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Reconsidering a Weakened Regulation: A Critical Analysis of Delisting in the Endangered Species Act

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RECONSIDERING A WEAKENED REGULATION: A CRITICAL ANALYSIS OF DELISTING IN THE ENDANGERED SPECIES ACT

*Crystal D. Anderson**

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INTRODUCTION

The grizzly bear, a magnificent creature that once ranged throughout the west, was recently delisted from the protection of the Endangered Species Act (ESA)¹, which it had benefitted from since being listed as a threatened species in 1975. Presumably, this delisting should have been supported by evidence that the grizzly had recovered to its original population levels. However, the grizzly bear's delisting is misleading. More grizzlies died in 2008 (since being delisted) than in any year ever recorded, and nearly 70% of grizzly deaths were due to killings by humans because there are virtually no penalties for killing grizzlies post-delisting². Many of the other deaths were related to the massive destruction of whitebark pine trees, one of the main staples of the grizzlies' diet.³ The mountain pine beetle, which has increased significantly in population due to recent warm winters allowing the beetle to remain alive longer, causes destruction of the trees.⁴ In addition, the majestic grizzly now faces grave danger from global warming, loss of its main food source, and loss of its habitat. Unfortunately, as the grizzly is one of the world's slowest reproducing mammals,⁵ any threat to individual bears is a threat to the entire population. Although this action may not fully protect the bear from global warming or loss of habitat, it will at least allow the bear to be protected from human-caused mortalities.

The ESA, specifically the delisting process, is not working the way it was originally intended to work due to problems with implementation of the Act's protections. Some of these problems include bureaucratic difficulties, decisions linked to the political arena, and differing interpretations of scientific research. Although there are a few existing alternate methods of protection, including state and local regulation, these are not always enough to protect endangered species.

This paper will critically analyze the current ESA delisting process to find a method to promote successful protectionism and

1. News Release, U.S. FISH & WILDLIFE SERV., *Successful Recovery Efforts Bring Yellowstone Grizzly Bears Off the Endangered Species List* (Mar. 22, 2007), http://www.fws.gov/mountain-prairie/species/mammals/grizzly/press_release03222007.pdf.

2. Doug Peacock, *Yellowstone's Grizzly Bears Face Threats on Two Fronts*, YALE ENVIRONMENT 360, May 14, 2009, <http://e360.yale.edu/content/feature.msp?id=2152> [hereinafter Peacock].

3. GREATER YELLOWSTONE COALITION, *Whitebark Pine: What Its Demise Means For Greater Yellowstone*, <http://www.greateryellowstone.org/issues/climate/Feature.php?id=282#.UnuxgPIQHAK>.

4. *Id.*

5. *Id.*

conservation in the long-term and will examine whether the ESA delisting process is an accurate measure of successfully recovered species. This paper will propose what changes should be made and what other measures can and should be in place to protect species, including initiatives on a local and/or state level. This paper will examine the shortcomings of the ESA delisting process by analyzing the current delisting process and researching several case studies of delisted species that have experienced both success and failure in their recoveries. Finally, this paper will explore and recommend alternate solutions to improve the process.

Part I of the paper will provide necessary background information on conservationism, how this movement led to the Endangered Species Act, and the original intent of the Act. It will also convey basic information on how the listing and delisting processes work, a brief history of how the delisting process was added to the ESA, and whether the delisting process has been successful through a numerical analysis of species delistings.

Part II of the paper examines delisting in practice. It critiques both the ESA, more generally, and the delisting process. It criticizes the institutional difficulties in the ESA, such as its propensity for political bias and bureaucratic inefficiencies. It also examines shortcomings in the delisting process, why improper delistings occur, and what consequences result to endangered species. Part II also describes what other protections are in place to protect endangered species, including alternate federal regulations, state and local regulations, and the post-delisting monitoring requirement of the ESA.

Part III of the paper conducts case studies of three notable endangered species that have been delisted: the Yellowstone grizzly, the bald eagle, and the gray wolf. Each case study supports a different point about problems in the delisting process. The Yellowstone grizzly serves as a good example of a delisting failure due to improper analysis of species status, an inadequate recovery plan, and premature delisting. The bald eagle is an example of a delisting that may appear at first glance to be successful, but is actually a species that remains protected under several alternate protective regulations. The case of the gray wolf exemplifies improper delistings due to the FWS considering only part of the population, failing to follow the species recovery plan, and prematurely delisting the species.

Part IV provides analyses of the problems and provides recommendations to improve the delisting process of the ESA, by providing three types of recommendations to improve protection for endangered species: institutional reform, new instruments, and strategic changes

to the ESA. Institutional reform includes broader suggestions of how to improve the system by removing political biases and shifting focus when making decisions. New instruments suggested in Part IV include adaptive management and communal conservancies. Part IV also recommends strategic changes to the ESA such as using interdisciplinary decisions and implementing initiatives on other levels, such as local, state, regional, or private levels, to create an interim method of species protection.

This article concludes that the current delisting process in the Endangered Species Act is not a successful method of protecting and conserving species in the long term. It concludes that due to deficiencies in the system, the delisting process is not an accurate measure of successfully recovered species and sometimes species may suffer irreversible harm and possibly have to be relisted. It proposes that removing political imbalances and making institutions more flexible and accountable in their decision-making can improve the delisting process. The success of the delisting process can be improved through the use of adaptive management, alternate measures, and initiatives to protect species while they are not under the protection of the ESA, including communal conservancies and interim protections on a state or local level.

I. THE ESA AND THE DELISTING PROCESS

This part of this paper will provide background information on conservationism, how it led to the Endangered Species Act, what was the original intent of the ESA, basic information on how the listing and delisting processes function, a brief history of how the delisting process became part of the ESA, and whether the delisting process has been successful through a numerical analysis.

A. *Pre-ESA Protections for Endangered Species*

The push for wildlife conservation in this country started in the 1900s after the near extinction of the bison and the passenger pigeon⁶. The first protective federal laws were the Lacey Act of 1900 (prohibited interstate commerce of animals killed in violation of state game laws), the Migratory Bird Conservation Act of 1929 and the Bald Eagle Pro-

6. Endangered Species Act of 1973, DIGEST OF FEDERAL RESOURCE LAWS OF INTEREST TO THE U.S. FISH AND WILDLIFE SERVICES (last visited Nov. 9, 2013), <http://www.fws.gov/laws/lawsdigest/ESACT.html> [hereinafter, Digest of Federal Resource Laws].

tection Act of 1940.⁷ By the 1960s, legal protections had shifted to focus more on preserving habitats of endangered species rather than on regulations against harming species, exemplifying a more forward thinking approach to species conservation.⁸

In 1966 came the original predecessor to the ESA: the Endangered Species Preservation Act of 1966.⁹ This act authorized the Secretary of the Interior (“SOI”) to list endangered domestic fish and wildlife, and authorized the U.S. Fish and Wildlife Service to purchase habitat for listed species. It also required federal land agencies to preserve habitat on their land and encouraged other public agencies to protect species. The first list of species was issued under the act in 1967.¹⁰ In 1969, the Endangered Species Conservation Act was passed as an amendment to the original 1966 Act. The amendment provided additional protections to species threatened by “worldwide extinction” by prohibiting their importation and subsequent sale in the U.S. This amendment led to an international meeting in Washington, D.C. to adopt a treaty intended to conserve endangered species. This gathering created the CITES treaty, or the Convention on International Trade of Endangered Species of Wild Fauna and Flora, which works through voluntary adherence by countries to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

B. ESA and Its Original Strength Under TVA v. Hill

The Endangered Species Act was enacted in 1973. The stated purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”¹¹ The ESA is administered by two agencies: the United States Fish and Wildlife Service (FWS), which regulates freshwater fish and all other species, and the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA), which handles marine species.

The ESA is a comprehensive effort to protect identified species and to consider habitat protection as an essential part of that at-

7. *Id.*

8. *Id.*

9. Native Fish and Wildlife Endangered Species, 32 Fed. Reg. 48 (Mar. 11, 1967).

10. *Species Listed Near Extinction; Udall Issues Inventory with Appeal to Save Them*, N.Y. TIMES, Mar. 12, 1967.

11. 16 U.S.C. §1531(b) (2009).

tempt.¹² Species are listed as either “endangered” or “threatened” according to an evaluation of the amount of risk to the species. An “endangered” species is “any species which is in danger of extinction throughout all or a significant portion of its range” and a “threatened” species is “any species which is likely to become an endangered species within the foreseeable future.”¹³ Upon the initiative of the Secretary of the Interior or after receiving a petition to list a species from an individual, group, or state agency, the FWS and NOAA follow rulemaking procedures by publishing each step in the Federal Register.¹⁴

These agencies examine petitions to determine whether there is substantial information to support listing, which triggers a status review. In this review, the agencies conduct a comprehensive assessment of a species’ biological status and threats, determining whether listing is “warranted,” “not warranted,” or “warranted, but precluded.” “Warranted” means the agencies will publish a proposed rule to list the species as threatened or endangered, taking comments from the public and conducting hearings. “Not warranted” means the listing process ends and the species remains unlisted. “Warranted but precluded” means the listing of the species will be deferred to give precedence to higher priority listings.

During this assessment, the Secretary must decide whether to list the species based only on the best scientific and commercial information available. The Secretary must not consider the economic effects that listing may have on the area where the species is found; doing so is expressly forbidden in the ESA. In this review, the Secretary also conducts the following five-factor analysis:

- 1) Is there a present or threatened destruction, modification or curtailment of the species habitat or range?
- 2) Is the species subject to over-utilization for commercial, recreational, scientific, or educational purposes?
- 3) Is disease or predation a factor?
- 4) Are there adequate regulatory mechanisms in place, taking into account the initiatives by States and other organizations, to protect the species or habitat?
- 5) Are other natural or manmade factors affecting its continued existence?¹⁵

12. Peter Saundry, *Endangered Species Act United States*, ENCYCLOPEDIA EARTH, Congressional Research Service, available at <http://www.eoearth.org/view/article/152413/> (last modified Aug. 11, 2009) [hereinafter Saundry].

13. 16 U.S.C. § 1532(6) (1994).

14. 16 U.S.C. §§ 1531-1544 (1994).

15. Memorandum from the U.S. Fish and Wildlife Service on Delisting a Species (Feb. 2004), available at <http://www.fws.gov/idaho/species/delisting%20copy.pdf> [hereinafter Memo on Delisting].

The Secretary must monitor the status of these “candidate” species while they are being assessed; if any emergency poses a significant risk to the well-being of the species, the Secretary must immediately list them. A final determination is made within a year on whether to list the species. Once a species is listed, it receives legal protections to aid in the recovery of the species and to protect its habitat with funds for species protection and conservation.

When the Supreme Court first analyzed the ESA in *Tennessee Valley Authority v. Hill*, it interpreted the Congressional intent behind the statute to be protecting endangered species with the highest of priorities and halting and reversing the trend toward extinction at “whatever the cost” because the value of endangered species was “incalculable”.¹⁶ Since then, the ESA has been criticized for losing much of its strength in protecting endangered species due to many problems with the Act, such as bureaucratic delays, underfunding, and susceptibility to the current political and administrative priorities.¹⁷

C. *The Listing and Delisting Processes*

The goal of the ESA is to conserve endangered and threatened species and to ensure their long-term survival in the wild.¹⁸ These plans identify goals for delisting and downlisting the species, and recommend specific conservation measures. The groups devote resources to the plan to promote and support the conservation of the species.¹⁹ After species populations start to rejuvenate, the FWS will reassess species to determine whether they should be delisted using the same five criteria that are used to originally determine whether a species should be listed. This analysis occurs if the Secretary of the Interior initiates a change in the status of listed species or if the Secretary receives a substantive petition for change in any listing status. A status review can also be conducted of a listed species once every five years to determine whether it should be removed from the list or changed from endangered to threatened (or threatened to endangered).

16. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

17. Frank W. Davis, Dale G. Goble, and J. Michael Scott, 305, Volume 1 296, 297 (Dale G. Goble, J. Michael Scott, Frank W. Davis eds., Island Press 2006) [hereinafter Davis, *ESA at 30*].

18. Memo on Delisting, *supra* note 15. Once a species is listed, the FWS - in conjunction with other partners interested in the protection of a species, such as species experts, federal, state and local agencies, tribes, nongovernmental organizations, the academic community, and other stakeholders - creates recovery plans for endangered or threatened species.

19. *Id.*

At this point, at least theoretically, the protections of the ESA are no longer necessary for the species' survival. Once a species reaches this level of recovery, the FWS can choose to "delist" or "downlist" the species. To delist a species, the FWS must remove the species from the list by making a determination that threats against the species have been eliminated or controlled based on several factors. To downlist a species, the FWS can reclassify a species from endangered to threatened by a determination that some of the threats have been controlled and the population has met recovery objectives for downlisting.²⁰ The species can also be uplisted from threatened to endangered, if necessary.

The process used to determine whether a species may be delisted or downlisted is similar to the process used to initially list species. The FWS reviews the same five factors in making this determination as discussed in Section I. B. of this paper. After examining and analyzing whether these factors have been met, the FWS determines whether the threats have been eliminated or sufficiently reduced based "solely on the basis of the best scientific and commercial data available,"²¹ and "without reference to possible economic or other impacts." Although courts have ruled that the best "available" data does not mean the best possible data, occasional imperfections are allowable,²² so information must be reviewed and evaluated to make sure that it is reliable information.²³ If the result of this analysis is positive, FWS may consider delisting a species.

After this, the first step in delisting a species is for the FWS to publish a proposed rule in the *Federal Register* to request review and comment by other Federal agencies, state biologists, species experts, and the public. Once this period is over and comments have been analyzed and responded to, the FWS's final decision is announced in the *Federal Register*, either completing the final rule or withdrawing the action and maintaining the species' status.²⁴ Species are generally removed for the following reasons: recovery, extinction, or new evidence of additional populations. For the purposes of this paper, recovery is the most relevant reason for delisting. To be "recovering", the decline of

20. *Id.*

21. 16 U.S.C. § 1533(b)(1)A (2009).

22. 50 C.F.R. § 424.11 (2013).

23. Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271 (July 1, 1994).

24. Memo on Delisting, *supra* note 15.

the species must be halted. Finally, the species population must be stabilized and then the number must be increased.²⁵

Once a species is delisted resulting from recovery, the FWS must monitor the species for at least five years to evaluate their ability to sustain themselves without the protection from ESA. FWS drafts a post-delisting monitoring strategy, which is usually available in the *Federal Register* at the time the delisting proposal is published. Again, FWS seeks peer-review and public comment until final approval when the plan is put into action. If, during this designated monitoring period, threats to the species change or unforeseen events change the stability of the population, FWS may extend the monitoring period or choose to re-list the species.²⁶

D. The Road to Delisting: A Brief History

The forefathers of the ESA did not focus on species recovery, but on preventing species extinction.²⁷ In the Endangered Species Act of 1966, there were no provisions regarding removal of species from the protected lists.²⁸ Delisting was first addressed in the Endangered Species Conservation Act of 1969, which required the SOI to review the endangered species list every five years to determine whether the species continued to be threatened with extinction. If they were not, they could be removed from the list.²⁹

The ESA of 1973 was designed to conserve endangered and threatened species, and was intended to recover species to a point where they could be delisted because protections were no longer necessary.³⁰ When the ESA was amended in 1978, the specific delisting process garnered attention. Section 4(f) of the ESA required the SOI to develop recovery plans to provide a “framework for actions directed at conserving or survival” of each listed species.³¹

During the Reagan administration, emphasis was shifted from recovery as a more aspirational goal to the concrete and final delisting

25. *Id.*

26. *Id.*

27. Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 *PUB. LAND & RESOURCES L. REV.* 55, 69-70 (1996).

28. *Id.* at 69-70.

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

30. Endangered Species Act of 1973, Pub. L. No. 93-205, § 4(5)(1), 87 Stat. 884, 887 (1973).

31. H.R. Rep. No. 95-1625, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9469.

of species. Congress mandated the same process and criteria used for listing a species be utilized for delisting a species.³² The ESA Amendments of 1988 focused on recovery planning and made several changes to the delisting process and recovery plans. These changes included the following: the SOI would be required to compose recovery plans without regard to a species' taxonomic classification, resources would be allocated more evenly among species on the basis of biological information to create a priority system, section 4(f) was amended to change the requirements for recovery plans, and monitoring requirements were made for delisted species.³³ The major change was the addition of objective measurable criteria for recovery planning.³⁴

Finally, the Clinton administration stressed that delisting would be the measure of success for species conservation³⁵ and the FWS subsequently emphasized the importance of the relationship between the recovery plan and delisting.³⁶ Currently, the FWS views recovery plans as integral to the recovery of listed species by providing a guide to recovery and believes that a "species may be ready for down-listing or delisting by measuring their status against the tangible objectives and criteria developed in the recovery plan."³⁷

E. Delisting by Numbers: A Success?

The FWS claims that its rate of preventing extinctions is 99 percent³⁸ and that but for the ESA, 192 species would now be extinct.³⁹ Though these statements may technically be accurate, they are misleading and based on flawed research. Several sources give a much

32. H.R. Rep. No. 97-567, at 12 (1982), as reprinted in 1982 U.S.C.C.A.N. 2812.

33. Endangered Species Act Amendment of 1988, Pub. L. No. 100-478, 1988 U.S.C.C.A.N. 2700, 2703.

34. Davis, *supra* note 17, at Sec. 4.

35. Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L.Q.* 1, 41 (1996).

36. U.S. Fish & Wildlife Service, Report to Congress on the Recovery Program for Threatened and Endangered Species 2 (1996), available at <http://www.fws.gov/endangered/esa-library/pdf/1996-1.pdf>. This report declared that "Recovery is the cornerstone and ultimate purpose of the endangered species program. . . The goal of this process is to restore listed species to a point where they are secure, self-sustaining components of their ecosystem and, thus, to all delisting."

37. U.S. Fish & Wildlife Serv., Recovery Report to Congress 12 (2000), available at http://www.fws.gov/endangered/recovery/reports_to_congress/2001-2002/2001-2002_full_report.pdf.

38. Memo on Delisting, *supra* note 15.

39. BRIAN SEAHOLES, *BAD FOR SPECIES, BAD FOR PEOPLE: WHAT'S WRONG WITH THE ENDANGERED SPECIES ACT AND HOW TO FIX IT* (Sept. 2007), available at <http://www.ncpa.org/pdfs/st303.pdf> [hereinafter Seaholes].

more accurate picture of the success of ESA in terms of delisting due to recovered species. The FWS claims that of the forty-six delisted species, nineteen were recovered, seventeen were due to data error, nine were due to extinction, and one was due to partial recovery or data error.⁴⁰

The reality, according to the National Center for Policy Analysis, is that none of the species were delisted due to recovery from ESA protections. According to this analysis, an accurate accounting of delisted species is that twenty-seven species have been removed due to data error, nine species were determined to be extinct, five species were delisted primarily due to factors unrelated to the ESA including other regulations and laws, and five species were delisted for a variety of other reasons including private conservation, state not federal conservation efforts, and recovery in spite of harm done by the ESA.⁴¹ An earlier analysis by the National Center for Policy Analysis of 60 previous delistings found similar results. The Center determined in this study that twelve species were delisted due to extinction, twenty-four were delisted because of data errors, nine were delisted because they only exist on federal lands and would therefore be protected even without the help of the ESA, three recovered due to the ban on the pesticide DDT, and twelve were conserved by state agencies or private organizations with only minimal contributions by the federal government.⁴²

II. DELISTING IN PRACTICE

Part II analyzes the regulatory methods currently in place to protect species, including the ESA and its delisting process. It also explores what other protective regulations are available to help endangered species.

A. Federal Regulation: ESA

1. Problems stemming from the ESA

Although there are those who argue that the ESA has many positive effects and may lead to species delisting, there are many critics of the Act who believe that it falls short of the statute's original

40. *Id.* at 11.

41. Seaholes, *supra* note 39, at 13.

42. STERLING BURNETT AND BRYON ALLEN, THE ENDANGERED SPECIES ACT: FIRST STEP TOWARD FIXING A COSTLY FAILURE, available at <http://www.ncpa.org/pub/ba276> [hereinafter Burnett].

intent because it is broken. Some of the problems noted by critics include 1) severe lack of funding, 2) susceptibility to political whims of the current political party and administrative branches of government, 3) the lengthy and burdensome listing process not being completed in time to protect species from population and habitat decline, lowering species' chance of recovery, 4) unrealistic expectations of species recovery perpetuated by recovery programs, and 5) excessive bureaucracy leading to lost opportunities for conservation.⁴³

For as many ESA "success stories" that exist, there are also other examples of species becoming extinct because they were never listed. Generally, when a species is not listed, it may be due to a lack of funding or the political policies at the time causing speculation that decision-makers come to their conclusions by a selective and incomplete interpretation of data biased to meet their agendas. Many times, the federal government will use flimsy evidence to justify listing species rather than utilizing requirements of specific scientific criteria.

One possible example of this problem occurred in August 2009 when the U.S. Fish and Wildlife Service decided to review 29 species for listing, but rejected the review of nine others.⁴⁴ Regardless of whether the choice of scientific information used was biased, the problem lies in the unfortunate situation where this initial denial of review leads to a situation where the species is so far depleted by the time it is actually considered for review, it is unable to regain its population. Further, because of the overall lack of funding, this situation can occur in multiple species at once, leading to a snowballing situation where the agencies continually fall behind in their conservation efforts. Also, because of funding problems, agency priorities in making listing and delisting decisions lead to judgments made by litigation and crisis management.⁴⁵

Additionally, many opponents of the ESA believe that the Act encourages perverse incentives to destroy species and their habitat because of economic interests. Over 75% of listed species depend on private land for all or part of their habitat, but if people provide habitat for endangered species with or without knowledge, their land can become subject to regulation and potentially confiscation.⁴⁶ These critics argue that the ESA may encourage preemptive habitat destruction by landowners who fear losing their land, including either its use or

43. Davis, *ESA at 30*, *supra* note 17, at 297.

44. Julie Cart, *Federal Endangered Species List Could See 29 Additions*, L.A. TIMES, Aug. 21, 2009.

45. Davis, *ESA at 30*, *supra* note 17, at 298.

46. Burnett, *supra* note 42.

value, because of the presence of an endangered species on the land.⁴⁷ There are countless examples of situations where a landowner, in response to a certain listing of a species, increases harvesting or plows the land with the purpose of destroying a species or its habitat. These critics believe that finding a way to reduce these perverse incentives could lead to increased protection of endangered species.⁴⁸

2. Problems stemming directly from the delisting process

There are also more problems in the ESA, specifically involving the delisting process. Many believe that the process is broken. A major rationale for this allegation is that species are delisted improperly because the FWS does not conduct a proper analysis of the species' recovery. This may be because the FWS does not consider the population as a whole, strays from the species recovery plan, or does not properly conduct the five-factor analysis for delisting. Other reasons are that a species is delisted too early or when a previously delisted species is being considered for relisting, it may be too late for species recovery.

a. Considering only partial species populations

One example of an improper delisting where the FWS did not consider the population as a whole in its analysis is the gray wolf. In April of 2003, the US Department of the Interior downlisted the gray wolf from an endangered to a threatened species in certain areas of its range (distinct population segments or DPSs) and delisted the wolf in other DPSs.⁴⁹ The DOI issued an Advance Notice of Proposed Rulemaking, announcing its intention to pursue the delisting of the gray wolf in certain DPSs.⁵⁰ Subsequently, the Defenders of Wildlife brought suit challenging the decision to downlist the species.⁵¹ The court determined that since the Secretary of the Interior only considered the wolf's recovery in one of the DPSs (the wolf's current range), rather than across a significant portion of its range in analyzing the

47. Stephen Dubner and Steven Levitt, *Unintended Consequences*, N.Y. TIMES MAGAZINE, Jan. 20, 2008.

48. Gardner M. Brown, Jr. and Jason F. Shogren, *Economics of the Endangered Species Act*, Journal of Economic Perspectives 12, at 3, 1998.

49. Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife, 68 Fed. Reg. at 15,804 (Apr. 1, 2003) (codified at 50 C.F.R. part 17).

50. *Id.* at 15,876.

51. *Defenders of Wildlife v. Sec'y U.S. Dep't of the Interior*, 354 F. Supp. 2d. 1156, 1158-59, 1162 (D. Or. 2005).

five factors for downlisting/delisting in its decision to downlist the wolf, the Secretary's conclusions were invalid.⁵² This resulted in the gray wolf remaining an endangered species in nearly the entire continental U.S., except a few specific areas.⁵³

The gray wolf is not the only example of the FWS attempting to use the DPS system to downlist only certain groups within a species. This also happened with the bull trout in 2001.⁵⁴ The FWS was attempting to use the DPS policy as a means to avoid the ESA requirements and a national listing by saying that the bull trout lived in five DPSs and only needed listing in one of them.⁵⁵ This was FWS's way to attempt to decrease the protections avoided to the species even when the population status of the species has not increased overall. The FWS had argued in 2003 that the agency believes that "when an endangered species has recovered to the point where it is no longer in danger of extinction throughout all or a significant portion of its *current* range, it is appropriate to downlist the listed species to threatened even if a substantial amount of the historical range remains unoccupied. When it is not likely to become endangered in the foreseeable future throughout all or a significant portion of its *current* range, it should be delisted."⁵⁶ However, this statement has no basis in the text of the ESA and is not clearly defined anywhere. Without a clear definition or rationale, the FWS essentially has the power to make its own rules and policies when making delisting or downlisting decisions about a particular population.

b. Straying from species recovery plans

Another reason delisting is criticized is because of instances where FWS has strayed from a species recovery plan. According to the text of the ESA, the SOI is required to "develop and implement plans. . .for the conservation and survival of endangered species and threatened species. . .unless he finds that such a plan will not promote the conservation of the species" and the plans must include "objective, measurable criteria which, when met, would result in a determination,

52. *Id.* at 1172.

53. Final Rule To Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15,804, 15,818 (Apr. 1, 2003).

54. *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144-45 (9th Cir. 2001).

55. *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv. (Friends II)*, 12 F. Supp. 2d 1121, 1132-34 (D. Or. 1997).

56. Jamison E. Colburn, *Canis (Wolf) and Ursus (Grizzly): Taking the Measure of an Eroding Statute*, 22 NAT. RESOURCES ENV'T 22 (2007) (citing 68 Fed. Reg. at 15,857).

in accordance with the provisions of this section, that the species be removed from the list”.⁵⁷ Additionally, the ESA specifies that satisfaction of the recovery goals is not the basis for downlisting or delisting decisions, though it is always considered as a factor in the analysis. Though recovery plans are intended to be a road map to species’ recovery and have the purpose of helping bring species to a level where delisting is appropriate, the plans are not always followed, causing the journey to delisting to be hindered.

Historically, courts have not found the provisions in recovery plans to be legally enforceable⁵⁸ and environmental groups have generally been unsuccessful at enforcing provisions of recovery plans.⁵⁹ In *National Wildlife Federation v. National Park Service*, the federal district court ruled that it will not “second guess the SOI’s motives for not following the recovery plan”⁶⁰ and has since refused to force the FWS to comply with species recovery plans.⁶¹ Additionally, the district court ruled in *Defenders of Wildlife v. Lujan* that the “recovery plan itself has never been an action document”⁶² and the U.S. Court of Appeals interpreted Section 1533(f) of the Act in *Fund for Animals, Inc. v. Rice* as making “it plain that recovery plans are for guidance purposes only.”⁶³

c. Improper analysis by agencies

Another major problem with the delisting process arises when agencies do not properly conduct the five-factor analysis in making decisions to delist species. By statute, the Secretary of the Interior must use the best scientific or commercial data available in completing the five-factor analysis of the species’ current situation when determining whether to list or delist a species. Additionally, FWS regulations require that no “possible economic or other impacts” may apply to delisting a species.⁶⁴ There is evidence available that some recent delisting proposals and final determinations may not be grounded in the best scientific evidence available.⁶⁵ Critics have many doubts about

57. 16 U.S.C. § 1533(f)(1) (2003) (emphasis added).

58. Frederico Cheever, *Recovery Planning, the Courts and the Endangered Species Act*, 16 NAT. RESOURCES & ENV’T 106, 108 (2001).

59. *Id.* at 2.

60. Nat’l Wildlife Fed’n v. Nat’l Park Serv., 669 F. Supp. 384, 389 (D. Wy. 1993).

61. Nat’l Audobon Soc’y v. Hester, 801 F.2d 405, 406 (D.C. Cir. 1986).

62. *Defenders of Wildlife v. Lujan*, 792 F. Supp. 834, 835 (D.C. Cir. 1992).

63. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 539, 547 (11th Cir. 1996).

64. 50 C.F.R. § 424.11(b) (1999).

65. Philip Kline, *Grizzly Bear Blues: A Case Study of the Endangered Species Act’s Delisting Process and Recovery Plan Requirements*, 31 ENV’T L. 371, 392 (2001).

whether several species should have been delisted, including the bald eagle, the gray wolf, and the Yellowstone grizzly.⁶⁶ One of the reasons the FWS may be delisting controversial species is to attempt to decrease political criticism of the ESA by trying to show that species do eventually recover under ESA protection.⁶⁷

d. Resulting consequences

One of the consequences of problems in the delisting process, such as mistakes in evaluating whether a species should be delisted, is a species being delisted too early. Premature delisting of a species could easily lead to severe consequences if there is a subsequent population decline due to the lack of protection after delisting. A recent example of this situation occurred with the Yellowstone grizzly (see section III.A.). In addition to the obvious danger imposed on the species, premature delisting can lead to even further consequences if it later requires an emergency relisting. Additionally, when agencies focus on making the decision first and justifying it later, they might be prone to use less reliable data to support their decisions and the political cost of this type of action may eventually lead to even greater criticism of the Act than the current criticisms. Even if relisting is possible, considering the bureaucracy inherent in the process and any inefficiency that might arise in communication to interested parties, the initial lack of protection might prove fatal to the species if its population has already dropped too low. Not only might it be too late for the species to recover at this point, it could lead to the weakening of the ESA's credibility. When uncertainties exist in the process, the ESA cannot be relied upon to protect species.

B. Other Methods of Species Protection

Fortunately for certain species, additional protections exist outside of the ESA even if they are delisted. For example, some species are protected under the Migratory Bird Treaty Act of 1918.⁶⁸ Bald eagles are specifically protected under the Bald Eagle Protection Act.⁶⁹ The Lacey Act protects wildlife, fish, and plants that have been ille-

66. *Id.*

67. *Id.* at 391.

68. 16 U.S.C. §§ 703-12 (1994 & Supp. IV. 1998). This Act makes it illegal to take, kill, or possess any migratory birds listed under the Act and offers limited habitat protection for migratory birds.

69. 16 U.S.C. § 668 (1994). This Act prevents the taking or transport of bald and golden eagles, their nests, or eggs.

gally taken, possessed, transported, or sold from being traded.⁷⁰ The National Wildlife Refuge System Administration Act of 1997 provides guidelines and directives for administration and management of all areas in the wildlife refuge system, including “wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas.”⁷¹ The Federal Land Policy and Management Act governs the uses of public lands, thereby protecting species that exist on them.⁷² The National Forest Management Act protects national forests and the species that live in them.⁷³ Thus, even if a species loses ESA protection after delisting, there are still alternate protective measures available to some, though not all species.

State regulations also exist to protect species. Section 6 of the ESA provides funding for the development of state programs for the management of threatened and endangered species by state wildlife agencies.⁷⁴ Additionally, each state has state endangered species lists containing species that are endangered in some, but not all states. If states meet federal standards, the Secretary must cooperate with states in conservation of protected species and must enter into cooperative agreements to assist states in their endangered species programs. If a cooperative agreement exists, states may receive federal funds from a specific fund created under the ESA to implement the program, though normally states are expected to contribute a minimum amount.⁷⁵

There are also some local regulations available to protect species. These protections mainly involve land use. They protect species from land use affecting species’ habitat. and regulate local ownership. Also, local agencies are in charge of use permits, which is important because if a use interferes with the well-being of an endangered species, the use will probably not be permitted. Other local protections afforded to species can be quite broad. Regulations of pesticides and animal control laws can also affect species more indirectly. Pesticide and chemical regulation can help protect species habitats and keep species and their food supplies healthy. Animal control laws can help

70. 16 U.S.C. § 3371-3378; 18 U.S.C. § 42 (1994). These Acts authorize federal enforcement of state and foreign wildlife laws, particularly to those involving commerce in, and taking of, wildlife.

71. 16 U.S.C. § 668dd-668ee (Supp. IV 1998).

72. 43 U.S.C. §§ 1701-1785 (1994 & Supp. IV 1998).

73. 16 U.S.C. §§472a, 521b, 1600, 1611-1614 (1994 & Supp. IV 1998).

74. 16 U.S.C. § 1535.

75. Saundry, *supra* note 12.

species from being interfered with taken or transported, thus protecting their populations. Local regulations can therefore affect species both directly and indirectly.

Post-delisting monitoring requirements exist under section 4 of the ESA.⁷⁶ Although in the original ESA there were no requirements for continued protection of a delisted and recovered species, the 1988 amendments addressed this problem.⁷⁷ The monitoring requirements contained within the amendments require the Secretary to cooperate with affected states in creating a system to monitor any recovered species for a period of at least five years after it is removed from the ESA protected species list.⁷⁸ Additionally, this section allows for a species to be relisted in an emergency if a "significant risk" to the "well being" of the species develops any time after delisting.⁷⁹ There are no specific requirements in the ESA to determine what exactly must be included in the mandatory monitoring system. However, Congress intended that a collaboration exist between FWS and the states to determine monitoring needs for a species as well as communication and coordination with other relevant and interested groups, such as federal and state agencies, the scientific and academic community and private conservation organizations.⁸⁰

III. CASE STUDIES

The following case studies will examine the delisting process of several species, most notably, the Yellowstone grizzly, the bald eagle, and the gray wolf. The purpose of this analysis is to determine whether the delistings in each example were conducted accurately, whether they were effective, and whether the species really should have been delisted. Examining the cases will also provide support for the previously mentioned criticisms of the ESA. Evaluating these specific examples of delisted species will also support more informed recommendations about how the delisting process could be improved.

76. 16 U.S.C. § 1533(g) (1994).

77. Endangered Species Act Amendments of 1988, Pub. L. No. 93-205, 81 Stat. 884 (1973).

78. 16 U.S.C. § 1533(g)(1) (1994).

79. 16 U.S.C. § 1533(g)(2) (1994).

80. S. Rep. No. 100-240, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2701.

A. *Yellowstone Grizzly*

The Yellowstone grizzly serves as an example of a delisting failure due to improper analysis of species status, an inadequate recovery plan, and premature delisting. The Yellowstone grizzly and its experience with the ESA is a complicated story. The Yellowstone grizzly was listed as threatened in 1975.⁸¹ Since then, its population has revived and proponents of the ESA view this as proof of the Act's success. The grizzly was removed from the list in 2007, after extensive public opposition⁸² when it was determined to have recovered sufficiently due to ESA prohibitions on harming the bear and increased public awareness. In the years shortly after its delisting, the grizzly died out in record numbers due to factors including global warming, habitat loss, and lack of protection allowing hunters to kill them again.⁸³ When agencies met to determine why the grizzly was dying in such high numbers, they determined that the species could be protected by better hunter education, use of bear spray as a deterrent, and opening a limited grizzly hunt for hunters in three states; however, what they did not discuss were the effects of global warming, habitat loss, and delisting from the ESA on the species.⁸⁴

Since then, there have been many challenges to the bear's delisting and many advocates for relisting the grizzly. Critics of this situation believed it imperative for the grizzly to be relisted; however, with the lack of funding and slow bureaucratic process of listing, some worried it might be too late for the grizzly.⁸⁵ The most notable challenge to the grizzly's delisting was *Western Watersheds Project v. Servheen*.⁸⁶ The plaintiffs in this case claimed that FWS violated the ESA by removing the Yellowstone bears from protection even though the species still met three of the five criteria for listing, rendering them

81. U.S. Fish & Wildlife Service Endangered Species, *Grizzly Bear Recovery*, see <http://www.fws.gov/mountain-prairie/species/mammals/grizzly/>.

82. Endangered and Threatened Wildlife and Plants, Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment From the Federal List of Endangered Species; Notice of Petition Finding, 72 Fed. Reg. 14,866 (Mar. 29, 2007) (to be codified at 50 C.F.R. pt. 17).

83. PBS, *The Good, the Bad, and the Grizzly: The Delisted Yellowstone Grizzly Update from Natural Resources Defense Council*, July 16, 2008, available at <http://www.pbs.org/wnet/nature/episodes/the-good-the-bad-and-the-grizzly/the-delisted-yellowstone-grizzly-update-from-natural-resources-defense-council/1036/>.

84. Peacock, *supra* note 2.

85. *Id.*

86. Complaint for Declaratory and Injunctive Relief, *Western Watersheds Project, et al., v. Servheen, et al.*, No. 07-cv-243 (D. Idaho Jun. 4, 2007).

still eligible for protection. The plaintiffs also alleged that the delisting of the grizzly bear violated the ESA because it was based on a plan that insufficiently protects the bears' habitat, fails to address threats to the bears' food sources, and considered custodial management.⁸⁷ The plaintiffs also said the bears' "comeback" might not be sustainable, that the species' still-declining numbers demonstrated that grizzlies had not recovered, and that the FWS' decision to delist the bear "simply assumed that grizzly bears will adapt to a drastically changed environment".⁸⁸

In September of 2009, the delisting ruling was vacated and the grizzly was put back on the endangered species list. While legal issues were being resolved, the court ruled that the grizzly must be treated as a threatened species so its protection would continue. Additionally the court ruled that the FWS was blocked from delisting the bears. Though parties involved with grizzly bear management bemoan the delisting ruling being overturned, the judge ordered the species' relisting because of the exact problems with the delisting process discussed in this paper. The court's rationale for overturning the rule was there are inadequate regulatory mechanisms in place to protect grizzlies in the future after delisting and the FWS did not adequately take into consideration the impacts of global warming and other factors on whitebark pine nuts, one of the species' main food sources.⁸⁹

Even though the FWS had developed a grizzly bear conservation strategy as part of the delisting process that included standards for monitoring the bear population after delisting, the court ruled this strategy was unenforceable and nonbinding on states and federal agencies, specifying that "without tangible requirements specifying how the population will be maintained at 500 bears and how the mortality limits will be enforced," there was no real regulatory mechanism to maintain the grizzly population.⁹⁰ Further, the court determined that the FWS had not adequately articulated a rational connection between the best available science and its conclusion that bears will not be affected by declines in one of its food sources, the whitebark pine, because its conclusion was based on little evidence.⁹¹

After the delisting, the bears died out in record numbers. Now that the bear is protected again, that number has decreased and the

87. *Id.*

88. Sherry Jones, *Advocates Challenge Decision to Remove Protections for Yellowstone Grizzly Bear*, ENVIRONMENT REPORTER, June 15, 2007.

89. *See* Western Watersheds, *supra* note 86.

90. *Id.*

91. *Id.*

population has begun to revive. This example of the grizzly bear shows FWS needs to make its conclusions based on better scientific information and should continue to offer better protections for endangered species even after delisting. This example of the Yellowstone grizzly also shows that while agencies are considering relisting a species, it is important that the species has some protection so it does not fall to dangerously low levels again before it is relisted. By then, it might be too late to revive the species.

B. Bald Eagle

The bald eagle, on the other hand, supports a different point. The bald eagle was delisted in 2007, considered a success story by proponents of the ESA.⁹² However, upon closer analysis, it is clear that the bald eagle is actually protected by several other regulations, such as the Clean Water Act, Bald and Golden Eagle Protection Act, and the Migratory Bird Treaty Act.

The bald eagle had been protected under the ESA since 1978.⁹³ However, its population revived and the eagle population increased from 417 nesting pairs in 1963 to 9,789 known nesting pairs in 2007.⁹⁴ In 1999, the FWS published a proposed rule to delist the species but did not make a final decision.⁹⁵ In 2007, the Secretary of the Interior announced removal of the bald eagle from the ESA list.⁹⁶ The Secretary commented that the Department was “confident in the future security of the American bald eagle” and that it would work to ensure the species no longer needed the protection of the Act.⁹⁷

Although proponents of the ESA consider this a success, there were several other ways the Eagle would continue to be protected even without the protections of the ESA after delisting. The bird had been protected under the Bald and Golden Eagle Protection Act since 1940 and under the Migratory Bird Treaty Act since 1918. There are also acts that do not directly protect the bald eagle, but have indirectly helped it recover. For example, the Clean Water Act has helped protect bird habitats by keeping water clean, protecting eagle’s food supplies

92. Defenders of Wildlife, *Bald Eagle Delisting Delayed*, February 8, 2007, <https://www.defenders.org/press-release/bald-eagle-delisting-delayed>.

93. Mark Wolski, *Federal Court Orders Interior Department to Decide if Bald Eagle Remains Protected*, ENVIRONMENT REPORTER, Aug. 18, 2006.

94. *Interior Announces Bald Eagle’s Removal from Endangered Species Act Protections*, ENVIRONMENT REPORTER, Jul. 6, 2007 [hereinafter *Bald Eagle Removal*].

95. Wolski, *supra* note 93.

96. *Bald Eagle Removal*, *supra* note 92.

97. *Id.*

and habitats. Also, before the 1972 ban on the pesticide DDT, the chemical contaminated the bald eagles main food source, fish, and caused the eagle to lay eggs with shells so thin they cracked before hatching. Both factors caused the eagle's population to plummet. The ban also contributed to the recovery of the species.⁹⁸ The example of the bald eagle shows that even though the population did recover, the species' delisting was not completely due to ESA protections contributing to the population's revival but also to protections of other statutes and regulations.

C. Gray Wolf

Another example of the failure of the delisting process under the ESA is the gray wolf. The case of the wolf exemplifies improper delisting due to considerations of only part of the population (as discussed in Section II.A.ii.a. of this paper), failing to follow the species recovery plan, and premature delisting. Wolves were nearly exterminated by the 1930s due to government-sponsored eradication programs.⁹⁹ The gray wolf was listed in 1974, after the ESA was adopted.¹⁰⁰ It was protected until 2008, when the northern Rocky Mountain gray wolf was designated a distinct population segment and delisted. Before being delisted, FWS loosened restrictions on killing wolves in certain states (Idaho, Wyoming and Montana) while the delisting process was underway.¹⁰¹ FWS defended this decision as giving states the power to manage their species populations, but many environmental activists believe the government was trying to sidestep the ESA by weakening provisions for the wolf before delisting had been approved.¹⁰² Once the wolves were delisted, certain state fish and game agencies, such as in Idaho, Montana, and Wyoming, proposed to allow for the killing of up to a certain percentage of wolves once they were delisted.¹⁰³

98. SMITHSONIAN NATIONAL ZOOLOGICAL PARK, <http://nationalzoo.si.edu/Animals/NorthAmerica/BaldEagleRefuge/SaveOurSymbol/default.cfm> (last visited Nov. 10, 2009).

99. Robert C. Cook, *Rocky Mountain Gray Wolves Returned By Federal Court to Endangered Species List*, ENV'T REP., Jul. 25, 2008.

100. *Id.*

101. *Proposal to Allow Wolf Hunting in Yellowstone States*, ENV'T REP., Jul. 13, 2007, (citing 72 Fed. Reg. 36, 942).

102. *Id.*

103. Sherry Jones, *Commission Proposes Rules Setting Quotas for Killing of Delisted Wolves*, ENV'T REP., May 9, 2008.

In part because of many opinions that the proposed rule to kill wolves was too aggressive and allowed for too many deaths¹⁰⁴, there were several challenges to the wolf's delisting. In July 2008, a federal district court in Montana issued a preliminary injunction to restore ESA protections to the Rocky Mountain gray wolf.¹⁰⁵ The first reason the judge gave for requiring the wolf to be delisted was that the FWS acted arbitrarily in delisting the wolf without a showing of "genetic exchange" between the Greater Yellowstone core recovery area and the northwestern Montana and central Idaho core recovery areas, which means that the FWS violated the ESA by removing statutory protections too early, before finding evidence that the wolves were able to mingle and breed among the various groups of the wolf population.¹⁰⁶

Another problem the court found with the delisting was that the FWS acted arbitrarily and capriciously by approving Wyoming's 2007 wolf management plan despite the state failing to commit to managing 15 breeding pairs.¹⁰⁷ This 2007 plan classified the wolf as a predatory animal in almost 90% of the state and only committed the state to managing for half the amount of required breeding pairs outside of national parks.¹⁰⁸ This led to more wolves being killed under state management because of public wolf hunts than were killed when the ESA protections were in place.¹⁰⁹ Idaho's governor had publicly pledged to reduce wolves as aggressively as FWS would permit immediately upon delisting, and Wyoming had proposed eradication of the wolves outside of the national parks, setting a goal of essentially "functional (re-) extinction".¹¹⁰

The lawsuit resulted in the court issuing a preliminary injunction to restore ESA protections, at least until the lawsuit was finalized, because the plaintiffs had demonstrated a likelihood of success on the merits of several of their claims as well as the possibility of irreparable injury.¹¹¹ Since then, the FWS is planning to reassess this status and designation by conducting further rulemaking and rendering new de-

104. *Id.*

105. Cook, *supra* note 99.

106. *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160 (D. Mont. 2008).

107. *Id.*

108. Cook, *supra* note 99.

109. *Id.*

110. 71 Fed. Reg. 6,634, 6,654 (Feb. 8, 2006). See also Jim Robbins, *For Wolves, a Recovery May Not be the Blessing it Seems*, N.Y. TIMES, Feb. 6, 2007.

111. *Defenders of Wildlife*, 565 F. Supp. 2d at 1160.

terminations regarding the appropriate designation and status of gray wolves in the northern Rocky Mountains.¹¹²

IV. ANALYSIS AND RECOMMENDATIONS

The point to be gleaned from the previous case studies is that another method, or at least an improved one, is necessary to protect a species after it is delisted. Agencies on all levels should be allowed to take preliminary protective actions before having to resort to ESA protections or attempt relisting.

When species are delisted by the ESA, it should be clear and obvious that it is not too early in the species' recovery. When species need to be relisted, it should not be at the point where it is too late for revival. Ultimately, the mindsets of humans involved in conservation efforts need to be changed to a more forward thinking approach: an attitude of determining how we can prevent problems from occurring in the future, not how we can fix them after they have already occurred.

Currently, there is excessive concern with pleasing all involved groups rather than focusing on what endangered species need. The original purpose of the ESA should always be kept in mind: protecting individual species, reviving lagging populations, and protecting ecosystem diversity. Each of these goals could be met by slimming down both the ESA and delisting process to create an easier and clearer method of species protection, in combination with proactive conservation policies, such as conserving current habitats and creating new habitats by relocating species.

To address this problem, the ESA needs to be trimmed into a clearer and less encumbered statute. The ESA should be used as a last resort for protection, rather than an obstacle to conservation.¹¹³ If conservation methods, such as habitat conservation and species relocation, were performed on a more local level, species might be able to get the help they need before going to the federal level and having to navigate the bureaucracy of the ESA.

Part IV provides three types of recommendations to improve protection for endangered species: (1) methods of institutional reform, which include broader suggestions on how to improve the system by removing political biases and shifting focuses when making decisions;

112. Tom Alkire, *Fish and Wildlife Service to Reassess Status of Rocky Mountain Gray Wolves*, *Judge Says*, ENVIRONMENT REPORTER (Oct. 24, 2008), available at <http://news.bna.com/erln>.

113. Davis, *ESA at 30*, *supra* note 17, at 305.

(2) new instruments, such as adaptive management and communal conservancies; and (3) strategic changes to the ESA that address interdisciplinary decisions and implement initiatives at the local, state, regional, or private levels to create an interim method of species protection.

A. *Institutional Reform*

The most basic way to change the way species are protected and de/relisted is on an institutional level. The system will function better if political pressures on agencies are removed or reduced, institutions are made more flexible and accountable for their decisions, and if agencies can make decisions based on what is best for the species, disregarding any controversies.

Each time a new political party comes into power, agencies prioritize species protections differently. Some people generalize that species are better protected by Democratic regimes, but this is not always the case. George W. Bush's administration listed 71 new species as threatened or endangered during Bush's two terms, compared with 538 in Bill Clinton's two terms and 251 in George H. W. Bush's single term.¹¹⁴ However, part of the reason why the second Bush's listings were so much lower might be because of the high amount of litigation about species protection.¹¹⁵ Obama listed fewer species in his first year as President than George W. Bush did.¹¹⁶ FWS attributes this to the amount of litigation, as in the Bush administration, but others believe Obama has not made listings a priority.¹¹⁷ Whatever the reason, the protections given to species should not sway according to the current political party, but should be constant over the years.

Agencies also need to incorporate more accountability and flexibility into their decisions. Agencies can be more accountable for their decisions by implementing a stronger or stricter scientific requirement for better information. "Best commercial and scientific data available" should mean exactly that. If agencies have more control over the scientific surveys and studies conducted, the quality of information will

114. Emma Marris, *Endangered Species Chart a Fresh Course*, NATURE NEWS, (Mar. 10, 2009), <http://www.nature.com/news/2009/090310/full/news.2009.148.html>.

115. *Id.*

116. Allison Winter, *New Endangered Species Listings Wait as Obama Admin Charts New Course*, N.Y. TIMES (Nov. 24, 2009), available at <http://www.nytimes.com/gwire/2009/11/24/24greenwire-new-endangered-species-listings-wait-as-obama-25085.html>.

117. Brian Merchant, *Obama Protecting Fewer Endangered Species than Bush*, TREEHUGGER (Nov. 25, 2009), <http://www.treehugger.com/files/2009/11/obama-protecting-fewer-endangered-species-bush.php>.

improve. Though it is important for there to be some finality in decision-making to facilitate public oversight, agencies need to be open to making changes when necessary. Agencies can become more flexible by involving more opportunity for response to other actors in both the public and private sectors, including state and local governments and the public. This way the process is more spread out and handled by multiple organizations, rather than allowing cumbersome bureaucracy to exist on one level. However, agencies must be careful to reduce redundancy and overlap if several layers are involved. This can be done with integrated technology that would allow for agencies to cooperate with each other and be knowledgeable about what is occurring at all levels.

Agencies would be better to focus on the species that have the biggest effect on other species or on ecosystems in making listing/delisting decisions rather than making decisions based on avoiding litigation or based on political pressures. Agencies might also alter their decision making by considering what species could recover and be delisted at a lower cost thereby improving recovery statistics. Also, there are some species that may never recover due to irreversible habitat degradation, rarity of the species, and climate change. Since these species require more ongoing and active conservation management, agencies could add another category and ESA-status for such species.¹¹⁸ Ultimately, species would benefit from decisions made on what would be best for the individual species and the ecosystem that surrounds it, removing any outside influences or political pressures.

B. *New Instruments*

Agencies can also use new instruments to change the way the ESA functions to protect species. By using adaptive management, by both implementing it and exploring how it has already worked, agencies can change their current processes by looking at past experiences.

Adaptive management has recently been a primary concern in ESA policy in managing ecosystems,¹¹⁹ but there have been many issues with using adaptive management in the ESA. Adaptive management specifically “consists of managing according to a plan by which decisions are made and modified as a function of what is known and learned about the system, including information about the effect of

118. Davis, *ESA at 30*, *supra* note 17 at 299.

119. Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 WASHBURN L.J. 50, 51 (2001) [hereinafter Doremus].

previous management actions.”¹²⁰ Most simply, we can use adaptive management to look at past experiences with the ESA to determine how to change policies and behaviors in the future and to help agencies realize that even though it might seem preferable initially to stick with decisions when considerable time and money has already been devoted, in the long run, it is more beneficial to be flexible in decision-making and adapt based on changes as they come.

Currently, adaptive management is being used along with the ESA in three key ways: in managing specific decisions, in developing habitat conservation plans, and in listing critical habitat designation.¹²¹ However, in practice, adaptive management has been hindered by agencies vulnerable to political pressures and lack of flexibility in changing management methods.¹²² What can be learned from the experience of adaptive management in the ESA is that institutions must avoid political imbalance, reduce political pressures, keep management decisions open to correction without bending to changing political winds while providing some sort of closure, and must combine flexibility and accountability.¹²³ In doing this, it must be kept in mind that agencies can use adaptive management as a kind of cover to claim they are meeting demands for environmental protection while not actually enforcing any constraints on themselves. Agencies should not be using adaptive management as a way to avoid making politically and/or publicly controversial decisions.

To allow adaptive management to work in the ESA, there must be institutional reform among agencies as discussed in Part IV.A of this paper. Agencies must be monitored to make sure the best data is being used, and not in agencies’ self-interest or according to the political party in place at the time. This can be accomplished by allowing more groups to participate in the information collecting stage, so more information can be evaluated to determine what is the “best scientific and commercial data available.” There must also be wide access to the information to allow for better accountability in evaluating the information. Political pressures can be avoided by making sure that all interested parties “have a say” from the beginning and by using measures such as citizen suits to maintain balance in the process. Political pressures can also be avoided through judicial decisions that review agency decisions for arbitrariness, capriciousness, or insufficient infor-

120. Ana M. Parma et al., *What Can Adaptive Management Do for Our Fish, Forests, Food and Biodiversity?*, 1 INTEGRATIVE BIOLOGY 16, 19 (1999).

121. Doremus, *supra* note 119, at 66-77.

122. *Id.* at 78.

123. *Id.* at 80-81.

mation.¹²⁴ To combine flexibility and accountability in decision making and final decisions, Holly Doremus suggests incremental decision-making and pre-negotiated agreements.¹²⁵ Incremental decisions would force agencies to make decisions for a short time period and information gleaned from evaluations at the end of this period would support a decision as to whether to renew or extend the decision. Pre-negotiated agreements, where management agencies and regulated parties agree on the steps to be taken if monitoring shows that a species is in decline, would be more final as they would include responses to monitoring data in the initial decisions.¹²⁶

Another new instrument could be taken from the example of some international programs that allow the poor to earn money by working in areas that promote conservation of endangered species. A primary example of this phenomenon is Namibia. The Namibian constitution incorporates protection of the environment and the government has reinforced this protection by giving its communities the opportunity and rights to manage their wildlife through communal conservancies, thus alleviating poverty through the sustainable use of natural resources. Namibia started an organization called the Integrated Rural Development and Nature Conservation (IRDNC) in the mid-1980s to inspire community stewardship of wildlife. After the country became independent in 1990, the IRDNC transformed into Namibia's communal conservancy program with the help of the World Wildlife Fund. Since 1998, 52 communal conservancies have been created, engaging more than 220,000 community members. Namibian communities now view wildlife as a valued livelihood asset, and are setting aside vast tracts of land as wildlife management areas. All of this work has made poaching no longer socially acceptable and has restored populations of many native species, and has also improved the community welfare through the addition of nearly \$4 million in annual income generated by the conservancies.¹²⁷

The U.S. could take a similar approach to both help protect species and help local communities in our country to help revive wildlife populations and ecosystems and promote sustainable economic growth in America. Helping citizens become more involved in the process might reduce perverse incentives of landowners. Communal conser-

124. *Id.* at 85.

125. *Id.* at 87.

126. *Id.* at 87.

127. *Namibia: Empowering communities to manage their natural resources*, WORLD WILDLIFE FUND, <http://www.worldwildlife.org/what/wherewework/namibia> (last visited Dec. 9, 2009).

vancies might also bring revenue into the country by increasing available tourism and recreational activities.

C. Strategic Changes to the ESA

Strategic changes to the ESA could include initiatives on other levels, including the local, state, regional, or private levels. Changes could also include implementing an interim method to protect species, taking interdisciplinary approaches to decisions, and using adaptive management techniques.

Ideally, more initiatives would be implemented on lower levels, such as local, state, regional or private levels so that species can be protected without going through the burdensome and inefficient listing and delisting process in the ESA. If actions were taking on these levels, to educate the public, protect species, or create protective species and habitat management plans, the species might not ever have the need for ESA protections allowing species at risk of endangerment to be recognized at an earlier level. State and regional governments would have a better idea about how to prioritize species for recovery actions and protection and avoid the need for federal protection.

Agencies can become more flexible in implementing the ESA by providing additional opportunities to receive feedback from other actors in both the public and private sectors, including state and local governments and the public. Agencies should start by including more meaningful public involvement and education. More knowledge and better education on local levels will lead to more involvement on local levels and more involvement will lead to initiatives by the local and state governments themselves.

The reason involvement is so important on lower levels, such as local, state and regional levels, is these governmental institutions will be better able to design successful conservation strategies, including programs for endangered species and species conservation plans. The knowledge and scientific information needed comes from a more first-hand level, allowing decisions and conservation plans to be made with better understanding of the species and ecosystems that are affected. Also, by having initiatives on a more local level, there are fewer propensities for burdensome complexities to arise from necessary coordination of conservation efforts. Even if the power remains with the federal government, which it will, at least in the foreseeable future, states should be consulted earlier in the ESA process and should have more effect on recovery planning and implementation of such plans.

There should be more cooperation among agencies on all levels to share information, expertise, and data.¹²⁸

Finally, agencies on all levels need more funding for species delistings to be successful. Paul J. Ferraro, Craig McIntosh and Monica Ospina conducted an economic study of the effectiveness of listing in the ESA in 2006. In their study, they found that listing a species for recovery without substantial government funding is actually detrimental to species on average, and also found that species listed that do receive funding tend to improve.¹²⁹ The study also found that there is no evidence that listed species do better than unlisted species unless they are well funded.¹³⁰ This indicates that well-funded recovery plans work better than plans that do not receive adequate funding; rather, these plans seem to have adverse consequences. Agencies need to create a logical method to determine how to fund species, examining appropriate scientific, political and financial concerns. This way, agencies can determine how to prioritize their funding among species, whether by probability of recovery, immediate need, or any other factors.

CONCLUSION

The delisting process is not perfect and being delisted does not necessarily mean that a species has recovered. Since the courts originally interpreted Congress's intent in creating the ESA as protecting endangered species with the highest of priorities and to halt and reverse the trend toward extinction at "whatever the cost" because the value of endangered species was "incalculable," the ESA has not protected species as highly in practice, in part due to deficiencies in the delisting process. The ESA is no longer operating the way it was originally intended, so provisions for delisting need to be revamped for the benefit of all endangered species.

By analyzing criticisms of the Act and the delisting process and examining case studies of specific endangered species that have gone been delisted, it is clear that several fundamental problems exist. The ESA has general and broad problems, such as bureaucratic difficulties, lack of accountability in interpreting scientific research, and making decisions without first focusing on the endangered species' best inter-

128. Davis, *ESA at 30*, *supra* note 17, at 300.

129. PAUL J. FERRARO, CRAIG MCINTOSH & MONICA OSPINA, *THE EFFECTIVENESS OF LISTING UNDER THE U.S. ENDANGERED SPECIES ACT: AN ECONOMETRIC ANALYSIS USING MATCHING METHODS* (April 2006), available at <http://irps.ucsd.edu/assets/003/5269.pdf>.

130. *Id.* at 24.

est. More specifically, problems occur because species are delisted prematurely, agencies do not conduct proper analyses in making delisting decisions, and data to make decisions is inefficient. Once these problems are discovered, it can be too late for the endangered species to recover. Although a few existing alternate methods of protection exist, including state and local regulation, these are not always enough to protect endangered species.

To promote successful protectionism and conservation in the long-term, changes need to be made to the ESA and the delisting process. Adaptive management can be used to examine the shortcomings of the current ESA delisting process and studying several case studies of delisted species that have experienced both success and failure in their recoveries. This paper concludes that the current delisting process in the Endangered Species Act is not a successful method of protecting and conserving species in the long term. It concludes that due to deficiencies in the system, the delisting process is not an accurate measure of successfully recovered species, and sometimes species may suffer irreversible harm and possibly have to be relisted. By removing political imbalances and making institutions more flexible and accountable in their decision-making, the delisting process can improve. The process can also become better through the use of adaptive management and alternate measures and initiatives to protect species while they are not under the protection of the ESA, including communal conservancies, interdisciplinary cooperation, and interim protections on a state or local level. If the delisting process is improved, endangered species will benefit from increased and better protection.
