Endangered Species Act
Congressional Working Group

Report, Findings and Recommendations

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Executive Summary

Thirteen Members of the House of Representatives from across the United States formed the Endangered Species Act (ESA) Working Group in May 2013 to examine a variety of questions related to ESA implementation.

On the eve of the ESA's 40th year, and in light of the fact that ESA has not been updated by Congress in over a quarter century, the Working Group sought to answer questions related to whether the Act has been or will continue to be effective and if the Act reflects scientific advancements and societal needs of the 21st century. Upon answering these and other questions, the Working Group's overall goal was to improve, if necessary, the ESA for both species and people.

In short, the Working Group found that the ESA, while well-intentioned from the beginning, must be updated and modernized to ensure its success where it matters most: outside of the courtroom and on-the-ground. A two percent recovery rate of endangered species is simply not acceptable.

Americans who live near, work on and enjoy our lands, waters and wildlife show a tremendous commitment to conservation that is too often undermined and forgotten by the ESA's litigation-driven model. Species and people should have the right to live and prosper within a 21st century model that recognizes the values of the American people and fosters, not prohibits, a boots on-the-ground conservation philosophy that is working at many state and local levels. The ESA can be modernized to more successfully assist species that are truly in danger. It can be updated so species conservation does not create conflicts with people. All the while, the ESA should promote greater transparency in the way our federal government does business.

This Report summarizes the findings of the Working Group and answers key questions related to those findings. The report acknowledges the continued need for an ESA, but recommends constructive changes in the following categories:

- Ensuring Greater Transparency and Prioritization of ESA with a Focus on Species Recovery and De-Listing
- Reducing ESA Litigation and Encouraging Settlement Reform
- Empowering States, Tribes, Local Governments and Private Landowners on ESA Decisions Affecting Them and Their Property
- Requiring More Transparency and Accountability of ESA Data and Science

While there are certainly other ideas for reform, this Report is intended to be a starting point for positive, targeted legislative changes that can truly benefit species and people.

Statement of the ESA Working Group's Mission and Purpose

The Endangered Species Act (ESA) was created over 40 years ago in 1973 to preserve, protect and recover key domestic species. Since that time, over 1,500 U.S. domestic species and sub-species have been listed. Most species remain on the list and hundreds more could potentially be added within the just the next two years. The ESA was last reauthorized in 1988, prompting questions about whether Congress should update and modernize the law.

On May 9, 2013, Members of the House of Representatives, representing a broad geographic range of the United States, announced the creation of the Endangered Species Act (ESA) Working Group. Led by House Natural Resources Committee Chairman Doc Hastings and Western Caucus Co-Chair Cynthia Lummis, the Group included: Representative Mark Amodei (Nevada, 2nd District); Representative Rob Bishop (Utah, 1st District); Representative Doug Collins (Georgia, 9th District); Representative Andy Harris (Maryland 1st District); Representative Bill Huizenga, (Michigan, 2nd District); Representative James Lankford, (Oklahoma, 5th District); Representative Blaine Luetkemeyer (Missouri, 3rd District); Representative Randy Neugebauer (Texas, 19th District); Representative Steve Southerland (Florida, 2nd District); Representative Glenn Thompson (Pennsylvania, 5th District); and Representative David Valadao (California, 21st District).

The Working Group sought to examine the ESA from a variety of viewpoints and angles; receive input on how the ESA was working and being implemented and how and whether it could be updated to be more effective for both people and species. Despite sometimes intrinsic differences on the means, there appears wide agreement that improvements to the 40-year old ESA are not only possible, but desirable. A few months ago, the Obama Administration's Director of the U.S. Fish and Wildlife declared that the ESA can be improved.[1] We agree.

During its deliberations, the Working Group focused on asking and receiving answers from a variety of perspectives to the following questions:

- *How is ESA success defined?*
- *How do we measure ESA progress?*
- *Is the ESA working to achieve its goals?*
- *Is species recovery effectively prioritized and efficient?*

[1] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, Member, U.S. Fish and Wildlife Service, at 56).

- *Does the ESA ensure the compatibility of property and water rights and species protection?*
- *Is the ESA transparent, and are decisions open to public engagement and input?*
- *Is litigation driving the ESA? Is litigation helpful in meeting ESA goals?*
- *What is the role of state and local government and landowners in recovering species?*
- *Are changes to the ESA necessary?*

This report analyzes answers to these questions in depth below, summarizes the findings of the Working Group and concludes with several key recommendations to present to the 113th Congress relating to the ESA.

Description of the Activities of the ESA Working Group

The Working Group received hundreds of comments from outside individuals and heard from numerous ESA experts throughout last year. In addition, the Working Group reviewed formal written testimony submitted by more than 50 witnesses appearing at nine full and subcommittee ESA hearings of the House Natural Resources Committee over the last three years.[2]

On October 10, 2013, the Working Group convened a forum titled, "***Reviewing 40 Years of the Endangered Species Act and Seeking Improvement for People and Species.***" The forum featured seventeen witnesses from across the nation representing private landowners, agriculture, sportsmen, electric utilities, timber, labor unions, state and local government, chambers of commerce, research and policy organizations, energy producers, and environmental and conservation groups.[3]

Overview of the Endangered Species Act Since 1973

Congress passed the Endangered Species Act in 1973 with the goal of conserving and recovering animal and plant species facing extinction.[4] Specifically, the conference report described the Act's purposes as: "to provide for the conservation, protection, restoration, and propagation of threatened and endangered species of fish, wildlife, and plants, and for other purposes."[5]

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[2] Testimony of witnesses and archived video of ESA-related hearings held Dec. 6, 2011; May 21, 2012; June 19, 2012; July 24, 2012; June 6, 2013; Aug. 1, 2013; Sept. 4, 2013; and Dec. 12, 2013 are available from the House Committee on Natural Resources website: http://naturalresources.house.gov.
[3] Endangered Species Act Congressional Working Group Forum, U.S. House of Representatives (Oct. 10, 2013).
[4] Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (1973).
[5] 1973 U.S.C.C.A.N, 3001.

In general, the law provides authority for federal agencies to list species as either threatened or endangered (section 3), and requires them to use their respective authorities to conserve listed species and avoid actions that may affect listed species or their federally-designated habitat (section 7).[6]

This mandate has been interpreted broadly and affects private entities and individuals by covering federal "actions" such as funding, permitting, licensing, and the granting of easements and rights-of-ways.[7] The ESA also establishes prohibitions on the taking of listed species (section 9), which applies directly to private individuals without the requirement of a federal nexus.[8]

Congress' most significant amendments to the ESA occurred in 1978, 1982, and 1988.[9] Despite these targeted changes to the law, the "overall framework of the 1973 Act" has remained "essentially unchanged" according to the U.S. Fish and Wildlife Service (FWS).[10] Under the current framework, the ESA charges the FWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) to field petitions to list species as threatened or endangered and to designate critical habitat, using the "best scientific and commercial data available."[11] In addition, ESA requires the implementing federal agencies to "cooperate to the maximum extent practicable with the States" in implementing ESA, including "consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species." (section 6).[12]

Litigation and threats of litigation on both substantive and procedural grounds have significantly increased in recent years, and legitimate questions are being raised over petitions, listings, the rigid timeframes, and transparency of data supporting decisions regarding the priorities of the two agencies that administer ESA.[13]

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[6] A History of the Endangered Species Act of 1973, United States Fish and Wildlife Service.
[7] 50 CFR 402.02 (most recent regulation defining agency "action" for ESA purposes).
[8] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10).
[9] A History of the Endangered Species Act of 1973, United States Fish and Wildlife Service.
[10] *Id.*
[11] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 9).
[12] Endangered Species Act of 1973, 16 U.S.C. § 1531-1544 (1973).
[13] *Id.*

In addition, though the federal government annually awards attorneys' fees to plaintiffs who file ESA-related lawsuits, the exact amount spent by American taxpayers on ESA litigation and attorneys' fees is unattainable. Even the former Interior Secretary acknowledged at a 2012 budget hearing that he could not identify how much money his agency spent on ESA-related litigation.[14]

The last authorization for federal appropriations to fund ESA occurred in 1988, with specified appropriation caps for each fiscal year from 1988 through 1992.[15] In each subsequent year since, Congress has appropriated funds for the continued implementation of ESA-related activities despite the expiration of the express statutory authorization.[16]

Questions and Answers Regarding the Endangered Species Act

At the formation of the ESA Working Group, several key questions were posed in relation to the ESA's past and current effectiveness, and to help determine the scope and type of possible improvements that may be needed going forward. The Working Group examines each of these in detail below.

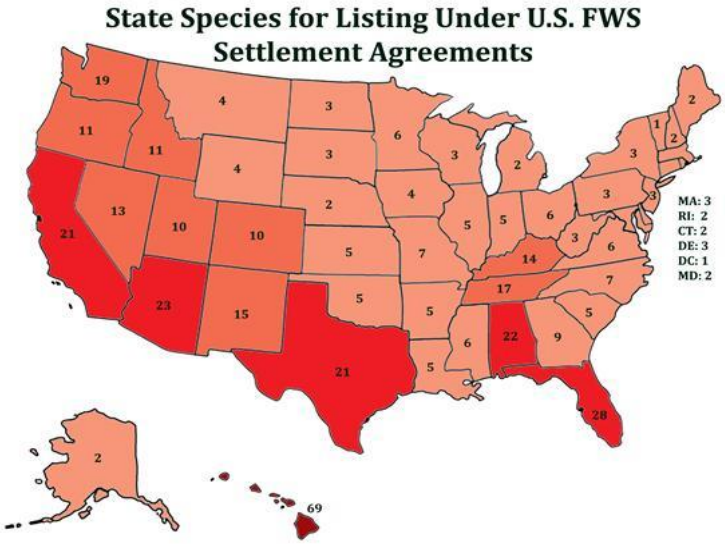
How is ESA "Success" Defined, and How is Progress Measured?

Working Group Conclusion: With less than 2% of species removed from the ESA list in 40 years, the ESA's primary goal to recover and protect species has been unsuccessful. Progress needs to be measured not by the number of species listed, especially as a result of litigation, but by recovering and de-listing those that are currently listed and keeping new ones off of the list.

The Center for Biological Diversity (CBD) alleges that "the ESA is 99.9 percent effective in preventing extinction."[17] A representative from the WildEarth Guardians (WEG) bluntly stated, "Species on the list receive the Act's protections while unlisted species do not," and

[14] *Department of Interior Spending and the President's Fiscal Year 2013 Budget Proposal: Oversight Hearing Before H. Comm. On Natural Resources*. 112th Cong. (2011) (statement of Ken Salazar, Secretary of U.S. Department of the Interior, at 38-39).
[15] Pub. L. No. 100-478, Title I, §1009, 102 Stat. 2312
[16] *Id.*
[17] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Kieran Suckling, Center for Biological Diversity, at 19).

"increasing the rate of recovery will require more, not less, protective regulations—the type of regulations that have the potential to affect economic activity."[18]



Source: House Natural Resources Committee derived from data from FWS settlements

Certain conservation biologists and some environmental groups have extolled a "human-caused extinction crisis," and have opined that without ESA listing, "half of the species on earth" could be lost to global climate change and other forces affecting habitat.[19] WEG opines that an "estimated 6,000 to 9,000 species are at risk and should be granted legal protection," and that "species extinction are ripping a hole in the web of life."[20] Further, because they believe a species "truly is in emergency room status before it can even get on the endangered species list,"[21] these groups have instilled a sense of urgency that delaying listing of species "makes conservation more difficult" and causes species to "go extinct while waiting for status determinations."[22]

It is in this perspective that these groups, taking advantage of strict and unworkable statutory deadlines in the ESA, have filed literally hundreds of ESA lawsuits and thousands of petitions, and in essence, have overtaken the ESA priorities of the FWS and NMFS.

In May and July 2011, the Obama Administration, through the FWS, negotiated and agreed to two litigation settlements involving petitions by two national environmental

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[18] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (written testimony of James Tuchton, WildEarth Guardians, at 32-33).

[19] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (testimony of Patrick Parenteau, Vermont Law School, at 27).

[20] Press Release, WildEarth Guardians, Group Seeks Federal Protection for 475 Southwestern Endangered Species: Largest Listing Petition Filed in Thirty Years (June 21, 2007).

[21] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Brock Evans, Endangered Species Coalition, at 2).

[22] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Dr. Joe Roman, University of Vermont, at 5).

organizations, the CBD and the WEG to make hundreds of species listings and designate critical habitat decisions under the ESA through more than 85 lawsuits and legal actions.[23] These settlements mandate that over 250 candidate species must be reviewed for final listing as either threatened or endangered within specific deadlines.

The settlements combined thirteen federal court cases filed in several federal district courts by either WEG or CBD. Over the last two years, FWS has attempted to cast these settlements in a positive light, going so far as to say that the settlements would "enable the agency to systematically, over a period of six years, review and address the needs of more than 250 candidate species to determine if they should be added" to the list.[24]

However, the settlements actually include actions impacting *1,053* species. While the FWS claims the settlements don't require that listing will occur, the overwhelming decisions so far have resulted in the vast majority going toward new listings, which is the goal of these groups. In just the past two years, over 80 percent (210 of the over 250) decisions involving these species were either listings or proposals to list by the FWS.[25]

Additionally, the settlements do not apply to any other special interest groups that are still free to file lawsuits. Indeed, the settlements do not even limit WEG or CBD from filing additional petitions for any myriad of other species. After these settlements were signed, it did not take the organizations long to start filing additional petitions. In July 2012, CBD touted filing the "Largest Petition Ever" targeting amphibians and reptiles for 53 species in 45 states. The FWS admitted in response that it was "disappointed that [CBD] filed another large, multi-species petition. Fifty-three is a large number, and the species are spread across the country. They have a right to do that; [the settlement] did not give away that right. But the service now has our priorities set through the settlement."[26]

In summary, lawsuits to list species under strict statutory deadlines only end up impeding recovery efforts for truly endangered species. Serial litigation actually makes ESA success even harder to accomplish. More listed species do not necessarily equate to ESA progress.

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[23] *WildEarth Guardians v. Salazar* (2011); *Center for Biological Diversity v. Salazar* (2011)
[24] Endangered Species Program: Improving ESA Implementation, U.S. Fish and Wildlife Service.
[25] 78 CFR 226 70113,70114 (Nov. 2013); and 77 C.F.R. No. 225, 7004-7007.
[26] Allison Winter, *Petitions for new species protection wobble balance in FWS settlement, agency says*, E&E News, Aug. 7, 2012.

<u>Working Group Conclusion</u>: Current implementation of ESA is focused too much on responding to listing petitions and unattainable statutory deadlines, litigation threats and ESA regulatory mandates, rather than on defensible policies, science or data to recover and de-list species. This slows or halts a multitude of public and private activities, even those that would protect species.

As referenced above, litigation and associated settlements to list species under the ESA's statutory timelines have an impact on the agencies charged with implementing ESA. As a state lands commissioner testified:

> "The FWS is faced with a no-win situation; they are overwhelmed by environmental groups with hundreds of candidate listings that the agency cannot possibly respond to in the statutory timeline specified; they then find themselves in violation of that statute and subsequently sued by these same groups who filed to protect the species. These groups create the problem by purposely overwhelming the agency, knowing that they will be unable to respond and then dictate an outcome because the agency settles rather than being able to follow the appropriate proves, including the study of scientific evidence. Listing a species without adequate scientific data, just to settle a lawsuit is capricious.[27]

One outdoors writer and widely known environmentalist commented that the federal government "could recover and delist three dozen species with the resources they spend responding to the CBD's litigation."[28] Recently, WEG declared that since "only" 94 listed species out of the total 2,097 listed species are in the ocean, "a historic imbalance needs to be righted," and, as a result, petitioned NMFS to list 81 new species to "stem the extinction crisis in the world's oceans."[29]

ESA litigation has also increased the federal government's inability to control catastrophic wildfires. The four federal land management agencies (the U.S. Forest Service, Bureau of Land Management, National Park Service, and the FWS) are responsible for managing over 600 million acres of land or nearly one-third of the United States. Decades of failed federal forest management have created unhealthy and overstocked forests,

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[27] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2012) (written testimony of Jerry Patterson, State of Texas, at 15).

[28] Ted Williams, *Extreme Green*, High Country News, May 31, 2011.

[29] *WildEarth Guardians Launches Major Campaign to Protect Marine Biodiversity*, WildEarth, July 8, 2013.

placing 73 million acres of National Forest lands and 397 million acres of forest land nationwide at risk of severe wildfire.[30]

Fires are destroying species habitat and ESA itself is creating obstacles that are counter-productive to fighting wildfires, including use of heavily mechanized equipment, use of aerial retardant and restricted use of water due to concerns about potential impacts to other ESA-listed species, such as salmon.[31] State and tribal lands adjoining federal forest lands are increasingly at risk of wildfires partly because of ESA.[32]

The Forest Service's self-described "analysis paralysis," excessive appeals on timber sales, ESA-related litigation, statutory and administrative land designations (such as wilderness, roadless areas and critical habitat) all serve to delay or outright block management activities necessary to reduce hazardous fuels and improve forest health and habitat.

For example, in northwestern Montana, the Kootenai National Forest Supervisor approved an Environmental Impact Statement to proceed with the Grizzly Vegetation Management project on 2,360 acres. The proposed activities included timber harvest, fuels reduction, prescribed burning, pre-commercial thinning, wildlife habitat improvement, and watershed rehabilitation. In late 2009, several environmental groups filed suit under the ESA, claiming these activities would harm grizzly bear habitat. A federal district court judge granted an injunction in 2010, which effectively blocked the management activities, and awarded the plaintiff's attorneys' fees in the amount of $56,000. This area was recently identified by the National Interagency Fire Center as being at a "significant risk of wildfire." Over the past two fiscal years alone, 26 lawsuits, notices of lawsuits, and appeals were filed in the Idaho and Montana region of the U.S. Forest Service to block timber thinning and other vegetation management in areas at high risk of wildfire.[33]

Endangered species habitat destruction was a reality last year, when the Arizona Game and Fish Department noted that two major fires resulted in the destruction of 20 percent of Mexican spotted owl nests known to exist in the world.[34] In addition, biologists

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[30] Fire and Fuels Buildup, U.S. Forest Service.

[31] *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Rick Dice, State of Texas, at 20).

[32] *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Alison Berry, The Sonoran Institute, at 23).

[33] Vegetation Management Litigation Trends in Region 1, U.S. Forest Service.

[34] Bonnie Stevens, *An era of mega fires*, Arizona Daily Sun, May 15, 2012.

scrambled last year to protect endangered fish in New Mexico from the Whitewater-Baldy Complex fire, which consumed almost 300,000 acres.[35] Some have pointed out that ESA's regulatory requirements work to hinder other much needed efforts to protect the environment, such as control of aquatic invasive species that threaten the Great Lakes and its local water bodies.[36]

ESA implementation and litigation continue to have tremendous negative impacts on a host of activities that could protect or improve habitat. For example, a rural public utility district sought to construct a wind project on state-owned land and spent $4 million over five years in consultation with the FWS to develop an environmental assessment of the potential impacts on the ESA-listed marbled murrelet, purchasing over 260 acres of land as habitat for the bird. Though the analyses determined the project would have negligible impact on endangered species, the utility ultimately withdrew from the project when the FWS insisted on additional peer review and $10 million as additional habitat and other requirements.[37] In addition, the 1998 construction of an elementary school in San Diego was delayed by ESA litigation and FWS mitigation requirements to protect a two-inch shrimp. Construction is finally slated to go forward as a result of an agreement by the school district to spend $5 million in ESA mitigation expenses, all of which will be passed on to local citizens.[38]

ESA-related surveys can result in significant delays and costly project modifications; for example, surveys may be required for some listed species that are not present for months out of the year, and existing federal permits, licenses or authorizations could be subject to re-initiation of ESA consultation upon new listings of information.[39]

Discovery of species can hamper activities on lands owned by local entities that have limited resources and must comply with strict seasonal "work windows" to accomplish their activities. For example, because an orchid-like, ESA-listed plant (Ute-ladies' tresses)

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[35] Susan Montoya Bryan, *Raging New Mexico Fire prompts rescue of threatened fish*, San Jose Mercury News, June 16, 2012.

[36] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Senator Tom Casperson, Michigan State Senate, at 3).

[37] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (written testimony of Doug Miller, Public Utility District No. 2 of Pacific County, at 15-18).

[38] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2012) (written testimony of John A. Stokes, San Diego Unified School District, at 19).

[39] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kent Holsinger, Holsinger Law, LLC, at 29).

was spotted in a small Utah town, federal regulations require a survey for all "suitable habitat," slowing down development permits in the county for a year.[40] In San Antonio, Texas, despite extensive permits and environmental analyses approved by the FWS and the Federal Highway Administration, after a biologist sited a dime-sized spider not seen in the area for over 30 years, construction of a $15 million highway project was halted.[41] Over a year later, the Texas Department of Transportation has been forced to completely redesign the highway project design and submit it for federal approval.[42] A few months after its discovery, the same spider halted completion of an $11 million water pipeline project.[43]

In Montana, a mining project that had gone through environmental reviews and received all required permits in 1993 is being required to spend millions of dollars to update environmental impact statements; and the mining company has been told by the FWS that it will need to pay for contractors to help them complete a biological opinion related to grizzly bears, without any assurance the project will be approved.[44] A rural electric cooperative in Utah that sought to construct a power line primarily on private and state-owned lands completed an extensive NEPA process, but was ordered to stop construction when it was determined that two acres of Utah Prairie Dog habitat were within a 350-foot buffer of the project's right-of-way. This resulted in a nine-month delay in order for the FWS to conduct a survey and the work was only re-started after the electric co-op agreed to pay $20,000 to the National Wildlife Defense Fund and hire a biologist to monitor the impacts of the project on prairie dogs.[45]

Is Species Recovery Effectively Prioritized and Efficient?

<u>Working Group Conclusion</u>: Current implementation of ESA does not clearly identify what is needed to recover and delist species, resulting in a lack of incentives, for state and private conservation, costly mandates, and wasted resources even in light of increased federal funding.

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[40] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Issa A. Hamud, City of Logan, Utah, at 1-2).

[41] Rob Gordon, *GORDON: Little meshweaver brings San Antonio to a screeching stop*, The Washington Times, Oct. 17, 2012.

[42] Karen Grace, *Drivers frustrated with construction projected to halt endangered spider*, KEN5 San Antonio, Oct. 21, 2013.

[43] Colin McDonald and Vianna Davila, *Rare spider again bites construction*, My San Antonio, Feb. 25, 2013.

[44] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep. John Duncan, Member, H. Comm. on Natural Resources, at 45).

[45] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Carl Albrecht, Garkane Energy, at 1-2).

Listing Species Has Become the Federal Overarching Priority, not Avoiding Listing or Recovery of Species

The legislative history of the ESA stated that its purpose is to provide a mechanism to recover species, not simply put them on a list.[46] Yet, the 2011 "mega-settlements" are exclusively devoted to listing species, rather than more productive goals of developing more current and better data and working cooperatively with states, localities and private landowners to avoid listings.[47]

The FWS states that its ESA recovery program "oversees development and implementation of strategic recovery plans that identify, prioritize, and guide actions designed to reverse the threats that were responsible for species' listing. This allows the species to improve, recover, and ultimately be removed from the ESA's protection (i.e., delisted).[48] However, even one litigious advocacy group's director acknowledges that the average federal recovery plan requires 42 years of a species listed under ESA.[49] Another environmental activist acknowledges that some species "could take a century or more, if ever" to be totally delisted.[50]

Despite litigious groups' inflated claims that 90 percent of 110 selectively-chosen endangered species are "advancing toward recovery,"[51] the FWS' own statistics simply don't match this claim. Unfortunately, the FWS acknowledges in its most recent review of its own recovery efforts that less than 5 percent of the over 1,500 domestic species on the ESA list are improving.[52] NMFS reports that a little over one-third of its 70 listed species are improving.[53] This is concerning considering many of the species listed have been on

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[46] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 6).
[47] *Id, at 6.*
[48] Fiscal Year 2013 Budget Justification, U.S. Fish and Wildlife Service.
[49] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Kieran Suckling, Center for Biological Diversity, at 18).
[50] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Patrick Parenteau, Vermont Law School, at 28).
[51] Kieran Suckling, Noah Greenwald, and Tierra Curry, *On Time, On Target: How the Endangered Species Act is Saving America's Wildlife, Center for Biological Diversity*, 2012.
[52] Report to Congress on the Recovery of Threatened and Endangered Species Fiscal Years 2009-2010, U.S. Fish and Wildlife Service.
[53] Recovering Threatened and Endangered Species FY 2011–2012 Report to Congress, National Oceanic and Atmospheric Administration Fisheries.

the list for up to 40 years and has cost tens of billions of dollars in direct spending and untold amounts of indirect costs to Americans.

Even when federal agencies have little or no data, they are defaulting to listing species under ESA, despite other ongoing conservation activities. In 1998, NMFS determined that ongoing state and federal protective measures undertaken by Atlantic States were sufficient to preclude an ESA listing of the Atlantic sturgeon, an anadromous species of fish present in 32 rivers in the eastern U.S. from Maine to Florida. However, following a 2009 petition by the Natural Resources Defense Council, NMFS proposed to list five distinct population segments of Atlantic sturgeon, without a single stock assessment or population estimate for any of the "distinct population segments."[54]

Even military budgets and operations have been significantly affected by species conservation activities that ultimately appear to lead to federal listings anyway. In western Washington, the Department of Defense and other federal agencies have invested more than $12.6 million to acquire and protect properties designed to mitigate impacts of the settlement-driven, proposed listings of six subspecies of gophers. These costs do not include over $250,000 spent by local entities, school districts, ports and private landowners as part of the FWS listing process and development of a conservation plan.[55]

Biological Opinions and other Measures Required by ESA Force Open-Ended, Expensive and Questionable Measures

Under ESA, anyone can submit unlimited petitions to the FWS or NMFS to list species as "threatened" or "endangered." There is no requirement that the agencies considering these petitions actually count the species populations prior to listing.[56] Thus, there is no real measurable numerical goalpost to justify the agencies' determination that a species deserves to be listed or to justify what would be needed to recover them once they are listed.

One witness' testimony noted that alternative approaches authorized by ESA to recover listed species, such as use of artificial propagation, are often ignored in favor of

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[54] *The Atlantic Fisheries Statutes Reauthorization Act of 2012: Hearing on H.R. 6096 Before the S. Comm. on Fisheries, Wildlife, Oceans, and Insular Affairs,* 112th Cong. (2012) (written testimony of Gregory DiDomenico, Garden State Seafood Assoc., at 2).

[55] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (submission for the record of Thurston County, Washington).

[56] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 9).

scapegoating human activity.[57] Another pointed out that agricultural crop protection products that already undergo extensive regulation under one federal statute must go through consultation with FWS and NMFS, which have little expertise, resulting in consultation delays and litigation.[58]

When Species Should be Delisted, the Process is Uncertain and Rare

According to FWS' data, in the 40 years since ESA was enacted, only 30 U.S. and foreign species have been delisted.[59] However, a recent review of this information reveals that more than 30% of all "delisted" species were removed from the ESA list due to data errors, indicating that they should never have been listed in the first place.[60] In one case, a Texas plant was listed on petition information data that 1,500 species remained, when in reality more than four million existed, and it took FWS more than a decade to remove the improperly listed plant from the ESA list.[61]

Two Utah counties and private landowners have been unable to control an influx of prairie dogs that have destroyed private lands because the FWS only counts prairie dogs found on public lands, not private lands, for recovery purposes.[62] This interpretation has cost one rural electric cooperative over $150,000 to airlift transmission poles around federal lands that have been designated for Utah prairie dogs, despite private landowners being able to obtain permits to kill them on nearby lands[63].

The FWS and NMFS rarely act to delist or downlist a species, even when they acknowledge the species merits delisting or downlisting.[64] For example, in 1999, the FWS announced the recovery of the iconic bald eagle and formally proposed to delist it from

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[57] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (statement of Brandon Middleton, Pacific Legal Foundation, at 67).

[58] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Kevin Kolevar, Conservation Leadership Conference, at 1).

[59] Delisting report, U.S. Fish and Wildlife Service.

[60] Reed Hopper, *Inflated Endangered Species Act 'success stories' revealed*, Pacific Legal Foundation, June 5, 2012.

[61] 76 Fed. Reg. 206 (Oct. 25, 2011).

[62] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Chris Stewart, Member, H. Comm. on Natural Resources, at 63).

[63] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Carl Albrecht, Garkane Energy, Inc., at 2).

[64] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Damien Schiff, Pacific Legal Foundation, at 1).

ESA, yet took eight years to act, and only acted after having been forced to by court order.[65] Last year, court actions were filed to force the FWS to follow through on its own recommendations to delist or downlist six California species.[66]

The FWS has taken the position that it is not required to act on delisting of a species unless and until an "interested party" petitions for action and then follows up with a lawsuit.[67] Because most citizens do not desire or are not in a position to file petitions or lawsuits against the federal government, many species continue to be listed under ESA even when it may not be necessary.

Even when a species has been deemed recovered, certain groups continue litigating to keep the species on the list.[68] A prime example of this is in the State of Wyoming, where gray wolf populations exceeded the FWS' stated recovery goals for twelve consecutive years before it was delisted Thereafter, the agency faced three separate lawsuits filed by fourteen litigious organizations opposing the delisting.[69]

State and tribal representatives have expressed concern that federal proposed recovery timeframes are too lengthy and lack incentives for local, state and tribal entities to delist species.[70] They also are concerned that federal ESA recovery goals are being set too high, and that they include objectives unrelated to species, such as greenhouse gas emission targets.[71]

Federal ESA Budgets are Not Underfunded, and More Funding Won't Resolve Entrenched Problems of ESA Implementation

Despite frequent claims that ESA would be much more effective if it only received greater funding, the amount of federal funding has increased for the ESA. FWS and NMFS

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[65] 72 Fed. Reg. 37346 (July 9, 2007); and *Contoski v. Scarlett,* 2006 WL 2331180 (D.Minn. Aug. 10, 2006).
[66] *Petition of Pacific Legal Foundation, et al. before The U.S. Department of the Interior and the U.S. Fish and Wildlife Service,* (Dec 9, 2011).
[67] *Coos County Bd. Of County Comm'rs v. Kempthorne,* 531 F.3d 792 (9th Cir. 2008).
[68] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 7).
[69] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Steve Ferrell, State of Wyoming, at 33).
[70] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 19).
[71] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Doug Vincent-Lang, Alaska Department of Fish and Game, at 3).

received in excess of $360 million—an increase compared to the prior fiscal year (2013).[72] According to data made available since the beginning of the Obama Administration, federal and state expenditures have continued to rise steadily, totaling **$6.2 billion** between Fiscal Years 2009 and 2012.[73] These costs do not include the soaring direct and indirect costs on local governments and the private sector.[74]

The FWS' FY 2013 budget allocated $20.9 million for endangered species listings and critical habitat designations, and it acknowledges that 86 full time employees are devoting their attention to complying with court orders or settlement agreements resulting from litigation.[75]

Some have raised the point that the FWS, the NMFS and other federal entities are not spending funds wisely relating to ESA recovery. For example, in 2013, as near-record runs of salmon returned, and after more than fifteen years and several billions of taxpayer and electricity ratepayer dollars have been spent on ESA-listed salmon and steelhead recovery in the Pacific Northwest, including extensive habitat, hatchery, and hydropower improvements, NMFS announced plans to spend between $200,000 to $300,000 to conduct interviews aimed at "identifying key challenges facing the recovery effort and helping inform solutions" for listed salmon and steelhead.[76]

Another recent, egregious example is the FWS's handling of the endangered Desert Tortoise, some of which were housed in a $1 million budgeted conservation center at the southern edge of Las Vegas Valley in Nevada. Though the tortoise has been ESA-listed since 1990, when available funds to operate the conservation reserve center decreased, the FWS

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[72] Fiscal Year 2014 Budget Justification, U.S. Fish and Wildlife Service; and Fiscal Year 2014 Budget Summary, National Oceanic and Atmospheric Administration.

[73] Fiscal Year 2012 Federal And State Endangered And Threatened Species Expenditures, U.S. Fish and Wildlife Service; Fiscal Year 2011 Federal And State Endangered And Threatened Species Expenditures, U.S. Fish and Wildlife Service; Fiscal Year 2010 Federal And State Endangered And Threatened Species Expenditures, U.S. Fish and Wildlife Service; and Fiscal Year 2009 Federal And State Endangered And Threatened Species Expenditures, U.S. Fish and Wildlife Service.

[74] John Shadegg and Robert Gordon, *Environmental Conservation: Eight Principles of the American Conservation Ethics,* The Heritage Foundation, 2012.

[75] *Spending for the National Oceanic and Atmospheric Administration, the Council on Environmental Quality, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2014 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 113th Cong. (2013) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service). See also: *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 4).

[76] *Wash. Congressman Seeks Review Of NOAA Fish Recovery Assessment*, NW Fishletter, Feb. 12, 2013; and Letter from Rep. Doc Hastings, Chairman, H. Comm. on Natural Resources, to Jane Lubchenco, Administrator, National Oceanic and Atmospheric Administration (Feb. 4, 2013).

began plans to actually kill hundreds of tortoises rather than finding other protection methods. "It's the lesser of two evils, but it's still evil," said the FWS program recovery coordinator.[77]

Does the ESA Ensure Property and Water Rights are Compatible with Species Protection?

Working Group Conclusion: The ESA punishes private property owners and water rights holders and fails to properly account for huge economic and regulatory burdens that also hinder species conservation. The ESA also advances the agendas of groups seeking land and water acquisition and control.

Private Property Owners Lack Incentives to Conserve under current ESA Implementation

A continuing controversy generated by ESA and related regulations is the conflict between government regulation and private property rights and water rights after a species has been listed. If a property owner has a protected species on their land, the government can limit or ban activities on that land or water source, which may harm the species. Under section 9 of the ESA, individuals are subject to criminal penalties if they "take" or "harm" a threatened or endangered species.[78] The definition of "harm" includes any activity that could "significantly impair essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering" of a species.[79]

According to one property rights expert, "the ESA penalizes people for being good stewards of their land. Landowners whose management practices create and preserve habitat for an endangered plant or animal open their land to being regulated under ESA. And contrary to what many environmental pressure groups claim, ESA regulations do not simply prevent development or changes in land use. Customary land uses and practices, such as farming, livestock grazing, and timber production have regularly been prohibited, even when such practices help to maintain the species' habitat."[80]

While the Fifth Amendment to the U.S. Constitution provides that government cannot take private property unless it provides "just compensation" to the owner, many private

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[77] Hannah Dreier, *Desert Tortoise Faces Threat From Its Own Refuge*, AP, Aug. 25, 2013.
[78] Endangered Species Act of 1973, 16 U.S.C. §1538(a), §1533(d) (1973).
[79] 50 C.F.R. §222.102 (NMFS' "harm" rule); see also 50 C.F.R. §17.3 (FWS' "harm" rule)
[80] Myron Ebell, *An Update on Endangered Species Act Reform*, Competitive Enterprise Institute, May 5, 2005.

property rights advocates are concerned that courts have not favorably ruled on the onerous effect of ESA regulations that amount to "regulatory takings" allowing for just compensation to property owners.

One witness remarked that the ESA puts the needs of species over people when describing the impact it had on California farmers and workers.[81] Another testified that it creates a "regulatory straightjacket" and disincentive to landowners, standing in the way of good conservation work, and can actually result in harm to species.[82] Another private landowner testified that the FWS' 2012 proposed expansion of critical habitat for the Northern Spotted Owl would not compensate landowners for use of their private lands to protect public resources.[83]

Aggressive ESA enforcement by federal officials fuels mistrust both in federal ESA implementation and the law. For example, the FWS defended trespass of a FWS enforcement officer arriving in plain clothes onto a private landowner's property that was alleged to be in the midst of critical habitat.[84]

In 1982, Congress amended the ESA to authorize federal approval of "habitat conservation plans," including a new permit process meant to give incentives to non-federal land managers and private landowners to protect listed and unlisted species, while still allowing for economic development.[85] Unfortunately, this process has proven unduly cumbersome and expensive for some private landowners who are seeking certainty to utilize their land. For example, a private landowner of 45 acres of timber land testified that despite investment of over $4 million and over fifteen years of process, the FWS and NMFS has still not provided written approval of the habitat conservation plan to allow him to harvest timber on the land and protect spotted owl and murrelet habitat.[86]

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[81] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Brandon Middleton, Pacific Legal Foundation, at 40).

[82] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kent Holsinger, Holsinger Law, LLC, at 27).

[83] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kelly Kreps, Kreps Ranch LLC, at 48).

[84] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service, at 59).

[85] Endangered Species Act | A History of the Endangered Species Act of 1973 | 1982 ESA Amendment, U.S. Fish and Wildlife Service.

[86] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Tom Fox, Family Forest Foundation, at 11).

Critical Habitat Rules/Executive Orders Do Not Adequately Quantify the Significant Economic Impacts to Private Property Owners and Water Rights Holders and Comes too Late in Process

In practice, though federal officials downplay its significance (for example, the Director of FWS stated "it may likely mean nothing"),[87] designation of critical habitat can have a significant negative economic impact on property values. For example, the FWS itself estimated the annual economic impact of critical habitat for the California gnatcatcher to be over $113 million.[88]

The Obama Administration has designated new critical habitat, and revised previously designated critical habitat that is increasingly and more directly affecting private property, including areas not even occupied by the listed species the habitat is designed to protect. For example, in 2010, the FWS revised a 2005 designation of critical habitat for ESA-listed bull trout, found in streams in Washington, Oregon, Idaho, Nevada and Montana, expanding the stream habitat by nearly 500%, including additional areas where no bull trout currently exist, and increasing the negative economic impact by $7 million per year.[89]

In April 2013, as part of the 2011 mega-settlement, FWS proposed to list the Sierra Nevada yellow-legged frog as endangered, and proposed to designate over 2.1 million acres as critical habitat for the frog, including over 82,000 acres of private property.[90] The FWS' designation of critical habitat for the elderberry longhorn beetle, native to California's Central Valley, has imposed significant economic and other costs, including $4.2 million in mitigation costs for one local flood control agency that maintains levees along a river where the FWS designated the critical habitat.[91]

Concerns have been raised that ESA does not ensure that economic impacts are fairly quantified at the time of listing, despite at least one circuit court of appeals mandate to this effect.[92] Instead, recent regulations finalized by the Obama Administration will require only that the federal government is required to analyze economic impacts of a critical habitat designation rule itself.[93]

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[87] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service, at 59).
[88] 72 Fed. Reg. 243, 72010 (2007).
[89] Final Bull Trout Critical Habitat Designation, U.S. Fish and Wildlife Service.
[90] 78 Fed. Reg. 80, 24516 (2013).
[91] Endangered and Threatened Wildlife and Plants: Removal of the Valley Elderberry Longhorn Beetle from the Federal List of Endangered and Threatened Wildlife, U.S. Fish and Wildlife Service.
[92] *N.M. Cattlegrower Ass'n v. U.S. Fish & Wildlife Serv.,* 248 F.3d 1277 (10th Cir. 2001).
[93] Improving ESA Implementation, U.S. Fish and Wildlife Service.

Critical habitat designations have also created a litigious atmosphere surrounding the ESA. Even the former Deputy Interior Secretary under the Obama Administration, Mr. David Hayes, declared that critical habitat designations have been "fish in the barrel litigation for folks."[94]

ESA Being used to Forward Extreme Groups' Agendas

An additional concern is that current implementation of ESA is bowing to out-of-the mainstream and unjustified agendas of certain groups. The CBD's 2010 annual report states "where humans multiply extinction follows, and that the planet cannot continue to sustain both an exponentially growing human population and the healthy abundance of other species."[95] One biologist went so far as to defend his statement that "the collective needs of non-human species must take precedence over the needs and desires of humans."[96] Another stated that "humanity threatens to turn the earth into a planet of weeds."[97] These groups and many conservation biologists believe the primary reason for lawsuits is "to hold the government accountable" on forcing habitat protection and acquisition from private landowners for species.[98]

In 2009, CBD's Executive Director stated: "*When we stop the same timber sale three or four times running, the timber planners want to tear their hair out. They feel like their careers are being mocked and destroyed – and they are. Psychological warfare is a very underappreciated aspect of environmental campaigning."*[99]

While certainly heartfelt, these statements foster a contentious atmosphere that creates unnecessary conflicts between humans and species, rather than encouraging cooperative efforts to aid species.

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[94] Environmental Law & Policy Annual Review, Vanderbilt Law School, Mar. 22, 2013.

[95] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (statement of Rep. Doug Lamborn, Member, H. Comm. on Natural Resources, at 75).

[96] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Raul Labrador, Member, H. Comm. On Natural Resources, at 74).

[97] *Id.*

[98] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Patrick Parenteau, Vermont Law School, at 28).

[99] Tony Davis, *Firebrand ways, A visit with one of the founders of the Center for Biological Diversity*, High Country News, Dec. 21, 2009.

Is the ESA Transparent, and Are Decisions Open to Public Engagement and Input?

<u>Working Group Conclusion</u>: The ESA promotes a lack of data transparency and science guiding ESA-related decisions, and there are conflicts of interest and bias in "peer review" of federal ESA decisions.

<u>"Best Available Scientific and Commercial Data" Not Clearly Defined, and Not being Implemented as Defined</u>

President Obama directed all federal agencies in a 2009 Executive Order to "create an unprecedented level of openness."[100] Relating to ESA, this directive has been ignored. Five years later, most of the federal agencies that administer ESA are unable to make basic and legitimate data used for listings and critical habitat available to the public, and the Obama Administration is more frequently resorting to the use of executive orders and closed-door settlements on ESA.

Concerns have been raised that while the ESA requires decisions to be made solely on the basis of the best available data, the FWS and NMFS base their ESA decisions increasingly upon unpublished reports or professional opinions.[101] In the words of Mr. Dan Ashe, the current FWS Director, "if there is little information available, then often times we go to the experts and we ask experts for their best professional judgment."[102] In the case of the BLM's National Technical Team (NTT) Report for Greater Sage Grouse, this has resulted in concerns that professional opinions are offered first, and then "science" is found to justify the opinions.[103]

Last year, a federal district court even ruled that data and conclusions included in a 482-page NMFS ESA biological opinion were "arbitrary and capricious," stating, "In sum, the Fisheries Service's November 2008 BiOp relied on a selection of data, tests, and standards that did not always appear to be logical, obvious, or even rational." The Court also noted that NOAA's BiOp lacked required analyses of economic or technological feasibility of its proposed mitigation measures.[104]

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[100] 74 Fed. Reg. 4686 (Jan. 26, 2009).

[101] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 2).

[102] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service, at 36).

[103] *Id.*

[104] *Dow AgroSciences LLC v. National Marine Fisheries Service,* 4th Cir., No. 11-2337, (Feb. 2013).

Many believe that modern scientific data methods, such as DNA testing, are superior to federal agencies' reliance on unpublished studies or professional opinions.[105] Federal agencies nevertheless are resistant to using DNA. In one recent example, despite actual DNA results showing one proposed listing of a subspecies of plant was genetically indistinguishable from other similar plants found in three other states, the FWS defended studies that it stated required the plant be listed as a separate subspecies.[106]

An Alaska official raised concerns about the overuse of the "precautionary principle" in listing decisions, use of modeling rather than observational science, and other methods that have the effect of removing species from state jurisdiction and extending the period of "foreseeable future" into the far distant future. In one such example, the NMFS listed the beluga whale as endangered based on modeling that showed the population had a greater than 1 percent chance of going extinct beyond 50 years, based on modeled extinction projections to 300 years.[107]

Data Not Used or Available to Increase Confidence in Decisions

The American people pay for data collection and research relating to threatened and endangered species through grants, contracts, cooperative agreements and administration of research permits. Concerns have been raised that despite federal transparency and data quality guidelines, agencies are not required to make data relating to their ESA decisions publicly accessible, thus eliminating legitimate scientific inquiry and debate and to allow independent parties to reproduce the results.[108]

For example, the 2010 decision by FWS that Greater Sage Grouse warrants ESA listing is based primarily on a 2009 taxpayer-funded FWS study by Edward O. Garton and others. This study was cited 62 times in the FWS' listing decision. Yet, the data used in the Garton study still has not been made publicly available. Another scientist's written requests for the data have been refused.[109]

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[105] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Kent McMullen, Franklin County Natural Resources Advisory Committee, at 32).

[106] Geoff Folsom, *Bladderpod to be listed as protected species on federal lands*, Tri-City Herald, Dec. 19, 2013.

[107] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Doug Vincent-Lang, Alaska Department of Fish and Game, at 2).

[108] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 2).

[109] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dr. Rob Roy Ramey, at 38).

Counties that questioned the accuracy of a map developed for sage grouse habitat in Colorado have been refused by the FWS in their requests to verify data used by the FWS in its NTT report.[110] In more than one case, a court order has been required to obtain the data from federal officials, even though the data was obtained through taxpayer-funded studies.[111]

Many reports and studies used to justify ESA decisions have been found to have mathematical errors, missing data, errors of omission, biased sampling, undocumented methods, simulated data in place of more accurate empirical data, discrepancies between reported results and data, inaccurate mapping, selective use of data, subjective interpretation of results, fabricated data substituted for missing data, and even no data at all.[112]

Litigious groups are petitioning for new species that lack even common names or descriptions, citing from a database called NatureServe, which is not reliable as an accurate or complete source of data.[113] Too often, the "science" included in citizen listing petitions is directly relied upon in the 90-day findings and is then codified as "fact" by the time the 12-month review is completed, and 12-month reviews are sometimes subjected to ad hoc and informal peer reviews that may amount to no more than an email distribution of the document with informal comments received.[114]

Lack of transparency can lead to policies that invite further controversy and conflicts. For example, though ESA carefully circumscribes authority to list only species, subspecies and distinct population segments of species,[115] NMFS created and has used a different means to quantify and classify populations of fish. NMFS characterizes populations of salmon and steelhead as "evolutionary significant units,"[116] whereas the FWS utilizes "distinct population segments" as defined by ESA under section 4. Some have suggested

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[110] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Tom Jankovsky, Garfield County, Colorado, at 39).

[111] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Dr. Rob Roy Ramey, at 27).

[112] *Id.*

[113] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Kent Holsinger, Holsinger Law, LLC, at 26).

[114] *The Endangered Species Act: Reviewing the Nexus of Science and Policy: Oversight Hearing Before the H. S. Comm. On Investigations and Oversight*, 112th Cong. (2011) (written testimony of Dr. Neal Wilkins, Texas A&M Institute of Renewable Natural Resources, at 5).

[115] 16 U.S.C. §1532(16)

[116] 56 Fed. Reg. 58612 (1991).

that FWS and NMFS have used less-than-transparent processes to ensure that they can list a population of species, even though doubts have been raised about the science underlying a listing proposal.[117]

Peer Review Open to Federal Agency Conflicts and Bias

Concerns have been raised that while well-intended, "peer review" of ESA decisions should not be substituted for public access to underlying data. Unfortunately, most peer reviews rarely are provided access to the data that the study was based on, and often peer reviewers miss errors. In addition, they can be biased and subject to financial and ideological conflicts of interest.[118]

To obtain peer reviews, the federal agencies often turn to individuals who work closely on a specific species and have many others who tend to agree with them, and thus, they have "confirmation bias" for a certain opinion relating to ESA.[119]

In addition to the inherent lack of transparency of ESA data and science, the Obama Administration's use of executive orders and rulemaking relating to ESA is exacerbating concerns about the lack of transparency and implementation by federal agencies. One example is the policy interpreting "significant portion of the range" of ESA-listed species, which some believe could actually undermine the use of conservation tools and resources invested by states and local entities for species.[120]

In addition, certain environmental groups appear more interested in advancing an anti-development agenda than in supporting policies to ensure the best science or data is used for ESA decisions. In a 2009 interview, the executive director of the CBD, in response to a question of whether he was concerned that his organization hired activists lacking scientific credentials, stated:

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[117] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Damien Schiff, Pacific Legal Foundation, at 6).

[118] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 4).

[119] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dr. Rob Roy Ramey, at 36-37).

[120] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Steve Ferrell, State of Wyoming, at 37).

"No. It was a key to our success. I think the professionalization of the environmental movement has injured it greatly. These kids get degrees in environmental conservation and wildlife management and come looking for jobs in the environmental movement. They've bought into resource management values and multiple use by the time they graduate. I'm more interested in hiring philosophers, linguists and poets. The core talent of a successful environmental activist is not science and law. It's campaigning instinct. That's not only not taught in the universities, it's discouraged."[121]

Such agendas can have real world consequences. A college student doing biological surveys funded by FWS Section 10 recovery permits falsely reported seeing an endangered species on privately-owned property in his survey area, but the FWS did not immediately report it. The student later said it was "a joke" but this incident nevertheless resulted in a gravel company having to modify its operations under ESA.[122]

Once an ESA listing or critical habitat decision has been made, there is enormous resistance to utilize new, more accurate information or to reconsider any of the "science" used to support the original decision.[123] According to the FWS and NMFS, ESA requires them to conduct "status reviews" of each listed species every five years.[124] Few of these status reviews result in downlisting or de-listing of species.

Is Litigation Driving the ESA? Is Litigation Helpful in Meeting ESA's Goals?

<u>Working Group Conclusion</u>: ESA is increasingly becoming a tool for litigation and taxpayer-funded attorneys' fees. The Obama Administration's use of closed-door settlements undermines transparency and involvement of affected stakeholders and drives arbitrary mandates and deadlines that do little to recover species.

<u>Lawsuits and Threats of Litigation & Petitions Proliferate</u>

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[121] David Blackmon, *The Sue and Settle Racket*, Forbes, May 27, 2013.

[122] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Rob Bishop, Member, H. Comm. on Natural Resources, at 65)..

[123] *The Endangered Species Act: Reviewing the Nexus of Science and Policy: Oversight Hearing Before the H. S. Comm. On Investigations and Oversight*, 112th Cong. (2011) (written testimony of Dr. Neal Wilkins, Texas A&M Institute of Renewable Natural Resources, at 3-4).

[124] Five-Year Status Reviews Under the Endangered Species Act, U.S. Fish and Wildlife Service.

Many view the ESA as being driven by litigation, or threats of litigation, which in turn distracts from species conservation and recovery. The FWS Director acknowledged that "when the Service is sued for missing deadlines, we have no defense."[125]

Publicly available court documents reveal that ESA litigation has risen dramatically over the past few years. In 2012, the Department of Justice (DOJ) provided the House Committee on Natural Resources case information on 613 total cases. Each of these cases was at least partially devoted to litigating some aspect of the ESA. Of these, 573 (93%) were cases where federal agencies were sued under the ESA.[126] That amounts to an average of at least *three cases a week* dealing just with citizen suits under the ESA.[127] In analyzing the data provided by DOJ, some trends were immediately apparent. Organized and well-funded special interest groups (primarily a few prominent environmental organizations) were significantly more likely to file multiple lawsuits than individual citizens, and much more likely to be awarded attorney's fees.

According to the California Forestry Association, environmentalists filed more than 50 appeals in just one county to block thinning projects that sought to protect the Northern Spotted Owl habitat that had been destroyed by fire.[128] In addition, a lawsuit filed by one group led to a federal court order last year that could block state allocation of existing water rights.[129]

Even efforts by federal agencies to streamline the ESA consultation process for federal fire management plans have been challenged by environmentalists. In 2003, the Forest Service, Bureau of Land Management, FWS, the National Park Service, the Bureau of Indian Affairs and NMFS issued joint regulations that would expedite National Fire Plan actions not likely to adversely impact critical habitat.[130] The Defenders of Wildlife and other groups filed suit under ESA, and a federal district court first upheld the regulations, and then reversed itself.[131]

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[125] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dan Ashe, U.S. Fish and Wildlife Service, at 1).

[126] The other 40 cases included criminal cases, defensive cases not within the purview of the Wildlife Section, and 6 affirmative cases.

[127] Citizen suits are discussed below at section

[128] *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep Jeff Duncan, Member, H. Comm. on Natural Resources, at 32).

[129] The Aransas Project v. Shaw, 930 F.Supp.2d 716 (5th Cir. 2013) (issuing injunction requiring Texas Commission on Environmental Quality to apply for incidental take permit that would lead to development of Habitat Conservation Plan, potentially abrogating state allocation of water).

[130] 68 Fed. Reg. 68254 (2003).

[131] *Defenders of Wildlife, et.al. v. Salazar,* Case No. 04-1230, Feb. 6, 2012.

Furthermore, the number of petitions to list has greatly proliferated from an average of 20 petitions from 1994 to 2006 to more than 1,200 since 2009.[132] While FWS states the mega-settlements have helped them manage the workload, it acknowledged the settlements have not stopped the CBD, WildEarth Guardians or other litigious groups from filing even more petitions or ESA lawsuits since the settlements, and indeed they have done just that.[133]

Settlements Not Transparent, Set Arbitrary Deadlines

In response to document requests by both House Members and Senators relating to the mega-settlements, the Department of the Interior has refused to disclose adequate information, claiming that federal court rules prohibit them from disclosing "any written or oral communication made in connection with or during any mediation session."[134] The Department of Interior also acknowledged that the settlement agreements require the federal officials to meet annually to review the status of the settlements with the environmental groups, but that these meetings are closed to the public.[135] States have voiced concerns that the Interior Department failed to consult with them prior to entering into ESA settlements with litigious groups, and this hampers their own planning and resource priorities.[136] The federal courts approving the settlements retain jurisdiction over the process until at least 2018, thereby binding future FWS officials to follow the requirements set by these two settlements. The FWS itself cannot change any of the terms of the settlements (i.e. extending a deadline for rulemaking, amendments due to new information or data) without first obtaining the consent of the litigating plaintiffs.[137]

Some groups deny that "sue and settle" is a problem at all and believe batch listings like those agreed to in the mega-settlement are actually more efficient than listing species one

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[132] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (statement of Rep. Chris Stewart, Member, H. Comm. on Natural Resources, at 54).

[133] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Cynthia Lummis, Member, H. Comm. on Natural Resources, at 39-40).

[134] *Spending for the National Oceanic and Atmospheric Administration, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2013 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 112th Cong. (2012) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service).

[135] *Id.*

[136] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tyler Powell, State of Oklahoma, at 47).

[137] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 5).

by one, because it helps them work quicker to get them on the list.[138] Yet, in 2011, the FWS Director requested the House Interior Appropriations Subcommittee to cap the amount the FWS could spend to process ESA petitions, acknowledging it would help them manage endangered species more effectively.[139]

Local jurisdictions are concerned that FWS is short-changing transparency and confirming best available science to meet settlement deadlines. In western Washington, the FWS included a deadline of December 2013 to make listing determinations for six sub-species of gophers as part of the settlements, yet is refusing to utilize genetic science and data in another part of the country that led to a decision not to list gopher subspecies.[140] Moreover, the FWS refused a local Chamber of Commerce Freedom of Information Act request to view data and results from a federal study justifying the western Washington listing decision.[141]

Settling Groups Receive Tax-Payer Funded Attorneys' Fees

According to a 2012 GAO Report of cases brought against the Departments of Agriculture ("USDA") and the Interior between 2000 and 2010, the ESA was the third most expensive and litigious statute for the USDA (costing taxpayers $1.63 million in attorneys' fees and costs), and the most expensive and litigious statute for the entire Interior Department (costing the taxpayers $22 million in attorneys' fees and costs).[142]

According to information provided by the Justice Department, the CBD was responsible for 117 ESA lawsuits filed against the federal government between October 2009 and April 2012.[143] WEG had the second highest with 55 ESA cases, and the Sierra Club and Defenders of Wildlife were fighting for third place with 30 and 29 filed ESA cases, respectively (see Figure 1).

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[138] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Patrick Parenteau, Vermont Law School, at 32).

[139] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Cynthia Lummis, Member, H. Comm. on Natural Resources, at 39).

[140] 78 Fed. Reg. 220 at 68,660 (2013).

[141] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (submission for the record of Thurston County, Washington).

[142] GAO-12-417R, Report to Congressional Requesters; Subject: Limited Data Available on USDA and Interior Attorney Fee Claims and Payments, U.S. Government Accountability Office, 28-30 (2012).

[143] This number includes all cases open in DOJ's case management system between October 2009 and April 2012. Some of the cases were opened prior to 2009, and were closed prior to 2012 but the case management system included all cases open in the time range.

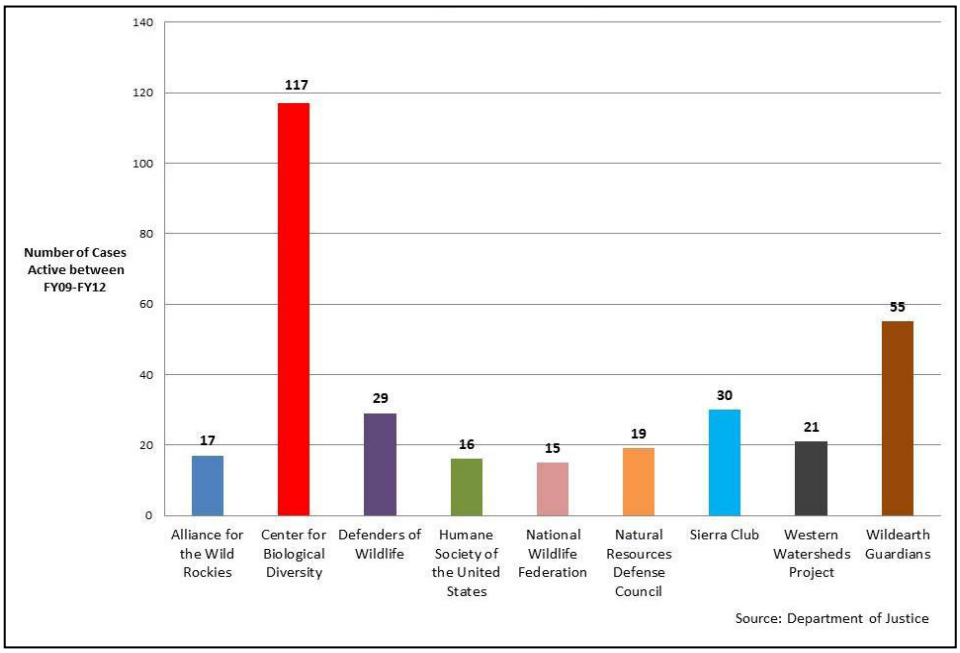

Figure 1. Number of Active Federal ESA-related Cases Brought by Non-Governmental Entities, FY 2009-12.

For all of these cases, DOJ acknowledged there is no accounting available for the amount of federal funds spent to pay the DOJ, the Department of the Interior or other federal agency attorneys assigned as subject matter experts on each of these cases, or the administrative costs associated with engaging in settlement discussions for these cases. Also, according to a 2012 Government Accountability Office (GAO) report, most federal agencies within the Departments of the Interior and Agriculture do not keep detailed records of the litigation, including the cases where they are required to pay attorneys' fees, or even the type of the cases that involve particular statutes such as the ESA.[144]

Because there is no statutory requirement to maintain this information, the House Natural Resources Committee was told that DOJ and other departments do not keep records of these expenditures. DOJ did track some payments to organizations for attorneys' fees and court costs. A graph representing the top 15 payees of attorney fees for ESA litigation between fiscal year 2009 and fiscal year 2012 is shown below.

[144] GAO-12-417R, Report to Congressional Requesters; Subject: Limited Data Available on USDA and Interior Attorney Fee Claims and Payments, U.S. Government Accountability Office, 9 (2012).

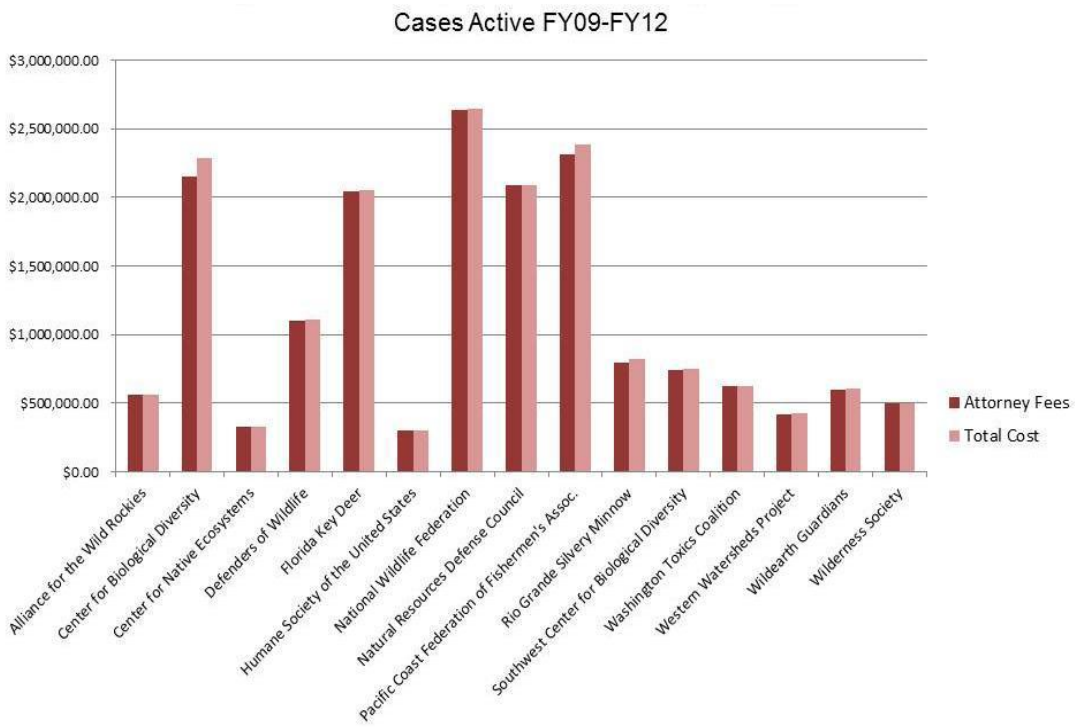

Figure 2. Non-Governmental Entities' Receipts of Federal Attorneys' Fees on ESA-related Cases, FY2009-12. Source: Department of Justice.

As Figure 2 illustrates, several organizations filing "citizen suits" have received millions of dollars in attorneys' fees from the federal government. According to DOJ documents, ESA has cost American taxpayers more than $15 million in attorneys' fees alone – in just the past four years. These groups – and their lawyers – are making millions of taxpayer dollars by suing the federal government, being deemed the "prevailing party" by federal courts, and being awarded fees either through settlement with DOJ or by courts.

According to the documents provided by DOJ, some attorneys representing non-governmental entities have been reimbursed at rates as much as $500 per hour, and at least two lawyers have each received over $2 million in attorneys' fees from filing ESA cases. With regard to the mega-settlements, according to documents filed in the case, taxpayers are on the hook for $128,158 in attorneys' fees to the CBD[145] and $167,602 to WildEarth Guardians.[146]

An expert who testified before the House Natural Resource Committee calculated the estimated process-related costs to taxpayers associated with the "mega-settlements" using

[145] *In Re Endangered Species Act Section 4 Deadline Litigation*, 1:10-mc-00377, Feb. 2, 2012, MDL Dkt. No. 2165, Document 65.
[146] *In Re Endangered Species Act Section 4 Deadline Litigation*, 1:10-mc-00377, Feb. 2, 2012, MDL Dkt. No. 2165, Document 66.

the median administrative cost for the federal government to prepare and publish ESA-related rules and notices in the *Federal Register*, would be over $206 million.[147]

FWS acknowledged that these ESA-related attorneys' fees have already been paid from the Judgment Fund, which does not place a cap on the amount of hourly fees that attorneys may receive. The U.S. Chamber of Commerce recently reported that between 2009 and 2012, a total of 71 lawsuits were settled under circumstances that can be categorized as "sue and settle," and have resulted in more than 100 new federal rules, many of which are major rules with compliance price tags of more than $100 million annually.[148]

The Equal Access to Justice Act ("EAJA"), enacted in 1980, allows the award of attorneys' fees in suits by or against the United States in two situations: (1) where the prevailing party would be entitled to attorneys' fees under common law, and (2) in all civil actions brought by or against the United States unless the federal government proves that its position was "substantially justified," or that special circumstances made an award unjust.[149] EAJA was intended to provide the financial means for individuals and small businesses to seek judicial redress when harmed by the federal government. The law set several hurdles to ensure that taxpayer reimbursement of attorneys' fees is kept in check.

For example, the law makes individuals with a net worth of over $2 million, and for profit businesses with a net worth of over $7 million ineligible for EAJA reimbursement. However, the law sets no such cap on non-profit organizations. The effect is large, deep-pocketed environmental groups with annual revenues well over $100 million are reaping taxpayer reimbursements from a law intended for the "little guy." Additionally, while there is a loose fee cap of $125 per hour embedded in EAJA, environmental attorneys routinely argue that their legal expertise is "specialized" and just as routinely avoid the $125 fee cap. As a result, environmental legal shops can and do charge the taxpayer upwards of $300, $400, even $500 per hour using a law written for those who have no legal shops at all.[150]

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[147] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Before the H. Comm. on Natural Resources*, 112th Cong., Dec. 6, 2011 (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., 6).

[148] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 4).

[149] 5 U.S.C. §504 and 28 U.S.C. §2412(d); *see also* Henry Cohon et al., Cong. Research Serv., Awards of Attorneys' Fess by Federal Courts and Federal Agencies, Order Code 94-970 (2008).

[150] Henry Cohon et al., Cong. Research Serv., Awards of Attorneys' Fess by Federal Courts and Federal Agencies, Order Code 94-970 (2008). See also: Lowell E. Baier, *Reforming the Equal Access to Justice Act,* Journal of Legislation, Notre Dame Law School, Vol. 38 (2012).

Unlike EAJA, the ESA has no restriction that attorneys' fees be paid only to prevailing parties, and no limit to the amount of attorneys' fees that can be awarded. In determining attorney fees for ESA cases, the courts use a lodestar approach in setting the rate of fees – determining the number of hours reasonable expended multiplied by a reasonable hourly rate. Courts have determined that a reasonable hourly rate takes into account "the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[151] This approach allows exorbitant attorneys' fees rates paid by large private sector corporations to be imposed by courts for litigious groups acting in the "public interest," and reimbursed by the taxpayers.

In addition to the lucrative source of federally-funded attorneys' fees, several of the most litigious environmental groups have also been rewarded federal grants by the very federal agencies they sue. During the Obama Administration, according to the FWS, the Defenders of Wildlife was awarded three grants totaling $25,000, WEG was awarded two grants totaling $100,000 and the National Wildlife Federation was awarded 11 grants totaling $376,106.[152] Money is fungible, and these organizations, as a result of these federal taxpayer-funded grants, have been afforded more available resources to target lawsuits against federal agencies.

Deadline Lawsuits on Process Not Substance

In addition to filing lawsuits, litigious groups have filed increasing numbers of petitions under the ESA, seeking to list species as endangered or threatened under the Act. Under the Act, the FWS or NMFS must make a finding within 90 days of receiving a petition as to whether there is "substantial information" indicating whether the petitioned listing may be warranted.

After this 90 day finding, there are many statutorily prescribed deadlines and decisions that the agency must make regarding each petition.[153] While the statute may be well-intentioned in formulating a timeline for agency decision making, special interest groups

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[151] *Conservation Law Found. of New England, Inc. v. Watt*, 654 F. Supp. 706 (D. Mass 1984).

[152] *Spending for the National Oceanic and Atmospheric Administration, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2013 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 112th Cong. (2012) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service).

[153] Decisions to be made include "substantial information" or "not substantial information" that the listing may be warranted, a 12-month finding from the date of the petition or statue review that can either be "not warranted finding," "warranted finding," or "warranted but precluded finding." Depending on the finding, there is an additional timeframe (60 days) for additional decisions to be made whether to list the species, and additional timelines for publishing information in the federal register, only to then require a decision of whether critical habitat should be designated for the species – which has its one timelines and decision trees.

attempting to list hundreds of species at a time was not what was intended and serves only as a vehicle for an award of attorneys' fees, as the deadlines become impossible to meet.

Even proponents of current implementation of ESA will admit that mega-petitions and endless lawsuits do not serve the purpose of the statute. Mr. Gary Frazer, FWS's assistant director for the Endangered Species Program recently conceded that these "mega-petitions" can be problematic. When asked about CBD's July 10, 2012 petition to list 53 amphibians and reptiles, Frazer stated, "[w]e're a field-based organization. The people that have expertise in these species are going to be scattered across the whole country. Just the coordination required within that initial review is a substantial effort."[154] Frazer earlier stated, "[t]hese mega-petitions are putting [the FWS] in a difficult spot, and they're basically going to shut down our ability to list any candidates in the foreseeable future."[155]

These multi-species petitions are filed without regard to the ability of FWS and NMFS to actually complete the task requested. In fact, it appears as though it is precisely because these agencies will be unable to complete the requested task that the suits are filed – thereby guaranteeing a "successful" decision and a likely award of attorneys' fees.

Documents received by the House Natural Resources Committee from the FWS show the incredibly broken system, with environmental groups filing notices of intent to sue if the government does not make species-specific findings on more than 400 species within a three month time-frame. In one example, Forest Guardians (the predecessor organization to WEG) submitted a petition to FWS in June 2007 to list 569 species. By October 2007, the Service had "only" listed 94. Forest Guardians threatened a lawsuit if FWS if it did not make the required ESA 90-day finding on their 475-species listing petition within sixty days.[156]

For the four years leading up to the mega-settlements, the FWS received petitions to list more than 1,230 species,[157] with dozens of Notices of Intent to sue based on the ESA. These petitions often number thousands of pages in length.

Witnesses have testified that timeframes provided currently under ESA are not feasible, and that groups are litigating not over whether a species ought to be listed, but that the

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[154] Helen Thompson, *Citizen provision found beneficial to US Endangered Species Act*, Nature News Blog, Aug. 16, 2012.
[155] Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. Times, Apr. 20, 2011.
[156] A Petition to List All Critically Imperiled or Imperiled Species in the Southwest United States as Threatened or Endangered Under the Endangered Species Act, Forest Guardians, June 18, 2007.
[157] Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. Times, Apr. 20, 2011.

federal government can't comply with rigid 90-day or 12-month timeframes set by ESA.[158] As a result of FWS' focus on listings, others have complained that opportunities for public comment and engagement, and accessibility to scientific data supporting significant ESA proposals have been short-changed, often with the federal agencies citing deadlines from the mega-settlement as the excuse.[159]

What are the Roles of State, Tribal and Local Governments and Private Landowners in Recovering Species?

Working Group Conclusion: ESA shuts out states, tribes, local governments, and private landowners not only in key ESA decisions but in actual conservation activities to preserve and recover species.

States and Local Government Not Involved in Decisions to Accept Petitions to List or in Settlements with Litigious Groups

The ESA includes a specific section that was intended to ensure a prominent role for states in species conservation and recovery. Section 6(a) of the ESA contemplates conservation of species that involves a strong federal-state partnership, and provides that "in carrying out the program authorized by the Act, the Secretary *shall cooperate to the maximum extent practicable* with the States."[160] However, the bipartisan Western Governors' Association, representing 22 states and American Samoa, has raised concerns that states' role of species management under ESA and its current implementation "is largely optional and has been provided by the federal government inconsistently."[161]

One state official testified that the FWS' handling of settlements and responses to listing petitions has not been conducive to state participation.[162] Once a federal listing occurs, states and local entities note that the federal government takes over all coordination of the species and related activities.[163] However, even a well-intended cooperative agreement to

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[158] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (statement of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 50).

[159] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tom Jankovsky, Garfield County, Colorado, at 59).

[160] Endangered Species Act | Section 6, U.S. Fish and Wildlife Service.

[161] Endangered Species Act Policy Resolution 13-08, Western Governors' Association.

[162] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Jerry Patterson, State of Texas, at 30).

[163] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tyler Powell, State of Oklahoma, at 50).

consolidate two permitting processes into one between a state and the FWS, utilizing section 6 of ESA,[164] was threatened with a 60-day Notice of Intent to sue.[165] Heralded as the "first of its kind" by the Florida Commission's Executive Director and the FWS Regional Director, and viewed as "a positive step forward…freeing up resources to better conserve this state's treasured fish and wildlife,"[166] the agreement was targeted for lawsuit by the CBD and the Conservancy of Southwest Florida.[167]

States and Local Governments are often at Odds with Federal Government on Management/Conservation Priorities within their own Borders

Representatives of states have testified on multiple occasions that states are best equipped to manage resources within their own boundaries,[168] and that federal plans can complicate species conservation because they are often inconsistent with state and local plans.[169] States, tribal and local governments are devoting hundreds of millions of dollars annually in on-the-ground species protection actions, and are leveraging those funds with private conservation efforts. For example, the State of Texas has in place nearly 8,000 wildlife management plans covering 30 million acres of privately-owned land in the state.[170] At the same time, litigious groups are devoting little to on-the-ground species conservation or recovery.[171]

The goal of these efforts is to manage species at the state level without the need for a federal ESA listing, and to ensure better cooperation. In June 2012, the FWS reversed its earlier determination to list the Dunes Sagebrush Lizard as endangered, following approval

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[164] Cooperative agreement between U.S. Fish and Wildlife Service and Florida Fish and Wildlife Conservation Commission, May 14, 2012.

[165] Letter from Jason Totoiu, General Counsel, Everglades Law Center, to Ken Salazar, Secretary, U.S. Department of the Interior; Dan Ashe, Director, U.S. Fish and Wildlife Service; Cindy Dohner, Southeast Regional Director, U.S. Fish and Wildlife Service (Mar. 28, 2013).

[166] Nick Wiley and Cindy Dohner, *Column: Joining forces to protect Florida fish, wildlife*, Tampa Bay Times, Apr. 11, 2013.

[167] Press Release, Illegal Delegation of Federal Permitting Authority to State Weakens Endangered Species Act in Florida!, Center for Biological Diversity; Conservancy of Southwest Florida (2013).

[168] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (testimony of Tyler Powell, State of Oklahoma, at 9).

[169] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (statement of Tyler Powell, State of Oklahoma, at 61).

[170] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Ross Melinchuk, Texas Parks and Wildlife Department, at 1).

[171] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Steve Ferrell, State of Wyoming, at 68-69).

of the Texas-developed State Conservation Plan, which allowed for adaptive management to protect both the lizard and the state's economic activities in an area that produces fourteen percent of the nation's oil, and 47,000 jobs.[172] Not satisfied with this, CBD and Defenders of Wildlife sued the FWS, forcing the State of Texas Comptroller to seek permission in federal district court to intervene in the lawsuit just to defend the state's own conservation plan and the determination that an ESA listing of the lizard was not warranted.[173]

It would seem that a clear reading of section 6 would lead to promoting examples where states and the federal government can effectively manage ESA-listed species cooperatively. However, last year, a state's attempt to negotiate cooperative agreements with the FWS under section 6 to improve species management and streamline permitting processes, resulted in a lawsuit by CBD and other groups.[174] States view this as a "huge chilling effect" for other states and private landowners desiring to enter into agreements for constructive conservation without being sued.[175]

Since states are often developing more current and better data than federal agencies for species conservation, they also are developing their own defensible recovery goals and plans for species, and in certain cases, doing so because the federal agencies failed to do it.[176]

Recent appropriations language directed federal agencies to use state wildlife data and analyses "as a principle source" to inform their land use, land planning and related natural resource decisions, to not duplicate analysis of raw data previously prepared by the states, and that federal agencies should provide their data to state wildlife managers to ensure that the most complete data is available to be incorporated into all decision support systems."[177] This action would help address concerns that significant federal ESA decisions lack sufficient or unjustified data.

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[172] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Roger Marzulla, Marzulla Law LLC, at 7).; 77 Fed. Reg. 26,872 (June 2012).

[173] Neena Satija, *Judge Allows Comptroller to Intervene in Lizard Lawsuit,* The Texas Tribune, Nov. 7, 2013.

[174] Press Release, Illegal Delegation of Federal Permitting Authority to State Weakens Endangered Species Act in Florida!, Center for Biological Diversity; Conservancy of Southwest Florida (2013).

[175] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Steve Ferrell, State of Wyoming, at 77).

[176] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2012) (statement of Kent Holsinger, Holsinger Law, LLC, at 42).

[177] H.R. Rep. No. 113-, at 13.

In addition to states' concerns about federal ESA implementation, local counties similarly are legitimately concerned that FWS and NMFS are ignoring clear statutory requirements to coordinate and resolve inconsistencies with counties' plans and ensure public involvement on ESA actions that impact county and tribal land use.

For example, Section 202(c)(9) of the Federal Land Policy Management Act requires the Secretary of the Interior:

> "to coordinate . . .with the land use planning and management programs of. . . the States and local governments" and "shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between federal and non-federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-federal lands."[178]

Nine Colorado counties have developed their own local sage grouse habitat plans and have sought the federal agencies' to coordinate and reconcile their locally-developed maps and data. They remain concerned both that the BLM has refused to resolve clear policy differences between the federal and local plans, and that ultimately, the FWS will impose a "one size fits all" habitat model that is highly restrictive and does not match their own plan for sage grouse.[179] One county official testified that his rural Washington county was forced to file formally for legal recognition as a "cooperating agency" to ensure the Forest Service and FWS consulted with them on their habitat plans for listed spotted owl.[180]

In an example where the rush to meet mega-settlement deadlines can lead to errors and poor consequences for local governments and private landowners, the FWS failed to properly notify a local county and private landowners on a proposal to list a plant subspecies, including designation of over 400 acres of private irrigated farmland. The FWS was forced to seek permission from the CBD to amend the original settlement deadline to list, and refused to further study DNA data provided to them which completely

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[178] 43 U.S.C. 1712 , Sect. 202(c)(9).

[179] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Tom Jankovsky, Garfield County, Colorado, at 38).

[180] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Paul Pearce, Skamania County, Washington, at 8).

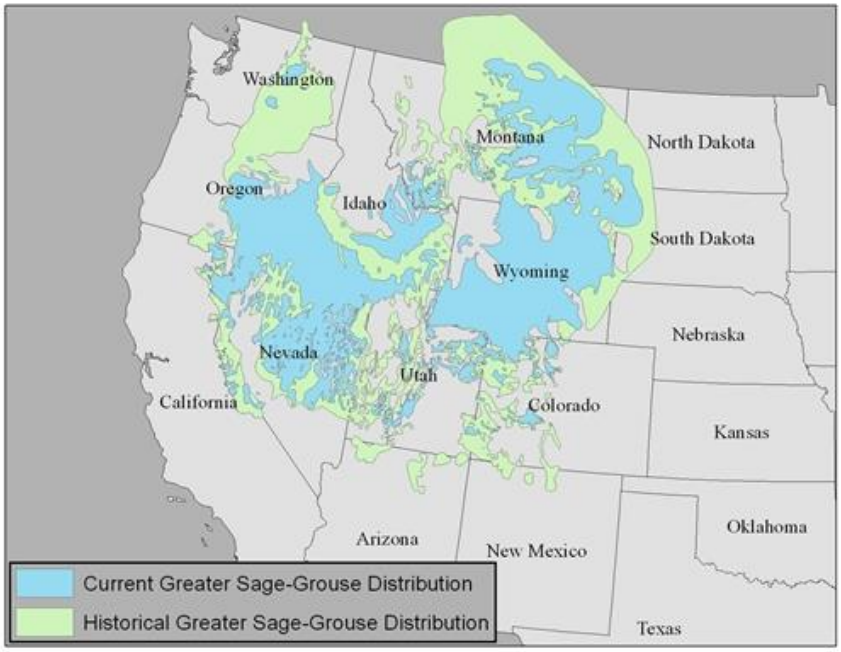
contradicted the FWS' science in its ESA listing. The FWS nevertheless proceeded to list the plant within the settlement deadline.[181]

Case Studies:

The Greater Sage Grouse

Perhaps the most prominent and likely most sweeping potential listing under the mega-settlements is the Greater Sage Grouse (GSG). The GSG is found in Washington, Oregon, Idaho, Montana, North Dakota, California, Nevada, Utah, Colorado, South Dakota and Wyoming. Listing the GSG would directly impact land management, economies and domestic energy supplies and production in these states.

Litigious environmental groups, through numerous lawsuits dating back to 2003, have sought federal ESA protection for the greater sage-grouse for years.[182] Between 1999 and 2003, environmental groups filed eight petitions to list the GSG. FWS responded with a finding in 2005 that an ESA listing was "not warranted." Five lawsuits against the FWS were filed in multiple courts challenging FWS' determination.[183]



Source: Bureau of Land Management

In 2010, FWS reversed its determination, finding that an ESA listing of sage grouse was "warranted, but precluded" by higher priority species activities. On March 8, 2010, three days after the FWS's announcement, the Western Watersheds Project (WWP) filed a lawsuit challenging the government's decision to

[181] Geoff Folsom, *Bladderpod to be listed as protected species on federal lands*, Tri-City Herald, Dec. 19, 2013.; *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Kent McMullen, Franklin County Natural Resources Advisory Committee, at 21).
[182] *American Lands Alliance, et.al. v. Norton, et.al.,* 242 F. Supp. 2d 1 (2003).
[183] Overview of the Greater Sage-Grouse and Endangered Species Act Activities, U.S. Fish and Wildlife Service.

not list the GSG.[184] On June 28, 2010 the WWP, the CBD and WEG filed an amended complaint to force the agency to promptly publish a proposed ESA listing for the GSG.[185] Then, as part of the May 2011 "mega settlement" with WEG, the FWS agreed to review the ESA status of hundreds of candidate species, including the GSG. The settlement stipulates that FWS review and make a listing determination for the GSG no later than 2015.[186]

A GSG listing would likely harm economies throughout the West. The potential impact of a sage grouse listing is so great that it has caused at least one industry group to refer to it as "the spotted owl on steroids."[187] Most areas where sage grouse have been identified are managed by the BLM, which is required by federal law to manage these areas for "multiple use and sustained yield".[188] A study by the Policy Analysis Center for Western Public Lands found that, "[p]ublic land is an important seasonal source of forage for western ranches. Thus, eliminating BLM grazing to improve habitat for sage grouse would have a significant impact on the economic viability of affected ranches."[189] Additionally, earlier this year, the BLM announced it was delaying for two years a decision whether to approve a wind project that would cross 30,000 acres of BLM-owned land.[190]

In a FWS' press release issued prior to the mega-settlement, Interior Secretary Ken Salazar stated: "we must find common-sense ways of protecting, restoring, and reconnecting the Western lands that are most important to the species' survival while responsibly developing much-needed energy resources. Voluntary conservation agreements, federal financial and technical assistance and other partnership incentives can play a key role in this effort."[191] Efforts by states to conserve the GSG also predate the mega-settlement and go back as far as 2008.[192] Several western states have subsequently embarked on range-wide efforts to protect sage grouse habitat in an effort to avoid federal

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[184] *Western Watersheds Project v. U.S. Fish and Wildlife Service,* No. 06-cv-277-BLW (D. Idaho Mar. 8, 2010).
[185] *Western Watersheds Project et al v. U.S. Fish and Wildlife Service*, No. 10-cv-229-BLW (D. Idaho June 28, 2010).
[186] *In re Endangered Species Act Section 4 Deadline Litigation*, Stipulated Settlement Agreement, MDL Docket No. 2165 (May.10, 2010).
[187] *Effect of the President's FY 2013 Budget and Legislative Proposals for the Bureau of Land Management and the U.S. Forest Service's Energy and Minerals Programs on Private Sector Job Creation, Domestic Energy and Minerals Production and Deficit Reduction: Hearing Before the Subcomm. on Energy and Mineral Res. Of the H. Comm. on Natural Resources*, 112th Cong., (2012) (written testimony of Laura Skaer, Northwest Mining Association, at 8).
[188] Pub. L. No. 94-579.
[189] L. Allen Torell, *Ranch-Level Impacts of Changing Grazing Policies on BLM Land to Protect the Greater Sage-Grouse: Evidence from Idaho, Nevada and Oregon*, Policy Analysis Center for Western Public Lands.
[190] Scott Streater, *In Idaho, sage grouse vs. major wind project is no contest*, E&E News, Mar. 9, 2012.
[191] News Release, U.S. Department of the Interior, *Interior Expands Common-Sense Efforts to Conserve Sage Grouse Habitat in the West* (Mar. 5, 2010).
[192] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (testimony of Steve Ferrell, State of Wyoming, at 35).

listing.[193] The investment of time and resources at the state level has been considerable and according to one state wildlife manager, amounts to "numbers that we have never seen before in my profession being committed by a State to a single species."[194] Nonetheless, despite former Secretary Salazar's comments and because of the looming "mega-settlement" deadline, these state efforts still face the uncertainty of a listing that could undermine state efforts to conserve the GSG and discourage similar state efforts in the future.[195]

State-led conservation efforts also face uncertainty as the BLM and FWS pursue of GSG-related regulatory actions in anticipation of the mega-settlement deadline. In fact, the BLM issued internal regulatory memoranda that threatened to severely restrict activities through 79 BLM Resource Management Plans affecting nearly 250 million acres.[196] Areas identified as "priority" or "critical" habitat for sage grouse could delay or completely shut down mining, timber, grazing, energy development, and other activities in millions of acres in the interior West.[197] In addition, BLM issued a December 2011 National Technical Team (NTT) report advocating stringent GSG habitat protections throughout its range in the eleven states.[198]

One of the main contributing factors listed by FWS for the decline of GSG populations is wildfire destruction of sagebrush habitat. The BLM has noted that "Wildfires are a leading cause of sagebrush loss."[199] Land managers throughout the west are concerned that habitat loss to wildfire could push a sage-grouse listing. Nevada State Forester Pete Anderson recently stated, "Virtually every time we're getting a fire we're getting some impact to sage-grouse habitat."[200] Ironically, ESA litigation, as noted earlier has, in many cases, contributed to the poor forest health conditions that create greater risk of wildfire.

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[193] *Id* at 35-36.

[194] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (statement of Steve Ferrell, State of Wyoming, at 68).

[195] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (testimony of Steve Ferrell, State of Wyoming, at 36).

[196] Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 22, 2012); *See also* Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 27, 2012).

[197] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kent Holsinger, Holsinger Law, LLC, at 28).

[198] Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 27, 2012).

[199] BLM Fire and Aviation, Sage-grouse Conservation Efforts, U.S. Bureau of Land Management.

[200] Jeff DeLong, *Big fire season further threat to Nevada's sage grouse habitat*, Reno Gazette Journal, July 6, 2012.

Recently, the Governor of Colorado, in a letter to the BLM,[201] raised concerns over measures included in the NTT and advocated his own state's plan for conserving GSG over a "one size fits all" approach.[202] The NTT Report has generated criticism, not only from states that have complained the report would setback to sage grouse conservation,"[203] but from other scientists.[204]

According to peer review of the NTT Report conducted prior to its release, it does not represent the "best available science;" imposes "one-size-fits-all" regulatory prescriptions; and includes a number of invalid assumptions, mischaracterization and misrepresentation of sources; omission of existing programs that benefit GSG, and injection of personal opinion over science; contains unachievable measures; and is inconsistent with agency multiple-use regulations.[205] The NTT Report also fails to adequately address the main threats to GSG: fire and invasive species.[206] One peer reviewer stated the report "seems a strange blend of policy loosely backed by citations, with no analysis of science," and that requirements called for in the report appear not to have any "rational scientific basis."[207] Other industry interests have noted that the NTT Report has been used to justify four-mile buffers around areas it identifies as "leks," a standard that could shut down access to large swaths of economic and energy activities in the interior west.[208]

Turning to the FWS, the agency created a "Conservation Objectives Team" (COT), made up of federal and state technical advisors, who released a Report in March 2013 designed to encourage states, local and private landowners "to take conservation action," such as "modifying or amending regulatory frameworks to ensure the long-term conservation of the species by avoiding, minimizing, or mitigating the threats to the species."[209] The COT Report has also drawn criticism from many in that it does not include any independent

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[201] John Stroud, *Governor urges consideration of local sage-grouse alternative*, The Post Independent, Jan. 15, 2014.

[202] Valerie Richardson, *Colorado governor: Interior bureaucrats biased on species issue*, The Washington Times, Nov. 25, 2013.

[203] Letter from James Douglas, President, Western Association of Fish and Wildlife Agencies, to Sally Jewell, Secretary, The Department of the Interior (May 16, 2013).

[204] Dorothy Kosich, *NWMA study challenges BLM sage grouse management report validity*, Mineweb, May 22, 2013.

[205] Megan Maxwell, *BLM's NTT Report: Is it the Best Available Science or a Tool to Support a Pre-Determined Outcome?*, May 20, 2013.

[206] 75 Fed.Reg. 13910 at 13931-4, and *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Megan Maxwell, at 3).

[207] Megan Maxwell, *BLM's NTT Report: Is it the Best Available Science or a Tool to Support a Pre-Determined Outcome?*, May 20, 2013.

[208] Letter from Kathleen Sgamma, Vice President of Government and Public Affairs, Western Energy Alliance, to Sally Jewell, Secretary, The Department of the Interior (Nov. 19, 2013).

[209] Greater Sage-Grouse Conservation Objectives Team Report, U.S. Fish and Wildlife Service.

data or analyses, and omits any accounting for the major causes of decline for the sage grouse, including hunting and drought.[210] In addition, individuals who were tasked with peer reviewing the report received lucrative contracts and grants to study the GSG from the U.S. Geological Service and the FWS, an apparent conflict of interest. Further, the COT Report omitted important scientific studies and failed to use the most current state and local maps.[211]

Despite all of these criticisms, the FWS released proposed rules on October 28, 2013 to list a population of GSG between northwest Nevada and northeast California as threatened, and to designate critical habitat on close to two million acres in parts of three California counties and eight Nevada counties. The FWS is seeking to finalize a separate population of Gunnison sage grouse found in Utah and Colorado by March 2014.

Meanwhile, the BLM, working jointly with the Forest Service, has the stated goals of preparing Environmental Impact Statements to address the effects of implementing proposed GSG conservation measures for all of the states, issuing draft revised Resource Management Plans in Spring 2014, and finalizing these documents in Fall 2014.[212] BLM acknowledges it has rushed to meet deadlines set by the mega-settlements to avoid listing the GSG. The BLM's website states: "Given the tight time frames in which the FWS must make its listing decision, it's crucial that we get this done right and done quickly."[213]

In summary, the GSG is a case study of how the current implementation of the ESA through litigation is not working well for either species or people. While states, local governments, and other private landowners have invested significant resources to conserve the GSG and ensure its population remains healthy, the federal government appears to be reacting to its own ESA settlement deadlines and threats of future litigation, in the meantime basing its decisions on data that has been seriously questioned. The FWS' litigation-driven reversal of its 2005 determination that an ESA listing of GSG was not warranted undermines multiple state and local efforts to protect the sage grouse. In addition, the federal government's failure to manage federal lands at risk of catastrophic wildfires and invasive species that threaten the GSG, is putting the states and their citizens in a 'no win' situation. Further, the GSG is an example of how lack of accessible and transparent data undermines the credibility of federal ESA efforts.

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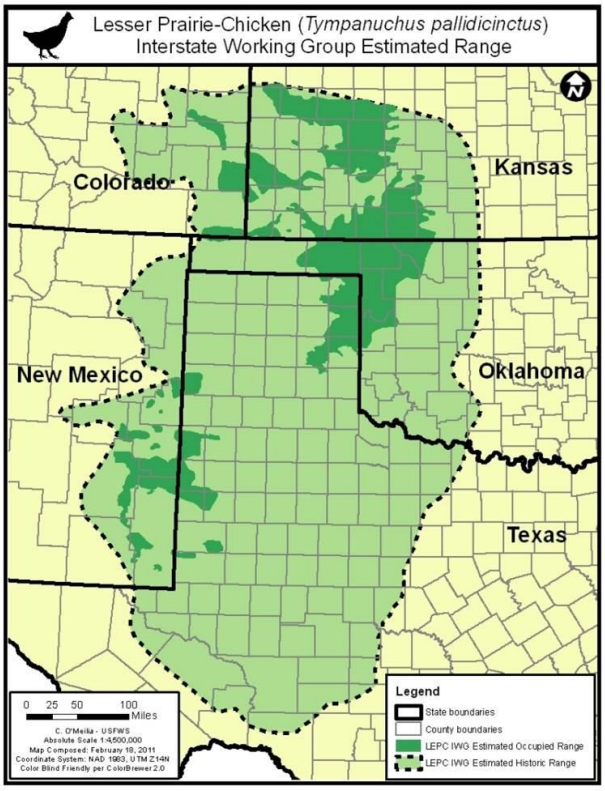
[210] Letter from Kathleen Sgamma, Vice President of Government and Public Affairs, Western Energy Alliance, to Sally Jewell, Secretary, The Department of the Interior (Nov. 19, 2013).
[211] *Id*.
[212] News and Information, U.S. Bureau of Land Management.
[213] Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 27, 2012).

The Lesser Prairie Chicken

The Lesser Prairie Chicken (LPC), found throughout 62,000 square miles on the prairies of Kansas, Colorado, Oklahoma, Texas and New Mexico, is one of the most sweeping listings included in the 2011 mega-settlements.

State fish and wildlife agencies estimate the population in the five-state region has varied over the past twelve years between 37,000 to 84,000.[214] Of the habitat currently occupied by the LPC, 95 percent of that is on privately-owned lands. The FWS attributes the main causes of prairie chicken decline on "overutilization by domestic livestock, oil and gas development, wind energy development, loss of native rangelands to cropland conversion, herbicide use, fire suppression and drought."[215]

In October 1995, the Biodiversity Legal Foundation filed a petition to list the LPC under the ESA, and in 1998, the FWS determined a listing of LPC was "warranted, but precluded by higher priority species."[216] Until 2007, the FWS categorized LPC near the bottom of priority for listing. In 2008, without cooperating with the states, FWS changed the priority status from an "8" (low priority) to a "2" (high priority) due to "increasing and ongoing threats" to the species. In 2010, WEG filed a lawsuit against FWS to force a listing of the LPC, and it was included in the 2011 mega-settlement with provisions requiring FWS to make a determination in Fiscal Year 2012. The FWS subsequently announced a proposal to list the LPC as "threatened" in December 2012, and is slated to make a final determination in March 2014.[217]



Source: U.S. Fish and Wildlife Service

[214] The Lesser Prairie-Chicken Range-Wide Conservation Plan, Western Association of Fish and Wildlife Agencies, Oct. 2013.
[215] Questions and Answers for the Lesser-Prairie Chicken, U.S. Fish and Wildlife Service, July 2012.
[216] 63 Fed. Reg. 110, 31400 (1998).
[217] 77 Fed. Reg. 238, 72828 (2012).

A significant amount of resources has already been devoted at the state level for LPC conservation. A 2012 bipartisan letter signed by over 20 House Members and Senators to the FWS advocating that ESA listing was not warranted for the LPC, pointed out that more than $50 million in conservation, research and other activities had been devoted across the five-state region.[218] For example, the State of Oklahoma has spent over $26 million on lesser prairie chicken habitat conservation, research, land acquisition and development of habitat conservation plans. Oklahoma undertook this effort with the philosophy that conservation should be facilitated by the state, but developed in a cooperative fashion with private landowners, and a coalition of state agriculture, oil and gas, wind energy, and transportation industries that all have a stake and that have a common goal of developing a plan allowing both for species conservation and land use and development.[219]

Similarly, in Kansas, thousands of volunteers and 105 conservation districts in every county have enrolled more than 2.3 million acres in the USDA's Conservation Reserve Program, and private landowners are concerned that a listing of the LPC could actually decrease participation in voluntary programs designed to protect the species.[220] In Texas, the state has over 500,000 acres of land voluntarily enrolled in a "candidate conservation agreement with assurances" (CCAA) for the LPC with the goal of keeping it off the list.[221] Other entities in the affected states have spent significant time and resources on CCAAs to avoid listing have raised concerns that the FWS has indicated these voluntary efforts may not even be considered in its decision whether or not to list the LPC.

This raises concerns that the FWS appears to be giving more deference to litigious groups and settlement deadlines than to the state wildlife agencies that have been doing the studies and on-the-ground work.[222]

The states have been concerned that the FWS' approach of proposing a "4(d) rule" – a provision of ESA that authorizes FWS or NMFS to define what activities are prohibited for

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[218] Press Release, U.S. Senate Comm. On Environment and Public Works, Bipartisan, Bicameral Letter Urges FWS to Make 'Not-Warranted' Decision on Lesser Prairie Chicken (July 17, 2012.)

[219] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (testimony of Tyler Powell, State of Oklahoma, at 8).

[220] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Greg Foley, Kansas Department of Agriculture, at 3).

[221] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Ross Melinchuk, Texas Parks and Wildlife Department, at 2).

[222] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group*, 113th Cong. (2013) (written testimony of Roger Kelley, Continental Resources, at 3).

species listed as "threatened" under ESA[223]-- is premature, since the rule was proposed months before FWS has stated it must make a final decision. Many believe the FWS' proposed 4(d) rule indicates that the FWS has already made up its mind to list the LPC.[224] The states are also concerned that a listing of LPC would result in a loss of the trust relationships they have built with private landowners. A coalition of 32 Kansas counties affected by the potential listing of LPC prepared its own plan and submitted it to the FWS. These counties have objected to the FWS' settlement-driven deadlines to list species without proper coordination with county governments where proposed ESA listings occur.[225]

On October 28, 2013, the FWS "endorsed" the five-state plan, stating the plan "provides a model for State leadership in conservation of a species proposed for listing under the ESA."[226] While some were encouraged that the FWS endorsement could lead to a decision not to list the LPC, the FWS publicly has stated the endorsement "is not a decision…that implementing the plan will preclude the need to protect the lesser prairie chicken under the ESA."[227]

In short, this is another example of the FWS' mega-settlement deadlines driving a sweeping potential listing decision over multiple states' and landowners' good faith efforts to develop data and protect species while also protecting other important economic and private property interests. The FWS' escalating the priority of an LPC listing this year raises questions about how states and private property owners could ever prevent species listings.

The Northern Spotted Owl

The history of the Spotted Owl in the Northwest is a poster child for ESA litigation crippling forest management, costing jobs, and harming communities and species habitat. The Northern Spotted Owl was listed as threatened under ESA on June 26, 1990.[228] This listing and a number of subsequent lawsuits led to mass shutdown of timber harvesting activity in the Pacific Northwest. More than 30 timber sales by the Forest Service and the

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[223] Questions and Answers: Revised Proposed Special Rule for the Lesser-Prairie Chicken, U.S. Fish and Wildlife Service, Dec. 10, 2013.

[224] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (testimony of Tyler Powell, State of Oklahoma, at 9).

[225] Mike Corn, *Counties set to talk chickens*, The Hays Daily News, Nov. 1, 2013.

[226] Press Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Endorses Western Association of Fish and Wildlife Agencies Lesser Prairie-Chicken Range-Wide Conservation Plan (Oct. 23, 2013).

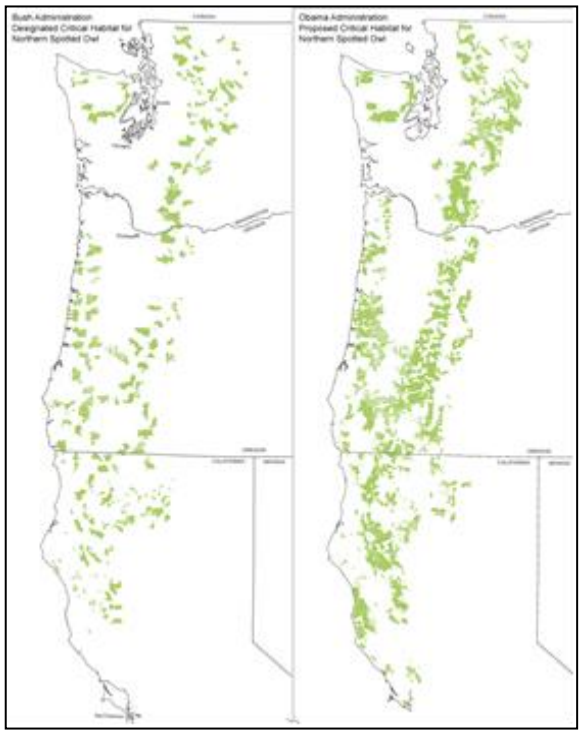
[227] *Id.*

[228] Northern Spotted Owl, U.S. Fish and Wildlife Service.

BLM in Washington and Oregon were blocked shortly after the Northwest Forest Plan became law due to management of the spotted owl.[229]

Mr. Andy Stahl, Executive Director of the Forest Service Employees for Environmental Ethics famously summarized this objective at a 1988 environmental law clinic:

> *"The Northern Spotted Owl is the wildlife species of choice to act as a surrogate for old-growth protection, and I've often thought that thank goodness the spotted owl evolved in the Northwest, for it hadn't, we'd have to genetically engineer it. It's the perfect species to use as a surrogate."*[230]



Comparison of Northern Spotted Owl critical habitat, 2005 vs. 2012.
Source: U.S. Fish & Wildlife Service

Shortly following the listing, the federal government, through the Clinton Administration's Northwest Forest Plan, administratively withdrew nearly 24 million acres of federal land[231] – resulting in no access to nearly 85% of the area available for timber harvest – from active management and restricted harvest levels.[232] As a result, over 400 lumber mills have closed across Oregon, Washington, Idaho, Montana, and California, terminating over 35,000 direct jobs and countless more indirect jobs[233] (timber harvest activity results in approximately 29 indirect jobs for every million board feet of timber harvested). This shift in federal forest management policy directly impacted rural timber-dependent counties and communities that had previously been utilizing timber receipts for schools and roads for decades.

In February 2012, as a result of ongoing litigation, the FWS announced a proposal to revise an earlier agency decision and designate nearly 14 million acres in Oregon,

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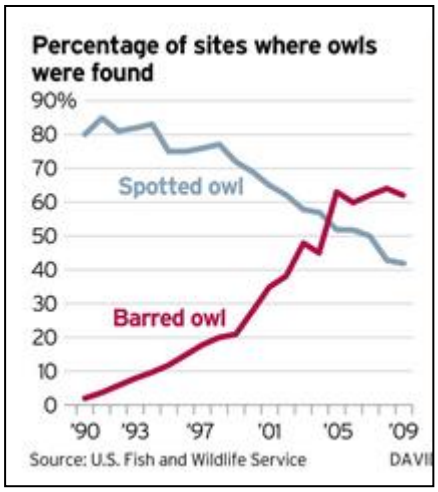
[229] *Oregon Natural Resources Council v. U.S. Forest* Service, 59 F.Supp. 2d. 1085 (W.D. Wash. 1999), the court granted an injunction against 9 timber sales.
[230] Brian E. Gray, *The Endangered Species Act: Reform or Refutation?*, p. 7, 13 Hastings W.-Nw. J. Envtl. L. & Pol'y 1 (2007).
[231] 59 Fed. Reg. 76, (1994).
[232] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2012) (written testimony of Tom Nelson, Sierra Pacific Industries, at 52).
[233] Paul F. Ehinger & Associates, *Summary Description of Mill Closure Data from 1990-2010*, Dec. 15, 2010.



Washington and northern California as "critical habitat" for the Northern Spotted Owl. The proposal would increase areas designated for Northern Spotted Owl habitat by 62% over that designated in the FWS' plan issued in 2008.[234] The entire boundary of one Oregon county is included within the expanded critical habitat designation, yet FWS declined the county's request to enter into a coordination agreement with the federal government on managing the owl.[235]

Ironically, not only has the Northern Spotted Owl populations continued to decline (estimates range the decline as high as 40 percent since 1990), but the Pacific Northwest has also witnessed a dramatic decline in overall forest health. In fire-prone forests, unabated fuel accumulation leads to uncharacteristic wildfires that can ultimately harm listed species, habitat and water quality.

Catastrophic wildfire has now become the major threat to the spotted owl, consuming 87% of habitat lost between 1994 and 2004, while timber harvest attributed to less than two-tenths of one percent. However, the amount of old growth habitat increased by approximately 2% each year over that same timeframe, including all losses. In addition, even the federal government acknowledges that the continued declines in spotted owl populations are not due to forest habitat loss, but rather, the invasion of a larger, predatory species – the Barred Owl.[236]

It would seem that after 20 years, efforts to better manage and reduce fuel buildup in the Northwest's federal forests would be non-controversial given the risk to the Northern Spotted Owl's habitat. However, environmental groups have continued to file lawsuits to block expansions of ski resorts,[237] mining activities,[238] closure of recreational trails,[239] and federal forest management timber thinning projects and sales, including projects designed

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[234] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2012) (written testimony of Stephen Mealey, Boone and Crockett Club, at 25).

[235] Letter from Don Skundrick, Chair of the Jackson County, Oregon Board of Commissioners, to U.S. Department of the Interior (Aug. 17, 2012).

[236] Revised Recovery Plan for the Northern Spotted Owl,I-8, U.S. Fish and Wildlife Service, June 28, 2011.

[237] *Oregon Natural Resources Council v. Goodman*, 505 F.3d 884 (2007).

[238] *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (2012).

[239] Letter from Chris Horgan, Executive Director, Stewards of the Sequoia, to the ESA Working Group (May 9, 2013).

to reduce the risk of catastrophic wildfires that would destroy spotted owl habitat.[240] According to experts that track federal ESA litigation, at least 69 timber or salvage sales were challenged in federal court just between 2008 and 2010.[241]

These lawsuits have also resulted in hundreds of thousands of dollars of attorneys' fees awarded to environmental groups either by court order or through settlement with the federal government. For example, after several years of public process, the BLM released forest management plans in 2008 for western Oregon that would allow for reasonable timber harvests in overgrown areas and areas that are at high risk of catastrophic wildfire. In 2009, more than a dozen environmental groups filed four separate lawsuits to block implementation of the BLM's plans under the ESA and NEPA.[242] The Oregon federal district court, approving the Justice Department's 2009 settlement with the environmental plaintiffs, awarded the plaintiffs $12,500 in attorneys' fees under the Judgment Fund.

The U.S. Forest Service estimates that 60 percent of all national forests in Washington, Oregon, and California have been placed off-limits to harvests as a result of policies relating to the Northern Spotted Owl.[243] This is due largely from litigation and threats of litigation. The trend of paralysis has only intensified under the Obama Administration. Recently, despite a court upholding a Forest Service timber sale in the Gifford Pinchot National Forest, the Forest Service failed to defend the sale when appealed by environmentalists.[244] Timber companies have been forced to turn to states, private lands and even outside of the U.S. for timber supply as a result of the federal forests' small harvests. Though states are managing much smaller amounts of forest lands, they are producing significantly more in receipts than the federal government.[245]

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[240] *See* *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service,* 378 F.3d 1059 (2004); *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147 (2006) (post-fire restoration projects would "have significant negative effects on California spotted owl"); *Oregon Natural Resources Council v. Allen,* 476 F.3d 1031 (2007) (incidental take permit for 75 timber sales on 64,006 acres in Rogue River Basin rendered invalid); *Oregon Natural Resources Council v. Brong,* 492 F.3d 1120 (2007) (BLM timber salvage logging project after forest fire violated NEPA and FLPMA); *Wildlands v. U.S. Forest Service,* 791 F.Supp.2d 979 (Dist. Ct. Ore. 2011).

[241] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (written testimony attachment of Karen Budd-Falen, Budd-Falen Law Offices, LLC.).

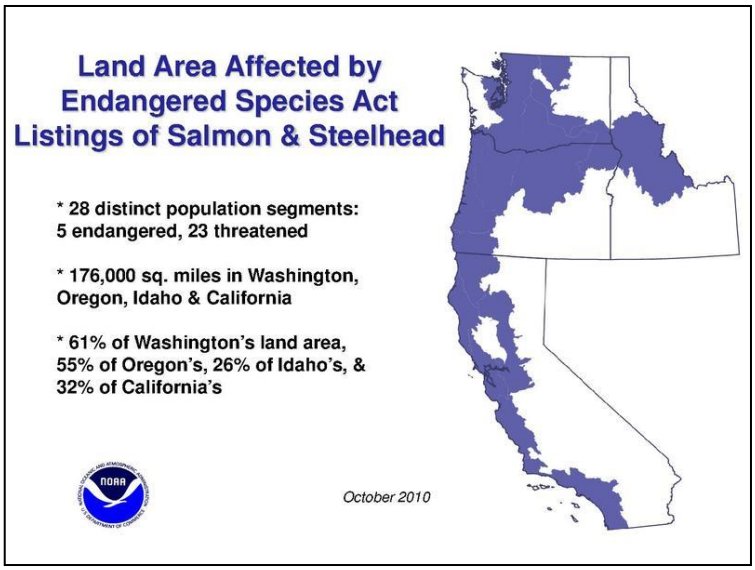
[242] *Oregon Wild, et.al. v. Shepard, et.al.*, (Cause No. 03:09-cv-00060-PK, Dist.Ct. Ore 2009).

[243] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Kent Connaughton, U.S. Forest Service, at 54).

[244] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep. Herrera Beutler, Member, H. Comm. on Natural Resources, at 55).

[245] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep. Doc Hastings, Chairman, H. Comm. on Natural Resources, at 58). For example, Region 6 of the U.S. Forest Service holds in excess of 52 million acres of

Pacific Salmon and Steelhead



Source: National Oceanic and Atmospheric Administration

Another example of how ESA has become a cottage industry for attorneys and an unclear goalpost is NMFS' salmon and steelhead listings. Since 1991, NMFS has listed 28 populations of salmon as endangered in Washington, Oregon, Idaho and California.[246] These listings impact 176,000 square miles—about 61% of the land mass of Washington and 49% of Oregon's—they also impact significant portions of California and Idaho. Because of these listings, NMFS conducted over 1,000 major consultations on a host of projects and activities, which impose significant direct and indirect costs to private entities, and local and state taxpayers.[247]

Despite near-record and record numbers of returning salmon in many areas over the past few years, [248] and even with NMFS' own recent report to Congress that the status of two-thirds of the listed salmon runs are either "stable" or "increasing,"[249] the agency has approved only 9 out of 28 salmon recovery plans.[250] NMFS' most recent required status review of the listings made no changes to downlist or delist any of the 28 species.[251]

Nevertheless, litigious groups have continued filing or threatening lawsuits and appeals relating to ESA salmon implementation, from challenging permitted activities that occur in rivers or adjacent lands to blocking use of salmon hatcheries designed to actually recover

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forest lands, compared to the Washington Department of Natural Resources' 2 million, and sold 575 million board feet to Washington's 550 million board feet.

[246] West Coast Salmon and Steelhead Listings, National Oceanic and Atmospheric Administration.

[247] Public Consultation Tracking System, National Oceanic and Atmospheric Administration.

[248] AP, *Fall chinook salmon run on Columbia River largest in decades*, The Oregonian, Sep. 14, 2013; Quinton Smith, *Sockeye salmon run sets record for Columbia River*, The Oregonian, Aug. 1, 2010; Ben Romans, *Record Numbers Of Chinook Salmon Are Running Up The Columbia River*, Field and Stream, Oct. 10, 2013; Adam Spencer, *Record Salmon Run Expected*, Del Norte Triplicate, Aug. 15, 2012.

[249] ESA Biennial Report to Congress, National Oceanic and Atmospheric Administration.

[250] Salmon Recovery Plans and Supporting Documents, National Oceanic and Atmospheric Administration – West Coast Region.

[251] National Oceanic and Atmospheric Administration – West Coast Region.

them, to federal agencies' failure to properly consult on registration of crop protection products, to removing or breaching dams.

Most prominent of these is litigation, beginning in 1998, governing the operation of several federal hydropower dams on the Columbia and Snake Rivers.[252] The Columbia River basin is North America's fourth largest, draining about 250,000 square miles and extending throughout the Pacific Northwest and into Canada. There are more than 250 reservoirs and about 150 hydroelectric projects in the basin, including 18 mainstem dams on the Columbia and Snake Rivers. [253]

These lawsuits and the resulting federal ESA mitigation actions have taken a significant toll on Northwest energy output, and have provided encouragement to certain groups that seek to remove four federal dams in the lower Snake River. According to some Northwest power customers, over an average of 1,000 megawatts (or enough electricity for one million homes) has been lost due to ESA lawsuits and mitigation. Over the past decade, Northwest electricity ratepayers have paid an average of $750 million per year in indirect and direct costs associated with complying with endangered salmon requirements. In the coming year, the Bonneville Power Administration's fish and wildlife program, which is largely driven by ESA compliance, will account for approximately *one-third* of federal wholesale electricity rates in the FCRPS system.[254]

In addition, to satisfy ESA requirements for salmon, non-federal utilities with dams have paid millions over several years to obtain and implement habitat conservation plans and long-time certainty necessary to license and operate their dams.[255] Meanwhile, the environmental plaintiffs have been awarded close to $2 million in taxpayer and ratepayer funding for their legal fees.[256]

Aside from the litigation involving the Northwest hydropower system, the lack of clarity of the ESA and how it relates to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in the regulation of these products has posed a significant threat to economically vital industries such as agriculture in the Pacific Northwest, California and the rest of the

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[252] *NWF, et.al. v. NMFS,* 254 F. Supp. 2d 1196 (D. Or. 2003); *NWF v. NMFS,* 524 F.3d 917 (9th Cir. 2008); *NWF v. NMFS,* 41 ELR 20247, No. 01-00640, (D. Or., 08/02/2011).

[253] Svend Brandt-Erichsen, *Close, but No Cigar: More Work Needed on Salmon and the Columbia Hydro System*, Marten Law, Aug. 9, 2011.

[254] *Electricity Prices and Salmon: Finding a Balance: Oversight Field Hearing Before the H. Subcomm. on Water and Power of the H. Comm. On Resources*, 109th Cong. (2006) (written testimony of Stephen Wright, Administrator, Bonneville Power Administration, at 47).

[255] *Chelan PUD Says HCP Working At 10-Year Check-In*, NW Fishletter, Mar. 7, 2013.

[256] Federal Hydro System Biological Opinion Ruling and Implementation, Northwest RiverPartners, Mar. 2012.

nation. It also has been the subject of continual lawsuits, including one filed by the CBD seeking to eliminate 380 agricultural, forestry, and mosquito-controlling pesticides and crop protection products used in 49 states on more than 112 million acres.[257]

In 2008, NMFS concluded in biological opinions that all 28 populations of salmon would be jeopardized by continued use of these products, long registered and labeled by the EPA. NMFS' requirements included nearly a quarter-mile buffer around water bodies that would affect as much as 60 percent of agricultural lands in Washington alone, and according to an estimate by the Department of Agriculture, could result in lost revenues of over $580 million.[258] These measures were strongly questioned by state agriculture agencies who were concerned that NMFS failed to utilize current state data and information and to allow transparency and review and revise to ensure the best available science.[259] The former director of the EPA office with authority and responsibility for scientific review of hundreds of pesticides found over 14 significant flaws in NMFS' biological opinions.[260]

Last year, a federal district court ruled that data and conclusions used in NMFS pesticide/ESA biological opinion were "arbitrary and capricious," failed to rely on logical or rational data, and lacked analyses of the economic or technological feasibility of its proposed measures.[261] In 2013, the NAS issued a report that recommended changes to how NMFS' and the FWS evaluate risks to salmon species in its pesticide consultation process. [262] However, the report failed to address several important questions relating to the lack of peer review of the biological opinions themselves, the use of available scientific data, and analyses of the economic and technological feasibility of NMFS' biological opinions, and a bipartisan group of 30 members of Congress wrote to House appropriators in 2011 supporting language to compel the National Academy of Sciences to study these specific issues.

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[257] Press Release, Center for Biological Diversity, Landmark Lawsuit Re-filed Against EPA to Protect Dozens of Endangered Species From Pesticides (June 2, 2013).

[258] *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture*, 112th Cong. (2011) (written testimony of Joseph Glauber, U.S. Department of Agriculture, at 15).

[259] *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture*, 112th Cong. (2011) (statement of Dan Newhouse, Washington State Department of Agriculture, at 146).

[260] *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture*, 112th Cong. (2011) (written testimony of Dr. Debra Edwards, Exponent Engineer and Scientific Consulting, at 118-120).

[261] *Dow AgroSciences LLC v. National Marine Fisheries Service,* 4th Cir., No. 11-2337, (Feb. 2013).

[262] National Research Council. *Assessing Risks to Endangered and Threatened Species from Pesticides*. Washington, DC: The National Academies Press, 2013.

While an improvement over the previous modeling that was used, there is still no clarity within the law on the nexus between Section 7 of ESA and FIFRA in regulating these products. In addition, the federal agencies refused to revisit the biological opinions that have already been released and are still threatening implementation of the measures questioned in the first place.

Another source of litigation has been the use of salmon hatcheries to recover ESA-listed salmon populations. Though tribal hatchery managers have successfully utilized hatchery supplementation to enhance salmon and steelhead recovery for several years, NOAA and other environmental activists continue to oppose any efforts to utilize hatcheries as a means to count and seek delisting of ESA-listed salmon and steelhead. The Snake River fall chinook run, for example, has rebounded to record levels with the hatchery programs, expanding from 500 adult fish in 1975 to more than 41,000 in 2010.[263]

According to tribal officials, the only way hatchery and naturally-spawning salmon can be distinguished is through a clip on the adipose fin, and the progeny of hatchery fish are virtually indistinguishable from naturally spawning fish, leading some to question why hatchery fish are not counted for purposes of ESA recovery goals. [264] Though a court ordered the NMFS in 2001 that it must consider hatchery salmon in populations proposed for ESA listing, the agency issued a revised policy that emphasized the "negative impacts" of hatchery fish on naturally spawning fish, but ignored the positive benefits that hatchery fish clearly are having on recovering salmon in the Northwest.[265]

The Gray Wolf

The gray wolf was one of the first species listed as "endangered" under ESA, and was originally listed by FWS in the entire lower 48 states.[266] Since then, the status of the wolf has shifted from: conservation in the 1970's and 1980's; reintroduction of "experimental populations" to three parts of the U.S. in the early 1990's; to breaking the wolf into separate populations, reclassifying and de-listing wolves where they have surged in recent years.[267] In general, the gray wolf's recovery has succeeded and the species is currently in the

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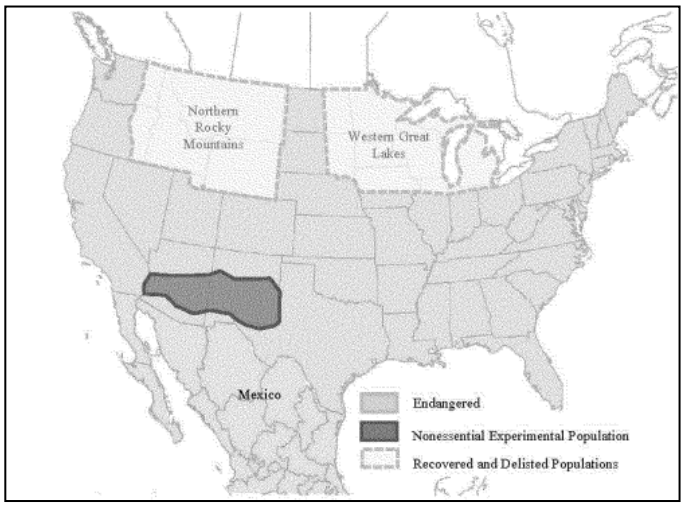
[263] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 17).

[264] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 66).

[265] *Trout Unlimited v. Lohn,* 559 F.3d 946 (9th Cir. 2009); 70 Fed. Reg. 37, 204.

[266] 39 Fed. Reg. 3, 1171 (1974).

[267] Gray Wolf Species Profile, U.S. Fish and Wildlife Service.

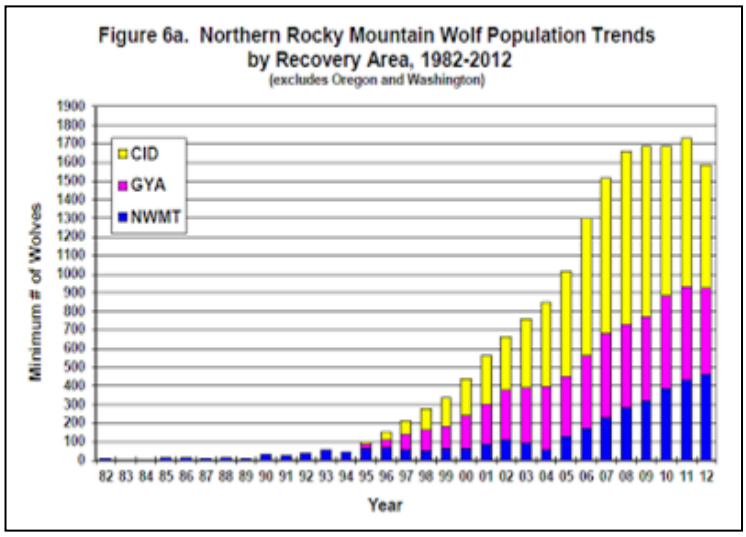


Source: U.S. Fish and Wildlife Service

classification of "least concern" globally for risk of extinction, according to a prominent international scientific group of experts.[268]

Nonetheless, at every juncture that the FWS has sought to change the wolf's ESA status, environmental groups have filed lawsuits opposing state management and seeking to enforce federal ESA listings. Take, for example, the 1996 reintroduction of wolves as an experimental population into the northern Rocky Mountain Region. A total of 31 wolves were introduced with the recovery goal of 300 wolves and 30 breeding pairs between Idaho, Montana and Wyoming.[269] Wolves in the northern Rocky Mountains increased rapidly and dispersed well beyond the original recovery area, meeting federal delisting criteria in 2002. Yet continual lawsuits and threats of lawsuits delayed FWS action to delist the wolf until 2012.[270]

In the meantime, as a result of inconsistent federal court rulings of the wolf's ESA status, Congress included a provision in the enacted Fiscal Year 2011 Continuing Resolution to delist the wolf in Montana, Idaho, and parts of eastern Washington, eastern Oregon and north-central Utah.[271] In December 2011, the FWS delisted wolves in the Western Great Lakes area. On September 30, 2012, wolves in Wyoming were delisted by the FWS, but only after twelve consecutive years of exceeding recovery goals. The Wyoming delisting process included thorough review by the FWS and was



Source: U.S. Fish and Wildlife Service

[268] Canis lupus, The IUCN Red List of Threatened Species.
[269] *Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Steve Ferrell, State of Wyoming, at 35).
[270] Wolves in Wyoming, Wyoming Game and Fish Department.
[271] P.L. 112-10, Sect. 1713.

peer reviewed two times by independent wolf scientists.[272]

Similar to FWS-approved plans for the States of Montana and Idaho, Wyoming's post-delisting management framework seeks to maintain at least 150 wolves and fifteen breeding pairs within the state's borders. The Service expects the Greater Yellowstone Area wolf population to maintain a long-term average of around 300 wolves, while the entire Northern Rocky Mountains Distinct Population Segment is expected to achieve a long-term average of around 1,000 wolves.[273]

The most recent official minimum wolf population estimate shows that the northern Rocky Mountain wolf population contains more than 1,774 adult wolves and more than 109 breeding pairs. Most of the suitable habitat across this region is now occupied and likely at, or above, long-term carrying capacity. This population has exceeded recovery goals for twelve consecutive years. At the end of 2011, an estimated 328 wolves were in Wyoming, including 48 packs and 27 breeding pairs.[274]

Shortly after the Wyoming delisting was final, four environmental groups (the Defenders of Wildlife, the CBD, the Sierra Club and the Natural Resources Defense Council) filed suit against FWS seeking to have the delisting reversed, claiming Wyoming's wolf management plan "is too aggressive and does not protect wolves in 85 percent of the state."[275]

FWS' overall review of gray wolf populations in 2012 found few gray wolves outside of the delisted areas, leading to a proposal in 2013 to delist the species nationwide. This determination has also become the target of litigation. Recently, six environmental groups (the Defenders of Wildlife, CBD, Earthjustice, Endangered Species Coalition, Natural Resources Defense Council and the Sierra Club) sent a letter to Interior Secretary Sally Jewell asking her to reconsider its proposal to delist the wolf nationwide. [276] Moreover, while the FWS has proposed delisting the wolf nationwide, they have refused to delist the Mexican wolf, which the agency considers to be a still-endangered subspecies.

The gray wolf saga under the ESA demonstrates the tremendous lack of certainty on what is necessary to actually delist species once they are recovered and no longer

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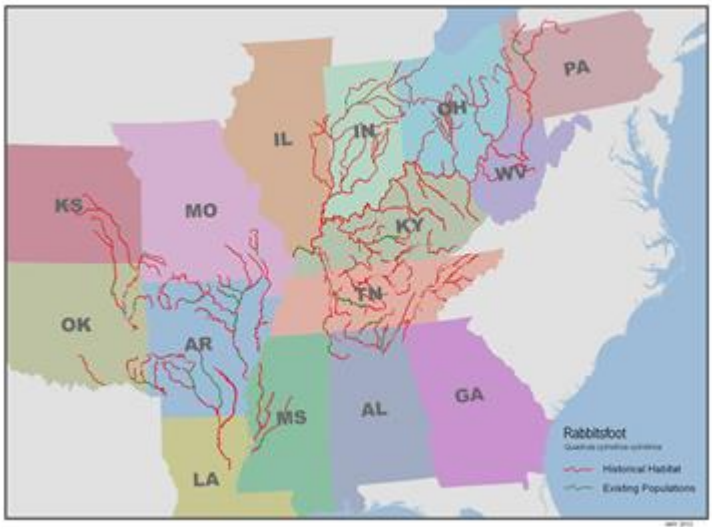
[272] Gray Wolves in the Northern Rocky Mountains, U.S. Fish and Wildlife Service.
[273] News Release, U.S. Fish and Wildlife Service, Service Declares Wyoming Gray Wolf Recovered Under the Endangered Species Act and Returns Management Authority to the State (Aug. 31, 2012).
[274] Wyoming Wolf FAQs, Wyoming Game and Fish Department.
[275] Press Release, Defenders of Wildlife, Suit Filed Against Wyoming's Kill-at-Will Wolf Policy (Nov. 13, 2012).
[276] Letter from Kieran Suckling, Executive Director, Center for Biological Diversity, to Sally Jewell, Secretary, The Department of the Interior (May 9, 2013).

threatened with extinction. In the twelve years since gray wolf recovery, states and private property owners dealt with serious impacts of the wolf's unfettered expansion beyond the recovery area, including harm to livestock and populations of big game animals. That delisting has been held hostage to litigation and forced Congress to legislate narrow delistings. This has resulted in a disjointed gray wolf policy where the entire species has recovered, yet the only difference between a listed gray wolf or a delisted gray wolf is separation by highways or imaginary state or international boundaries (See Map above). This is particularly true as the FWS in its most recent management rule notes there is no distinctive genetic or behavioral difference between wolves found in Canada and the western de-listed regions of the U.S. [277]

374 Mussel and Aquatic Species in the Midwest and Gulf Coast

The 2011 mega-settlements have led to other potential listings and habitat designations of literally hundreds of aquatic species in several mid-west and Gulf states, such as the Rabbitsfoot Mussel (listed as threatened), and the Neosho Mucket, (listed as endangered).[278] In an unprecedented move the FWS in September 2011 announced that it was reviewing the status of 374 aquatic species that in its view "may warrant" listing under ESA. This followed petitions and threats of lawsuits from CBD, which launched a new campaign to address the "southeast freshwater extinction crisis."[279] The proposal drew an outcry because of the size and scope of the proposal, that it could undermine public involvement and result in a legally deficient administrative record, and would require the FWS to review all 374 listing determinations in twelve months. [280]



Rabbitsfoot Mussel Range Map
Source: U.S. Fish and Wildlife Service

The flood of hundreds of listing petitions at one time has undermined FWS' ability to conduct a rational science-driven process for prioritizing

[277] 50 CFR Part 17.
[278] Press Release, Center for Biological Diversity, Two Midwest and Southeast Mussels for Endangered Species Act Protection With 2,000 Protected River Miles (Oct. 15, 2012).
[279] News Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Finds 374 Aquatic-dependent Species May Warrant Endangered Species Act Protection (Sep. 26, 2011); and The Southeast Freshwater Extinction Crisis, Center for Biological Diversity.
[280] Letter from Leslie James, Chair, NESARC, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Nov. 8, 2011).

listing decisions. FWS itself has acknowledged that due to the large number of species involved, stating it is "only able to conduct cursory reviews of the information in our files and the literature cited in the petition. For many of the narrowly endemic species included in the 374 species, we had no additional information in our files and relied solely on the information provided in the petition and provided through NatureServe."[281]

As part of its settlement deadlines, in October 2012, FWS proposed 2,138 river miles as critical habitat for the mussels in twelve Midwest and Southeast states[282], including 42% of Arkansas' geographical area, spanning 31 counties and 769 river miles (see Map). The FWS also issued an economic impact analysis of its critical habitat designation. [283]

After originally allowing just 30 days for the public to comment on these sweeping regulations, the FWS was forced to re-open the comment period for another 60 days.[284] The Arkansas Governor, Attorney General and Arkansas Legislature, local counties and private landowners raised concerns that in addition to under-valuing the true economic impact of the designation, the proposed critical habitat would have widespread impacts to rural portions of Arkansas, potentially impacting farmers, ranchers, timber producers, oil and gas producers, utility providers, county and municipal governments, school districts, irrigation districts and small businesses. Every Member of the Arkansas Congressional Delegation released statements condemning the proposed critical habitat,[285] and a letter that called into question the lack of transparency and science, the closed-door nature of the settlements that resulted in these actions, the flawed process, and called on the FWS to reconsider the critical habitat designations, based upon a flawed process.[286]

These designations resulted in the creation of a coalition, spearheaded by the Association of Arkansas Counties, that proposed decreasing critical habitat designations by approximately 38% to 477 miles of river. The FWS dismissed concerns as exaggerated, and that "for most landowners, the designation of critical habitat will have no impact," and that the designations "will not prohibit a farmer from allowing cattle to cool down in a river, or

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[281] 76 Fed.Reg. 187,59836-59862.

[282] Press Release, Center for Biological Diversity, Two Midwest and Southeast Mussels for Endangered Species Act Protection With 2,000 Protected River Miles (Oct. 15, 2012).

[283] News Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Lists Neosho Mucket as Endangered and Rabbitsfoot as Threatened (Sep. 16, 2013).

[284] News Release, U.S. Fish and Wildlife Service, Service Re-opens Review of Draft Economic Analysis for the Proposed Critical Habitat Designation for Two Freshwater Mussels (Aug. 26, 2013).

[285] Press Release, Association of Arkansas Counties, Entire Arkansas Congressional delegation members release statements regarding US Fish and Wildlife Services proposed critical habitat designations in Arkansas (Nov. 8 2013).

[286] Letter from Arkansas Congressional Delegation, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Jan. 9, 2014).

from driving a vehicle through a stream on their property."[287] However, FWS acknowledged that critical habitat could impact property in some cases. Without further action, FWS will finalize the critical habitat designations for the Rabbitsfoot Mussel and Neosho Mucket by March 2014.

[287] AP, *Arkansas' congressional delegation opposes mussel plan*, Arkansas Online, Jan. 10, 2014.

Recommendations for Improving ESA and Removing Impediments to Recovery

The main goal of the ESA is to recover species. This is a laudable and worthy goal. However, as has been demonstrated in this report, the ESA, federal implementation of it, and seemingly never-ending litigation are creating increasing impediments towards reaching that goal. Only by removing these impediments can the ESA be improved for the benefit of saving species.

After more than 40 years, sensible, targeted reforms would not only improve the eroding credibility of the Act, but would ensure it is implemented more effectively for species and people. The Working Group heard several common themes on areas for improvement that fall into four categories: (1) greater transparency and prioritization of ESA implementation to ensure more focus on species recovery and de-listing; (2) ESA litigation and settlement reforms; (3) empowering states, local, tribes and private landowners on ESA; and (4) improving transparency and accountability of ESA scientific data.

1. Ensure Greater Transparency and Prioritization of ESA Decisions: More Focus on Species Recovery and De-listing than Listing

The Working Group received many comments that raised serious concerns about federal implementation of the ESA, the lack of prioritization of resources, and a seeming-fixation with listing species versus ensuring species recovery and compatibility to other vital economic and private property priorities. Some areas of improvement could include:

- ***Ensure Prioritization of Species Protection.*** Rather than listing hundreds or thousands of new subspecies of plants, animals and fish, the focus and priority of the federal government should be protecting those species most imperiled or found to be at the brink of extinction.

- ***Require Numerical Goals Needed for Species Recovery -- Upfront.*** Federal agencies that implement ESA should not list species unless and until they are able to identify actual recovery and numerical goals for healthy species populations upfront—before, or at the time of any proposed rule involving listing a species. Recovery plans should be drafted and completed and approved *before* listing or critical habitat is designated, not as an afterthought, years later, or not at all.

- ***Require ESA Listing and Delisting Petitions to be based on Actual, Accessible Data.*** Rather than basing decisions on vague trends showing decline or improvement or "professional opinions," ESA listing/delisting petitions should not be accepted by federal ESA implementing agencies unless they are based upon actual data relating to the species' condition. Data used for listing and delisting decisions should be made publicly available, especially if the data and related studies are being financed by the American taxpayer.

- ***Require Delisting and Downlisting as Data Supports.*** Instead of having to guess when (or even whether) the federal government will make decisions to remove species from the ESA list that are healthy or have met required recovery goals, federal agencies should be required to issue actual rules to delist and remove or downlist species from the ESA list where supported by data.

- ***Authorize Flexibility of ESA Statutory Deadlines.*** Federal agencies should have discretion to extend 12 month or 90-day deadlines relating to species listing or critical habitat determinations, without fear of spurious litigation. Rather than force federal agencies to accept every petition with equal weight no matter how lacking the science and data, agencies should be allowed to incorporate the best and most current data to allow for better prioritization. The ESA must keep its eye on those species at the brink of extinction or most imperiled. Agencies' Listing Priority Guidance (48 Fed.Reg. 43098) should supersede any conflicting 12-month or 90-day deadline set by rule, settlement or other action.

- ***Codify Policy for Evaluating Conservation Efforts (PECE).*** To ensure ongoing species conservation efforts are given proper authority and consideration under the law, the Policy for Evaluating Conservation Efforts (PECE) (found at 68 Fed.Reg. 15100) should be codified.

- ***Clarify and Define ESA Terms to Ensure Consistency.*** Several terms in the law have become magnets for misinterpretation, conflicting interpretations, or even litigation, and should be clarified, including, for example: **"foreseeable future";** "**significant portion of the range**," **"jeopardy"** to a species**,** the technological and economic feasibility of **"reasonable and prudent alternatives/measures,"** and "**maximum extent practicable"** relating to mitigation.

2. ESA Litigation and Settlement Reform

The Working Group received many comments that ESA decisions need to be made less susceptible to litigation, which has served to be a significant hurdle in prioritizing the recovery of truly endangered species and created rush to judgments that lack transparency. In times of tight fiscal budgets and escalating national debt, the first priority of the federal government's endangered species protection and recovery programs should be on species—not lawyers or prepping biologists for court.

Moreover, the federal government should not be rewarding those that have made a business out of suing the federal government on ESA to receive taxpayer-funded federal grants or funding through other programs. Here are three areas the Working Group recommends ESA should be addressed:

- ***Transparency and Flexibility of Closed-Door Settlements/Deadlines.*** ESA listing and habitat designation deadlines (agreed to by the Department of the Interior in its 2011 "mega-settlements" with two litigious groups, the WildEarth Guardians and the Center for Biological Diversity), should not supersede the federal government's ESA responsibilities to American private property owners, states, tribes and local governments, or further incentivize these and other groups to litigate and settle. Federal agencies should be required to disclose all details of consent decrees to Congress and an appropriate NEPA process should be applied for settlements to ensure public input in ESA decisions, and to ensure they include best scientific data.

- ***ESA Litigation Transparency and Reform.*** Litigious groups and plaintiffs should be discouraged from filing procedural challenges against agencies simply because they do not agree with the agency's decisions, (such as delisting determinations, findings of species listing not warranted). Litigants should be required to pay their own way to curb repeated litigation and foster court cases only on substantive matters. To discourage forum shopping by frequent ESA-litigation-plaintiffs, ESA lawsuits should not be permitted in federal courts other than in a state a species is primarily located.

  Federal agencies, (including the Departments of Justice, Interior, Forest Service, and NOAA), should be required to maintain and make publicly available and report to Congress on the complete and accurate records of federal funds spent annually for ESA-related litigation, payment of attorneys' fees, settlements, and consent decrees for the Judgment Fund and the Equal Access to Justice Act.

- ***Curbing Excessive Taxpayer Funding of ESA Attorneys' Fees.*** Hourly fees paid by the federal government to litigious attorneys for ESA litigation should be capped like other federal statutes to prevent lucrative payment of attorneys' fees. Courts should no longer view "settling" parties as "prevailing" or entitled to taxpayer-funded attorneys' fees. Parties that engage in settlement negotiations and settlements should bear their own costs. In addition, non-governmental organizations or individuals that file ESA-related lawsuits against the federal government should be barred from receiving federal taxpayer-funded grants. Since money is fungible, litigation should not be subsidized by taxpayers.

3. Empower States, Tribes, Local Governments and Private Landowners on ESA Decisions Affecting Them and Their Property

The Working Group has found both the capability and willingness of states, tribes, localities and private landowners to conserve and recover species. Multiple parties have identified impediments and deficiencies in federal ESA implementation, including misguided priorities and fear of litigation, which undermines species protection and conservation while simultaneously ensuring multiple use, protection of economies, private property and water rights. In this regard, several areas are recommended:

- ***Strengthen States' Authority and Role in ESA Policy.*** Section 6(a) should be strengthened to ensure that states' roles in ESA policy provisions have meaning and are enforceable. Agreements to delegate authority between the Federal government and states for management of activities involving listed species should not be subject to excessive litigation. States that have approved species conservation plans and agreements should be given presumption by federal agencies that ESA listing is not warranted.

- ***Require State, Tribe, and Local Approval of ESA Settlements.*** In addition, states (as well as tribes and other local governments) should be afforded legal standing and be consulted with on federal ESA-related court settlements impacting their jurisdictional borders. The ESA should provide local, tribal and state governments a voice in closed-door settlements where such settlements impact their land.

- ***Require Involvement of State, Tribe, Local Data and Peer Reviews.*** States, tribes, local governments, private landowners and other entities, in many cases, have more current and accurate data, which should be given the highest consideration and

presumption in ESA decisions. No ESA petition or listing determination should be approved without incorporating and analyzing data provided by states, tribes, local governments and private landowners. In addition, federal ESA agencies should be directed to include states, tribes and local governments in the design, selection and scope of peer reviews of major ESA-related decisions.

- ***Strengthen and Simplify HCPs and CCAAs and Exempt them from Critical Habitat.*** To encourage and give validity to voluntary Habitat Conservation Plans or Candidate Conservation Agreements with Assurances, these agreements should be exempt from critical habitat designations. In addition, the process to obtain such HCPs and CCAAs, which now can be cumbersome, expensive and out of reach, should be simplified and codified to incentivize individuals undertaking voluntary conservation efforts.

- ***Authorize Reconsideration of Listing/Critical Habitat Decisions that Significantly Harm Private Landowners.*** Property owners have no recourse in certain cases where their property is significantly devalued or subject to regulatory taking. The Secretaries of the Interior and Commerce should be authorized in certain circumstances to reconsider and reevaluate, without judicial review, any critical habitat or listing decision where evidence shows significant economic harm or other justification warrants it.

- ***Require Real Economic Analyses Up Front for ESA.*** The Obama Administration's finalization last year of a rule changing the way ESA economic impact analyses are conducted to only include "baseline" costs should be replaced with a rule that codifies a 10th Cir. Court of Appeals ruling requiring agencies to analyze *all* economic costs of an ESA listing. Moreover, critical habitat economic analyses should be required at the time of any proposed listing, making it publicly available.

- ***Authorize Private Funding of ESA Permit Processing.*** To improve processing of federal ESA consultations, non-federal contractors should be authorized to privately funded by an ESA permit applicant to prepare biological opinions, similar to documents now authorized under NEPA by third-party contractors. In addition, "action agencies" should be permitted to prepare a biological opinion subject to review and approval by FWS and NMFS.

4. Transparency and Accountability of ESA Data and Science

Finally, the Working Group heard from a number of experts and witnesses on the need to ensure that ESA science and data are transparent, publicly available, and not driven by individuals with conflicts of interests. The Working Group recommends improvements could be made to this area as follows:

- ***Modernize and Clarify "Best Available Scientific and Commercial Data".*** Data, including DNA, should be preferred to support ESA determinations over unpublished reports or professional opinions. ESA-related data should be required to meet Data Quality Act guidelines. In addition, federal agencies should be required to justify why data relied upon for ESA decision is the "best available" and why such data is deemed "accurate" and "reliable."

- ***Transparency and Accessibility of Data in Federal ESA Decisions.*** Data used by federal agencies for ESA decisions should be made publicly available and, when possible, reviewable through online access on the Internet. This includes data or information that may be contrary to federal agencies' own data. A public repository of data should be required for all ESA decisions.

- ***Reform, Transparency and Accountability of ESA-related Peer Reviews.*** To ensure accountability, ESA-related peer reviews that do not comply with the Data Quality Act should be deemed "arbitrary and capricious," and all ESA-related peer reviews should be made publicly available and available online on the Internet. In addition, peer reviewers selected should not have a financial or other conflict of interest. FWS and NMFS should be required to consult with the National Academy of Sciences and affected states, tribes and local governments, to develop list of qualified peer reviewers on each controversial ESA action.