.02; see, e.g., Notice of Availability of Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 61 Fed. Reg. 63,854 (Dec. 2, 1996); Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8,859 (Feb. 23, 1998) (to be codified at 50 C.F.R. pt. 222); Endangered Species Act Incidental Take Permit Revocation Regulations, 69 Fed. Reg. 71,723 (Dec. 10, 2004).

108. Endangered Species Act § 1540.

*manage this unique species. The last decade of litigation is a testament to those passions.*"<sup>109</sup>

The wolf wars of the past three decades, epitomized in the *Wyoming* and *Western Great Lakes* cases, illustrate how the rhetoric of delisting can mask the underlying concept of recovery. As an iconic species, the gray wolf, like the bald eagle and the grizzly bear, has become a symbol of endangered species but, perhaps more than other such species, the gray wolf is also a lightning rod for controversy.<sup>110</sup> Filling the pages of mythology, wolves intrinsically evoke passionate emotions both for and against.<sup>111</sup> They also tell a tale of the American west with their once-abundance, followed by near extirpation; slow natural recolonization, reintroduction, and robust recovery. Wolves were once abundant throughout most of North America, but by the early 20<sup>th</sup> Century, wolf hunting and an active, government-sponsored eradication program resulted in the extirpation of wolves from the contiguous 48 states, except Minnesota.<sup>112</sup> Some may never see a wolf, but want to know they are on the landscape, others grudgingly accept the wolf's presence on the landscape and its impacts on their way of life. Wolves even symbolize states' rights.<sup>113</sup> The long battle over wolves teaches us lessons that we can apply to other species as well, clarifying what recovery means under the ESA and applying it in a meaningful way.

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109. *Humane Soc'y v. Jewell*, 76 F. Supp. 3d at 74.

110. *Id.* (Citing Jamison E. Colburn, *Canis (Wolf) and Ursus (Grizzly): Taking Measure of an Eroding Statute*, 22 NAT. RESOURCES & ENV'T 22 (2007).

111. As an example of the interest and wide ranging opinions on wolf recovery, in its 150 day comment period on its proposed rule, Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife, the USFWS received over 520,000 comments. 72 Fed. Reg. 6106, Feb. 8, 2007.

112. 74 Fed. Reg. 15,123, 15,123 (Apr. 2, 2009).

113. *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1162 (D. Mont. 2008) ("That, like a cloud larger than a man's hand, will hang over the northwest states of Montana, Idaho, and Wyoming until there has been a final determination of the complex issues presented.").

Wolves are social animals that live in groups, or packs, which typically include a breeding pair (the alpha pair), their offspring, and other non-breeding adults.<sup>114</sup> Wolves are capable of mating by age two or three, can breed past the age of ten, and can live to around thirteen years.<sup>115</sup> Pups are born in early spring, litters average around five pups, and by the time pups are seven to eight months old they are almost fully grown and begin traveling with the adults.<sup>116</sup> After a year or two, young wolves may leave to try to find a mate and form a pack. Lone, dispersing wolves have traveled as far as 600 miles in search of a mate or territory.<sup>117</sup> Wolves prey primarily on medium and large mammals; they are obligate carnivores.<sup>118</sup> Wolves howl because they like to communicate. For a threatened species, their reproduction is relatively high and they are habitat generalists.<sup>119</sup> Their biggest threat is human-caused mortality.<sup>120</sup>

The northern Rocky Mountain gray wolf and the eastern timber wolf were on the first list of species protected by the 1973 ESA.<sup>121</sup> At the time, only a few hundred wolves remained in the U.S., in

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114. 74 Fed. Reg. 15,123, 15,123. For detailed information on the biology of the gray wolf, see the “Biology and Ecology of Gray Wolves” section of the April 1, 2003 Final Rule to Reclassify and Remove the Gray Wolf from the List of Threatened and Endangered Wildlife in Portions of the Conterminous U.S. 68 Fed. Reg. 15844.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. For a comparison to Grizzly bear or wolverine reproductive rates, see *Greater Yellowstone Coal., Inc. v. Servheen*, 672 F. Supp. 2d 1105, 1109 (D. Mont. 2009) (grizzly bears have one of the slowest reproduction rates among terrestrial mammals, resulting primarily from late age of first reproduction, small average litter size, and the long interval between litters).

120. *Id.* For detailed information on the biology of the gray wolf, see the “Biology and Ecology” section of the April 1, 2003 Final rule to Reclassify and Remove the Gray wolf from the List of Endangered and threatened Wildlife in Portions of the Conterminous U.S., 68 Fed. Reg. 15844.

121. 76 Fed. Reg. 8166 (Dec. 28, 2011) (citing USDI, 1974).

northern Minnesota and Isle Royale, Michigan.<sup>122</sup> Subsuming these previous individual listings, in 1978, the USFWS reclassified the gray wolf at the species level, listing it as endangered throughout the conterminous U.S. and Mexico, except for the Minnesota population which it listing as threatened.<sup>123</sup> The USFWS appointed a wolf recovery team, which initially recommended that natural dispersal and reintroduction be used to restore wolves to the northern Rocky Mountain (NRM) region.<sup>124</sup> In 1987, the USFWS developed a revised and more specific recovery plan that recommended: (1) promotion of natural recovery in northwestern Montana; (2) reintroduction of wolves designated “nonessential experimental” in Yellowstone National Park (YNP); and (3) other measures (presumably reintroduction) would be instigated in central Idaho if two breeding pairs had not naturally established there by 1992.<sup>125</sup>

The USFWS undertook significant efforts to recover the gray wolf, and after much planning, ultimately an interagency team of biologists captured 29 wolves in Alberta and transported 14 to Yellowstone National Park and 15 to central Idaho.<sup>126</sup> In 1996, the USFWS

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122. USFWS, Wolf Recovery in North America: <http://www.fws.gov/midwest/wolf/aboutwolves/pdf/WolfRecoveryFactSheetNA2013.pdf>; Table 1, Winter Wolf Population in Minnesota, Wisconsin, and Michigan (excepting Isle Royale) from 1976-2010, 76 Fed. Reg. 81676 (Dec. 28, 2011); *see also* USFWS, Wolf, Western Great Lakes, Table if Wolf numbers for Minnesota, Wisconsin, and Michigan, excluding Isle Royale, 1976-2014: [http://www.fws.gov/midwest/wolf/aboutwolves/mi\\_wi\\_nos.htm](http://www.fws.gov/midwest/wolf/aboutwolves/mi_wi_nos.htm).

123. Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607, 9608 (March 9, 1978) (codified at 50 C.F.R. pt. 17).

124. United States Department of Justice Environment and Natural Resources Division Northern Rocky Mountain Gray Wolf, *available at* <http://www.justice.gov/enrd/northern-rocky-mountain-gray-wolves>

125. The USFWS revised the recovery plan for the northern Rocky Mountain region in 1987, for the Western Great Lakes region in 1992, and for the southwest region in 1982. 74 Fed. Reg. 15123, 15124, 15130 (April 2, 2009).

126. The USFWS reintroduced these wolves as nonessential experimental populations under Section 10(j) of the ESA. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Central Idaho and Southwestern Montana, 59 Fed. Reg. 60, 266 (Nov.

released an additional 17 wolves into Yellowstone National Park and the Frank Church River of No Return Wilderness in Idaho. Following these reintroduction programs wolves began to recover in the northern Rocky Mountains. By 2008, wolves had dispersed to much of the northern Rocky Mountain region and beyond, comprising over 1,600 wolves, 95 breeding pairs, and documented genetic exchange among the metapopulations.<sup>127</sup>

The Recovery goals for the gray wolf in the western Great Lakes region called for at least two viable populations within the coterminous 48 states including a stable or growing Minnesota population and a second population outside Minnesota and Isle Royale having at least 100 wolves in late winter for a minimum of five consecutive years.<sup>128</sup> The Recovery Plan identified 1,250 to<sup>129</sup> 1,400 as a population goal for Minnesota.<sup>130</sup> The state's wolf population has been at or above that level since the late 1970s; and the Wisconsin/Michigan wolf population has been above 100 since the winter of 1993-1994.<sup>131</sup> By winter 2013-2014, the winter wolves were temporarily delisted in the western Great Lakes region, population estimates had dropped largely due to human caused mortality, with 636 wolves in Michigan's Upper Peninsula, 2,423 in

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22, 1994) [hereinafter Experimental Population of in Idaho and Montana]; and Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of the Mexican Gray Wolf in Arizona and New Mexico, 63 Fed. Reg. 1752 (Jan. 12, 1998) (to be codified at 50 C.F.R Pt. 17). *Northern Rocky Mountain Gray Wolves*, UNITED STATES DEPARTMENT OF JUSTICE ENVIRONMENT AND NATURAL RESOURCES DIVISION, <http://www.justice.gov/enrd/northern-rocky-mountain-gray-wolves>.

127. Julie Cart, *First Wolf Pack Found in California in Nearly a Century*, L.A. TIMES, Aug. 20, 2015, <http://www.latimes.com/local/lanow/la-ln-california-wolf-pack-08132015-story.html>.

128. Endangered and Threatened Wildlife and Plants; Revising the Listing of the Gray Wolf (*Canis lupus*) in the Western Great Lakes, 76 Fed. Reg. 81666, 81674 (Dec. 28, 2011).

129. 74 Fed. Reg. 15130, 15123, April 2, 2009.

130. *Id.*

131. *Id.*

Minnesota, and 660-689 in Wisconsin.<sup>132</sup> The states and the USFWS argue that achievement of the recovery goals and the consistent expansion in numbers and range demonstrate that the gray wolf population is healthy and recovered in the western Great Lakes region, but the decline in numbers during the temporary delisting indicate the role that state regulatory measures can play in the transition from listing to delisting.<sup>133</sup>

#### A. *The Wyoming Case*

*"Like a cloud larger than a man's hand, the status of the gray wolf has hung over the State of Wyoming since reintroduction efforts began."*<sup>134</sup>

Much of the challenge over delisting wolves in the northern Rocky Mountains centered on the recovery criteria and whether that criteria remains static or changes through time. When the USFWS reintroduced an experimental nonessential population of wolves in Yellowstone in 1995, its environmental impact statement on the reintroduction also revised the recovery goals. It changed the standard for a breeding pair to mean an adult male and an adult female that have produced at least two pups that survived until December 31 of the year of their birth and adding a genetic exchange component, requiring thirty or more breeding pairs comprising some 300+ wolves in a metapopulation with genetic exchange between subpopulations.<sup>135</sup> This genetic exchange requirement ensured that Idaho, Montana, and Wyoming allow for wolves to disperse from

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132. 2012-2014 Post Delisting Annual Monitoring Report, September 2014, Twin Cities Ecological Services Field Office, USFWS: <http://www.fws.gov/midwest/wolf/monitoring/pdf/Year1PDMReportSept2014.pdf>.

133. *Gray Wolves in the Western Great Lakes States*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/midwest/wolf/>.

134. *Defenders v. Hall*, 565 F. Supp. 2d at 1162.

135. Gray Wolf Listing Removal, 77 Fed. Reg. at 55, 536 (2012). Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 60,252 (Nov. 22, 1994) (codified at 50 C.F.R. pt. 17).



their metapopulations of wolves and breed with the other metapopulations, ultimately providing for the long-term health and survival of the species. In 2000, the northern Rocky Mountain wolf population reached the recovery goal of thirty breeding pairs and 300 wolves for the first time.<sup>136</sup> For many, achieving the numeric standard for wolf recovery was a watershed moment that demonstrated a success story of the return of wolves to the American west.

Following achievement of the numeric criteria for wolf recovery, the USFWS promulgated four rules, three final and one proposed, trying different ways to designate, downlist and delist a northern Rocky Mountain DPS of gray wolves.<sup>137</sup> None survived judicial scrutiny, albeit for various reasons.<sup>138</sup>

In 2003, the USFWS designated three DPSs for wolves and reclassified two of them from endangered to threatened status.<sup>139</sup> Two separate cases challenged this rule, and both courts found that

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136. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d 193, 197-98 (D.D.C. 2014).

137. Endangered and Threatened Wildlife and Plants; Final Rule To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Establishment of Two Special Regulations for Threatened Gray Wolves, 68 Fed. Reg. 15,804 (April 1, 2003).

138. *Defenders of Wildlife v. Sec'y Dep't of Interior*, 354 F. Supp. 2d 1156, 1172 (D. Or. 2005) (taking issue with the USFWS' narrow interpretation of the term "significant portion of a species range" as current range thus rendering large portions of suitable habitat insignificant); see John A. Vucetich, Michael P. Nelson, and Michael K. Phillips, *The Normative Dimension and Legal Meaning of Endangered and Recovery in the U.S. Endangered Species Act*, 20 CONSERVATION BIOLOGY 1385 (2006); *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005) (vacating the rule for failure to provide adequate opportunity for notice and comment and for combining the Midwestern and Northeastern populations when the northeastern population did not exist and applies its threats analysis only to core populations and not to the entire area within the DPS).

139. 68 Fed. Reg. 15804 (April 1, 2004) Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered Species (Designating three district population segments and downlisting the Gray Wolf throughout Most of the Lower 48 States).

the rule violated the provisions of the ESA.<sup>140</sup> Once the USFWS determined that the northern Rocky Mountain wolf population achieved its numerical and distributional recovery goals, it required Montana, Idaho, and Wyoming to develop management plans to show they would maintain their share of a recovered population.<sup>141</sup> The USFWS rejected the Wyoming plan. Wyoming challenged the USFWS determination and the court ultimately dismissed Wyoming's challenge.<sup>142</sup> In 2005, Wyoming petitioned the USFWS to revise the listing status of the gray wolf and designate a northern Rocky Mountain gray wolf DPS and delist it. In 2006, in a 12-month finding, the USFWS determined that the petition was not warranted because Wyoming did not have adequate regulatory mechanisms in place to ensure a recovered wolf population.<sup>143</sup> Wyoming challenged the USFWS determination, which the judge dismissed as moot after Wyoming changed its regulations.<sup>144</sup>

In 2007, the USFWS proposed designating a northern Rocky Mountain gray wolf DPS and removing it from the list of threatened and endangered species in Idaho, Montana, and Wyoming, and parts of Oregon, Washington, and Utah.<sup>145</sup> Hoping to encourage Wyoming to adopt measures to demonstrate its commitment to its portion of a recovered wolf population, the proposed rule specifically noted that if Wyoming did not adopt adequate regulatory mechanisms, then the wolf would remain listed in significant portions of the range within the State.<sup>146</sup> Wyoming amended its plan which the USFWS approved. The USFWS subsequently finalized its rule designating and delisting the DPS.

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140. *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders of Wildlife v. U.S. Dep't of Interior*, 354 F. Supp.2d 1156 (D. Or. 2005).

141. 72 Fed. Reg. 6106, 6106 (Feb. 8, 2007).

142. *Wyoming v. Dep't of Interior*, 360 F. Supp. 2d 1214 (D. Wyo. 2005).

143. *Id.* at 1224 (citing 71 Fed. Reg. 43410 (Aug. 1, 2006)).

144. 74 Fed. Reg. 15123, 15124 (Apr. 2, 2009) (citing Wyoming U.S. District Court Case Number 2:06-CV-00245 (Feb. 27, 2008)).

145. 72 Fed. Reg. 6106 (Feb. 8, 2007).

146. *Id.* at 6106.

The District Court in Montana, rejected the Wyoming plan as adequate because “the provisions demonstrate there is nothing clear about Wyoming’s commitment to maintain fifteen breeding pair in its geographical area” and because it accepted a less than statewide trophy designation for the wolf.<sup>147</sup> In granting plaintiffs’ motion for preliminary injunction, Judge Molloy ruled that the USFWS acted arbitrarily and capriciously in approving Wyoming’s 2007 wolf management plan “despite the State’s failure to commit to managing 15 breeding pairs and the plan’s malleable trophy game area [outside of which wolves are not tolerated].”<sup>148</sup> Following Judge Molloy’s ruling, the USFWS went back to the drawing board and initiated new rulemaking this time designating a northern Rocky Mountain gray wolf DPS and delisting it in Montana and Idaho but not Wyoming. Again, Judge Molloy vacated the final rule, determining that the USFWS could not delist part of a designated DPS.<sup>149</sup>

Due to mounting pressure from Montana and Idaho that had walked a fine political line of adopting management plans that committed to wolf recovery, in a rider attached to Department of Defense appropriations, Congress delisted wolves in Montana and Idaho and precluded judicial review of the delisting.<sup>150</sup> After this legislative fix, Wyoming decided to address concerns that the courts and the USFWS had about Wyoming’s regulatory mechanisms and tolerance for wolves. Specifically, Wyoming revised its statutes and regulations expanding its trophy area, the area allowing for hunting wolves as a game species,<sup>151</sup> assuring that the state would maintain at

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147. *Defenders of Wildlife v. Hall*, 565 F. Supp.2d 1160 (D. Mont. 2008) (explaining “Wyoming claims Plaintiffs, like Cassandra, are concerned about issues that may only arise in the future”).

148. *Id.*

149. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), *vacated as moot*, 2012 U.S. App. Lexis 26769 (9th Cir. Nov. 7, 2012).

150. Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10 § 1713, 125 Stat. 38 (2011). *See also, Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012) (upholding the rider).

151. Wyo. Stat. Ann. § 23-1-304(a). The Trophy area allows for regulated hunting of wolves as a game species and the Predator area classifies wolves as predators that can be killed as provided for in the rules regarding predators. 23-1-

least 10 breeding pairs at a total of at least 100 individual wolves outside Yellowstone National Park and the Wind River Reservation at the end of the current calendar year, and revising its regulations regarding take of wolves.<sup>152</sup> Taking these changes into consideration, the USFWS issued a proposed rule to delist wolves in Wyoming.<sup>153</sup> After two rounds of peer review of the proposed rule, and further changes by Wyoming aimed at addressing concerns, the USFWS finalized its rule delisting wolves in Wyoming.<sup>154</sup>

Environmental plaintiffs who had followed and litigated wolf recovery in the northern Rocky Mountains for decades, challenged the USFWS 2012 final rule removing the gray wolf in Wyoming from the list of endangered and threatened species.<sup>155</sup> Environmental plaintiffs challenged the final rule on the grounds that (1) Wyoming's statutory and regulatory regime was inadequate – Wyoming's addendum was not a legally enforceable commitment that would satisfy the USFWS's requirement that the state maintain a buffer above the minimum 10/100 within its own territory; (2) that wolves in the Greater Yellowstone Area face the ongoing threat of genetic connectivity to other northern Rocky Mountain wolves, and (3) that USFWS incorrectly determined wolves are not imperiled throughout a significant portion of their range.<sup>156</sup>

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304, Wy. Code Ann. (2013). The concern over dispersing wolves travelling through the predator area illustrates one of the issues with finding that peripheral areas are not significant, because as Goble put it, those peripheral areas can be important later.

152. *See* Addendum, *infra* note 159.

153. 76 Fed. Reg. 61, 782 (Oct. 5, 2011). Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf in Wyoming From the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 76 Fed. Reg. 61,782 (Oct. 5, 2011).

154. Endangered and Threatened Wildlife and Plants; Removal of the Gray Wolf in Wyoming From the Federal List of Threatened and Endangered Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 77 Fed. Reg. 55530 (Sept. 10, 2012).

155. *Id.*

156. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d at 203.

Ruling on summary judgment, Judge Jackson granted the plaintiffs' motion in part and denied it in part, remanding the matter to the USFWS to place the gray wolf in Wyoming on the list of endangered species.<sup>157</sup> Judge Jackson analyzed what other courts have found to be adequate regulatory mechanisms and where they have allowed the USFWS to rely on nonbinding agreements. Applied to this instance, she found that Wyoming's commitment to maintaining a buffer of more than 100 wolves or 10 breeding pair was critical, and thus the non-binding nature of the addendum proved a critical failure.<sup>158</sup> On the second issue, whether the USFWS improperly extrapolated that studies show sufficient genetic exchange between Wyoming wolves and other populations of wolves in the northern Rocky Mountains, the court deferred to the USFWS explaining that documentation of sufficient genetic exchange requires a high level of expertise and the plaintiff's complaints amount "to nothing more than competing views about policy and science."<sup>159</sup>

On the third issue, and germane to distinguishing the concept of recovery from the mechanics of delisting, Judge Jackson found that the USFWS's analysis of "significant portion of the range" was reasonable.<sup>160</sup> The USFWS conducted an SPR analysis of wolves in Wyoming, determining that wolves within Wyoming's predator area were not a significant portion of its range because the predator area does not contain the original recovery zone and has little suitable habitat and few wolves.<sup>161</sup> The court found the USFWS's analysis to be reasonable, in part because two of the peer reviewers who commented on the predator area in the context of genetic connectivity noted that the trophy area contains virtually all of Wyoming's wolves and habitat implies that it will be sufficient to sustain connectivity to other parts of the northern Rocky Mountain wolf population.<sup>162</sup>

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157. *Id.*

158. *Id.* at 207.

159. *Id.* at 211.

160. *Id.*

161. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d at 211.

162. *Id.* at 203.

The wolf wars are in no small part a result of the species' biological recovery due to the ESA's provisions and ensuing recovery efforts. Removing the ESA's regulatory protections becomes difficult without social tolerance and the understanding that replacement regulatory mechanisms need to be in place to ensure the species' long-term recovery, and thus delisting. Like many other species, their long term recovery requires monitoring and management. Yet, the political ability for states to step in with adequate regulatory mechanisms proves challenging when the fight to delist goes on for so long. In the *Wyoming* case, the court ultimately determined that the state of Wyoming lacked the political wherewithal to provide assurance that it would adequately protect the wolf.<sup>163</sup> It was not the first court to rule the same way on the same issue, Wyoming consistently balked at explicitly committing to more than ten breeding pair of wolves outside Yellowstone National Park.<sup>164</sup>

The court did not delve into what the gray wolf needs to thrive and whether or not it had done so under the ESA's protections to date. To be fair, the complaint hinged on the technicality of delisting not the concept of recovery. The history of wolf litigation in the northern Rocky Mountains offers a stark example of how challenging it can be for States that work hard to balance species conservation with political pressure to control predator numbers to reap the rewards for their temperance when a neighboring state has no interest in doing the same. In the case of wolves, Congress stepped in to provide the reward for Montana and Idaho's temperance. Both Montana and Idaho now have the responsibility to maintain that temperance and manage the gray wolf in a manner where it continues to thrive. Unfortunately for Wyoming, its half-hearted attempts to allow for a buffer above ten breeding pairs of wolves did not persuade the court, leaving wolves in Wyoming protected by the ESA.<sup>165</sup>

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163. *Id.*

164. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), *vacated*, 2012 U.S. App. Lexis 26769 (9th Cir. Nov. 7, 2012).

165. The *Wyoming* case provides a stark example of the dialogue and ensuing litigation focusing on delisting rather than recovery. Wyoming adopted its

### B. *The Western Great Lakes Case*

The story of wolves in the western Great Lakes carries the same themes as its brethren in the northern Rocky Mountains, colorful, tortuous, and complex. The *Western Great Lakes* case builds on the *Wyoming* case. It only cursorily addresses the need for states to put adequate regulatory mechanisms in place to address human caused mortality and rather focuses on the USFWS using the ESA's definitional phrases "significant portion of its range" and "distinct population segment" to remove the ESA's protections for the gray wolf.<sup>166</sup>

Since 2003, the USFWS has promulgated rules to remove federal protection under the ESA for the gray wolf population 4 times. The first 3 times, the USFWS rescinded the proposed rule – "delisting" the gray wolf – twice on orders of Federal courts, and once on its own initiative when facing another likely legal challenge.<sup>167</sup> The court found the Final Rule at issue in the case no more valid than its prior three attempts. The court methodically analyzed the framework of the ESA and the USFWS rulemaking regarding the gray wolf. Quoting the legislative history of the ESA, the court noted that "[b]y heeding the warnings of possible extinction today, we will prevent tomorrow's crisis."<sup>168</sup>

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addendum to its gray wolf management plan committing to recovery of the gray wolf in Wyoming, but failed to commit to numbers the court would require and in a format that fell within the ESA's requirement of adequate regulatory mechanisms. While Wyoming was unable to make this regulatory commitment to protect arguably the periphery populations of the gray wolf, gray wolf recovery has at very least gotten to the point where management is the issue. For species on the brink of extinction, we only wish they needed "management," code for regulated take or killing allowed in certain circumstances. With wolves though, states would be wise to remember wolves were extirpated because of hunting and bounties, thus their regulatory assurances would go a long way to assure that won't happen again.

166. *Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d at 77.

167. *Id.* at 41-77 (discussing each Rule by date, 2003, 2007, 2009, and 2011).

168. *Id.* at 79 (citing 119 CONG. REC. 30, 162-63 (1973) (Statement of Rep. Gilman)).

Animal protection and conservation organizations challenged the USFWS final rule delisting wolves in the western Great Lakes as (1) violating the ESA by simultaneously designating and delisting a DPS without first making findings to support listing it, and delineating DPS boundaries that are too expansive; (2) erroneously restricting analysis of threats to the western Great Lakes DPS instead of the gray wolf population in the coterminous U.S.; and (3) designating a western Great Lakes DPS without sufficient knowledge of the species to which the wolves in that population belong.<sup>169</sup>

Throughout its opinion, the court expressed its frustration with the USFWS's "untenable reading" of the ESA, specifically noting that at times a court "must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough."<sup>170</sup> The *Western Great Lakes* case followed some of the analysis in the *Wyoming* case. While its background of the ESA's provisions and the legislative history was comprehensive, the court gave short shrift to the adequacy of the regulatory mechanisms. Specifically, the court paused at the lack of regulation in six of the nine states that comprise the distinct population segment, noting that three of the states had closed or no hunting seasons for wolves, but did not have state endangered species acts in place.<sup>171</sup> The court looked for these states to list the gray wolf as threatened or endangered within a state ESA, assuming the states had comparable statutory frameworks. The court made no mention of other regulatory mechanisms, including state management plans, administrative rules, or agreements. The brief analysis showed a lack of understanding or interest in how state regulatory mechanisms can work.<sup>172</sup>

The court found that the USFWS does not have the authority to designate a DPS in order to delist it, reasoning that it "raises a significant issue of statutory construction that has previously been

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169. *Id.* at 75.

170. *Id.*

171. *Id.*

172. *See, e.g., id.* at 114.



identified as problematic.”<sup>173</sup> The court stated, “[n]ow, after more than a decade of rulemaking, delisting, litigation, vacatur by district courts, and relisting of the gray wolf, the time has come to resolve this long-running dispute.”<sup>174</sup> At issue for the court was not the USFWS simultaneously designating of a DPS and delisting it, nor listing a DPS and at some other time reclassifying it, but rather with the USFWS decision to create a DPS only to delist it.<sup>175</sup>

The court reasoned that designation of a species as threatened or endangered is a threshold determination. The designation as threatened or endangered must precede the determination of whether or not the species qualifies as a DPS.<sup>176</sup> The court lamented “[i]n short, the creation or initial designation of a DPS operates as a one-way ratchet to provide ESA protections to the covered vertebrates.”<sup>177</sup> Focusing on the language in the DPS policy, and speaking only in terms of listing, the court determined that a DPS must first be listed before it can recover and be delisted.<sup>178</sup> The court’s interpretation and focus on listing, illuminates the problem with how the ESA, and its policies are geared toward listing. While the understanding is that delisting is the converse of listing, this court imposes a one-way ratchet on the plain language of Section 4 of the ESA which sets out the very same criteria for listing and delisting determinations. The *Western Great Lakes Case* deepens the confusion over the mechanics of delisting and fails to recognize the concept of recovery.

The court faulted the USFWS for contracting its analysis of the gray wolf’s range from historic to current without providing an explanation.<sup>179</sup> Where as in the western Great Lakes region, the area in which the species can no longer live is substantial, the court

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173. *See id.* at 77 (discussing *Humane Soc’y of the United States v. Kempthorne*, 579 F. Supp. 2d 7, 16-18 (D.D.C. 2008)).

174. *Id.* at 119.

175. *Id.* at 105.

176. *Id.*

177. *Id.* at 112.

178. *Id.*

179. *Id.* at 110.

required that the USFWS better articulate how a significant portion of its range is the same as current range.<sup>180</sup> This shortcoming was in part a result of the USFWS's interpretation of SPR at the time which the Solicitor of the Department of the Interior Tompkins has since withdrawn.<sup>181</sup>

The court's decision in the *Western Great Lakes* case demonstrates the disconnect between recovery of a species and the mechanics of delisting by focusing on taxonomy and administrative process and not discussing the status of the species or state recovery efforts. It must have been frustrating for such a thorough court that is clearly well versed in the ESA to focus almost solely on what it saw as the failure of the mechanics of delisting and not address the issue of whether wolves are recovered or recovering. If the court had gotten to a more thorough discussion of what recovery means for the gray wolf in the Western Great Lakes, it could have shed light on how the two concepts work together.

### III. LESSONS LEARNED

*"We are the only species which, when it chooses to do so, will go to great effort to save what it might destroy."* Wallace Stegner

The wolf wars and their latest iteration in the *Wyoming* and *Western Great Lakes* cases provide much to learn from, not least of which are lessons apparently not learned by some of the parties involved. What is striking about setting out the background for both cases, is the number of times similar if not the very same issues have repeatedly come before the courts, with similar results.<sup>182</sup>

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180. *Id.* (citing *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980)).

181. Solicitor, U.S. Dep't of the Interior, Opinion on Withdrawal of M-3701—The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range,” M-37024 (May 4, 2011), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37024.pdf>.

182. Idiom attributed to Albert Einstein but never verified as his: “The definition of insanity is doing the same thing over and over again, but expecting different results.”

Disappointingly though, no solutions emerged from the opinions. As controversial as it was, and disconcerting for opening the door to future Congressional listings or delistings, the Congressional delisting of wolves in Montana and Wyoming broke the log jam in a very specific location. In addition, the USFWS appears to have learned from the wolf wars and went back to the drawing board to promulgate an SPR Policy that will address many of the issues raised in the *Western Great Lakes* case. However, the dilemma of how to address species that are thriving in an SPR but are not doing as well on other areas and could continue to expand in their peripheral areas remains.<sup>183</sup>

The USFWS addressing its interpretation of SPR was a long time coming. On March 16, 2007, Solicitor Bernhart issued a legal opinion addressing the meaning of the SPR.<sup>184</sup> Subsequently, Judge Molloy rejected Opinion M-37013's conclusion that allowed applying the ESA's protections to only a portion of a DPS of northern Rocky Mountain gray wolves.<sup>185</sup> Due to further court rulings reaching similar conclusions, Solicitor Tompkins withdrew Opinion M-37013.<sup>186</sup> In 2011, the Services announced a draft policy providing its interpretation of SPR.<sup>187</sup> The Services issued their final policy on interpretation of the phrase, making some changes to address public input.<sup>188</sup> The final SPR Policy addresses a concern from the *Western Great Lakes* case and in a flow chart sets out its step-by-step analysis, summarized as:

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183. 79 Fed. Reg. 37,578 (July 1, 2014).

184. Bernhardt Opinion, M-37013.

185. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), vacated, 2012 U.S. App. Lexis 26769 (9th Cir. Nov. 7, 2012).

186. Solicitor, U.S. Dep't of the Interior, Opinion on Withdrawal of M-3701—The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range,” M-37024 (May 4, 2011), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37024.pdf>.

187. Draft Policy on Interpretation of the Phrase “Significant Portion of its Range,” 76 Fed. Reg. 76,987 (proposed Dec. 9, 2011).

188. Final Policy on Interpretation of the Phrase “Significant Portion of its Range,” 79 Fed. Reg. 37,578, 37,587 (July 1, 2014) (to be codified at 50 C.F.R. ch. II).

If [the Services] determine that the species is in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range, we will list the species as endangered (or threatened) and no SPR analysis will be required. If the species is neither endangered nor threatened throughout all of its range, we will determine whether the species is endangered or threatened throughout a significant portion of its range. If it is, we will list the species as endangered or threatened, respectively; if it is not, we will conclude that listing the species is not warranted.<sup>189</sup>

The Services interpret “range” to be the general geographic area in which the species is currently found, the area it occupies.<sup>190</sup> Even with this narrower construction of “range,” the Services recognize that in reviewing that status of a species, they necessarily evaluate the effects of lost historical range on the viability of the species.<sup>191</sup> Further, the Services clarify that a portion of a species’ range is “significant” if a species is not threatened or endangered throughout all its range, but the portion’s contribution to the viability of the species is so important that without the members of the species within that portion the species would be in danger of extinction, or likely to become so in the foreseeable future throughout all of its range.<sup>192</sup> The Services have come a long way in approaching SPR in a unified fashion, yet their interpretation leaves little room for adaptability for species that thrive in some areas but do more poorly in others.

While, the USFWS changed course to correct past mistakes, it is interesting to compare Wyoming’s reticence to commit to wolf recovery in contrast to its leadership role in proactively adopting conservation strategies for the greater sage grouse.<sup>193</sup> Throughout the

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189. *Id.* at 37585.

190. *Id.* at 37583.

191. *Id.* at 37584.

192. *Id.* at 37583.

193. Perhaps Wyoming could not recover from its negative reaction to reintroduction of wolves in Yellowstone and the subsequent wolf recovery efforts. See generally Hope M. Babcock, *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 *FORDHAM ENVTL. L. REV.* 25 (2013).

wolf wars, Wyoming was not willing to commit through regulations to maintaining fifteen breeding pair of wolves outside Yellowstone National Park. Montana, Idaho, and the USFWS tried over the decade to encourage and cajole Wyoming into changing its stance. Ultimately, the USFWS paid a price in three court rulings for trying to work with Wyoming in an effort to keep the wolf recovery program intact, realizing that the State is crucial to conservation of the species and that tolerance of wolves on the ground is equally important. The *Wyoming* case demonstrates just how hard it is for states to hold a reasonable line for a predatory game species. The political rhetoric of Wyoming's unwillingness or inability to demonstrate its commitment to the long term recovery of wolves impacted practical conservation for Montana and Idaho, leaving the two states in the difficult position to measure their management in the face of political pressure to do otherwise.

The fixation on the action of delisting masked the remarkable recovery efforts that the states, federal agencies, landowners, and NGO's continue to undertake. As Professor Doremus has noted, "[t]he same political pressures that stand in the way of adding species, push towards delisting."<sup>194</sup> This article furthers Professor Doremus' suggestion that a healthier view would separate the concept of delisting from the concept of recovery. "Recovery should be seen as the provision of biological security [and] [d]elisting should be understood as requiring the additional provision of regulatory security outside the ESA, such that the special regulatory protections of the ESA are no longer necessary."<sup>195</sup>

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194. Doremus, *supra* note 12, at 10,437.

195. *Id.* at 10453. Professor Doremus makes a compelling argument that a benefit of the clearer vision of distinguishing recovery from delisting and subsequent understanding of the low number of delistings could provide incentive for state and federal agencies and I would add private interests as well to take steps to protect species before they qualify as threatened or endangered. *Id.* at 10454. Indeed, this is where the ESA works well. *See generally* Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (proposed June 19, 2012) (to be codified at 50 C.F.R. pt. 17); *Defenders of Wildlife v. Jewell*, 70 F. Supp. 3d at 183 (upholding the withdrawal of the proposal to list the sagebrush lizard). Similarly, robust conservation efforts precluded the need to list

As Section 4 of the ESA requires, the Services and the courts look to the adequacy of regulatory mechanisms in controlling or ameliorating threats to the species. As demonstrated by the *Western Great Lakes* case, neither federal courts nor plaintiff environmental groups tend to be well versed in state wildlife management and the states' underlying regulatory structure.<sup>196</sup> The problem arises when a species is afforded full protection of the ESA one day and moves to state management as a game species the next. If states adopted an intermediary step, one that allows for a certain buffer or cooling period demonstrating their ability to manage the species in transition from being protected under the ESA to full state control, the courts and environmental plaintiffs might pay more attention to the crucial role states can play in continued conservation of a species. Moreover, for those species that are recovered in their SPR, and are thriving, but could still benefit from expanding their range or even more benefit from state and private conservation strategies in their peripheral ranges, the concept of an intermediate step between listing and delisting or state management as a species in need of special management would help. For example, with the gray wolf, while one can argue that the species is thriving in its SPR, and to thrive as a species does not need to fill its historic range, it would nonetheless benefit the species to hold a special status in Oregon, California, Utah, and Colorado.<sup>197</sup>

As Professor Cheever has noted, “the focus should be not on whether the species has recovered to the point at which it can go it

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the Upper Missouri Distinct Population Segment of the Arctic Grayling. *See generally* Revised 12-Month Finding on Petition to List the Upper Missouri River Distinct Population Segment of Arctic Grayling, 79 Fed. Reg. 49,384 (proposed Aug. 20, 2014) (to be codified at 50 C.F.R. pt. 17).

196. *Humane Soc’y v. Jewell*, 76 F. Supp. 3d at 170 (discussing what the court perceives as nonexistent regulatory mechanisms where a state does not have its own act for the protection of endangered species in place).

197. Many states have adopted management plans for wolves, within which they establish a framework for managing wolves. Nonetheless, designating a species with special status within an administrative rule or statute lends regulatory credence to the commitment, credence that a court can use in analyzing the five delisting criteria.

alone in an inhospitable world, but rather on whether we know enough about the species and its habitat to assess its needs in the foreseeable future and can put together an effective legal and political effort to meet those needs outside the framework of the Act.”<sup>198</sup> For wolves and even grizzly bears, we know much about their habits and efforts to recover them. In the west where state rights become a matter of principle, the political will to conserve a species and human tolerance to support conservation just may be enough stronger under a state rather than federal regulatory regime. A species can reach its recovery goals in terms of population and distribution and even in the temporal sense, but if removed from the list of threatened or endangered species without some binding commitments to continued recovery of that species, human threats to its existence could quickly or over time change the conservation status of the species.

Certain iconic species fit a middle category of recovered enough that they are thriving biologically, but are not recovered to their historic range or the range that certain environmental advocates argue the ESA demands. These species, the gray wolf, and potentially the grizzly bear, have a hard time winding their way through the mechanics of delisting but are well past the acute risk of extinction and are biologically viable. In addition, for species such as the gray wolf and grizzly bear, whose historic range covered much of the country, the question remains what geographic area does the ESA require for a species to be recovered. Defining that boundary of what is enough has fed the wolf wars over the last decades. Yet, with the focus on the action of delisting rather than the process of recovery, the substance of the question gets lost in rhetoric and lack of a definition of SPR in the ESA. The question seems almost nonsensical, because it is the fight over delisting that requires a geographic line to be drawn.

Many scholars have striven to explain what recovery means.<sup>199</sup> Dale Goble looks to the risk of extinction, the probability that a

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198. Cheever, *supra* note 16, at 11,307.

199. Goble, *supra* note 6, at 6.

species will become extinct and the acceptability of that risk.<sup>200</sup> Referring to the ESA's purpose to conserve at risk species and the ecosystems upon which they depend, Goble equates recovery with successful conservation.<sup>201</sup> J. Michael Scott and Holly Doremus have also supported the concept that recovery necessarily involves science, but that it also involves legal, social, and political issues as well that help determine the acceptability of that risk.<sup>202</sup> As Professor Doremus has written, the determination of whether a species is threatened or endangered is not a scientific decision. It is, instead, an ethical/policy decision on the acceptability of the risk a species faces.<sup>203</sup> Science informs this decision but does not make it. For example, the terms 'endangered species' and 'threatened species' give legal meaning to the concept of recovery because delineating the significant portion of those species' range entails a normative decision on how much and to what degree of their range we require to determine if a species is recovered. Delineating the significant portion of a species' range also contains a scientific dimension that helps determine whether a species is indeed recovered to the degree we require.<sup>204</sup>

Population viability or population viability analysis assigns values to the probability and time components of extinction risk.<sup>205</sup>

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200. *Id.*

201. *Id.* at 2.

202. Doremus, *supra* note 12, at 10,439.

203. Goble, *supra* note 6, at 12.

204. *See* Vucetich et al., *supra* note 140, at 1383. "A recovered species is not threatened or endangered when it 'is not in danger of extinction throughout all or a significant portion of its range and is not likely to become so in the foreseeable future.' Thus, a recovered species is in danger of extinction throughout at most an 'insignificant portion of its range,' now or in the foreseeable future. The meaning of recovery (and endangerment) depends on an appropriate interpretation of the phrases significant portion of its range and insignificant portion of range." *Id.* at 1385. This quote demonstrates that the definition of "species," and "significant portion of its range" drive what the courts determine is recovery in contrast to what is contained in the recovery plans and what is achievable and achieved to date. *See id.* For Vucetich, a useful meaning of "significant" is likely to vary among species, as what is significant for one, may not be for another. *See id.* at 1384, 1386 (Kirtland's warbler example).

205. Goble, *supra* note 6, at 8; *see also id.* at 8 n.20.



Population viability analysis models allow decision makers to evaluate the relative importance of different threats. As Professor Goble notes, the downside to equating recovery to population viability, is that “peripheral populations provide biological and genetic options” and what is today peripheral with rapid ecological change may become the core in the future.<sup>206</sup> Further, drawing boundaries that confine species is problematic.<sup>207</sup> The wolf wars demonstrate his reasoning: the court in the *Wyoming* case deferred to the USFWS’s SPR analysis determining that if a portion of the range is not significant, it need not analyze whether the species is threatened or endangered there. That means that Wyoming may manage wolves as predators throughout much of the state, regardless if it may one day be important peripheral or connective habitat.<sup>208</sup> In the *Western Great Lakes* case, Judge Howell took issue with this approach, noting that the USFWS did not explain why its SPR analysis must be limited to suitable habitat and remarking that “[i]f anything, the ESA requires the USFWS to draw the opposite conclusion from a finding that suitable habitat has disappeared: such ‘curtailment’ of habitat is a contributing factor to the threatened nature of a species.”<sup>209</sup> The normative decision of what the ESA means in its definitions of endangered and threatened species and more specifically how to interpret the phrase “significant portion of its range” is neither obvious nor easy.<sup>210</sup> While in the face of climate change, it makes biological sense to interpret the phrase to include peripheral areas, doing so poses its own set of issues. For example,

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206. Dale D. Goble, *Recovery in a Cynical Time - With Apologies to Eric Arthur Blair*, 82 WASH. L. REV. 581, 606 (2007).

207. See generally *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (2010).

208. *Defenders of Wildlife v. Jewell*, 68 F. Supp. 3d at 214.

209. *Humane Soc’y v. Jewell*, 76 F. Supp. 3d at 130; but see *Greater Yellowstone Coal.*, 672 F. Supp. 2d at 1125 (finding that the USFWS provided a “reasoned explanation for the conclusion that unsuitable habitat is not a significant portion of the [grizzly] bears’ range.”).

210. See, e.g., *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) and *Defenders of Wildlife v. Secretary, U.S. Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005).

those areas that the USFWS determines are not SPRs because they are not suitable due to topography, livestock operations, development or other reasons, may be important in the future, but also, even with the regulatory burden of the ESA, it may not be feasible to change these areas to be more tolerant or suitable than they are today.

If the USFWS were to interpret SPR to include areas that are not currently suitable habitat, it would apply different standards for delisting under the ESA than it does for listing. For example in decisions not to list fluvial arctic grayling or the bi-state and greater sage grouse, the USFWS did not focus on those areas where the species could or should be but are no longer, instead they focus on the status of the species and the certainty that existing regulatory mechanisms will prevent further decline or continue to improve the species.<sup>211</sup> In applying the PECE policy, the USFWS applies specific criteria when evaluating conservation efforts and their benefits to the status of the species.<sup>212</sup> The PECE Policy states that it could also guide the development of conservation efforts that sufficiently improve a species' status so as to make listing the species unnecessary.<sup>213</sup> *The Western Great Lakes* case already applies a different standard to listing and delisting, stating that delineation of a DPS is a one way ratchet.<sup>214</sup>

A solution to this normative conundrum of what we mean by recovery could include a new approach to delisting. What if the USFWS interpreted the ESA to allow delisting a species that is recovered and doing well in its current range when that range also coincides with the suitable range and of course when each of the five listing/delisting factors are satisfied. Then, the more compact DPS that is recovered could be delisted, while the unsuitable or peripheral areas remain listed. This "recovered and thriving here" approach would not include all possible or all historic range, but would support

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211. *See* 79 Fed. Reg. 49384, 49407 (Revised 12 month finding on Petition to List Arctic Grayling); 77 Fed. Reg. 36871 (June 19, 2012)(Listing Determination for Dunes Sagebrush Lizard).

212. *See* PECE Policy, 68 Fed. Reg. 15110.

213. *Id.* at 15112.

214. *Humane Soc'y v. Jewell*, 76 F. Supp. 3d at 112.

those species such as the wolf, grizzly bear, and whale that thrives in certain areas and struggles in others. It would allow the USFWS to turn its attention and resources to those species that aren't thriving at all, those that are truly threatened or in danger of extinction.

The *Wyoming* and *Western Great Lakes* cases shine light on how difficult it is to delist wolves specifically, that have met recovery plan criteria, exceeded original recovery expectations, and are arguably recovered in certain portions of their range, but have not recovered throughout their vast historic range. Wolves are even filling in the peripheries of the recovered areas. Yet, crucially, and for different reasons, Minnesota and Wyoming are either not willing to or able to adopt regulatory mechanisms to supplant the ESA's protection from human caused mortality.<sup>215</sup> Further, for a species like wolves with such a vast historic range and complex taxonomy, the DPS policy affords little application.

The *Wyoming* and *Western Great Lakes* cases coupled with the Services' SPR Policy leave little room for delisting healthy populations of a species that is still recovering in a larger portion of its range. However, the challenge this poses could instead be an opportunity to encourage states, municipalities, and private parties to establish robust conservation strategies with concrete agreements in place to prevent the need for listing a species as threatened or endangered in the first place. Through its regulatory reform of the ESA, the USFWS has proposed to bolster both the strength and flexibility of the provisions of the ESA that offer promise in addressing our changing world. The Services have learned some

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215. Listing and delisting under the ESA, as Judge Molloy has put it, becomes a sword of Damocles over states. Federal assertion of control over wildlife infringes on the strong and traditional right held by the states. This turf battle is more understandable for game species that could be hunted if not under the ESA's protections, but makes less sense for non-game species. Nonetheless, it is real and drives listing and delisting wars. It has clearly driven the wolf wars as evidenced by the protracted litigation in the northern Rocky Mountains over the same issue of adequate regulatory mechanisms in Wyoming and in petitions to delist from Minnesota.

lessons from the decades-long battles over wolf recovery. Their proposed regulatory reform of the ESA to encourage more effective conservation partnerships with other federal agencies, states, tribes, conservation organizations, and private parties encourages the process of a species' recovery.<sup>216</sup> These efforts coupled with states tempering their zest for taking back control over management of a species and demonstrating their commitment to its long term recovery can provide a much needed transition from full protections of the ESA as a listed species to state management as a delisted species.

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216. 79 Fed. Reg. 42525 (Sept. 22, 2014) (Recognizing that prelisting conservation actions are important to upcoming listing decisions and conservation efforts prior to listing).