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THE WOLF AT THE DOOR:

COMPETING LAND USE VALUES ON MILITARY INSTALLATIONS

MAJOR SHARON E. RILEY
44TH GRADUATE COURSE

THE WOLF AT THE DOOR: COMPETING LAND USE VALUES ON MILITARY INSTALLATIONS

A Thesis

Presented to

The Judge Advocate General's School,
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other government agency.

by
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APRIL, 1996

THE WOLF AT THE DOOR: COMPETING LAND USE VALUES ON MILITARY INSTALLATIONS

MAJOR SHARON E. RILEY
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JUDGE ADVOCATE GENERAL'S CORPS

ABSTRACT: Federal land use law and policy have evolved from encouraging settlement and development to requiring retention and multiple use. A fierce, sometimes violent, competition has developed for the use of this land, as federal land management agencies seek to serve all ends with limited resources. Now these land management agencies are calling on the military to share its training lands to support non-military goals. With increasing frequency, the military is being asked to play a major role in wildlife conservation, and to set aside its land for the protection, and even the introduction, of endangered species. The military should continue its policy of wise stewardship, but should seek protective legislation, in the form of amendments to the endangered species act. The U.S. should move toward a national land management strategy by creating a National Trustee Board to establish and implement land use policy. In addition, DoD should appoint a Wildlife Coordinator, or "Wildlife Czar" to oversee the various wildlife conservation programs on military installations. The Wildlife Czar should sit on the National Trustee Board, so that DoD will have a formal voice in the development of federal land management policy.

THE WOLF AT THE DOOR:
COMPETING LAND USE VALUES ON
MILITARY INSTALLATIONS

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THE WOLF AT THE DOOR: COMPETING LAND USE VALUES ON MILITARY INSTALLATIONS

MAJOR SHARON E. RILEY[1]

"Why, land is the only thing in the world worth working for, worth fighting for, worth dying for, because its the only thing that lasts."[2]

Gerald O'Hara
Gone With the Wind

I. Introduction

A. Problem: We live in a world where wildlife advocates want to put endangered wolves, already extinct in the wild, onto military bombing ranges. If this sounds like some Orwellian view of the future, or the sinister design of someone with a "nuke the whales" bumper sticker, think

[1] I want to thank MAJ(P) David N. Diner for his never ending patience, enthusiasm, and assistance; for convincing me to write a thesis; and for making the process so much fun. I also want to thank MAJ Tom Ayers at the Army Environmental Law Division for sharing his files and ideas.

[2] GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939).

again. One project has already been implemented and a second is proposed and endorsed by a variety of environmental and wildlife conservation organizations.

Red Wolves, extinct in the wild and living only in captivity, were released onto the Air Force's Dare County Bombing Range in North Carolina. The U.S. Fish and Wildlife Service has proposed the reintroduction of the Mexican Wolf, which is also extinct in the wild and living only in captivity, onto the White Sands Missile Range in New Mexico. Environmental groups support both programs.

A "boot-camp" to train black-footed ferrets is operating on the contaminated Pueblo Army Depot in Colorado. Red-Cockaded Woodpeckers will be "harvested" from private land in Louisiana and relocated to Ft. Polk to allow development of the private land. Are we turning military installations into zoos? Are we jeopardizing the lives of these endangered animals, already struggling for survival? How did such a world come in to being and what are the implications for the military?

B. Solution: The United States was once considered a land of limitless resources. Because we had more land than people, our land use policies encouraged the development and exploitation of resources. Over time the ratio of land to people decreased, and we began to compete for suddenly limited resources. As resources became more precious, a natural tension developed between their use and

preservation. The evolution of land-use legislation reflects that competition and attempts to satisfy all of the various use values with what we have left. In some places, the tension is so severe that violence results. Federal land managers now wear bullet proof vests and travel in pairs.

Today we face intense competition for disparate, and often inconsistent, land-use and resource allocation values. Although the United States owns hundreds of millions of acres of land, this land is controlled by a variety of federal agencies, and there is no overarching federal land-use policy. Instead, federal land is managed in a piecemeal manner, with each agency attempting to support an ever increasing variety of goals. Now, almost desperate federal land use managers are asking the military to share some of its otherwise protected property to ease this tension. Because the current federal land use crisis can be expected to worsen rather than abate, these requests can be expected to continue and increase.

As a trustee of federal lands, the military has always been involved in wildlife management. But military installations are being asked to support wildlife conservation values which exceed mere resource trustee responsibilities, at a time when training and weapons testing require more and more land. The proposed reintroduction of the Mexican Wolf onto the White Sands

Missile Range exemplifies the struggle of competing land-use values for finite resources.

Why is the military being asked to fill this new role? Is the support of non-military objectives endangering military operations, and if so what should be done to protect important national security operations. The Mexican Wolf is a symbol of all of this history, competition, and tension. The White Sands Missile Range can accommodate the Mexican Wolf, just as the military can contribute to the ongoing effort to meet all of our competing national land-use objectives, but the military must not become a victim of its own good intentions. Instead, we should seek protective legislation which will enable us to be good neighbors without endangering our primary mission.

First, I propose amending the Endangered Species Act to further protect private parties and military installations which accept new populations of endangered species onto their property. This amendment would follow the Clinton Administration's current "Safe Harbor" policy, which ensures that requirements for the conservation of endangered species do not become more severe after a management agreement is reached. Such an amendment would protect military installations which cooperate in the reintroduction of species in the event the reintroduced animals become "essential" to the overall survival of the species.

Second, I propose appointment of a DoD "Wildlife Czar" to oversee and coordinate all wildlife conservation programs

on military property. The Wildlife Czar would have a big picture perspective on existing and proposed wildlife conservation initiatives, and would replace our current piecemeal approach. This big picture perspective at the DoD level would afford stronger bargaining power, and would ensure that military interests are protected on a national level.

Third, I propose the creation of a National Trustee Board (NTB) to develop and implement a federal land management strategy. The DoD Wildlife Czar would sit on the council to ensure that DoD has a voice in shaping federal land management policy.

In this thesis I will demonstrate how we got where we are, evaluate the current crisis in federal land management, and propose specific legislation to protect military interests and advance federal land use planning.

II. From Sea to Shining Sea - *"It is impossible to comprehend contemporary public land controversies fully without an understanding of public land law history."*[3]

A. U.S. Land Acquisition. The newly formed United States (U.S.) comprised 13 states on the eastern side of the continent.[4] In 1803, the U.S. purchased 828,000 square

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[3] GEORGE CAMERON COGGINS, CHARLES F. WILKERSON, JOHN D. LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 44, (3d Ed., 1993) [hereinafter FEDERAL].

miles from France for less than 3 cents per acre.[5] Known as the "Louisiana Purchase," the "greatest land bargain in U.S. history" suddenly doubled the size of the country.[6] The Rocky Mountains served as the western border of the purchase, and the area which would become the states of Louisiana, Arkansas, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Oklahoma was added.[7] The purchase also included most of Kansas, Colorado, Wyoming, Montana, and Minnesota.[8] Suddenly, the U.S. included a predominately undeveloped western expanse which "turned out to contain rich mineral resources, productive soil, valuable grazing

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[4] *United States of America: History,* BRITANNICA ONLINE, at "http://www.eb.com.180 (Encyclopaedia Brittanica, 1996).

[5] *Louisiana Purchase,* BRITANNICA ONLINE, at "http://www.eb.com.180 (Encyclopaedia Brittanica, 1996).

[6] *Id.* Ownership of the territory bounced back and forth through the late 1700s. French settlements established in the 17th and 18th centuries initially gave France control, but France transferred control of the area west of the Mississippi river to Spain in 1762 and the remainder to Great Britain in 1762. With the rise of Napoleon Bonaparte, Spain returned the land in 1800, giving France control of New Orleans and the mouth of the Mississippi River. Meanwhile, the U.S. had expanded westward into the Tennessee and Ohio rivers area, and depended on free use of the Mississippi river and the port at New Orleans. President Thomas Jefferson dispatched his minister to discuss the purchase of New Orleans. When negotiations failed, the American minister threatened a British-American alliance against France. in early 1803, Napoleon offered the entire Louisiana territory to the U.S. His motives are unclear, but the decision is attributed to the prospect of war between France and Great Britain and the financial constraints of Napoleon's ongoing wars. James Monroe helped to negotiate the purchase, and an agreement was signed on May 2, 1803. However, Jefferson's authority to purchase the property was not clear. Congress was unaware of the planned purchase, and Jefferson feared a constitutional amendment might be necessary. The Senate, however, did ratify the treaty, and the purchase proceeded.

[7] *Id.*

land, forests, and wildlife resources of inestimable value."[9]

In 1845, the legacy of the Louisiana Purchase produced two events which would solidify our national vision. First, in March 1845, Mexico severed relations with the U.S.[10] Then in July, 1845, John O'Sullivan, a lawyer and journalist, coined the phrase "manifest destiny."[11] He advocated the "fulfillment of our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions."[12] Politicians quickly adopted the phrase in debating the annexation of Texas and Oregon and the prospect of war with Mexico.[13] Congress issued a formal declaration of war against Mexico in 1846 and in 1848 the U.S. annexed the area now known as New Mexico, Utah, Arizona, Nevada, California, Texas, and western Colorado.[14] The U.S. obtained the Oregon territory, containing Washington, Oregon, Idaho, and the western portions of Montana and Wyoming through the Oregon

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[8] *Id.*

[9] *Id.*

[10] *Mexican War,* BRITANNICA ONLINE, at "http://www.eb.com.180 (Encyclopaedia Brittanica, 1996).

[11] *Manifest Destiny,* BRITANNICA ONLINE, at "http://www.eb.com.180 (Encyclopaedia Brittanica, 1996).

[12] *Id.*

[13] *Id.*

[14] *Mexican War,* BRITANNICA ONLINE, at "http://www.eb.com.180 (Encyclopaedia Brittanica, 1996). The U.S. purchased this area for $15 million.

Compromise of 1846.[15] These major acquisitions, with several smaller additions, expanded U.S. domain across the width of the continent.

B. The U.S. As Land Owner. As discussed above, the U.S. gained possession of land through a variety of purchases and annexations. But what was the legal status of that land? Article I, section 8, clause 17, of the U.S. Constitution, known as the enclave clause, gave Congress exclusive jurisdiction over federal enclaves.[16] Article IV, section 3, clause 1 provided for the addition of new states.[17] Finally, Article IV, section 3, clause 2, known as the Property Clause, provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[18]

Congress went about the business of sorting out what portion of the new territories it owned and what was owned by individuals. This process was long and laborious, but the U.S. government owned most of what it had purchased. In 1823, the U.S. Supreme Court ruled in *Johnson v. McIntosh*

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[15] *Oregon Question*, BRITANNICA ONLINE, at "http://www.eb.com.180 (Encyclopaedia Brittanica, 1996).

[16] U.S. Const. art. I, § 8, cl. 17.

[17] U.S. Const. art. IV, § 3, cl. 1.

[18] U.S. Const. art. IV, § 3, cl. 2.

that "the Indian inhabitants are to be considered merely as occupants, [and therefore] deemed incapable of transferring the absolute title to others."[19]

C. Settlement of Public Lands. With all of this land in federal hands, what was to be done with it? The federal land in the west became known as the "public domain" and Congress opened most of it for settlement and development. Indeed, "national public land policy for 150 years was directed primarily at getting the land into the hands of the pioneer...."[20] Prior to federal land use laws, it was common practice to "stake a claim" for land. This practice, also known as "squatting" was unpopular with Congress, because the new country was deeply in debt.[21] The Land Act of 1796 provided for public auctions of land at a minimum of $2.00 per acre.[22]

The Graduation Act of 1854 decreased the price of unclaimed land over time, and resulted in the purchase of millions of acres of land in Missouri alone.[23] The Homestead Act of 1862 allowed settlement of one homestead of

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[19] JOHNSON V. MCINTOSH, 21 U.S. 543 (1823).

[20] FEDERAL, *supra*, at 79.

[21] *Id.* at 80. A process known as Preemption became recognized, through a series of laws in the mid-1800's, whereby a squatter could purchase his land for about $1.25 per acre. The General Preemption Act of 1841 authorized future preemption on a maximum of 160 acres, also for $1.25 per acre.

[22] *Id.* at 82.

[23] *Id.* at 83.

no more than 160 acres.[24] If residence was established within six months after application, the land was free.[25] After five years of actual settlement and cultivation, the homesteader would receive a patent on the land.[26] Although the system was subject to widespread abuses, over 100 million acres of land were homesteaded.[27] The Desert Lands Act of 1877 offered up to 640 acres at 25 cents per acre to encourage use of land in dry areas not immediately suited to farming.[28] Large corporations got most of the land.[29]

The original "public domain" consisted of 1.8 billion acres.[30] American professor and historian Frederick Jackson Turner called it "the richest free gift that was ever spread out before civilized man."[31] Of this "vast expanse," two thirds was transferred to individuals, corporations, and states.[32]

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[24] 43 U.S.C. § 161, et seq., (repealed 1976).

[25] *Id.*

[26] *Id.*

[27] FEDERAL, *supra*, at 84. The Homestead Act was often used as a means to strip timber lands without payment.

[28] 43 U.S.C. §§ 321-339.

[29] FEDERAL, *supra*, at 85.

[30] *History of the BLM*, at "http://www.blm.gov/nhp/facts/his.html," March 27, 1996 [hereinafter *History of the BLM*].

[31] *Id.*

[32] *Id.*

In 1893, Professor Turner declared the American Frontier closed because, based on the 1890 census, there was no longer a vast western expanse for the explorer to conquer.[33] His thesis has been called "the most influential idea an American historian ever produced."[34]

There remained, however, large tracts of land to settle, and land disposal legislation continued. The Kinkaid Act of 1904 offered up to 640 acres of land in Western Nebraska for $1.25 per acre for cattle production.[35] The Enlarged Homestead Act of 1909 allowed claims of 320 acres of land instead of 160.[36] The 1916 Stock-Raising Homestead Act permitted claim of 640 acres of semi-arid land designated valuable for livestock grazing.[37]

III. The Evolution of American Land Use Law - *"The true test of American institutions will come when the free public domain is exhausted and an increased population competes for ownership of the land and its depleted resources."*[38]

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[33] FRANK J. AND DEBORAH E POPPER, *The Reinvention of the American Frontier*, AMICUS J., Summer 1991, at 4.

[34] *Id.*

[35] 43 U.S.C. § 224 (repealed 1976).

[36] 43 U.S.C. § 218.

[37] 43 U.S.C. § 292.

[38] LORD MACAULEY.

A. Regulation of Resources. With the west settled, it became necessary to regulate the allocation and consumption of resources. The primary resources in the west are water, minerals, timber, grazing land, and wildlife.

1. Water. Water rights are generally controlled by state law and local custom. But when the Desert Land Act failed to increase productivity of dry lands, Congress passed the Reclamation Act of 1902 to help irrigate the west through construction of structures for water diversion and storage.[39] The Bureau of Reclamation, an outgrowth of the Act, still manages the distribution of water for irrigation and other uses, and the Act continues to generate litigation today. The Reclamation Act was responsible for large projects such as the Hoover dam and still provides irrigation for millions of acres of land.[40]

2. Minerals. The Mining Act of 1866 provided that "mineral lands are free and open to exploration and occupation" subject to local custom and usage.[41] The Mining Law of 1872 developed requirements for perfecting a mining claim.[42] While title to the land remains with the U.S., the

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[39] 43 U.S.C. § 371 et seq.

[40] FEDERAL, *supra*, at 104.

[41] *Id.* at 95.

interest in the claim, the surface rights, and possession of the land are transferred to the claimant. The claimant's interest in the land becomes "property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

3. Timber. The Timber Culture Act of 1873 granted larger blocks of land to settlers willing to plant trees on a portion of the land in semi-arid areas. This statute, however, was primarily intended to encourage settlement of the land. In 1879, Congress decided not to appropriate funds for the regulation of timber cutting on federal lands.[43] The Timber and Stone Act of 1878 allowed the claim of land valuable for timber or stone harvesting for $2.50 per acre. The Timer Cutting Act of 1878 legalized the cutting of timber on unclaimed mining land.

4. Grazing Land. The Homestead Act brought ranchers to the west, but only access to additional lands could make cattle ranching profitable. In 1890, the U.S. Supreme Court recognized "an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States...shall be free to the people who seek to use them where they are left open and unenclosed, and no

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[42] 30 U.S.C. §§ 22-39. To maintain a claim, a claimant had to invest $100 worth of annual development. The Mining Act of 1872 is still good law.

[43] FEDERAL, *supra*, at 106.

act of government forbids their use."[44] Unfortunately, this policy encouraged ranchers to increase the size of their herds and produced the "inevitable consequence" of "severe overgrazing and degradation of the forage producing capacity of the land."[45]

5. Wildlife Resources. It was generally accepted that states owned the wildlife present on federal land.[46] In *Geer v. Connecticut*, the U.S. Supreme Court held that a state could outlaw the export of game taken from within its borders without violating the commerce clause.[47] There was little in the way of wildlife management at the federal level. Wildlife was generally considered either food or a threat.

B. Disposal to Management. In the late 1800's and early 1900's, land-use policy began the gradual shift from disposal to reservation and management. Land that would later become Yellowstone National Park was set aside in 1872. The General Revision Act of 1891 contained a Forest Reservation provision.[48] This provision allowed the

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[44] BUFORD V. HOUTZ, 133 U.S. 320 (1890).

[45] FEDERAL, *supra*, at 693.

[46] GEER V. CONNECTICUT, 161 U.S. 519 (1896).

[47] *Id.* at 534.

[48] 16 U.S.C. § 471.

President to "set apart and reserve...any part of the public lands wholly or in part covered with timber or undergrowth...as public reservations." This provision led to the "reservation" from the public domain of millions of acres of land which would later become national parks or national forests.

The Organic Act of 1897 authorized protective management of the retained forest reserves.[49] The Act intended "to improve and protect the forest" but did not "prohibit any person from entering upon such forest reservations...provided that such persons comply with the rules and regulations covering such forest reservations."[50] Such "rules and regulations," which we take for granted today, were still a new idea at the time. By 1901, 50 million acres of land had been withdrawn.[51] In 1903 Theodore Roosevelt issued the "Pelican Island Bird Refuge Proclamation," which set aside federal land for wildlife protection,[52] and during his presidency withdrew another 150 million acres of forest reservation.[53] Both President Roosevelt, and his successor, William Howard Taft, withdrew

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[49] 16 U.S.C. §§ 473-481 (repealed in part, 1976).

[50] *Id.*

[51] FEDERAL, *supra*, at 107.

[52] *Id.* at 782. The U.S. Supreme Court recognized the implied authority of the President to make withdrawals of public lands from use statutes where there has been acquiescence by congress.

[53] *Id.* at 107.

coal and oil rights from the application of the Mining Act of 1872.[54]

1. Increasing Federal Power. In the landmark decision of *U.S. v. Grimaud*, the U.S. Supreme Court addressed the growing tension between land reservation policies and grazing interests.[55] A group of ranchers challenged the constitutionality of the provisions of the 1897 Act which delegated rule-making authority to the Secretary of Agriculture and made rule violations a criminal offense. The lower court dismissed criminal prosecutions against ranchers who grazed sheep in the Sierra Forest Reserve without the license required by regulations.

The Supreme Court first affirmed the lower court's decision by a tie vote of 4-4, but granted rehearing a month later.[56] The Court "admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."[57] The Court, however, found that the Secretary's authority to make "such rules and regulations...as will insure the objects of such reservations" was "not a delegation of legislative

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[54] JAN G. LAITOS AND JOSEPH P. TOMAIN, ENERGY AND NATURAL RESOURCES LAW IN A NUTSHELL 84, (1992) [hereinafter ENERGY].

[55] U.S. v. GRIMAUD, 220 U.S. 506 (1911).

[56] FEDERAL, *supra*, at 112.

[57] U.S. v. GRIMAUD, 220 U.S. 506, 517 (1911).

power," and validated the Act.[58] The Court also validated the crucial delegation of rulemaking authority by finding "[w]hat might be harmless in one forest might be harmful to another. In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management."[59] This case set the stage for modern federal land-use management practices.

In a companion case, *Light v. U.S.*, the Supreme Court stated "'All the public lands of the nation are held in trust for the people of the whole country'....And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."[60]

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[58] *Id.* at 521.

[59] *Id.* at 516.

[60] LIGHT v. U.S., 220 U.S. 523.

> "At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those States where there were great plains and vast tracts of unenclosed land, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford v. Houtz*, 133 U.S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes. *Steele v. United States*, 113 U.S. 130; *Wilcox v. Jackson*, 13 Pet. 513.
>
> It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a Reserve is, in law, to be treated as open and

With this statement, the Supreme Court validated the right of the U.S. to retain and manage lands "for the people of the whole country" and set the stage for today's battle to determine just what it is "the people" want.

Congress created the U.S. Forest Service in 1905.[61] The Service was not created, however, purely for conservation purposes. The Secretary of Agriculture's instructions to the newly appointed Chief Forester stated "[a]ll the resources of forest reserves are for use...."[62] In 1916, Congress created the National Park Service to administer the National Park System.[63]

> unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes....The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely....'All the public lands of the nation are held in trust for the people of the whole country'....And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."

[61] 16 U.S.C. § 472.

[62] FEDERAL, *supra*, at 118. Instructions from Secretary of Agriculture, James Wilson, to Chief Forester, Gifford Pinchot. Pinchot was a leading figure in the establishment of the US Forest Service, and worked closely with President Roosevelt. Pinchot is also considered a leading figure in the move toward resource management, although he favored development over preservation. In describing the role of the Forest Service, Pinchot stated that "scenery is altogether outside its province." It is believed that Pinchot wrote the instructions he received from Wilson. But he did favor management of federal resource for the common good, and so played a vital role in the transition from exploitation to preservation.

[63] NATIONAL PARK SERVICE ORGANIC ACT, 16 U.S.C. § 1. Stephen Mather, Pinchot's counterpart in the National Park Service, took a different view. Pinchot originally opposed the creation of the Park Service (stating it was "no more needed than two tails to a cat.") While Pinchot advocated the transfer of the National Parks to the Forest Service and the development of resources within the parks, Mather believed in development of Parks for aesthetic enjoyment by people. He

2. The Conservation Movement. The "conservation" movement also began during this period. In 1892, John Muir, a friend of Roosevelt's, founded the Sierra Club. Muir and the Sierra Club joined battle with the Forest Service, and opened the dialogue over values which continues today.[64] In many ways, this was the pivotal era in land-use transition. It was Muir who, on a camping trip in 1903, convinced Roosevelt to create Yosemite National Park.[65] "Muir inspired a new ethic that has been absorbed into the American consciousness....[his] lasting contribution to public land law is incapable of measurement."[66]

The Migratory Bird Treaty Act of 1918 was the first significant wildlife law to interfere with or supersede

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encouraged construction in the parks to support guests (and is responsible for many of the grand lodges located in the great parks in the west). Under Mather, lodges and roads were built in the parks, and train lines up to (but not within) the parks. In many ways, Mather established our expectations for our national parks. With their increased popularity, the National Park Service is struggling with these expectations today.

[64] Muir and the Sierra Club battled Pinchot for years over his plan to flood the Hetch Hetchy valley in Yosemite National Park to create a reservoir. Pinchot won the battle in 1913, and the dam was built, but the controversy helped sway public opinion to favor the creation of national parks. In formulating his plan, Pinchot ignored other suitable areas for construction of the dam. Such examples of tunnel vision lay the groundwork for passage of the National Environmental Policy Act (NEPA) which requires consideration of alternatives and environmental harms.

[65] FEDERAL, *supra*, at 121.

[66] *Id.* at 120. A citizen poll in 1976 named John Muir the "single greatest Californian" in history.

state wildlife laws.[67] The Taylor Grazing Act of 1934 withdrew most remaining federal lands from prior settlement acts, and created "a new class of otherwise unclassified public lands, under the control of the BLM, that were valuable chiefly for grazing, mineral development, and recreation."[68] The transition continued between the 1920's and 1960's.[69]

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[67] 16 U.S.C. §§ 703-711. Missouri challenged the Act, as a violation of States' rights to manage wildlife within their borders, but in *Missouri v. Holland*, the U.S. Supreme Court upheld the Act. Justice Holmes wrote: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." MISSOURI V. HOLLAND, 252 U.S. 416 (1920).

[68] ENERGY, *supra*, at 84. The Grazing Act requires a permit and payment of fees for use of rangelands for grazing. The permit allows grazing of a fixed number of cattle or sheep on specified lands during specified periods. While the statute limits grazing and ended the custom of free grazing, federal lands are still widely used for this purpose. In the early 1990s, 20,000 ranchers held permits for approximately 160 million aces of BLM and Forest Service land. Id. at 91. The Wild, Free-Roaming Horses and Burros Act of 1971 further checked the influence of ranchers on federal lands. 16 U.S.C. § 1331.

[69] The Mineral Leasing Act of 1920 reserved to the U.S. all minerals existing under federal lands and withdrew from patents all energy minerals, such as oil, gas, and coal and subjected them to leasing. 30 U.S.C. § 181 et seq. The U.S. Supreme Court contributed to the transition. In HUNT v. U.S. in 1928, the Court held that the U.S. could kill deer in the Kaibab National Forest and Grand Canyon National Game Preserve without conforming to state law. HUNT v. U.S, 278 U.S. 96 (1928). Justice Sutherland wrote: "the power of the United States to...protect its lands and property does not admit of doubt...the game laws or any other statute of the state to the contrary notwithstanding. (*Id.* at 100.) This case undermined the GEER decision, supra, which recognized a state's inherent right to regulate the wildlife within its borders. Free-roaming horses, the descendants of domesticated animals, compete with cattle for forage in some areas. Prior to the act, the preferred method of management was roundup or slaughter. With the 1971 Act, Congress ensured a place for these now-wild horses on federal lands by prohibiting private parties from removing these animals. BLM is permitted to thin herds when necessary. 16 U.S.C. § 1333(b). BLM may

The 1964 Wilderness Act authorized designation of roadless lands as wilderness areas, exempt from development.[70] The National Wildlife Refuge System Administration Act of 1966 established the National Wildlife Refuge system and allowed withdrawal of land for the creation of refuges.[71]

3. The Modern Era. In 1962, Rachel Carson Published *Silent Spring*, and the modern environmental era was born.[72] Congress passed a variety of environmental laws and courts gave the federal government more power to control federal lands, but a federal land use policy was not established.

a. NEPA. Land use law entered the modern era with the passage of The National Environmental Policy Act (NEPA) of 1969, "the granddaddy" of environmental statutes. NEPA requires federal agencies to consider environmental effects of, and alternatives to, "major federal actions significantly affecting the quality of the

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kill old or unhealthy individuals or offer healthy ones for "adoption" "under humane conditions and use." Animals may not be adopted by ranchers for resale to dog food manufactures (ANIMAL PROTECTION INSTITUTE V. HODEL (1988)). BLM is also required to remove animals found on private lands.

[70] 16 U.S.C. § 1311.

[71] 16 U.S.C. § 668(dd)-668(jj).

[72] RACHEL CARSON, SILENT SPRING, 1962.

human environment."[73] NEPA does not require federal agencies to select the most environmentally friendly alternative. It is a planning rather than an action-forcing statute, which requires agencies to document, through an Environmental Assessment or Environmental Impact Statement, its decision making process. As an environmental planning law, NEPA became a de-facto land use law, since it significantly influences land use decisions. "NEPA is an environmental impacts full-disclosure law, but this is a far cry from setting a substantive 'national policy.'"[74]

b. The Endangered Species Act. Congress passed the Endangered Species Act (ESA), the "pit bull" of environmental statutes, in 1973.[75] The ESA places affirmative obligations on all federal agencies. Section 2(c) declares that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."[76]

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[73] 42 U.S.C. § 4321

[74] GARY D. MEYERS, *Old-Growth Forests, The Owl, And Yew: Environmental Ethics Versus Traditional Dispute Resolution Under the Endangered Species Act And Other Public Lands and Resources Laws*, 18 B.C. ENVTL. AFF. L. REV. 623, 645 [hereinafter MEYERS].

[75] 16 U.S.C. §§ 1531-1543. For a detailed discussion of the ESA, see DAVID N. DINER, *The Army and the Endangered Species Act: Who's Endangering Whom?* 143 MIL. L. REV. 161 (1994).

[76] 16 U.S.C. § 1531(c).

All federal agencies must "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species...."[77] The Act also provides: "The terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary..." to prevent the extinction of the species.[78] Stated more simply, federal agencies must affirmatively seek to "recover" the species.

Generally, ESA § 7 requires Federal agencies to "insure" that their actions will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...to be critical...."[79] Agencies make this determination "in consultation with and with the assistance

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[77] 16 U.S.C. § 1536(a)(1).

[78] 16 U.S.C. § 1532(3).

> "The terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transportation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulatory taking."

[79] 16 U.S.C. § 1536(a)(2).

of..." the U.S. Fish and Wildlife Service (FWS).[80] This process is known as Section 7 consultation.

Agencies may consult either formally or informally. Formal consultation results in the issuance of "a written statement setting forth the Secretary's opinion...."[81] "If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives" which would allow the action to go forward without violation of the Act.[82] The opinion, known as a jeopardy opinion, is non-binding. However, federal employees are subject to criminal prosecution for violating the ESA if the opinion is ignored, and are immune if they follow it.[83]

The Secretary of the Interior must "determine whether any species is an endangered species or a threatened species...."[84] Species so determined to be endangered or threatened are "listed" as such.[85] The determination is

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[80] *Id.*

[81] 16 U.S.C. § 1536(b)(3)(A).

[82] *Id.*

[83] See RESOURCES LIMITED V. ROBERTSON, 35 F.3d 1300, (9th Cir. 1994). An agency is justified in relying on a FWS opinion so long as there is "no 'new' information" which would change that opinion. An agency, however, "'cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species...'" and an agency's decision to rely on a FWS opinion cannot be arbitrary and capricious.

[84] 16 U.S.C. § 1533(a)(1).

[85] 16. U.S.C. § 1533(c)(1). "The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him...to be endangered species and a list of all species determined by him...to be threatened species."

made "solely on the basis of the best scientific and commercial data available to him...."[86] It is "unlawful for any person subject to the jurisdiction of the United States to...take any such species..." or to "possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation..." of the Act.[87]

Once a species is listed, the Secretary is required to develop "recovery plans" to ensure "...the conservation and survival of..." the species.[88] In addition, to the "maximum extent prudent and determinable," the Secretary shall "concurrently with making a determination...that a species is and endangered or threatened species, designate any habitat of such species which is then considered to be critical habitat."[89]

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[86] 16 U.S.C. § 1533(b)(1)(A).

[87] 16 U.S.C. § 1538(a)(1). More specifically, it is unlawful to

> "(A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species; or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter."

[88] 16 U.S.C. § 1533(f)(1).

[89] 16 U.S.C. § 1533(a)(3). Critical habitat is designated "on the basis of the best scientific data available and after taking into

The ESA has proven to be one of the most controversial statutes ever passed. Even the agencies of the federal government take inconsistent views. In the landmark case of *TVA v. Hill*, the Department of Justice supported the TVA's attempts to proceed with the building of the tellico dam even though it was believed certain to lead to the extinction of the snail darter. The Department of the Interior, however, filed an appendix to the government brief which opposed the action.[90]

With passage of the ESA, Congress intended to prevent, or at least slow, the alarming rate of extinction of species, not to enact land-use law. It is doubtful that Congress realized the ESA, coupled with NEPA, would become the driving land use statutes for federal lands. Because there is no comprehensive federal land use policy law, the ESA and NEPA have been shoe-horned into that role. For example, the ESA, which only "secondarily protects habitat," is now being used "as a tool to preserve the remaining old-growth forests."[91]

c. Complete Federal Power Over Federal Lands. In 1976, the U.S. Supreme Court settled long-

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consideration the economic impact, and any other relevant impact" of the designation. Habitat may be excluded if the benefits of exclusion outweigh the benefits of inclusion, unless the exclusion "will result in the extinction of the species concerned."

[90] FEDERAL, *supra*, at 802.

[91] MEYERS, *supra*, at 625.

standing questions of federal power over federal lands within states. The Court in *Kleppe v. New Mexico* found that the U.S. is more than a mere proprietor regarding federal lands and that Congress has full legislative authority without implicit limitation.[92] The Court stated: "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."[93]

In 1981, in *Minnesota v. Block*, Minnesota challenged federal restrictions on the use of state lands.[94] The Eighth Circuit held that "Congress' power must extend to regulation of conduct *on and off* public land that would threaten the designated purpose of federal lands."[95] (Emphasis Added). Thus, the "complete" federal power extends to actions on non-federal lands which affect federal lands.

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[92] KLEPPE V. NEW MEXICO, 426 U.S. 529 (1976).

[93] *Id.* at 541. KLEPPE recognized Congress' authority to pass legislation protecting wildlife, and validated the Wild, Free-Roaming Horses and Burros Act.

[94] MINNESOTA V BLOCK, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982). The Boundary Waters Canoe Area Wilderness Act of 1978 protects the boundary water area between Minnesota and Canada. The Act limited use of 920,000 acres of land bordering the waters, of which the U.S. owned 792,000 acres and Minnesota 121,000 acres. One provision prohibited motorboat and snow mobile use, except in designated areas. Minnesota challenged the law.

[95] *Id.* at 1249.

As the history of American land-use law demonstrates, Federal power to fully regulate federal land, which we might take for granted today, evolved slowly over time.

IV. Multiple Use and Ecosystem Management - *"Ecology is destined to become...a belated attempt to convert our collective knowledge of biotic materials into a collective wisdom of biotic navigation."*[96]

During the last 20 years, preservation management philosophy has shifted from preservation for a single use to multiple-use and ecosystem preservation. Put simply, multiple-use is the desire to serve all competing land use goals in a compatible manner. It is the effort to plan and integrate seemingly incompatible activities. Ecosystem management acknowledges that species exist within a complex system which man does not always understand. It is an attempt to preserve all portions of the interdependent support network created by nature. Biodiversity, a concept closely related to ecosystem management, is the recognition that "the variety of life" should be preserved. Protection of endangered species, and consequently of species diversity, is only a subset of biodiversity.

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[96] ALDO LEOPOLD, A SAND COUNTY ALMANAC 189 (1948).

For example, protection of the spotted owl constitutes protection of an endangered species. A plan to protect the spotted owl will not take the marbled murrelet, another old-growth inhabitant, into account. Protection of the old-growth forest ecosystem is a more broad based approach, which considers the survival of the entire ecosystem and all of its component parts, including those not currently endangered.[97] This approach is feared by many because it is more far reaching and restrictive.

The statutes discussed below dictate current federal land management practices. As I will demonstrate, however, they are piecemeal, rather than comprehensive, and fall far short of providing a national land use policy.

A. The Multiple-Use, Sustained-Yield Act. The Multiple-Use, Sustained Yield Act (MUSY) of 1960 declared that "[i]t is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[98] With this statement, Congress set the course for land use management we follow today. This policy transformed national forests from timber production facilities into versatile tracts of land, able to serve a variety of masters. Versatility, however, takes energy and

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[97] MELANIE J. ROWLAND, *Bargaining For Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVT'L L. 503, 1992.

[98] 16 U.S.C. § 528

effort, and the MUSY philosophy is difficult to implement. The statute does not give federal agencies much guidance.

MUSY defines multiple use as "[t]he management of all the various renewable surface resources...in the combination that will best meet the needs of the American people."[99] Determining what "will best meet the needs of the American people," however, is a daunting task. "The problem of how to protect sensitive and scarce public land resources does not lend itself to easy solutions."[100] The statute's definition of multiple use further defines the term as:

> making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest yield."

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[99] 16 U.S.C. S 531(a). The definition goes on to further define multiple use as:

> "making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest yield."

[100] MEYERS, *supra*, at 625.

This stunning example of obtuse legislative drafting goes a long way to explain why we are where we are. One court described MUSY as "breath[ing] discretion at every pore."[101]

B. The National Forest Management Act. The National Forest Management Act (NFMA) of 1976, as amended,[102] acknowledges that "the management of the Nation's renewable resources is highly complex and the uses, demand for, and supply of the various resources are subject to change over time."[103] The Act provides for:

> "a comprehensive assessment of the present and anticipated uses, demand for, and supply of renewable resources...through analysis of environmental and economic impacts, coordination of multiple use and sustained yield opportunities as provided in [MUSY]...and public participation in the development of the program."[104]

Most importantly, the NFMA requires the Forest Service to prepare "land and resource management plans" (LRMPs).[105] These plans are to be prepared "for each unit of the National Forest System."[106] Implementing regulations do

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[101] STRICTLAND V. MORTON, 519 F.2d 467, 469 (9th Cir. 1975).

[102] 16 U.S.C. § 1600 et seq.

[103] 16 U.S.C. § 1600(1).

[104] 16 U.S.C. § 1600(3).

[105] 16 U.S.C. § 1604.

[106] 16 U.S.C. § 1604(f)(1).

require planning on a regional and national level, but national planning consists of a "Renewable Resources Assessment and Program."[107] The national "objectives" developed are incorporated into regional plans, which are considered in individual LRMPs. But LRMPs remain the primary planning tool, the forest service has broad discretion at the local level, and the NFMA has failed to produce a national management policy, even within the Forest Service.[108]

C. The Federal Land Policy and Management Act. In The Federal Land Policy and Management Act (FLPMA) Congress declared "...that it is the policy of the United States that...the public lands be retained in Federal ownership...."[109] As demonstrated above, this represents a radical departure from historic federal land use policy.

FLPMA also declares a policy that:

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeologic values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals;

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[107] 36 C.F.R. § 219.4.

[108] MEYERS, *supra*, at 654-655.

[109] 43 U.S.C. § 1701(a). "Congress declares that it is the policy of the United States that--(1) the public lands be retained in Federal ownership, unless...it is determined that disposal of a particular parcel will serve the national interest..."

and that will provide for outdoor recreation and human occupancy and use...."[110]

FLPMA primarily applies to BLM.[111] While the Act contains limited provisions for BLM/Forest Service interface, the "land use plans" required by FLPMA are not coordinated with Forest Service LRMPs. As did the NFMA, FLPMA requires BLM to "observe the principles of multiple use and sustained yield."[112]

D. A National Policy? The statutes discussed above constitute the statutory framework for federal land use policy. BLM and the Forest Service are not required to integrate their planning efforts. The military is not statutorily involved on any level, and none of the planning efforts are coordinated on a national level. The U.S., then, substantially lacks a federal land use policy to govern management of its hundreds of millions of acres of land.

E. Ecosystem Management. In June, 1992, members of the United Nations executed the "Convention on Biological Diversity" in Rio de Janeiro at the United Nations Conference on Environment and Development, commonly known as

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[110] 43 U.S.C. § 1701(a).

[111] 43 U.S.C. § 1702(e) and (n).

[112] 43 U.S.C. § 1712(b)(1).

the Earth Summit.[113] The Convention seeks "the conservation of biological diversity, [and] the sustainable use of its components...."[114] The U.S. signed the Convention in 1993.[115] One purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...."[116] Biodiversity and ecosystem management have become a part of American land use practice.

In the Interior Columbia River Basin, which spreads across parts of Oregon, Washington, Idaho, Montana, and Wyoming, the current administration is attempting to protect and restore "entire communities of living things while still allowing some resource extraction where appropriate...."[117] In 1993, President Clinton announced a $31 million ecosystem-management project, aimed at avoiding looming litigation over the salmon, bull trout, water quality

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[113] United Nations Conference on Environment and Development: Convention on Biological Diversity, 31 I.L.M. 818 (1992) (entered into force Dec. 29, 1993).

[114] *Id.* at 823.

[115] 140 CONG. REC. § 14046, 14047. The Bush administration decided not to sign the convention. The Clinton administration signed the convention, despite reservations, because it already had the requisite number of ratification's to enter into force. For a discussion of the Convention on Biological Diversity, see DAVID EUGENE BELL, *The 1992 Convention on Biological Diversity: The Continuing Significance of U.S. Objections at the Earch Summit*, 26 GEO. WASH. J. INT'L L. & ECON. 480 (1993).

[116] 16 U.S.C. S 1531(b).

[117] KATHIE DURBIN, *Apathy? Not Around Here*, 34 NATIONAL WILDLIFE 36, 38 (1996) [hereinafter *Apathy*].

issues, and old-growth forest management.[118] The "Northern Rockies Ecosystem Protection Act of 1995" was introduced "to designate as wilderness, wild and scenic rivers, national park and preserve study areas, wild land recovery areas, and biological connecting corridors certain public lands in the States of Idaho, Montana, Oregon, Washington, and Wyoming, and for other purposes."[119] The bill has 47 Cosponsors, including 40 Democrats, 5 Republicans (from eastern and midwestern states) and 2 independents.

Ecosystem management is controversial, and both projects face uncertain futures.[120] While the Columbia initiatives were being developed, a rider added to a congressional spending-reduction bill allowed harvest of diseased and "associated" trees without full compliance with existing environmental laws.[121] The exemption angered

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[118] *Id.* at 40.

[119] 104 H.R. 852, Introduced Feb 7, 1995. The last cosponsor was added March 13, 1996.

[120] *Id.* In July, 1995, the House voted to cut funding for the project, but in August the Senate restored sufficient funding to complete the Environmental Impact Statement being prepared to consider future management of the area.

[121] Pub. L. No. 104-19, July 27, 1995. The law allows "salvage timber sale" (defined as a timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence.) Sales are permitted during the "emergency period" of the date of passage to September 30, 1997. The law permits "expedited" sales following

environmentalists, who charged it undermined the efforts underway in the Columbia River Basin and permitted "'logging without laws.'"[122] These emerging multiple-use and ecosystem management policies are met with strong opposition from some sectors. This opposition is discussed below.

V. Backlash and Controversy - *"The Federal Government doesn't have a right to own any lands, except for post offices and armed forces bases."*[123]

A. The Sagebrush Rebellion. In seeking to encourage development of the country, federal land-use laws created certain expectations which Congress gradually eroded as the country matured. Because the east developed first, its population tends to be more concentrated. As the desire for

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completion of "a document that combines an environmental assessment under section 102(2) of the National Environmental Policy Act of 1969...and a biological evaluation under section 7(a)(2) of the Endangered Species Act of 1973...." The document need only "consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species" or "be consistent with any standards and guidelines from the management plans applicable to the National Forest or Bureau of Land Management District...," "at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible..."

[122] *Apathy, supra*, at 44.

[123] PAUL RAUBER AND B.J. BERGMAN, SIERRA, May 1995, quoting U.S. Rep. Barbara Cubin (R-WY).

reservation and conservation grew, available lands were reserved. These lands predominately occurred in the west.

The federal government always owned these lands; the land never belonged to the states. Nevertheless, the long-brewing backlash against federal land management policy reached its boiling point when Congress formalized its policy of public land retention by enacting FLPMA.

The resulting movement to pressure Congress to reverse these policies became known as the "Sagebrush Rebellion." In 1977, Utah distributed to other western states a proposal for litigation to force the federal government to cede land to the states. In 1979, Nevada asserted ownership of most federal land in the state by passing a state law to that effect. In 1980, presidential candidate Ronald Reagan and Utah Senator Orin Hatch joined the "rebellion."

B. Sagebrush II - Taking Back the Land. Discontent with federal land policy in the west continues today.

"Throughout the American West...state legislators and governors...are engaged in full-scale mutiny against federal and state regulations meant to protect what is left of America's natural resources."[124] More than 70 rural western counties passed or proposed laws to "take back" public lands. In some cases, the tension is so severe that violence results.

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[124] *New guys in white hats and black hats for the Old West*, THE VANCOUVER SUN, June 20, 1995, at A15 [Hereinafter *Hats*].

In 1993, a BLM office was bombed, resulting in $100,000 in damage. In April, 1995, a bomb shattered windows and a computer in the Forest Service's district office in Carson City, Nevada.[125] Later, pipe bombs destroyed a Forest Service office in Elko County, Nevada. Federal land managers now wear bullet-proof vests and travel in pairs.[126] They also carry cards with phone numbers for the U.S. Attorney's Office and the FBI, and hold conferences to discuss the "winds of war on the Western range."[127]

Confrontation between state and local officials is also on the rise. In Lemhi County, Idaho, a sheriff refused to allow FWS officers to search a rancher's property while they investigated the killing of a reintroduced wolf.[128] The FWS officers presented a valid federal warrant. In Nye County, Nevada, on July 4, 1994, the vice chairman of the county commission bulldozed open a road on federal land closed by the Forest Service.[129]

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[125] TOM WHARTON AND CHRISTOPHER SMITH, *West's Rebels Take Fight To The Feds*, THE SALT LAKE TRIBUNE, April 23, 1995, available on Lexis/Nexis.

[126] *Id.*

[127] *Id.* The cards bear this message from Forest Service Chief Jack Ward Thomas: "Because you are a Forest Service employee, we will do everything necessary to ensure your safety and protect your rights. Everything will be done to have you released as quickly as possible." They have been instructed to cooperate if detained by angry citizens, according to the *Salt Lake Tribune*.

[128] *Id.*

[129] *Id.*, and *Hats, supra*. "A Forest Service special agent dodged the advancing blade while attempting to warn angry citizens that their acts

Nye County, Nevada, is a leading example of the struggle over the future of public lands. The county claimed ownership of federal lands through local ordinance. The Justice Department filed a lawsuit against the county in December, 1994 to counter the county's contention that federal officials lack jurisdiction over lands within the state.[130]

In 1995, the county commissioners told the Fish and Wildlife Service to stay off the state's lands:

> "The U.S. Fish & Wildlife Service does not have the jurisdiction or authority to come onto lands owned by the State of Nevada or private lands to enforce the ESA. You have not been invited by this Board to come into Nye County...."[131]

Michael Spear, Fish and Wildlife Service regional director in Portland, Ore., responded to the board in a June, 1995 letter:

> "The service can indeed enforce the ESA on state or private lands....To the extent that you are implying that federal public lands actually belong to the state, you are incorrect....No court, anywhere, has ever held the ESA to be constitutionally invalid on its face....The service has the same jurisdiction any federal agency has when enforcing federal laws....An invitation does not have to be extended in order for the Fish and Wildlife Service to carry out its congressional mandate with respect to the ESA."[132]

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were illegal. "The agent's remarks were drowned out by the straining diesel engine and the cheering crowd." *Id.*

[130] *Hats, supra.*

[131] SCOTT SONNER, *Fish and Wildlife Service Flexing Muscles In Nevada Dispute*, Associated Press, June 15, 1995, available on Lexis/Nexis.

He also stated: "Nevada agreed as a condition of statehood to 'forever disclaim all right and title to the unappropriated public lands lying within the territory.'"[133]

On March 14, 1996, the U.S. District Court ruled that the U.S. does, in fact, own the land in question in Nye County.[134] U.S. Attorney General Janet Reno reported that the ruling confirms that public lands "are owned by all Americans, to be managed by the United States -- that's the rule of law...."[135]

The Wall Street Journal reported that "county supremacy movement" members plan to "redouble their efforts to get Congress to enact laws limiting regulators' power and even returning federal land to the states."[136] At the same time, the *Journal* reported that Republican leaders are "toning down their rhetoric on environmental issues, out of concern that the public perceives their position on environmental matters as too extreme."[137] The battle, apparently, will rage on.[138]

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[132] *Id.*

[133] *Id.* The United States acquired the lands in question from Mexico under the Treaty of Guadalupe Hidalgo in 1848, which ended the Mexican War.

[134] CHARLES MCCOY, *Ruling Quashes Nevada County's Claim on U.S. Land*, THE WALL STREET JOURNAL, March 18, 1996, at A20.

[135] *Id.* Opinion unpublished.

[136] *Id.*

[137] *Id.* Some freshman senate and congressional representatives came in to office with a clear environmental/land use agenda. SEE PAUL RAUBER AND

C. What is all the fuss about? The Bureau of Land Management (BLM) celebrates its fiftieth anniversary this year.[139] BLM manages 270 million acres of land, most of it in the western states.[140] This amounts to approximately one-eighth of the land surface of America, and comprises 41% of federal land. This land was once referred to as "'the land nobody wanted'" because settlers failed to claim it.[141]

Because the BLM land is primarily in western states, it accounts for a relatively large percentage of the total land area of some states. For instance, BLM land accounts for 28% of Montana, 48.8% of Wyoming, and 82.9% of Nevada, as well as over 50% of Oregon, Utah, and Idaho.[142] The Forest

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B.J. BERGMAN, SIERRA, May 1995: For instance, Rep. Barbara Cubin (R-wyo) stated "[t]he federal government doesn't have a right to own any lands, except for post offices and armed forces bases." Rep Helen Chenoweth (R-Idaho) asked how the plight of the chinook salmon can be taken seriously "when you can go and buy a can of salmon off the shelf in Albertsons?" Rep Sonny Bono (R-Calif) stated, regarding endangered species, "[g]ive them all a designated area and then blow it up." Other representatives simply favor turning federal lands over to the states. Rep. James Hansen (R-Utah) stated "I honestly feel that one of the most prudent things we could do is to pass legislation that turns over the BLM lands to the states."

[138] The Wyoming legislature passed a bill to provide $1,000 for each wolf killed outside Yellowstone Park. Governor Jim Geringer(R) vetoed the bill. The Colorado legislature passed a bill to allow the legislative body to overrule federal programs for reintroducing endangered animals into the State. Governor Roy Romer(D) vetoed the bill.

[139] *BLM Celebrates 50th Anniversary*, at "http://www.blm.gov/nhp/news/press.html," March 28, 1996.

[140] *History of the BLM, supra*.

[141] *The BLM Today*, at "http://www.blm.gov/nhp/facts/today.html," March 27, 1996 [hereinafter *The BLM Today*].

Service manages additional land in these states. This widespread federal presence apparently causes resentment among some. What the "return the land" movement fails to acknowledge, however, is the benefit enjoyed by the states. Of the 270 million acres of BLM land, over half (160 million acres) is authorized for grazing.[143] Logging and recreation in National Forests and Parks also generate income for states. But resentment persists.

Controversy also centers around the manner in which BLM manages its lands. Today, BLM is trying to satisfy all interests at one time, in keeping with our current management philosophy. According to an agency statement, "...BLM is working harder than ever to improve the way it manages the land. One of the ways the agency is doing this is by taking a 'big picture' or ecosystem approach to land management."[144] This management style, BLM says, "is consistent with the BLM's mandate under the Federal Land Policy and Management Act of 1976, which requires the agency to manage in a way that accommodates may uses of the land -- such as fishing, camping, hiking, boating, grazing, timber harvesting and mining."[145] This policy, designed to make everyone happy, seems to make everyone mad. Ranchers want

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[142] *BLM Map*, at "http://www.blm.gov/nhp/natmap.html," March 27, 1996.

[143] *Facts about BLM Lands*, at "http://www.blm.gov/nhp/facts/facts.html," March 27, 1996.

[144] *The BLM Today, supra*.

[145] *Id.*

more and cheaper grazing land, logging companies want more timber to harvest, outdoor enthusiasts want more trails and ski slopes, and naturalists want more wilderness. BLM and other federal land management agencies walk a tight rope trying to strike a delicate balance between all of these competing interests.[146]

VI. The Military Role in Land Management - *"Now more than ever, continued use of, and access to...[military] lands is required by today's powerful and sophisticated weapons systems which need large areas for training and testing."*[147]

A. Traditional Military Wildlife Management. If the military is not part of the federal land use management scheme, what is its role? The military departments are trustees for almost 25 million acres of land;[148] much of it teaming with wildlife. We have always had a wildlife conservation mission as the trustee of these lands. Often,

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[146] BLM calls such conflicts "inevitable," but "tries to achieve consensus by soliciting advice from all affected parties or 'stakeholders' -- such as ranchers, environmentalists and recreationists...." See *The BLM Today*, *supra*.

[147] Hearing Before the Subcommittee on Military Procurement and Subcommittee on Readiness of the House National Security Committee, 104th Cong., 2nd Sess. 1996 (Statement of Sherri W. Goodman, Deputy Under Secretary of Defense (Environmental Security)) [hereinafter Goodman].

[148] Id. at 14.

wildlife has flourished alongside seemingly incompatible military functions. Johnston Atoll and Rocky Mountain Arsenal are both excellent examples of this paradoxical success.

1. Nuclear Tests and Birds. The Johnston Atoll, a 12 mile long coral atoll, which lies 717 nautical miles southwest of Honolulu, was discovered by an American ship in 1796. In 1923, the Biological Survey of the U.S. Department of Agriculture conducted an expedition to the island to study the wildlife, and President Calvin Coolidge designated the island a bird refuge.[149] In 1934, President Franklin Roosevelt placed the atoll under Navy control, resulting in the first human habitation of the largest island.[150] Johnston Island served as an airfield in World War II, then was transferred to the Air Force in 1948.[151] Joint Task Force Eight used the atoll for a series of high altitude nuclear tests.[152] The Defense Nuclear Agency maintains the Island in reserve status for possible future atmospheric nuclear tests.

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[149] Exec. Order No. 4467.

[150] Exec. Order No. 6935.

[151] U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, JOHNSTON ATOLL NATIONAL WILDLIFE REFUGE, September 1991 [hereinafter JOHNSTON].

[152] P.S. LOBEL, A BRIEF HISTORY OF JOHNSTON ATOLL, 1991 [hereinafter LOBEL]. After the Korean War, Joint Task Force Seven, the organization charged with conducting atomic tests in the Pacific area, was given command of the atoll.

In 1971, the United States removed its stockpile of chemical munitions from Okinawa, Japan at the request of the Japanese government.[153] When Congress passed a law which specifically prohibited the transportation of the stockpile to the continental United States, the Army moved the weapons to Johnston for storage and destruction.[154] The Johnston Atoll Chemical Agent Destruction System (JACADS) was designed to destroy these chemical munitions. Congress then directed the Army to destroy all unitary chemical weapons, and named the JACADS facility the demonstration facility for destruction technology.[155]

Despite this history, wildlife continues to flourish. Today, the FWS conducts a full time conservation program at the atoll.[156] As the only land within millions of square miles of ocean, the atoll supports tens of thousands of migratory seabirds.[157] The atoll itself is composed of unique coral species not found in Hawaii.[158] The coral

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[153] GREENPEACE USA v. STONE, 748 F.Supp. 749, 752-753, (Dist.Haw. 1990).

[154] *Id.* See Pub.L. 91-672.

[155] *Id.* See MAJOR LAWRENCE E. ROUSE, *The Disposition of the Current Stockpile of Chemical Munitions and Agents,* 121 MIL. L. REV. 17 (1988). See also LTC WARREN G. FOOTE, *The Chemical Demilitarization Program--Will it Destroy the Nations Stockpile of Chemical Weapons by December 31, 2004?,* 146 MIL. L. REV. 1 (1994).

[156] LOBEL, *supra*.

[157] JOHNSTON, *supra*. These include the Golden Plover, which migrates directly from the atoll to the arctic , remaining in the air for up to seven days at a tme. The most numerous species is the Sooty Tern, with an estimated 50,000 to 100,000 breeding pairs on the smaller islands.

supports the green sea turtle and the Hawaiian monk seal, both endangered species, as well as 280 species of fish,[159] including the whitetip shark.[160] The wildlife conservation function has been consistent with, and has not interfered with, the varied and important national security functions performed at Johnston Atoll.

2. Chemical Weapons and Wildlife. In the 1940's the U.S. expanded its chemical weapons program as a deterrent to the German threat. In 1942, the U.S. purchased 27 square miles of farmland in central Colorado for construction of the Rocky Mountain Arsenal. During World War II, RMA produced mustard gas, Lewisite, and chlorine gas.[161] During the Korean War, RMA manufactured white phosphorous- and mustard-filled munitions. One commander boasted that "the arsenal can turn out millions of incendiary bombs a year when operating at full capacity."[162] In the 1950s, a new manufacturing area was added for the production of nerve agent.[163]

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[158] *Id.*

[159] *Id.*

[160] LOBEL, *supra*. These include the yellow and Achilles tang, trumpetfish, longnose and chevron butterflyfish, a variety of goatfishes, yellow and saddleback wrasse, and the flame angelfish.

[161] PROGRAM MANAGER FOR ROCKY MOUNTAIN ARSENAL, *Special Historical Issue*, 4 EAGLE WATCH 6, August 1992.

[162] *Id.* at 8.

As do all manufacturing areas, RMA produced large quantities of liquid wastes. The Army first disposed these wastes in a series of unlined lagoons, and later in a 243 million gallon lined pond. In addition, Shell Oil Company produced pesticides at RMA for 30 years.[164] In 1974, the Army discovered groundwater contamination offpost. All of RMA is now listed on the National Priorities List (NPL).

To ensure safety and security, the production and disposal facilities were placed in the center of the land to create a buffer area. As development around the Arsenal increased, wildlife increasingly sought a safe haven in this buffer area. A winter roosting population of the American Bald Eagle return to cottonwood trees each year, attracted by an abundant prey base of black tailed prairie dogs, rabbits, and other small mammals.

The burrowing owl, a candidate for listing as threatened or endangered, inhabits abandoned prairie dog colonies during the summer months. The Ferruginous Hawk, also a candidate species, as well as other raptors such as

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[163] *Id.* Built between 1951 and 1953, the "North Plants" produced most of the GB nerve agent (also known as Sarin) between 1953 and 1957. Programs to demilitarize, or get rid of, these weapons began in the late 1950s. Full scale disposal operations began in the 1970s. Between 1971 and 1973, over 3,000 tons of mustard agent was destroyed. A destruction facility for GB also operated for several years.

[164] *Id.* In fulfillment of Rachel Carson's prophesy regarding DDT, scores of ducks died at RMA from pesticide poisoning. The poisoning was attributed to settlement of pesticides in lake sediments, which were ingested by fish, and in turn by ducks that ate the fish. One of the first environmental cleanup projects at RMA involved dredging the lake bottoms to remove poisonous sediments.

swainson's hawks, great horned owls, and ospreys, call the Arsenal home.

In 1992, Congress declared DoD's most complex and expensive cleanup site a National Wildlife Refuge. The FWS conducts an extensive management program, alongside, and in partnership with, the cleanup program, which is estimated to cost approximately two billion dollars.

B. The Importation of Wildlife to Military Installations. Today, military training requires more land than ever. For instance, a Civil War battalion required 200 acres of land for training maneuvers.[165] In contrast, today's mechanized battalion requires over 80,000 acres for effective combat training.[166] At the same time, the military is being asked to drastically expand its traditional wildlife conservation mission. Increasingly, this involves the importation of individuals or species onto military property.

1. Ferret Boot Camp. In 1991, the FWS asked Rocky Mountain Arsenal for permission to establish a training ground for black footed ferrets on the Arsenal. The black-footed ferret is severely endangered over most of its range, and is currently bred in captivity in the hopes

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[165] *Id.*

[166] *Id.*

its numbers will increase sufficiently to allow it to be returned to the wild.[167] Because the ferrets are bred in captivity, they lack the skills necessary to survive in the wild.[168] The FWS decided to establish a boot-camp to train the ferrets.[169] They asked to put it on the Rocky Mountain Arsenal. The Army said no because of the on-going cleanup program, but the FWS was undaunted. They established the facility at the Pueblo Army Depot two hours south of Denver.[170]

The training facility simulates wild conditions. Ferrets live in outdoor pens with access to active prairie dog burrows.[171] Ferrets learn to hunt the prairie dogs, their natural food source, in a protected environment. Studies show that trained ferrets are three times as likely to survive in the wild as those released directly from

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[167] PATRICK O'DRISCOLL, *Experts to map ways to restore ferrets*, THE DENVER POST, June 1, 1995, at B-04 [hereinafter *Ways to restore ferrets*]. The black-footed ferret was thought to be extinct until a single colony was found on a ranch in Wyoming in 1981. After an outbreak of an unknown disease killed most of the colony members in 1987, the survivors were captured and placed in a captive breeding program. Since that time, several hundred ferrets have been bred in captivity, and 200 have been reintroduced in Wyoming, Montana, and South Dakota since 1991. Most of the reintroduced animals have died, as they become easy prey for hungry predators such as coyotes, badgers, hawks, and owls. See PATRICK O'DRISCOLL, *Plague latest hurdle to restoring ferrets*, THE DENVER POST, September 10, 1995, at B-01 [hereinafter *Plague*].

[168] *Id.*

[169] *Ways to restore ferrets, supra.*

[170] *Id.* The Pueblo Army Depot is also on the NPL.

[171] *Plague, supra.*

captive breeding facilities.[172] Unfortunately, ferrets are susceptible to plague, and 18 ferrets died at the Pueblo facility in November, 1995.[173] In January, 1996, FWS established another training facility at Warren Air Force Base in Wyoming, and transferred two male Pueblo ferrets for mating with females from another group.[174]

The ferret-conditioning program is an example of cooperative land management between the military and FWS. Because the training programs are small, confined, and temporary, there are few risks to the military. The FWS runs the program, and is responsible for its success. While it would be difficult for the military to evict the ferrets, few land use issues are triggered because the amount of land involved is so small. But the program, now at two military facilities, demonstrates the cooperative role DoD is playing in wildlife conservation.

2. RCWs Come Home to Roost at Ft. Polk. In 1995, the Red Oak Timber Company asked EPA for an "incidental take permit" so that it could cut down trees which are habitat

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[172] *Id.* Unfortunately, an outbreak of plague among prairie dogs in reintroduction areas jeopardizes the release program. Ferrets, thought to be immune to plaque, have recently been proven susceptible to the disease.

[173] PATRICK O'DRISCOLL, *Plague decimates federal ferret program*, THE DENVER POST, November 26, 1995, at B-04. The ferrets died from eating plague-infected prairie dogs.

[174] THE ROCKY MOUNTAIN NEWS, January 25 1996, at 6A.

for the red-cockaded woodpecker (RCW).[175] With the permit request, the company filed a Habitat Conservation Plan (HCP). HCPs spell out what the applicant will do to mitigate their project's impact to the species, and, when approved, become enforceable agreements between the FWS and the applicant.[176] Red Oak proposed to "translocate" RCWs "from the project site to the Fort Polk military installation...."

What? Transport more RCWs to an Army installation with an important training mission? So a timber company can cut down trees? What about the Army? RCWs need a lot of space. A single clan of two to six birds requires about 125 acres of habitat.[177] According to Will McDearman, staff biologist for the FWS, the move makes sense. An investment of eight to ten thousand dollars to implement the HCP will yield $250,000 in timber for Red Oak.[178] The RCWs on Red Oak's

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[175] Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for a Timber Harvest Operation by Red Oak Timber Company in Vernon Parish, Louisiana, 60 Fed. Reg. 26,049 (1995.) ESA § 10(a)(1)(B) provides for the issuance of permits where "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Incidental take permits allow the holder to kill or otherwise take up to a specified number of endangered animals.

[176] *Id.* ESA § 10(a)(2)(A) requires submission of a conservation plan, known as a Habitat Conservation Plan, which specifies: "the impact which will likely result...," and "what steps the applicant will take to minimize and mitigate such impacts...."

[177] 56 Fed. Reg. 40,598 (1991).

[178] Telephone Interview with Will McDearman, USFWS staff biologist, Jackson, Mississippi Field Office (Jan. 24, 1996).

land are "isolated groups" which are too small to contribute to the overall recovery of the species. Red Oak will set aside 10 sites, and FWS will add artificial cavities to the trees. In the spring, FWS will harvest the offspring, and transport them to Ft. Polk to augment Polk's existing RCW population. The Army, McDearman claims, agreed.

The ESA coordinator for the Army Environmental Law Division was unaware of the agreement, but said it makes sense from the Army's perspective.[179] Because the Army has an obligation to "recover" its RCW populations, it has to set aside land for RCW expansion which would otherwise be available for training. Recovery requires more land than maintenance of a population, so the land set aside for recovery is more than a recovered population would need. If the population increases, the amount of land set aside can actually be decreased, and more land will be available for training.

So we allow private parties to use their land, while we set ours aside. Our land is more valuable to conservation efforts than private land because we have left large tracts undisturbed. Our "undeveloped" land has become essential habitat for endangered species because surrounding land has been developed. The paradox of this is that our seemingly "undeveloped" land was actually "developed" long before the land surrounding it offpost. The Army actively uses the

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[179] Interview with MAJ Tom Ayers, U.S. Army Environmental Law Division (Jan. 29, 1996).

land for training. It is then, in a sense, "developed," because it is being used for its intended purpose. That purpose is not wildlife preservation, no matter how admirable the goal of preservation may be.

C. Buffalo Roam at Ft. Wingate. In keeping with the maxim "no good deed goes unpunished,"[180] the military is often the victim of its own good intentions. One effort at cooperation and generosity landed the Army in Federal District Court.

In 1966, the New Mexico Department of Game and Fish established a bison herd on Ft. Wingate Army Depot.[181] New Mexico originally intended to use the herd as breeding stock to produce offspring for formation of additional herds, but the herd is currently the only publicly owned herd in the State.[182] The State managed the herd after its introduction.[183] As the herd flourished, population control measures became necessary.[184] Throughout the 1970s, New

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[180] McGowan, William J. While this phrase is often repeated in the Army, I first heard it from COL(R) Mc Gowan, previously the chief of the U.S. Army Environmental Law Division.

[181] THE FUND FOR ANIMALS V. U.S., Civ.No. 96-0040 MV/DJS, at 2 (D. NM. Jan. 26, 1996) [hereinafter FUND FOR ANIMALS].

[182] NEW MEXICO DEPARTMENT OF FISH AND GAME, NEW MEXICO WILDLIFE NEWS, October 19, 1995, at 2 [hereinafter WILDLIFE NEWS].

[183] FUND FOR ANIMALS, *supra*, at 2.

[184] WILDLIFE NEWS, *supra*, at 3. Ft. Wingate is estimated to be capable of supporting approximately 75 bison. The herd reached 150 at one time.

Mexico held auctions to remove some surplus animals, and transferred others to local Native American tribal herds.[185]

A 1980 cooperative agreement between New Mexico and the Army permits State-authorized hunting of game on Ft. Wingate "subject only to the requirements of military security and safety."[186] New Mexico authorized periodic antelope hunts pursuant to that agreement.[187]

Ft. Wingate closed in 1993. The four remaining federal employees have no responsibility for the herd.[188] In August, 1995, New Mexico requested permission to conduct a bison hunt, and Ft. Wingate agreed, subject only to safety concerns.[189] In October, 1995, after holding public hearings, New Mexico adopted regulations authorizing the hunt and issued nine permits for the taking of nine bulls.[190]

On January 10, 1996, The Fund For Animals filed a "Complaint for Declaratory Relief" to prevent the hunt. The Fund claimed the hunt was a "major federal action" with the

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[185] *Id.* 115 bison were sold in 1972, 43 in 1979, and 95 in 1990. In 1993, 25 bison were moved to BLM property, but were returned to Ft. Wingate when BLM determined the herd to be "unmanageable and a nuisance."

[186] THE FUND FOR ANIMALS, *Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order*, Civ.No. 96-0040 MV/DJS, filed January 12, 1996 [hereinafter *Opposition*].

[187] *Id.* at Exhibit B.

[188] *Id.* at 3.

[189] *Id.* at 2-3.

[190] *Id.* at 3.

potential to significantly affect the human environment under the National Environmental Policy Act (NEPA). The complaint sought an injunction to stop the hunt until the Army complied with NEPA by preparing either an Environmental Assessment or Environmental Impact Statement.[191]

In its opposition brief, the U.S. countered that because the U.S. lacked a substantive role in the decision making process, the action did not rise to the level of a "major federal action."[192] The U.S. argued the Army "had no discretion to deny permission to access the lands for hunting purposes for any reason other than military security or safety."[193] The "bison have always belonged to the State of New Mexico and the agreement gives it the power to manage and dispose of them. The Army has no control or interest in the bison."[194]

On January 26, 1996, the U.S. District Court for the District of New Mexico found the Army's role "sufficiently major in scope to trigger NEPA analysis procedures."[195] The Court concluded "Defendants had obvious discretion over the outcome...."[196] As a result, the Army is required to perform

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[191] THE FUND FOR ANIMALS v. U.S., *Complaint for Declaratory Relief and Mandamus*, Civ. No. 96-0040 MV/DJS, filed January 10, 1996.

[192] *Opposition, supra*, at 6.

[193] *Id.* at 8.

[194] *Id.* at 9.

[195] FUND FOR ANIMALS, supra, at 6.

[196] *Id.* at 7.

costly, time-consuming NEPA analysis regarding the disposition of a bison herd it never requested, managed, or owned.

D. Where are we and why? Now, federal officials want to put the Mexican Wolf onto White Sands Missile Range (WSMR). The story of the wolf is one of the most ironic environmental tales. After intentionally eradicating it, federal land managers now want to restore the wolf, and they want the military to help. Why would federal land managers want to send these highly endangered animals to a Missile range, and what are the risks to the military?

VII. The Tale of the Wolf - "Wolves...stir the most visceral human fears - and the deepest human reverence."[197]

A. The Legend Of The Wolf. The wolf is one of the most universally hated species ever to walk the planet. Although the wolf was revered by some cultures, such as Native Americans, Eskimos, and other hunt-based societies, which considered the wolf a brother, and admired its abilities, most modern societies intentionally and systematically exterminated the wolf.[198]

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[197] KAREN BRANDON, *Why Wolves arouse the U.S. West*, THE TORONTO STAR, March 25, 1995, at C6.

In Europe, the view of the wolf evolved over the ages.[199] During the Roman Empire the legend of Romulus and Remus, raised by a she-wolf, depicted the wolf in a positive light.[200] But during the middle ages, the population increased dramatically due to improved agricultural techniques.[201] As forests were cleared and hunting for food and sport increased, wolves were driven into areas inhabited by humans in search of food.

Charlemagne employed professional wolf hunters, and the first reports of wolves attacking humans appeared.[202] "Whether they really attacked human beings cannot be established. It is hard to distinguish among reality, invention, and magic in the literature of the period."[203] "Little Red Riding Hood" was published in France in 1697.[204]

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[198] BARRY HOLSTUN LOPEZ, OF WOLVES AND MEN 77-97, (Charles Scribner's Sons, 1978) [hereinafter LOPEZ]; U.S. FISH AND WILDLIFE SERVICE, *Gray wolf (Canis lupus)*, at "http://www.fws.gov/bio-gwol.html" [hereinafter *Gray wolf*]; RUSSELL J. RUTTER AND DOUGLAS H. PIMLOTT, THE WORLD OF THE WOLF 29, (J.B. Lippincott Company, 1968), [hereinafter RUTTER]; ERIK ZIMER, THE WOLF: A SPECIES IN DANGER 293 (Eric Mosbacher trans., 1981) [hereinafter ZIMER].

[199] ZIMER, *supra*, at 295-296.

[200] *Id* at 296. Scientists, however, have declared the legend of Romulus and Remus impossible, since the wolf's lactation period would not be long enough to rear a human child.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] JIM DUTCHER (Producer and Film Maker) WOLF: RETURN OF A LEGEND, (ABC/Kane Prod. Int'l, Inc. 1993) [hereinafter DUTCHER].

In the story, a wolf devours an unfortunate grandmother, then lies in wait for the granddaughter to return.

While reports of attacks are too numerous to be ignored, the role of myth is evident. For instance, many European depictions of wolves from the middle-ages portray angry black wolves, but there were no black wolves in Europe.[205] Some biologists now attribute isolated wolf attacks on men to rabies, which was widespread in Europe, but uncommon in North America.[206] Despite the wolf's reputation, man's revulsion is widely attributed to his transition from a hunter-gatherer to a herder.[207] This loathing of the wolf was widespread throughout Europe and the British Isles. American colonists brought it with them to the new world.

B. The Wolf in America The "colonist was not much troubled by wolves until he began raising stock."[208] The first livestock was imported at Jamestown, Virginia, in 1609, but stock animals were common by 1625.[209] In 1630,

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[205] ZIMER, *supra*, at 298.

[206] RUTTER, *supra*, at 24-26.

[207] ZIMER, *supra*, at 295. The "positive attitude to the wolf...changed only with the extensive keeping of domestic animals, when the wolf became an enemy." RUTTER, *supra*, at 29. "The formal declaration of war was undoubtedly made by man the herder who greatly prized his domestic animals and was very jealous of them."

[208] LOPEZ, *supra*, at 171.

[209] *Id.*

Massachusetts passed the first wolf bounty statute. Other eastern colonies followed suit throughout the 1600's, and our war on the wolf was underway.[210] Wolves did attack stock animals, but the extent of these attacks was probably exaggerated. A limited number of individual wolves committed most of the attacks, but our reprisal was indiscriminate.[211] As the eastern forests were cut and settlement expanded, the eastern wolf was driven west and south. Despite bounties and wolf hunts, the loss of habitat through the clearing of forests was the primary cause of near-extinction for the eastern wolves.[212]

In the west, wolves were larger, and hunted the same animals of prey man hunted. Merriwether Lewis referred to the wolf as the "shepherd of the buffalo" in one of his journals.[213] Settlers "emerged from the dark forests" of the east and entered the plains.[214] Here they met *Canis lupus nubilis*, the prairie wolf. Initial reaction to the wolf varied from "amused" to finding them "the very incarnation

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[210] *Id.* at 171-172.

[211] *Id.* at 173. For instance, if a sheep died of natural causes and was scavenged by wild dogs or wolves, the death would be attributed to wolves. Most attacks by wild dogs would also be attributed to wolves, since their foot prints are similar and few could tell the difference. Responsible wolves were not hunted, rather, wolves were hunted and killed indiscriminately.

[212] RUTTER, *supra*, at 37.

[213] LOPEZ, *supra*, at 174.

[214] *Id.*

of destruction."[215] In the early days of open-range cattle ranching, wolf kills of cattle (called depredation) were largely tolerated as an inherent risk, and ranchers feared Native Americans more than wolves.[216]

Trappers were the first in the west to kill wolves.[217] Trappers first killed wolves incidentally to beaver hunting. Then, in the mid-1800s, when beaver populations had been exhausted, they began to hunt wolves for pelts. In 1853, the Missouri outfit of the American Fur Trading Company shipped 3,000 wolf pelts.[218] Buffalo, however, had become the primary target, with 75 million killed between 1850 and 1880.[219] Generally, only hides were taken, leaving carcasses for wolves to scavenge. This constant food supply encouraged wolves to follow hunters, and hunters in turn began to shoot wolves for sport or skins.[220]

Cattle ranching increased during this period, and as the buffalo was eradicated, hungry wolves turned to cattle for food. In the 1870s, ranching interests began to form

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[215] *Id* at 175. German explorer Maximilian of Wied wrote that he was "long amused" by the antics of wolves and found their howl pleasing. A buffalo hunter described the wolf as "the very incarnation of destruction, with his powerful jaws of shark teeth...." Others described the wolf as "cowardly."

[216] RUTTER, *supra*, at 38.

[217] LOPEZ, *supra*, at 177.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 177-178.

livestock associations.[221] Ranching was hard, and subject to the vagaries of drought and disease. Depredation may not have been a great threat, but it was controllable. The poison strychnine was introduced in the 1860s, and became a tool for controlling wolves.[222] It became "an unwritten law that no rangeman would pass an animal carcass without poisoning it...in the hope of eventually killing one or more wolf."[223] Wolves in mountainous areas fared better, subsisting on deer, elk, and other still plentiful game. But "the slaughter of wolves on the prairie reached its peak" between 1875 and 1895, when bounties were offered by state and local governments as well as livestock associations.[224] The widespread practice of poisoning had unintended effects. Raptors and other animals often fed on wolf carcasses and died.[225] Strychnine use was generally abandoned by 1900 as too dangerous, and steel traps became the weapon of choice.[226]

"As the land filled up with other ranchers, as water rights became an issue, and as the Indians were removed to reservation, however, the wolf became...'an object of

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[221] RUTTER, *supra*, at 38.

[222] FRANZ J. CAMENZIND (Producer) WOLVES, (National Audubon Society, Inc. and TBS Productions, Inc. 1989) [hereinafter AUDUBON].

[223] RUTTER, *supra*, at 38.

[224] LOPEZ, *supra*, at 179.

[225] *Id.* See also RUTTER, *supra*, at 38.

[226] LOPEZ, *supra*, at 190.

pathological hatred.'"[227] Perhaps ranchers "in a speculative business like cattle ranching singled out one scapegoat for their financial losses....There was a feeling that as long as someone was out killing wolves, things were bound to get better."[228]

In Montana, a one dollar wolf bounty was offered in 1884, and 5,450 wolves were presented the first year.[229] The State wolf bounty was raised to five dollars in 1899. "People went out and killed wolves far and wide, wolves up in the Bitterroot Mountains that had never even seen sheep and cattle."[230] Even as hatred toward wolves began to lessen among ranchers in the early 1900s, the Montana legislature passed a law requiring veterinarians to inject wolves with mange and release them to spread the disease among wolf packs.[231]

Wolves suffered a similar fate in other western states.[232] And the wolf did not benefit from the new American

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[227] *Id.* at 181.

[228] *Id.* at 184.

[229] *Id.* at 181. The cattle market was profitable that year due to high prices, but a harsh winter in 1886 devastated stock herds. At the same time, grazing policies were changing, and business became more difficult for the rancher. Similarly, the sheep industry, which "had lost more animals to bears and mountain lions than to wolves, began to blame its every downward economic trend on the wolf." *Id.* at 182.

[230] *Id.*

[231] *Id.* at 183.

"conservation" movement. In 1915, the U.S. Congress appropriated $125,000 to provide wolf hunters on public grazing land. By 1942, government hunters had killed over 24,000 wolves in Colorado, Wyoming, Montana, and western North and South Dakota.[233] "A final devastating blow fell when officials in Yellowstone decided to exterminate the park wolves--they succeeded."[234]

VIII. The Return of the Wolf - "*...to keep every cog and wheel is the first precaution of intelligent tinkering.*"[235]

A. Recovery and Reintroduction. The ESA mandate for species recovery required FWS to reintroduce some species into the wild. Like the black-footed ferret, several species survived only in captivity in breeding programs. But who would allow the FWS to place an endangered species on their property? Landowners dread the discovery of an endangered species on their property because of the

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[232] In 1912, Colorado's Piceance Creek Stock Growers' Association offered $150 per wolf. *Id.* at 187. In all, 80,000 U.S. bounties were collected between 1883 and 1918. AUDUBON, *supra*.

[233] LOPEZ, *supra*, at 187. Government hunters killed over 850 wolves in Arizona and New Mexico between 1916 and 1960. U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, DRAFT ENVIRONMENTAL IMPACT STATEMENT 1-6, June 1995 [hereinafter DRAFT EIS].

[234] AUDUBON, *supra*. Between 1914 and 1926, park officials killed at least 136 wolves, including 80 pups.

[235] LEOPOLD, *supra*, at 190.

restrictions the ESA places on their activities. Even most states and federal agencies did not want to host endangered species. If the ferret comes to your state park, other activities, such as grazing, trapping, and recreation would have to be curtailed to protect the ferret.

In response to this problem, The Endangered Species Act Amendments of 1982 gave the Secretary of the Interior increased flexibility in implementing the Act. Congress recognized the ESA's inherent "tendency to discourage voluntary introduction of species in areas of their historic range."[236] Through the amendment, they hoped to reduce "political opposition to reintroducing species," and "encourage private parties to host experimental populations on their lands."[237]

ESA § 10(j)[238] permits the Secretary to "authorize the release (and the related transportation) of any population...of an endangered species or a threatened species outside the current range of such species if...such release will further the conservation of such species."[239] Prior to release, the Secretary "shall by regulation

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[236] H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982), *available at* 1982 WL 25083 (Legis. Hist.) [hereinafter H.R. Rep. 97-567].

[237] *Id.* The legislative history recognizes that the introduction of listed species outside their current range "if carefully planned and controlled, may be beneficial in securing the restoration of listed species."

[238] Pub. L. 97-304, § 6, amended ESA § 10 by adding § 10(j).

[239] 16 U.S.C. § 1539(j)(2)(A).

identify the population and determine...whether or not such population is essential to the current existence of an endangered species or a threatened species."[240] If it is not, it is designated a non-essential experimental population. A populations released under the provisions above is considered an "experimental population" so long as it is "wholly separate geographically from nonexperimental populations of the same species."[241] The Secretary is not permitted to designated critical habitat for nonessential experimental populations..[242]

An experimental population may be treated as a threatened species instead of an endangered species.[243]

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[240] 16 U.S.C. § 1539(j)(2)(B). The legislative history indicates a population will be considered essential if "the loss of the experimental population would be likely to appreciably reduce the likelihood of survival of that species in the wild." The statute does not prohibit the release of a population determined to be essential, and does not impose any affirmative requirement if such a determination is made.

[241] 16 U.S.C. § 1539(j)(1). The 1982 amendments do not specify whether a population determined to be essential may be released under § 10(j) or whether it may be considered an experimental population. The conference report is inconsistent in that regard. In one passage, the history indicates that "[t]o qualify for the special treatment afforded experimental populations, it is necessary to determine whether the population is essential to the continued existence..." of the species. A later passage states "in most cases, experimental populations will not be essential."[241] In light of the conference report, the most reasonable reading of the vague language of the statute is that essential experimental populations may be designated and released, but only non-essential populations will receive the special treatment discussed below. The implementing regulations, however, allow an essential experimental population to be treated as a threatened species.

[242] 16 U.S.C. § 1539.

[243] 16 U.S.C. § 1539(j)(2)(C). The statute does not indicate whether essential experimental populations may be treated as threatened. The House Report is more clear and more detailed than either the conference

Threatened species receive less protection under the ESA than endangered species. Protection for threatened species is limited to regulations adopted by the Secretary of the Interior.[244] Since protection of threatened species is

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report or the statute. It indicates that "[e]ach experimental population is to be treated as a threatened species under the act."

[244] 16 U.S.C. § 1533(d) provides:

> "the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit...any act prohibited...with respect to endangered species; except that with respect to the taking of resident species...such regulations shall apply in any State which has entered into a cooperative agreement...only to the extent that such regulations have also been adopted by such State."

Section 6 provides for cooperative agreements with states. "[T]he Secretary is authorized to enter into a cooperative agreement...with any State which establishes and maintains an adequate and active program for the conservation of endangered and threatened species." In other words, threatened species are protected to the extent the Secretary deems necessary through regulations. The extent of protection, however, is tempered in the case of "taking" provisions. These provisions will apply in states which have not entered into cooperative agreements and in states with cooperative agreements if such states adopt them. Thus, states have a role to play in, and can limit, the protection of threatened species. The Secretary's power to regulate the protection of threatened species is not absolute, however. See *Fund For Animals v. Andrus*, and *Sierra Club v. Clark*.

Threatened status does not give FWS unfettered discretion regarding the species. In *Sierra Club v. Clark,* the Sierra Club challenged changes to regulations concerning the Minnesota Timber Wolf. The USFWS published regulations allowing public sport trapping of the Timber Wolf, a species listed as threatened. The District Court declared the regulation illegal. On appeal, the Secretary argued that the decision was permissible under ESA § 4(d) which authorizes the Secretary to issue regulations governing threatened species. Invalidating the regulation, the U.S. argued, "destroyed the distinction made in the Act between endangered and threatened species." The Eighth Circuit concluded, however, that the discretion permitted by § 4(d) "is limited by the requirement that the regulation he is to issue must provide for the conservation of" the species.

The U.S. argued that language contained in both the Senate and House reports on the 1973 Act demonstrated Congress' intent that the Secretary have discretion to permit "harvest" of threatened species. The Court, however, gave precedence to the Conference Committee report, which removed language dealing with harvesting and substituted language

limited to regulations, FWS can tailor the regulations to address the special needs of the experimental population and its reintroduction area. These regulations provide flexibility, as demonstrated below, and can lessen the sting of suddenly having to contend with a new endangered species.

In addition, an experimental population which is determined to be non-essential will be treated "as a species proposed to be listed" for § 7 purposes, except when it is on a National Wildlife Refuge or a National Park.[245] Therefore, for purposes of § 7 consultation, the military and other agencies are permitted to treat non-essential experimental populations merely as members of a "candidate" species. A candidate, or proposed, species is one which is "presently under consideration for listing..." as threatened or endangered.[246]

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indicating that controlled taking of threatened species should be limited to "extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where the pressure can be relieved in no other feasible way."

The U.S. then argued that the Senate Committee Report on the 1982 amendments contradicted the Court's interpretation. Before reviewing that language, the Court quoted the U.S. Supreme Court, stating "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Next, the Court examined the language regarding the 1982 amendments. The Senate Committee Report discussed the taking of members of an experimental population. Where appropriate, the regulations may allow for the direct taking of experimental populations. For example, regulations pertaining to the release of experimental populations of predators...will probably allow for the taking of these animals if depredations occur or if the release of these populations will continue to be frustrated by public opposition. The Court concluded it did "not follow that the report authorizes or approves of sport taking of threatened species."

[245] 16 U.S.C. § 1539(j)(2)(C)(i).

Candidate species "have no legal status, and are accorded no protection..." under the ESA.[247] Federal agencies are still required to enter into informal consultation with FWS if their actions are "likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat."[248] During the consultation, FWS "will make advisory recommendations...on ways to minimize or avoid adverse effects."[249] FWS is required to document the conclusions and recommendations offered during the conference.[250]

What does this mean for the federal land owner hosting the species? Consultation is still required, but it will always be informal, unless the agency requests formal consultation. The agency will not be required to prepare a biological assessment.[251] This will save the agency

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[246] 7 C.F.R. Part 1940 Exhibit D To Subpart G. Candidate species are divided into two categories. Category I species are those "for which FWS currently has substantial data on hand to support the biological appropriateness of proposing to list the species...." Category II species are those "for which information now in the possession of the FWS indicates that proposing to list the species...is possibly appropriate but for which conclusive data on biological vulnerability and threat(s) are not currently available to presently support proposed rules."

[247] 50 C.F.R. § 402.12(d).

[248] 50 C.F.R. § 402.10(c).

[249] *Id.*

[250] 50 C.F.R. § 402.10(d).

[251] 50 C.F.R. § 402.12(d)(1).

considerable work. But because the species is treated as threatened for purposes other than the consultation, the agency is still bound by the Section 7 requirements that it carry out "programs for the conservation of endangered species and threatened species."[252] And federal agencies are still subject to the general take prohibition of Section 9, except as authorized by the specific regulations adopted for the population. So while federal agencies are relieved from some of the procedural requirements of Section 7, they are still at risk if they violate the suggestions offered by FWS, and should still seek the protection of a biological opinion as a shield for their actions.

Regulations promulgated to protect the experimental population "shall provide...[m]anagement restrictions, protective measures, or other special management concerns of that population...."[253] Regulations must also provide "[a] process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species"[254] To accomplish the release and management of

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[252] See 16 U.S.C. §§ 1536(a)(1) and 1539(j)(2)(C)(i). Section 1539(j)(2)(C)(i) allows experimental populations to be treated as candidate species for purposes of section 7, except for subsection (a)(1) of section 7, which still applies.

[253] 50 C.F.R. § 1781(c).

[254] 50 C.F.R. § 1781(c)(4).

the species, the Secretary is authorized to issue incidental take permits pursuant to ESA § 10(a)(1)(A).[255]

The FWS is required to consult with affected state and local governments, federal agencies, and private landowners.[256] Promulgated regulations must "to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies, and persons holding any interest in land which may be affected...."[257] This section requires coordination between FWS, state agencies, county and municipal governments, or their equivalents, and land owners and land users, such as those holding grazing or timber permits on federal land.

The FWS issued implementing regulations interpreting the statute.[258] The regulations clarify the requirements for

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[255] *Id.* ESA § 10(a)(1)(A) provides for the issuance of incidental take permits "for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental population...."

[256] 50 C.F.R. § 1781(d).

[257] *Id.*

[258] 50 C.F.R. §§ 17.80-17.83. The regulations mirror the House Report more closely than does the statute. The regulation defines an "experimental population" as "an introduced and/or designated population...that has been so designated...but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species." "Any population determined by the Secretary to be an experimental population shall be treated as if they were listed as a threatened species...." The regulations clarify the statute, and indicate all experimental populations will be treated as threatened. This conclusion is supported by the following language: "The term 'essential experimental

treatment of an experimental population as a candidate species for § 7 consultation purposes. With the non-essential, experimental populations designation, federal agencies may treat the species as if it were merely a candidate for listing for S 7 consultation purposes. If the population is determined to be an essential experimental population, it will be treated as threatened for § 7 consultations.[259] As discussed above, this would require the preparation of a biological assessment and necessitate a formal consultation, but the significance of the consultation remains the same under either scenario.

B. Wolf Reintroduction. All wolves belong to the Genus *Canis*. The domestic dog, *Canis familiaris*, and the coyote, *Canis latrans*, are its closest relatives.[260] There

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population' means an population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. All other experimental populations are to be classified as 'nonessential.'" Because the regulation allows for both essential and nonessential populations, and does not distinguish in providing for the treatment of experimental populations as threatened, it must be assumed that even essential experimental populations will be treated as threatened.

The regulations provide for overlap between the range of the experimental populations with natural populations. If the range overlaps at times, the released population will lose its experimental designation during the overlap, and with that loss, will again be subject to the full protection of the ESA. The language regarding overlap is taken almost directly from the House Report. H.R. Rep 97-567, *supra*.

[259] 50 C.F.R. § 17.83(b). In addition, biological opinions concerning both experimental and nonexperimental populations shall analyze both as a single listed species.

[260] LOPEZ, *Supra*, at 62-68. Predecessors to the genus *Canis* evolved around 60 million years ago, during the Paleocene period. By the

are two species of wolf in the world: the Red Wolf and the Gray Wolf.[261] Both are listed as endangered species under the ESA. Like the black-footed ferret, some wolves were placed in emergency captive breeding programs and were considered extinct in the wild. Using the 1982 amendments, the FWS sought the reintroduction of the wolf in several locations. Two of the three most important projects require the use of military land.

1. The Red Wolf. The Red Wolf, *Canis rufus*, once extended throughout the eastern and southeastern U.S., as far north as Pennsylvania and as far west as central Texas.[262] The Red Wolf weighs 45 to 80 pounds, is smaller than the Gray Wolf but larger than the coyote, and ranges in color from light tan to red to black.[263] Its head generally

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Miocene period, 20 million years ago, dog and cat-type carnivores became distinct, and the first true member of the genus, the wolf's immediate ancestor, developed by 1 million years ago during the Pleistocene period. The dog was intentionally bred into a separate species by man. *Canis lupus* is thought to be its immediate ancestor. Wolves are related to bears, but hyenas are more closely related to cats than dogs or wolves. Some animals bearing the common name "wolf" are not wolves. For example, the maned wolf and the andean wolf are wild dogs, not wolves. The Tasmanian Wolf is actually a marsupial related to Kangaroos. The Cape hunting dog, or African wild dog, however, a member of the genus *Lycaon*, may actually be related to the wolf and belong in the same genus.

[261] *Wolf FAQ*, at "http://tigerden.com/Wolf-park/Walffaq.html, JAN 17, 1996.

[262] U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, *Red wolf, (Canis rufus)*, at "http://www.fws.gov/bio-rwol.html," January 17, 1996 [hereinafter *Red wolf*].

[263] *Id.*

has a reddish appearance, and it has long ears and legs.[264] Some biologists have recently suggested that the Red Wolf evolved as a hybrid between the Gray Wolf and the Coyote, but its origin remains unconfirmed.[265]

"The demise of the red wolf was directly related to man's activities, especially land changes, such as the drainage of vast wetland areas for agricultural purposes; the construction of dam projects that inundated prime habitat; and predator control efforts at the private, State, and Federal level."[266] The Red Wolf was finally found only in southeastern Texas and southwestern Louisiana.

In the mid-1970s, the FWS trapped 40 wild adults and placed them in a "captive breeding program" at the Metropolitan Park in Tacoma, Washington in a desperate effort to preserve the species.[267]

The first litter of pups was born in 1977.[268] The breeding program later expanded to six other facilities.[269] By 1986, there were 80 captive Red Wolves.

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[264] *Id.*

[265] *Id.*

[266] Proposed Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 26,564, July 24, 1986 [hereinafter 51 Fed Reg. 26,564].

[267] *Id.*

[268] *Id.*

[269] It is critical to expand captive breeding programs to a variety of facilities when the number of remaining individuals is low to avoid

a. Red Wolf Recovery Plan. The ESA requires FWS to prepare recovery plans for endangered species.[270] To be considered recovered, a species must live in the wild. The Red Wolf Recovery Plan envisioned the establishment of three self-sustaining populations prior to downlisting the species from its current "endangered" status.[271]

b. Experimental Releases. In 1976 and 1978, prior to the "experimental population" amendment to the ESA, the FWS conducted experimental releases of red wolves onto the 4,000 acre Bulls Island, part of the Cape Romain National Wildlife Refuge near Charleston, South Carolina.[272] Though the island was not large enough to support a self-sustaining population, the experiment demonstrated the feasibility of reintroduction. The release also

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extinction due to catastrophe (such as disease outbreak, fire, or other disaster).

[270] 16 U.S.C. § 1533(f)(1)(B)(i)-(iii). These plans must include:

> "(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
>
> (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
>
> (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal."

[271] 51 Fed. Reg. 26,564, *supra*.

[272] *Id.*

demonstrated the utility of creating a half-way house environment, where previously captive wolves could be released in a protective environment to breed. The wild-born pups would learn the ways of the wild from birth, and would be better candidates than their parents for release into less controlled environments. The wolves released on Bull Island were recaptured at the end of the experiment, and returned to captivity, but FWS continues to use island sanctuaries as transition environments.

c. Environmental Assessment and Designation of Experimental Population. The FWS published an EA to consider alternatives for the red wolf reintroduction program. The preferred alternative was the reintroduction of red wolves onto the Alligator River National Wildlife Refuge (ARNWR) and the Air Force's Dare County Bombing Range (DCBR). The FWS issued the "Proposed Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina" in July 1994.[273] FWS proposed to introduce mated pairs of Red Wolves into the ARNWR in Dare and Tyrell Counties, North Carolina, and to determine the population to be non-essential experimental.

Under the proposal, 8 to 12 animals would be released from the captive breeding program during the first 12 months. Pairs would be fitted with radio collars and placed

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[273] *Id.*

in an on-site acclimation pen for 6 months prior to release. In early spring of 1987, three pair would be released, a pair at a time, at two week intervals. The animals would be closely tracked by radio telemetry until they established a home range, after which tracking would become less frequent.

Based on the Bull Island experiment, the FWS selected the ARNWR based on its "[a]pparently ideal habitat," consisting of swamp forests, pocosins, and freshwater salt marshes.[274] The site also contained "the small mammal prey base and the denning and escape cover required by the species."[275]

The Proposed Determination referred to DCBR only briefly. "Adjacent to the refuge is a 47,000-acre U.S. Air Force bombing range with similar habitats. The very limited live ordnance expended by the Air Force and Navy on this range is restricted to two extremely small, well defined, and cleared target areas (approximately 10 acres each)."[276] The language is an obvious attempt to soft-pedal the activities conducted at the range. It is unlikely DCBR would survive the current BRAC battles if it only conducted "very limited live ordnance" testing.

The proposal clearly included DCBR as an integral part of the reintroduction program. The proposal "anticipated

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[274] *Id.*

[275] *Id.*

[276] *Id.*

that the Refuge and adjacent U.S. Air Force lands could eventually sustain a red wolf population of about 25 to 35 animals."[277]

The Proposed Determination also "anticipated that, because of the size and habitat characteristics of the reintroduction area, animals will remain within the boundaries of the refuge and adjacent military lands." Wolves are known to wander, and these wolves did just that. FWS had to expand the protected area twice after the original designation.[278]

The proposed rules, the heart of any reintroduction program, provided for the take of red wolves by any person:

> (i) Incidental to lawful recreational activities, or
>
> (ii) In defense of that person's own life or the lives of others, provided that such taking shall be immediately reported to the Refuge Manager...."[279]

In addition, the proposal permitted designated FWS and State conservation agency employees to take any wolf "which constitutes a demonstrable but nonimmediate threat to human safety, or which is responsible for depredations."[280] The

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[277] *Id.*

[278] In 1991, FWS added Beaufort County, North Carolina. 56 Fed. Reg. 37,513. In 1993, FWS added Martin and Bertie Counties, North Carolina. 58 Fed. Reg. 62,086.

[279] *Id.*, at proposed amendment to 50 C.F.R. 17.84(c)(4)(i),(ii).

[280] *Id.*, at (c)(5)(iii). The proposal allowed take by an employee of any wolf

Proposed Determination noted, however, that "[k]illing of animals would be a last resort..." and that public take would be "discouraged by an extensive information and education program...."

The provision allowing the taking of wolves incidental to lawful recreational activities was a crucial nod to the political reality surrounding the proposal. The North Carolina Wildlife Resources Commission supported the proposal only so long as the refuge continued to allow hunting and trapping.[281] Trappers were not at all sure they wanted the wolf invading their domain. The wolf would bring competition for small mammals and restrictions on their activities.[282] Only the dedicated efforts of FWS personnel, who worked closely with the trappers, made the reintroduction possible.

The proposed regulations demonstrate the flexibility of the 1982 amendments. The incidental take provisions account for pre-existing uses of the refuge. The provision allowing

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"which constitutes a demonstrable but nonimmediate threat to human safety, or which is responsible for depredations to lawfully present domestic animals or other personal property, it has not been possible to otherwise eliminate such depredation or loss of personal property, provided that such takings must be done in a humane manner, and may involve killing or injuring the animal only if it has not been possible to eliminate such threat by live capturing and releasing the specimen unharmed on the refuge."

[281] Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, Final Rule, 51 Fed. Reg. 41,790, November 19, 1986 [Hereinafter 51 Fed. Reg. 41,790].

[282] AUDUBON, *supra*.

employees to take animals guilty of depredation addresses the concern of farmers, ranchers, and local residents. Only the flexibility to kill a member of an endangered species made the proposal palatable to local residents. Conversely, the very idea that the ESA permits the killing of an endangered animal is unconscionable to some. But it is only this flexibility which makes reintroductions politically possible.

The proposal addressed state authority to regulate wildlife, concluding "[t]he State of North Carolina has regulatory authority to protect and conserve listed species and we are satisfied that the State's regulatory system for recreational activities is sufficient to provide for conservation of the red wolf. No additional federal regulations are needed." The proposal did not explain this statement further.

Because experimental populations are treated as threatened species, the state is responsible for protection outside the area covered by the regulations. The statement above is conciliatory, but also recognizes that while FWS has authority to enforce the ESA take prohibitions, it has little authority to institute conservation programs for these animals outside the designated reintroduction area. If a state is hostile to the reintroduction, as the western states are, protecting the reintroduced population becomes more difficult.

The Proposed Determination addressed the relaxed Section 7 consultation requirements for non-essential experimental populations as follows:

> only two provisions of section 7 would apply on...non-Service lands: section 7(a)(1), which requires Federal agencies to confer informally with the Service on actions that are likely to jeopardize the continued existence of the species. *The results of a conference are only advisory in nature; agencies are not required to refrain from commitment of resources to projects as a result of a conference* (emphasis added)."[283]

While this conclusion is factually correct, it overlooks the fact that if the agency ignores the conference results, it may be held liable for any take which occurs. As discussed above, DCBR is free of many of the procedural requirements, but is still required to ensure its actions do not jeopardize the species. In cases such as this, where a species is otherwise extinct in the wild, this remains a formidable responsibility.

The Proposed Determination also concluded that:

> [t]here are in reality no conflicts envisioned with any current or anticipated management actions of the Air Force or other Federal agencies in the area. The presence of the bombing range is in fact a benefit, since it forms a secure buffer zone between the refuge and private lands; the target areas...would be easily avoided by the wolves. Thus there would be no threats to the success of the reintroduction or the overall continued existence of the red wolf from...[the] less restrictive section 7 requirements.

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[283] 51 Fed. Reg. 26,564, *supra*.

The wolves do avoid the open areas used as target zones, except for hunting. And as the DCBR coordinator for the project stated, the odds of a practice round hitting a wolf are extremely remote.[284] The FWS conclusion quoted above, however, does not take future, currently unforeseen actions, in to account. If the Air Force decides to test a new weapon, or decides to realign the installation to serve other training goals, there could be a conflict, at least with regard to the DCBR portion of the habitat. In this case, there is a large wildlife refuge surrounding DCBR. As I will discuss below, that is not the case at White Sands Missile Range.

The Proposed Determination found that the reintroduction would be made into the historic range of the species but outside its current range, and would "further the conservation of this species." It also "reviewed all ongoing and proposed uses of the refuge, including traditional trapping and hunting with or without dogs, and found that none of these would jeopardize the continued existence of the red wolf, nor would they adversely affect the success of the reintroduction effort."

This was no doubt a gamble on FWS' part. Such activities certainly could jeopardize the reintroduced wolves. On the other hand, discontinuing these programs

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[284] Telephone Interview with Ron Smith, Wildlife Biologist, U.S. Air Force, Dare County Bombing Range, Feb. 9, 1996 [Hereinafter Smith].

would make the reintroduction unacceptable to local interests, and there was no where else to put the wolves. Since the wolves must be returned to the wild to recover, FWS had to find that the programs would not jeopardize the wolves. Continuation of the programs made wolf recovery politically possible.

The Proposed Determination found the "nonessential" status appropriate because "[a]lthough extirpated from the wild, the red wolf nevertheless is secured in seven widely separate captive breeding programs and zoos in the United States. The existing captive population totals 63 animals...."[285] It seems intellectually dishonest to claim that 12 of only 63 animals are not essential to the species survival, but reintroduction offers the best hope for the species. The FWS was not sued over this determination, despite the small number of surviving individuals. Suit was filed, however, challenging the non-essential experimental determination for gray wolves in Yellowstone. That suit is discussed below.

d. Final Determination of Experimental Population. The Final rule, with an effective date of

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[285] *Id.* "Given the health checks and careful monitoring that these animals receive, it is highly unlikely that disease or other natural phenomenon would threaten the survival of the species. Furthermore, the species breeds readily in captivity....Therefore the taking of 8 to 12 animals from this captive assemblage would pose no threat to the survival of the species even if all of these animals, once placed in the wild, were to succumb to natural or man-caused factors." 51 Fed. Reg. 26,564, *supra*.

December 19, 1986, determined the red wolf population to be a "nonessential experimental population."[286] The final rule contained clarifications and changes based on 12 letters received in comment on the Proposed Determination.[287] While the final rule was very similar to the Proposed Determination, it specifically addressed the comments received and included additional language.

Although the State insisted that on-going activities be allowed to continue on the refuge, The Wildlife Information Center and Defenders of Wildlife objected to the determination that such activities would not jeopardize the wolves. The final rule noted, however, that the 1982 amendments were enacted "to eliminate the requirement for absolute protection...in order to foster the chances of reintroduction." The rule concluded that "[i]f traditional uses of the refuge have to be significantly modified...it is going to be very difficult, if not impossible, to approach other public land management agencies to permit wolf reintroduction on their lands."

With respect to the provision permitting take "incidental to lawful recreational activities," the final rule recognized that:

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[286] 51 Fed. Reg. 41,790, *supra*.

[287] *Id*. The Edison Electric Institute, Tennessee Valley Authority, and North Carolina Department of Natural Resources and Community Development supported the proposal. The Defenders of Wildlife, National Audubon Society, the Humane Society of the United States, and the National Wildlife Federation supported the release, but objected to the incidental take provision.

> "circumstances could arise whereby a person engaged in an otherwise lawful activity such as hunting or trapping, might accidentally take a red wolf despite the exercise of reasonable due care. Where such a taking was unavoidable, unintentional, and did not result from negligent conduct lacking reasonable due care, the Service believes that no legitimate conservation purpose would be served by bringing an enforcement action under the ESA. Therefore...the Service would not prosecute anyone under such circumstances."[288]

The approval process for this proposed reintroduction went very smoothly when compared to the proposed reintroduction at Yellowstone and White Sands. Still, the process demonstrates the controversy inherent in this type of program, even among outdoor enthusiasts. Trapper, hunters, and hikers want the land for their own purposes, and are not always eager to share with a predator species. Wildlife organization, on the other hand, want increased protections, but such protections would make the reintroduction politically impossible.

e. Reintroduction of Red Wolves into the Wild. In September, 1987, eight radio-collared adult Red Wolves were released[289] onto the 120,000 acre Alligator River National Wildlife Refuge and the adjacent 47,000 acre Dare County Bombing Range.[290] The animals move between the

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[288] *Id.*

[289] 51 Fed. Reg. 41,790, *supra*.

properties without restriction, and the first wolf pups were born on the Air Force Bombing Range.[291] "The experiment represented the first project in conservation history designed to restore a species that had been declared extinct in the wild."[292] Between 1987 and 1995, 65 captive-born wolves were released.[293]

f. Results. Mike Phillips, former red wolf coordinator, declares that the "experiment was a success -- red wolves had been restored to the wild."[294] Since 1987, 85 pups were born in the wild.[295] FWS estimates the free-ranging population contains between 39 and 60 wolves.[296] Of 32 complaints filed, only 17 actually involved wolves. Of the 17, 11 were merely complaints that wolves were present where not wanted. Only one depredation was confirmed.[297]

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[290] Proposed Determination of Experimental Population Statutes for an Introduced Population of Red Wolves in North Carolina and Tennessee, 56 Fed. Reg. 37,513, August 7, 1991 [hereinafter 56 Fed. Reg. 37,513].

[291] Smith, *supra*.

[292] MICHAEL K. PHILLIPS, *Red Wolf Reintroduction-The Experiment Succeeds*, INTERNATIONAL WOLF, Fall, 1993, at 5-8 [Hereinafter PHILLIPS]. Michael Phillips worked on the Red Wolf project from 1986 until 1994, when he became the project leader for the gray wolf recovery program in Yellowstone National Park.

[293] U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, SUMMARY OF THE RED WOLF REINTRODUCTION PROJECT IN NORTHEASTERN NORTH CAROLINA-SEPTEMBER 1987 THROUGH 31 JULY 1995 [Hereinafter SUMMARY].

[294] PHILLIPS, *supra*, at 8.

[295] SUMMARY, *supra*.

[296] *Id.*

Only 30% of the population surveyed in the surrounding counties are opposed to the reintroduction.[298]

But the wolves "were so productive that in less than five years the population grew too large for the study area, and wild-born pups routinely dispersed out of the 400-square mile reintroduction area."[299] As discussed above, FWS had to expand the protected area more than once.

And some members of the public adamantly opposed the program. One State legislature representative called the red wolf "a deep and present danger."[300] Another said "[i]t's just another damn dog, as far as I'm concerned."[301] The legislature passed a bill to allow residents of two counties to trap or kill red wolves on their property.[302] Such bills add fuel to the fire of controversy, but cannot trump federal law, and do not protect individuals who violate the ESA. Debate continued in the U.S. Senate over funding for the Red Wolf program in 1995. Senator Helms introduced an amendment to the 1996 Department of the Interior Appropriations bill to prohibit FWS from spending

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[297] Id.

[298] RED WOLF NEWSLETTER 1 (1995). 51.7% supported the reintroduction, 18.1% had no opinion.

[299] PHILLIPS, *supra*, at 8.

[300] *Bill would allow open season on red wolves*, GOLDSBORO NEWS-ARGUS, June 24, 1994, at 6A.

[301] *Id.*

[302] *Red Wolf Taking Bill Passed by Legislators*, THE COASTLAND TIMES, July 3, 1994, at 5A.

federal funds on the project.[303] Senator Chafee from Rhode Island opposed the amendment in Senate debate.[304] As a result, the Senate tabled the Helms amendment.

The military experience with red wolves has been good, according to Ron Smith, Air Force wildlife biologist. When asked how the wolves have affected DCBR, he responded "not at all."[305] There has been "no modification to the mission" of the installation.[306] He calls the reintroduction program "very successful."[307] Trucks, rather than bombs, seem to be the greatest threat to the wolves at DCBR. Wolves have been struck and killed accidentally. When a wolf is killed by an automobile, the Air Force notifies the FWS. So far, the program seems to be a success. But the Air Force has not attempted to modify its use of the land in any significant way. Future land use could be restricted.

Because the population has been designated non-essential, FWS cannot designate critical habitat. But there is nothing in the statute to prevent FWS from changing the designation. If the designation is changed to essential, critical habitat could be designated, and it is likely the

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[303] 141 Cong. Rec. S 12002-01, S12018. Amendment No. 2309.

[304] *Id.* "I think it is to the advantage of all of us as a nation, as members of this society, as Americans, to have these populations come back."

[305] *Id.*

[306] SMITH, *supra*.

[307] *Id.*

DCBR would be included, since wolves actively use the installation. A critical habitat designation significantly restricts a landowner's activities, particularly when animals with a large home range such as the wolf are involved.

2. The Gray Wolf. *Canis lupus* is larger than the Red Wolf, and ranges in color from pure black to mixed grays to pure white.[308] There are numerous sub-species of Gray Wolf throughout the world, and each differs in some way.[309] In North America, wolves once ranged from Mexico to Alaska and Greenland.[310] The Gray Wolf is endangered over most of its range, except in Minnesota, where it is listed as threatened, and in Alaska, where it is not listed. The gray wolf was reintroduced into Yellowstone National Park in 1995.

Canis lupus baileyi (C.l. baileyi), a distinct sub-species of the Gray Wolf, is commonly known as the Mexican Wolf or "el lobo." The Mexican Wolf once ranged from near

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[308] LOPEZ, *supra*, at 12.

[309] *Id.*, at 13-15. *C.l.hattai* and *C.l. hodophilax* lived in Japan, but are presumed extinct. The small Iranian Wolf, *C.l. pallipes* is not believed to howl and travels alone instead of in packs. The Chinese Wolf, *C.l.laniger*, also hunts alone. The European Wolf, *Canis lupus lupus*, has adapted to living in close contact to humans. The taxonomic classification of wolves has changed over time as our understanding of them has grown.

[310] WOLF EDUCATION AND RESEARCH CENTER, WOLF INFORMATION SHEET (1993) [hereinafter WOLF EDUCATION] on file with the author. See also LOPEZ, *supra*, at 13.

Mexico City, Mexico, into Texas, New Mexico, and Arizona. The Mexican Wolf is the smallest[311] and the most endangered of the gray wolves.[312] It is considered one of the rarest land mammals in the world, and is the most genetically distinct of the North American gray wolves.[313] Because "'[e]volution occurs at the fringes of a species' range,'" and the Mexican Wolf was the southernmost gray wolf, it was "on the frontlines of evolution."[314] A UCLA geneticist has determined that the Mexican Wolf contains unique genetic material not found in other gray wolves.[315]

The last known Mexican Wolf in the U.S. was documented in 1970, and *C.l.baileyi* was listed as endangered under the ESA in 1976.[316] The last known member of the subspecies was captured in Mexico in 1980.[317] Between 1977 and 1980, two males and one pregnant female were captured from the wild in Mexico for captive breeding.[318] These were the last confirmed Mexican Wolves in the wild. By 1994, there were

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[311] THE PHOENIX ZOO, *Mexican Gray Wolf*, at "http://aztec.asu.edu/phxzoo/wolfmexn.html.," January 17, 1996.

[312] *Wolf FAQ*, *supra*.

[313] HARLIN SAVAGE, *Waiting for El Lobo*, DEFENDERS, Fall 1995, at 8-15, [hereinafter SAVAGE].

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.* at 8.

[318] DRAFT EIS, *supra*, at 1-7.

88 Mexican Wolves in captivity at 24 facilities in the U.S. and Mexico.[319]

The FWS proposes to reintroduce the Mexican Wolf onto White Sands Missile Range (WSMR). This proposal faces stronger opposition than the Red Wolf reintroduction proposal faced. The reintroduction of the Gray Wolf to Yellowstone Park is a preview of things to come for WSMR, and holds many valuable lessons.

a. The Gray Wolf Returns to Yellowstone. In May, 1994, DOI approved a Record of Decision (ROD) for the reintroduction of experimental populations of Gray Wolves into Yellowstone National Park and central Idaho.[320] FWS Regional Director Ralph Morgenweck issued the Final EIS (FEIS) on April 14, 1994.[321] The FWS made dozens of public

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[319] *Id.*, at 1-7. In 1994, there were 75 Mexican Wolves in the U.S. in 19 facilities, and 13 in Mexico in 5 facilities.

[320] U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT, April 14, 1994 [hereinafter FEIS], Abstract, available at "http://web2.starwave.com/outside/online/news/specialreport/wolf/eisabstract.html," February 13, 1996 [hereinafter FEIS ABSTRACT].

[321] *Id.* "The FEIS considered the following alternatives:

"Alternative 1. Reintroduction of Experimental Populations Alternative (The Proposal). Alternative 2. Natural Recovery Alternative (No Action). Encourage wolf populations to naturally expand into Idaho and Yellowstone. Alternative 3. No Wolf Alternative. Change laws to prevent wolf recovery. Alternative 4. Wolf Management Committee Alternative. Establish legislation so the states could implement wolf recovery and liberal management without federal oversight. Alternative 5. Reintroduction of Nonexperimental Wolves Alternative. Reintroduction and high level of protection for

presentations, and received over 160,000 comments on the Draft EIS.[322] The administrative process to bring wolves to Yellowstone has been called "the most exhaustive environmental review in the history of the Endangered Species Act."[323]

1. The Final Environmental Impact Statement. The FEIS considered five alternatives. FWS selected Alternative 1, the reintroduction of experimental populations alternative, as the proposed action.[324] The FEIS estimated that implementation of Alternative 1 would result in wolf population recovery (approximately 100 wolves per area for three successive years) by the year 2002.[325] FWS patterned the proposed regulations for protection of the wolves after the Red Wolf regulations.[326]

The FEIS examined public attitude toward wolves.[327] In a 1985 survey, Yellowstone National Park visitors favored

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wolves without establishing an experimental population rule to address local concerns."

[322] BRANDON, *supra*.

[323] KENWORTHY, *supra*.

[324] FEIS ABSTRACT, *supra*.

[325] *Id*.

[326] Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, November 22, 1994.

[327] FEIS, *supra*, at Appendix 3 (Public Attitudes About Wolves) [hereinafter Appendix 3]. This section summarized surveys regarding

reintroduction 3 to 1.[328] However, based on a 1987 study, 51% of the public in Wyoming counties surrounding the park (presumably local residents) opposed reintroduction. A nation-wide survey in 1992 determined that Yellowstone area residents are almost evenly divided regarding wolf reintroduction, but that Americans in general favor wolf reintroduction 2 to 1.[329]

Local opposition centers around the economic impact of wolf reintroduction. Ranchers oppose the reintroduction of wolves under any scenario, but adamantly oppose the introduction of wolves with ESA status. The National Cattlemen's Association (NCA) commented on the Draft EIS.[330] The NCA indicated it would support efforts to "delist the wolf and return the management of the species to the states..." but remained "strongly opposed to any expansion

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attitudes of Americans toward wolves. The surveys were conducted between 1977 and 1992.

[328] *Id.*, citing a 1985 study by McNaught.

[329] *Id.*, citing a 1992 study by Duffield et al. The survey also found that while over 89% of Wyoming Defenders of Wildlife members favored reintroduction, over 91% of Wyoming Stock Growers members opposed it.

A 1987 study of Montana residents found that 65% believed wolves belonged in Montana. Support, however, was considerably higher in more densely populated areas than in rural areas. In the most densely populated counties, 78% agreed that wolves belong in Montana; in rural areas, only 54% agreed. Most people (52%) supported reintroduction in Montana, Idaho, and Yellowstone Park.

[330] Letter from The National Cattlemen's Association to Ed Bangs, Wolf Recovery Coordinator, dated October 14, 1994, available at "http://web2.starwave.com/outside/online/news/specialreport/wolf/cattle.html," February 16, 1996. The letter indicates that the NCA represents "230,000 professional cattlemen, including members of 74 affiliated state cattle and national breeding organizations...."

of existing parks or designations of 'ecosystems' that give priority to wolf recovery efforts over economic values."

This attitude is not surprising when examined in light of the wolf's history in the west. It is ironic that Yellowstone officials exterminated the park wolves and now fight to bring them back. It is not surprising that ranchers, many of them second or third generation cattlemen who were steeped in the folklore of the wolf, still oppose their return. Cattle associations went to a lot of trouble and expense to get rid of wolves; they do not want them back with ESA protections. Biologists believe livestock loses can be controlled by improved management techniques.[331]

In 1987, Defenders of Wildlife created a fund with $100,000 raised through T-shirt sales to reimburse ranchers for wolf depredation.[332] The fund paid $17,000 to 20 ranchers in northwestern Montana for depredation by wolves recolonizing the area from Canada.[333] Defenders of Wildlife agreed to use the fund to reimburse ranchers suffering depredation from the Yellowstone wolves.

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[331] AUDUBON, *supra*, quoting Dave Olson, conservation warden for the Minnesota Natural Resources Division. Olson indicates the "mosaic" of farms and woods in Minnesota create a worst case scenario of "max contact" between wolves and farms. "If livestock loses can be controlled in this situation, biologists think they can be controlled anywhere." In Minnesota, biologists work with ranchers to improve management techniques, including electric fences and guard dogs, to avoid conflict. Some Minnesota farmers say its working.

[332] TAMAR STIEBER, *Ranchers in N.M. snarl at lobo plan*, THE DENVER POST, July 2, 1995, at C-01.

[333] *Id.*

Sport hunters also see the wolf as a threat. "Hunters don't want to compete with the wolves for deer."[334] The FEIS exhaustively addressed the impact of the introduction on recreation, hunting and ranching, and found that the reintroduction would have negligible effects on all of those activities.[335] Still, opposition is strong. Perhaps ranchers and hunters see the wolf as just one more form of government interference.

2. Wolves Released. On January 26, 1995, Montana Senator Conrad Burns told the Senate Energy and Resources Committee that the reintroduction plan "is a bad idea for Montana ranchers and taxpayers."[336] He

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[334] AUDUBON, *supra*, quoting Dave Olson, conservation warden for the Minnesota Natural Resources Division. He attributes wolf kills by hunters to "greed."

[335] The Yellowstone reintroduction area encompasses 25,000 acres of land, of which 76% is federally owned. Harvest of male prey by hunters would not decrease; harvest from some herds of female deer, elk, and moose might be reduced. The hunter harvest of bighorn sheep, mountain goats and antelope would not be affected. This area contains over 95,000 ungulates, of which over 14,000 are taken annually by hunters. The EIS predicted that a recovered wolf population would take 1,200 ungulates per year.

Approximately 412,000 livestock graze in the Yellowstone area. The FEIS predicted that wolves would take 19 cattle and 68 sheep per year. The estimate of 19 cattle is based on an estimated range of 1-32 cattle per year. The estimate of 68 sheep is based on an estimated range of 17-110 sheep per year.

The FEIS predicted that recreational visits to the area would increase by 5% due to the presence of wolves. The area currently receives 14,500,000 recreational visits per year. The associated increase in visitor expenditures is expected to exceed the combined loss to the economy from decreased hunter expenditures, decreased hunter benefits, livestock loses.

recommended using the money to improve the infrastructure of the national parks instead of reintroducing wolves.[337] Despite his protestations, wolves were transferred to Yellowstone and Idaho on January 1995. The wolves were captured in Canada by trappers, purchased by the U.S. for $2,000 each, and transported to 1-acre pens within the parks.[338] Wolves were freed in Idaho later that month. In Yellowstone, biologists opened the pens on Tuesday March 21 and Wednesday, March 22, 1995.[339] The wolves "refused to budge" at first, but left the pens on Friday, March 24.[340] They began "cavorting, playing, and checking things out..." according to a Park biologist, exhibiting behavior which "suggests recent liberation."[341] A male from the second pen

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[336] Senate Energy and Natural Resources Committee, January 26, 1995 (Statement of Senator Conrad Burns, R-Montana), available at "http://web2.starwave.com/outside/online/news/specialreport/wolf/burns.html," February 13, 1996.

[337] *Id.* "Yellowstone Park's infrastructure is falling down around our ears...where are our priorities?"

[338] *Wolves Leave Pens at Yellowstone and Appear to Celebrate*, THE NEW YORK TIMES, March 27, 1995 [hereinafter *Celebrate*].

[339] PAUL LEAVITT, *3 More Gray Wolves Freed in Yellowstone*, U.S.A. TODAY, March 23, 1995. The wolves did not leave the pens immediately, but biologists predicted they would leave as soon as they got hungry. When the wolves were released, one pro-wolf organization disbanded, its mission apparently complete. "The Wolf Fund," founded by Renee Askins, a wolf biologist, in 1986 to encourage restoration of the wolf to Yellowstone, officially dissolved when the first gate was opened. ROCKY BARKER, *Howls of Success Greet the Efforts of Wolf Advocate,* IDAHO FALLS POST REGISTER [hereinafter Barker].

[340] *Celebrate, supra.*

[341] *Id.*

began howling the same afternoon, breaking the wolf's 50 year silence in Yellowstone National Park.[342]

The Wolf was "the only species missing from [Yellowstone] that was [there] when the park was established in 1872."[343] With the reintroduction of the Gray Wolf, Yellowstone become one of only a few complete ecosystems left in the U.S.[344]

2. Yellowstone Litigation. Although the reintroduction brought Yellowstone Park full circle, the surrounding controversy produced a flood of litigation, some of which is still pending.

a. *Defenders of Wildlife v. Lujan*. Prior to the FEIS, Defenders of Wildlife sought to compel the release of wolves into Yellowstone in accordance with the Gray Wolf Recovery Plan.[345] The Recovery Plan determined that Gray Wolves should be conserved in three areas. The Plan found that natural repopulation might occur in Montana and central Idaho, as wolves migrate south from Canada, but that reintroduction would be necessary in Yellowstone.

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[342] *Id.* See also BARKER, *supra*.

[343] AUDUBON, *supra*.

[344] DUTCHER, *supra*.

[345] DEFENDERS OF WILDLIFE V. LUJAN, 792 F.Supp. 834 (D.D.C. 1992).

The Court held that the "Recovery Plan itself has never been an action forcing document."[346] In fact, no action could occur until the completion of NEPA documentation, and an EIS could not begin until an action plan was developed.[347] Because the 1992 Appropriations Act prohibited the expenditure of funds for the requested reintroduction, the lawsuit was moot. In addition, Plaintiffs asked for declaratory judgment that an EIS under NEPA could not be a pre-requisite to implementation of the Recovery Plan. The Court, appropriately, disagreed.

In 1988, the Senate-House Interior Appropriations Committee directed additional study regarding potential management problems. The 1992 Appropriations Act included a rider which provided "none of the funds of this Act may be expended to reintroduce wolves in Yellowstone National Park and Central Idaho."[348] The Appropriations Report, however, directed that an EIS be completed by mid-1993.[349]

b. *In Defense of Endangered Species (DES) v. Ridenour*. In this case, DES sought to preclude the consideration of alternatives in an EIS which

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[346] *Id.* at 835.

[347] *Id.*

[348] 1992 Appropriations Act, Pub.L. No. 102-154, 105 Stat. 970, 993-94 (1991).

[349] H.R.Rep. No. 256, 102d Cong., 1st Sess., at 16-17, 23-24 (1991).

did not include the release of wolves into Yellowstone.[350] DES also sought to compel the National Park Service to state at public meetings that wolves must be released into Yellowstone.

The Court found that the issue of alternatives was not ripe until a final decision, stating "[i]f defendants ultimately decide not to translocate wolves into Yellowstone, DES may seek judicial review..." at that time. The Court also found the issue of statements at public hearings moot since the hearing had been concluded, but noted "DES's frustration with the history of administrative delay relevant to this case is understandable...."[351]

c. *American Farm Bureau v. U.S.*

The American Farm Bureau (AFB) also challenged the release. The AFB and the Mountain States Legal Foundation argued that they would suffer severe economic losses due to wolf depredation of livestock, and sought to block implementation of the reintroduction plan.[352] On January 3, 1995, the federal district court in Wyoming denied the AFB request for an injunction to halt the release.[353] The Court found the

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[350] IN DEFENSE OF ENDANGERED SPECIES V. RIDENOUR, 19 F.3d 27 (9th Cir. 1994).

[351] *Id.*

[352] U.S. DEPARTMENT OF JUSTICE, Press Release, *Federal Court Rejects Request to Halt Wolf Reintroduction Program*, January 3, 1995, available at "http://www.usdoj.gov:70/ORO-2614-/press_releases/previous/Pre_96/January95/2.txt," February 16, 1999."

[353] *Id.*

AFB failed to establish irreparable harm, and concluded their evidence was speculative and anecdotal.[354]

d. *Sierra Club v. U.S.* On September 7, 1994, the Sierra Club, the National Audubon Society, and others, sent a 60 day notice letter to the Secretary of the Interior and the Director of the FWS.[355] The letter provided the Secretary "notice...that you are in violation of the Endangered Species Act...by approving the reintroduction of gray wolves to central Idaho on an experimental, nonessential basis...."[356] The letter charged that the designation as a nonessential, experimental population was improper because "...of overlapping introduced and natural wolf populations...."[357]

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[354] *Id.*

[355] Letter from Sierra Club Legal Defense Fund to Bruce Babbitt, Secretary of the Interior, and Mollie Beattie, Director, USFWS, dated September 7, 1994. The letter was written on behalf of the Sierra Club, the National Audubon Society, the Wilderness Society, the Idaho Conservation League, the Predator Project, Sinapu, Michael Medberry, and Louisa Willcox. Available at "http://web2.starwave.com/outside/online/news/special report/wolf/sierra.html," February 13, 1996.

[356] *Id.*

[357] Id. The letter stated:

> "(1) the plan invokes section 10(j) whose use is proscribed when, as in the central Idaho Experimental Nonessential Population Area ('Idaho Experimental Area'), non-introduced (or 'natural') members of the species are present; and (2) the plan withdraws or denies full ESA protections from animals legally entitled to those protections, including members of overlapping introduced and natural wolf populations, naturally recolonizing wolves already present within the Idaho Experimental Area, wolves that will migrate into the Idaho

The letter cites increased sightings of wolves in northwestern Montana in the early 1980s, and the discovery of a wolf den in 1986 in Glacier National Park, Montana, as evidence of natural (non-introduced) populations. The letter also cites frequent wolf sightings in Idaho. These sightings, the letter concludes, indicate "a likelihood that wolves are migrating to central Idaho and that such migration will increase with time."[358] The letter also cites FWS estimates that breeding activity "is likely within the next 1-5 years..." in Idaho.

The notice letter concludes that because there are already wolves in the central Idaho reintroduction area, the reintroduced population may not be designated as experimental since they would not be geographically separate or outside the species' current range. The letter also charges that the designation of all wolves in the area as nonessential, experimental, is a de facto delisting of wolves migrating from Canada, wolves which are now afforded full protection under the ESA.[359] This suit is pending.

Experimental Area in the future, and the offspring of reintroduced and naturally recolonizing wolves within the Idaho Experimental Area."

[358] *Id.* The letter contends that nine wolf packs currently range within 250 km of central Idaho.

[359] *Id.* Section 10(j)(1) provides that reintroduced populations may be declared experimental "only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species." Section 10(j)(2)(A) provides that the reintroduction area must be "outside the current range" of the species. The letter indicates that the USFWS defines a "population" as two breeding pairs, and thus does not consider wolves inhabiting central Idaho a population.

e. *National Cattlemen's Association v. U.S.* The NCA charged that rules allowing the taking of wolves were inadequate, particularly on federal grazing land. The comments also express doubt that the reintroduced population would be geographically separate, and question the viability of the "experimental" designation.[360] This suit is pending.

f. Court Hearing. On February 8, 1996, the Federal District Court in Casper, Wyoming, held oral argument on three consolidated cases challenging the reintroduction program.[361] The suits, by the AFB, the Sierra Club, and two residents of Wyoming, all attack the program for different reasons. The AFB wants the wolves out, the Sierra Club wants them to receive a higher level of protection, and the private citizens want to prevent breeding between two different sub-species.[362] If any of the challenges is successful, FWS may have to remove the wolves.

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[360] *Id.* The letter also questions the legality of treating migrating wolves as part of the experimental population.

[361] GARY GERHARDT, *Fate of 71 Wolves in Judge's Hands*, THE ROCKY MOUNTAIN NEWS, February 8, 1996.

[362] *Another Group*, *supra*. James and Cat Urbigkit allege the imported wolves belong to a different sub-species than the wolves already present, and oppose potential mixing of the two gene pools.

4. Wolf Kills. Protesters did not rely solely on litigation to express their opposition. Two wolves were killed by local residents in violation of the regulations.

a. Idaho. As part of the Yellowstone program, wolves were also released in Idaho in January, 1995. That same month, a wolf was shot near a dead calf.[363] Federal agents obtained a warrant to search the property of Eugene Hussey, an Idaho rancher.[364] Hussey denied killing the wolf, refused to acknowledge the warrant, and called the local sheriff, who also refused to admit the federal agents.[365] The incident created a storm in Congress and came to symbolize the tension between some westerners and "the feds" regarding conservation values in the west.[366]

Idaho Senator Dirk Kempthorne charged the agents with contributing to an atmosphere "of fear, anger and frustration," and insisted they should have been more sensitive.[367] The FWS later released a tape which

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[363] KIT MINICLIER, *Group Sues U.S. Over Dead Calf in Idaho Wolf Area*, THE DENVER POST, September 6, 1995 [hereinafter MINICLIER].

[364] *Rancher Tangles with Federal Agents*, available at "http://web2.starwave.com/outside/online/news/specialreport/wolf/audio/library.html," February 7, 1996 [hereinafter *Rancher Tangles with Federal Agents*].

[365] *Id.* Agents feared the sheriff, who threatened to go to "plan B" might call in a local militia.

[366] *Id.*

contradicted the rancher's claims of foul-play. A federal autopsy concluded that the calf died at or shortly after birth rather than from wolf predation, and the Defenders of Wildlife denied the rancher's claim for the calf.[368]

Hussey and the Mountain States Legal Foundation filed suit in U.S. District Court in Boise, Idaho, in September, 1995.[369] Plaintiffs sought $500 for the calf, $10,000 for the "physical taking" of his ranch, and $10,000 for the "regulatory taking" of the ranch through restrictions imposed by the reintroduction.[370] His attorney stated that "[t]he government has imported wolves and implemented regulations to protect the wolves, which prohibit him from protecting his own property."[371]

BLM ecologist Helen Ulmschneider praised Hussey's treatment of the federal land he uses to graze livestock, and says whoever pulled the trigger "probably just thought it was a coyote."[372] She indicated, however, that local

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[367] U.P.I., *Idaho Senator Blasts Feds for Search,*" March 30, 1995, available on Lexis/Nexis, file name "Current News," load date March 31, 1995.

[368] MINICLIER, *supra*.

[369] *Id.*

[370] GREENWIRE, *Rancher Doesn't Like Wolves, Sues Federal Government,*" available at http://web2.starwave.com:80/outside/online/news/specialreport/wolf/rancher.html," February 15, 1996.

[371] *Id.*, quoting Maurice Ellsworth.

[372] JASON LATHROP, *Stereotypes Abound in the New West*, OUTSIDE ONLINE, available at

ranchers bait their property with dead calves to attract coyotes, then shoot them on sight to thin the population.[373] Such management techniques are inconsistent with wolf reintroduction, and directly threaten the success of the program. Attempting to change these deeply ingrained attitudes will be a significant challenge for the reintroduction team.

b. Montana. In April, 1995, a male wolf was found dead outside Yellowstone. In October, 1995, Chad McKittrick, of Red Lodge, Montana, was convicted by a jury in federal court of killing, possessing, and transporting a federally listed and protected species under the ESA. McKittrick admitted shooting the animal, but testified he thought it was a wild dog. However, government witnesses testified he told them he knew it was a wolf.[374] Police found the wolf's hide and skull at his house after receiving a tip.[375]

5. The Fate of the Wolves. Despite the uproar, the Yellowstone reintroduction effort has been "an

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"http://web2.starwave.com/outside/online/news/specialreport/wolf/jwolf2.html," February 16, 1996.

[373] *Id.*

[374] *Wolf Shooter Convicted, Faces Prison*, OUTSIDE ONLINE, available at "http://web2.starwave.com:80/outside/online/news/specialreport/wolf/shooter.html," February 15, 1996.

[375] *Id.*

almost unqualified success."[376] The *Washington Post* reported in January that no livestock had been killed by reintroduced wolves in Yellowstone or Idaho in the first year.[377] The program coordinator for FWS reportedly remarked "'[n]one of the predictions of doom and gloom have come true.'"[378]

A later Associated Press story reported the loss of four sheep, but this would still fall well below predicted loses.[379] Federal agents shot and killed the male wolf responsible for the sheep depredation, and Defenders of Wildlife reimbursed the rancher for the value of the lost sheep.[380] A single depredation incident at the start of the second year heralds a very successful program.

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[376] TOM KENWORTHY, *Wolves Reintroduced to Yellowstone Making Themselves at Home*, THE WASHINGTON POST, January 13, 1996 [hereinafter KENWORTHY], citing Mike Philips, USFWS. Phillips indicates the reintroduction has begun to restore the predator/prey balance of local elk herds, and relates the story of two wolves selecting a deformed elk from a herd of 200. The story, Phillips says, is "'[a] vivid illustration of the culling effect'" wolves have. Wolves strengthen herds by removing weak individuals.

[377] *Id.* Wolves did kill a hunting dog outside Yellowstone Park. The incident created an outcry from local politicians and residents. Park officials were unable to track the wolves that day due to weather conditions.

[378] *Id.*

[379] *Another Group of Canadian Wolves Introduced to Yellowstone*, THE ASSOCIATED PRESS, January 23, 1996, AM cycle, available on Lexis/Nexis.

[380] *Federal agents kill Yellowstone wolf with an appetite for sheep*, OUTSIDE ONLINE, at "http://www.web2.starwave.com:80/outside/online/news/specialreport/wolf/wolfshot.html," loaded February 6, 1996.

Park visitors now rank the wolf first on their hope-to-see wish lists, displacing the grizzly bear for the first time.[381] At least 8 pups were born during the first year.[382]

Despite the success, political opposition remains strong. Senator Conrad Burns remains a staunch opponent. He championed a $200,000 cut in the program budget and believes the wolves will eventually develop a taste for sheep and cows.[383] "'As long as we put them there, we are going to have confrontations. It is only a matter of time.'"[384] A Yellowstone biologist disagrees. "'They have no trouble getting groceries,'" he said, thanks to the large elk and bison herds in the park.[385]

The Yellowstone program holds many lessons for the proposed White Sands Missile Range introduction. These lessons-learned are discussed below.

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[381] KENWORTHY, *supra*.

[382] *Id*. The pups were fathered by the male that was shot. Eight pups were born to the female shortly after his death. The female has taken a new mate. Six of the wolves released in Idaho have selected mates, and may reproduce next year.

[383] *Id*.

[384] *Id*. Quoting Sen. Conrad Burns (R-Mont.)

[385] *Id*. Quoting senior Yellowstone scientist John Varley. Varley reports the wolves have enjoyed an exclusive diet of elk, supplemented by one moose and one mountain goat.

b. Proposed Reintroduction of the Mexican Wolf.

1. The White Sands Missile Range (WSMR). The WSMR is located in south-central New Mexico. It is managed by the Army to develop and test missile and weapons systems for the armed forces and the National Aeronautics and Space Administration (NASA). The property spreads over five New Mexico counties and supports a variety of activities in addition to its primary mission. White Sands National Monument was established on WSMR in 1933 to preserve the unique sand dunes. The San Andres National Wildlife Refuge was established in 1941 on 90 square miles in the San Andres Mountains to protect a population of desert bighorn sheep. The Jordana Experimental Range overlaps the southwest corner of WSMR, and is operated by the Department of Agriculture for agricultural research.

The WSMR supports a variety of military operations. Holloman Air Force Base and a test center for the NASA Manned Spacecraft Center are located within WSMR. The missile range is divided into four range centers, with over 1,000 instrument sites.

2. Recovery Plan. In 1986, the State of New Mexico nominated WSMR as a potential Mexican Wolf reintroduction site.[386] In March and September, 1987,

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Michael Spear, Regional Director for FWS in Albuquerque, New Mexico, wrote to the WSMR Commanding General regarding the potential reintroduction, and requested access to the site so that it might be evaluated.[387] On April 15, 1987, the Army granted access to White Sands for that purpose. However, while the evaluation was being conducted, the Army withdrew White Sands from further consideration.[388] Since this was the only nominated site, the reintroduction project stopped cold.

3. Biological Evaluation of White Sands. Despite this development, the FWS completed "An Evaluation of the Ecological Potential of White Sands Missile Range to Support a Reintroduced Population of Mexican Wolves" in June, 1989.[389] The Evaluation criteria were whether suitable topography, suitable cover, sufficient water, an adequate prey base and a low enough level of human or other disturbances were present at the site.[390] The

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[386] See letter from Paul W. Johnson, Deputy Assistant Secretary of the Army for Installations and Housing, to Michael J. Spear, Regional Director, U.S. Fish and Wildlife Service, dated April 20, 1990, [hereinafter Johnson] on file with the author.

[387] *Id.*

[388] *Id.*

[389] JAMES C. BEDNARZ, FISH AND WILDLIFE SERVICE, AN EVALUATION OF THE ECOLOGICAL POTENTIAL OF WHITE SANDS MISSILE RANGE TO SUPPORT A REINTRODUCED POPULATION OF MEXICAN WOLVES" [hereinafter BEDNARZ]. The author thanked "All staff members of White Sands...that I interacted with..." (emphasis in original).

[390] *Id.*

report also considered potential conflicts between the WSMR mission and the wolf reintroduction program and the extent of potential depredation of livestock.[391]

The Evaluation found 996 square miles of suitable wolf habitat, predominately in the San Andres Mountains.[392] The estimated prey base was "within...the range of the biomass of prey that is available to populations of wolves currently reproducing and surviving in the wild...."[393] However, the estimated available biomass was "less than that recommended as 'desirable' by the Mexican wolf recovery team..." particularly for deer.[394] The report's attempts to justify approval of an insufficient prey base demonstrates FWS' desperation to find the wolves a home.

Despite overflights for Air Force training missions and occasional discard of targets in the area, the evaluator found "the San Andres Mountain range, in fact...much cleaner and more free of trash than are all other mountain ranges under public ownership that I have visited."[395] Because most testing occurs in the non-mountainous basin areas, which are not prime wolf habitat, impacts were expected to be minimal.[396] The report notes that no adverse effects have

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[391] *Id.*

[392] *Id.* at 27.

[393] *Id.* at 52.

[394] *Id.*

[395] *Id.* at 61.

been noticed at DCBR from air-to-ground target operations, and concludes that "it is extremely unlikely that high-altitude (>4,500m) training exercises involving military aircraft would have adverse impacts on the activity of wolves."[397] The Evaluation also found "no reason to predict that endangered Mexican wolves would be in any measurable jeopardy from the current activities that take place within White Sands."[398]

Ability to support a viable population was also a concern. The report predicted the available habitat could support five to eight social groups consisting of 25 to 48 wolves.[399] "[T]his population probably is too small for long-term self maintenance...[but] this limitation should not be an impedance to the proposal to restore wolves at White Sands...."[400] The author reached this conclusion because minimum viable population estimates have not been verified and population management models do not take protective management into account.[401] This conclusion must also have been driven by the lack of an alternative reintroduction site.

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[396] *Id.* at 65.

[397] *Id.* at 61.

[398] *Id.* at 65.

[399] *Id.* at 68.

[400] *Id.*

[401] *Id.*

The reintroduction area would be adjacent to BLM lands used for cattle production on the western side of the San Andres Mountains. In Canada and Minnesota, annual loss of one cow per 25-93 wolves and one sheep per 25 wolves is expected. The Evaluation estimated the potential depredation rate for this location at three or fewer livestock animals per year with proper management.[402]

Overall, the Evaluation did not assign a single "unsatisfactory" to any criteria, and concluded "several aspects of White Sands make this location highly attractive for implementing a reintroduction of the Mexican wolf."[403] Based on the most important criteria, the report determined that "White Sands may provide one of the best refuges possible for an isolated population of wolves in the United States." This conclusion is convenient, since WSMR is the only site under serious consideration.

4. *Wolf Action Group, et al. v. U.S.*

On February 14, 1990, more than seven years after publication of the recovery plan, an attorney representing the Wolf Action Group, Mexican Wolf Coalition, Environmental Defense Fund, National Audubon Society, Sierra Club, and the

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[402] *Id.* at 74. Proper management would include prompt removal of individual wolves responsible for livestock deaths, protection of wolves not involved in livestock depredation, and maintenance of the prey base, including "prudent harvesting by humans."

[403] *Id.* at 77. These include the large area available, the presence of water springs, lack of livestock in the primary area, restrictions on public access, and the isolated location of the suitable habitat.

Wilderness Society informed the Secretaries of Interior and Defense that the U.S. had violated the ESA by effectively abandoning the recovery plan and reintroduction effort.[404] This letter, known as a 60-day letter, is required by ESA § 11(g)(2) as a prerequisite to filing a citizen suit.[405]

On April 20, 1990, the Deputy Assistant Secretary of the Army for Installations and Housing wrote to Mr. Spear and agreed to participate in the reintroduction planning effort.[406] He quoted Army guidance which provides that "[t]he conservation of endangered species, including introduction and reintroduction, will be supported unless such actions are likely to result in long term significant impacts to the accomplishment of the military mission." The Deputy Assistant Secretary also noted that "decisions will be made in coordination with the installation and the Department of the Army only after a thorough assessment," and concluded "[n]othing in this letter should be construed as authorizing reintroduction of any Mexican wolf population at WSMR...."[407]

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[404] Letter from Grove T. Burnett, Attorney at Law, to Manuel Lujan, Secretary of Interior, and Richard Cheney, Secretary of Defense, February 14, 1990.

[405] 16 U.S.C. § 1540(g)(2).

[406] JOHNSON, *supra*, citing AR 420-74, "Natural Resources--Land, Forest, and Wildlife Management (25 February 1986)," as supplemented by CEHSC-FN Technical Note 420-74-2, "Endangered Species Management Requirements on Army Installations (17 November 1989).

[407] *Id.*

On April 23, 1990, the parties listed in the notice letter filed *Wolf Action Group, et al. v. U.S.*[408] The complaint sought "to compel the Secretary of the Interior...to implement the Mexican Wolf Recovery Plan...."[409] The complaint cited Michael Spear's statement that "[i]f wolves cannot be reintroduced they cannot be recovered...."[410]

Regarding the Army, the complaint alleged that the withdrawal of WSMR violated the ESA requirement that federal agencies "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species."[411] In addition, the complaint challenged the Army's failure to consult with the FWS before withdrawing WSMR as a violation of Section 7 consultation requirements.[412]

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[408] WOLF ACTION GROUP, ET AL. v. U.S., No. CIV90-0390HB, U.S. District Court, District of New Mexico, April 30, 1990 [Hereinafter WOLF ACTION GROUP].

[409] *Id.* at 1. In addition, the plaintiffs sought "a mandatory injunction obligating the Secretary of the Interior...to implement those provisions of the Mexican Wolf Recovery Plan which call for the Mexican Wolf to be reintroduced into the wild...[and] compelling the Secretary of Defense to cooperate...in the implementation of the Mexican Wolf Recovery Plan." See p. 1-2.

[410] *Id.* It also criticized Mr. Spear's decision to allow "[a]ffected States and land managers...the right to refuse authorization of the reintroduction effort within their jurisdiction."

[411] *Id.* at 12, citing 16 U.S.C. § 1536(a)(1).

[412] *Id.* at 12-13, citing 16 U.S.C. § 1536(a)(2).

In its "Motion to Dismiss," the U.S. stated that "immediate release of Mexican wolves into the wild would probably do more harm than good to the few remaining animals." "In order to ensure successful release...and to safeguard the animals themselves, the FWS must carefully plan the release process...."[413]

In its reply memorandum, Plaintiffs stated "the defendants' violations of the Endangered Species Act are likely to recur, and are likely to evade review...."[414] Plaintiffs noted that the defendants had exchanged letters by telefax the day before the 60 day notice period expired, and claimed "the current voluntary change in policy is inadequate assurance of long-term compliance..." with the ESA.[415]

On August 1, 1990, the Army granted the FWS staff access to the WSMR.[416] On August 4, 1990, the Arizona Game

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[413] WOLF ACTION GROUP, *SUPRA*, Defendants' Memorandum of Law in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment, U.S. Department of Justice, June 29, 1990. The U.S. argued that the elements of the complaint against the Secretary of Defense should be dismissed because the Army's actions since the notice letter had rendered them moot, and therefore the court lacked an actual "case or controversy." The U.S. also argued the FWS had "resumed the evaluation of WSMR as a potential reintroduction site for the wolves. Thus, the plaintiffs' claims are moot." See p. 15-16.

[414] WOLF ACTION GROUP, *supra*, "Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment," May 22,, 1991, at 2.

[415] *Id.* at 5 and 2.

[416] Letter from Major General J.P.Jones, Commanding General, WSMR, to Michael Spear, Regional Director, Region II, USFWS, August 1, 1990, on file with the author.

and Fish Commission authorized evaluation of candidate reintroduction sites in that state.[417]

On February 19, 1991, the FWS issued a "Proposal and General Plan for an Experimental Release of the Mexican Wolf."[418] The Proposal "to continue implementation of the *Mexican Wolf Recovery Plan* by initiating the re-establishment of wild Mexican wolf populations into suitable habitat" announced initiation of the NEPA process and future "scoping" sessions prior to release of an Environmental Assessment (EA).[419] The FWS held public meetings in Las Cruces, New Mexico, and Tucson Arizona later in February.[420]

Michael Spear wrote to Susan Livingston, the Assistant Secretary of the Army for Installations, Logistics and Environment, on March 24, 1992 requesting the Army's assistance in the preparation of an EIS for the reintroduction.[421] A year later, the FWS requested that WSMR

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[417] DAVID R. PARSONS, PROPOSAL AND GENERAL PLAN FOR AN EXPERIMENTAL RELEASE OF THE MEXICAN WOLF (CANIS LUPUS BAILEYI), February 19, 1991.

[418] *Id.*

[419] *Id.* at 2.

[420] DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, *News Release*, February 6, 1991; *Public Meeting Agenda*, February 25, 1991; *Public Meeting Agenda*, February 27, 1991.

[421] Letter from Michael Spear, Regional Director, USFWS, to Susan Livingston, Assistant Secretary of the Army for Installations, Logistics and Environment, March 24, 1992. The Deputy Assistant Secretary for Environment, Safety, and Occupational Health responded that the Army "will consider this request as the process develops. We recognize that our role will be limited in the event the selected site does not include Army lands." The letter also stated the necessity that an EIS include a full consideration of alternatives. Letter from Lewis D. Walker, Deputy

appoint to representatives to the interdisciplinary EIS preparation team.[422]

Wolf Action Group et al. v. U.S. terminated with a stipulation of dismissal (without prejudice) filed by the parties on May 21, 1993.[423] Contrary to the result in *Defenders of Wildlife v. Lujan* at Yellowstone, supra, which held that recovery plans are not action forcing documents, the U.S. agreed to "implement the Mexican Wolf Recovery Plan, and all amendments thereto, which Recovery Plan expressly recognizes that recovery of the species is dependent upon its establishment in suitable habitat in the wild."[424]

Although the U.S. agreed to reintroduce the Mexican Wolf, the problem of selecting a feasible site remained. FWS published notice of availability of the Draft EIS (DEIS)

Assistant Secretary of the Army for Environment, Safety, and Occupational Health, to David Parsons, USFWS, April 14, 1992. Michael Spear replied to the Army's letter with the assurance the EIS would include a consideration of alternatives, and again requested the Army's cooperation in the process. Letter from Michael Spear, Regional Director, USFWS, to Lewis D. Walker, Deputy Assistant Secretary of the Army, May 21, 1992.

[422] Letter from John G. Togern, Regional Director, USFWS, to Brigadier General Richard W. Wharton, Commanding General, WSMR, March 5, 1993.

[423] WOLF ACTION GROUP, *supra*, Stipulation of Dismissal, signed May 3, 1993 for the Department of Justice, and May 21, 1993, for the Plaintiffs, filed May 21, 1993, with Stipulated Settlement Agreement attached.

[424] *Id.* at Stipulated Settlement Agreement, at 1. In addition, the U.S. agreed to "accomplish the reintroduction of the Mexican Wolf into the wild..." in accordance with the Proposal cited above. The dismissal did "not constitute an admission or adjudication on the merits...including the issue of whether States, in their sovereign capacities...have the authority to refuse authorization of the reintroduction of the Mexican Wolf within their jurisdictions."

on June 27, 1995.[425] The FWS selected release into the San Andres Mountains on the WSMR and into the Apache and Gila National Forests.[426]

5. Local Opposition. Catron County, New Mexico, invoked Presidential Executive Order 12630 in May, 1992, and requested that the FWS complete a "takings implication analysis" for the proposed reintroduction, signaling the county might not be in favor of the proposal.[427]

Ranchers graze livestock on one side of the San Andres mountains. Ranchers generally do not want wolves reintroduced into their grazing areas. Al Schneberger, a leader in the New Mexico Cattle Growers Association, labeled the reintroduction plan "just another action by the federal government to evict rural people, destroy their culture and override their property rights."[428] Defenders of Wildlife agreed to extend its wolf depredation fund to the Mexican Wolf, so ranchers' proven losses will be covered.[429]

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[425] 60 Fed Reg. 33,224.

[426] DEIS, *supra*, at 2-10.

[427] Letter from Catron County Commission to USFWS Field Supervisor, May 13, 1992. The letter indicated that the reintroduction might effect private property and investment backed expectations.

[428] KEITH EASTHOUSE, *Wolf Recovery Plan Faces Uphill Battle*, THE SANTA FE NEW MEXICAN, June 28, 1995, at A1.

After the DEIS was issued, FWS received "10,000 comments, many of them negative...."[430] The FWS project director was surprised. "'We were caught a bit off guard, and we're disappointed by the opposition.'"[431] The governors of both New Mexico and Arizona issued statements supporting the reintroduction, but in each other's states. Both opposed reintroduction in their own states.[432]

The New Mexico Game and Fish Department opposed the plan because it "sees no potential Mexican wolf release site that provides both the biological and societal elements necessary."[433] This position made some citizens angry. They charged the Department was representing hunters and ranchers rather than all citizens of the state, since polls show a majority of New Mexico citizens favor the reintroduction.[434] One poll showed that even residents of the surrounding

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[429] *Mexican Wolf Draft EIS Released: Defenders Expands the Wolf Compensation Fund to the Southwest*, U.S. NEWSWIRE, June 27, 1995, available on Lexis/Nexis.

[430] GREENWIRE, *Wolves: Reintroduction in AZ, NM 'Doubtful' Officials Say*, GREENWIRE, Energy and Natural Resources Section, January 11, 1996, available on Lexis/Nexis.

[431] JODI BIZAR, *Opposition Stalls Program To Return Wolves*, THE TIMES-PICAYUNE, December 30, 1995, at A10.

[432] New Mexico Governor Gary Johnson expressed concern the wolf would "'devastate local economies." See KEITH EASTHOUSE, *Johnson: Wolf Could 'Devastate' Local Economies*, THE SANTA FE NEW MEXICAN, November 15, 1995, at A-1.

[433] GARY GERHARDT, *Love of lamb chops proves deadly for wolf No. 3*, ROCKY MOUNTAIN NEWS, February 6, 1996, at 28A.

[434] KATHLEENE PARKER, *Critics Angry Over Wolf Decision By Game Commission*, THE SANTA FE NEW MEXICAN, January 2, 1996, at B-1.

counties favored the reintroduction.[435] The Arizona Game and Fish Commission voted in favor of the reintroduction - but in New Mexico, not Arizona.[436]

Why is the FWS in this predicament? Because there is no federal land use policy. Because there are conflicting land use requirements, but no one with a national perspective to sort them out and make the big decisions. The Forest Service, FWS, and BLM are stuck in the middle, trying to do the right thing, trying to make everyone happy. Once again, the military is caught in the cross fire.

6. Risks to the Military. The proposed reintroduction of Mexican wolves onto WSMR raises five major issues.

a. The San Andres Wildlife Refuge. The habitat selected for the Mexican Wolf on WSMR is the San Andres Mountains. This site is already a National Wildlife Refuge. Under the Experimental Population provisions of the ESA, non-essential experimental populations receive full ESA protections on National Wildlife Refuges. That means some of the advantages to the experimental population designation are lost so long as wolves are within the bounds of the refuge. In terms of Section 7 consultation, the Army will really be accepting a threatened species rather than a

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[435] KEITH EASTHOUSE, *Survey: Support for Return of Wolves is Strong*, THE SANTA FE NEW MEXICAN, December 1, 1995, at A1.

[436] BARRY BURKHART, *The State That Cried Wolf: Politics May Decide Issue*, THE ARIZONA REPUBLIC, November 5, 1995, at C9.

candidate species onto its property. The Army will have to prepare a biological assessment if it proposes to change its activities in the San Andres Mountains, and enter into formal consultation with the FWS.

Congress neither anticipated nor intended this situation. The rule is appropriate on traditional wildlife refuges administered by the National Park Service or the FWS. There, both the land and the host agency have as their primary mission the conservation of species. The military, however, should receive the advantages every state and private land owner enjoy if they agree to host an experimental population. The provision regarding wildlife refuges should be changed to extend the exemption to experimental populations in wildlife refuges on military installations.

b. Future Missions. FWS found no conflict between current activities in or around the San Andres Mountains and the conservation of the Mexican Wolf. However, the wolf will retain threatened species status. The Army will not be permitted to take the wolf except under limited circumstances, as provided by the proposed rules. New weapons and new training missions are always being added. Next year, or the year after, DoD could decide to test a new weapon or vehicle. The San Andres Mountains may be the ideal, or only available, place to test the weapon or

vehicle. If the weapon or vehicle will "take" the wolf, DoD will not be allowed to test the weapon at that location.

While some additional activities may be permissible in the reintroduction area, others may be precluded by the presence of the wolf. The single greatest risk of accepting an experimental population is unanticipated changes in current land use. Military property was reserved primarily for training and national security purposes. As more land is donated for non-military functions, the chance of conflict increases. We may regret the loss of land if an unforeseen need for the mountains arises. We are giving up parcels of land at a variety of facilities, but no one person is aware of all of the non-traditional conservation projects within DoD. No single person is bringing a national perspective to the various conservation projects within DoD. No one is available to negotiate the conditions of these programs with DoD-level bargaining power.

c. Non-essential to Essential. The second greatest threat to the military is the loss of the non-essential designation. The statute does not prohibit a change to the designation. Since the status is regulatory, it can be amended or set aside by a judge. An essential experimental population is still treated as a threatened species.[437] However, an essential species is not

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[437] See FN 244, *supra*.

treated as a candidate species for Section 7 consultation purposes. As a result, the Army would have to prepare a biological assessment for actions which could affect the wolf. Formal consultation procedures could be triggered, and the Army would be subject to potentially lengthy negotiations with FWS. If the FWS found the proposed action would jeopardize the species, the Army would, for all practical purposes, be precluded from taking the action.

Clearly, counting on the non-essential designation for a species with so few remaining members is risky. An outbreak of disease among captive breeding programs could render the experimental population essential to the survival of the species. Thus, the protections afforded the population could be made more stringent.

The Clinton Administration is addressing a similar concern within the Habitat Conservation Plan (HCP) process. Landowners undertake HCPs, which serve as agreements with FWS. Under the "Safe Harbor" policy, the conservation requirements for the property covered by the agreement cannot be increased over time.[438] If landowners improve habitat, they are guaranteed that no additional requirements will be imposed. Under the "no surprises" policy, landowners who enter into HCPs are not subject to additional

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[438] Hearing before the House Resources Committee Regarding H.R. 2275, The Endangered Species Conservation and Management Act of 1995 (Testimony of George T. Frampton, Assistant Secretary For Fish and Wildlife and Parks, Department of the Interior), September 20, 1995, available on Lexis/Nexis.

requirements for species listed or found after the date of the agreement. The ESA should extend this policy to land owners who host experimental population, and should ensure that
requirements will not be increased if a non-essential experimental population is later declared essential.

d. Lawsuits. The ESA in general, and species reintroduction programs in particular, generate lawsuits. The Yellowstone reintroduction demonstrates the variety of litigation we can expect. Parties on all sides sued. Some to get rid of the wolves, others to grant them more protection. As discussed above, the Mexican Wolf has already generated litigation. We should be prepared for more. These lawsuits will be time consuming for the Army, and threaten the wolves themselves.

At Yellowstone, FWS may have to remove the wolves if the court finds fault with its program. Being recaptured and moved again would certainly stress the animals. While gray wolves are numerous, Mexican Wolves are not, and added stress decreases their chance of survival. Future lawsuits are also a concern. If the number of Mexican Wolves in captivity decreases, citizen suits could challenge the non-essential designation.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, contains a provision which prevents citizen suits prior to

completion of an environmental cleanup.[439] A similar provision could prevent citizen suits from interfering with a reintroduction once the animals have been released. Such a provision would protect the land owner and the animals. Citizens would still have the right to challenge the decision through NEPA citizen suits regarding the decision and Administrative Procedure Act suits regarding the regulations before the release occurs.

e. Piecemeal Decisions. Any decision reached regarding the Mexican Wolf at White Sands merely sidesteps the larger issue of federal land use policy. The conservation agencies are scrambling to comply with all the mandates heaped upon them. They will take help anywhere they can get it, and military installations are a rich target. Because the ESA requires all federal agencies to conserve threatened and listed species, the military has to cooperate. Conservation agencies get to "steal" land using the ESA as leverage. They use the ESA as a land management statute - a role Congress never intended it to fill.

A true federal land use policy, and someone to implement it, is an absolute necessity. A wise, well reasoned policy will not be reached by Congress or by a political appointee because of the detail involved. The

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[439] 42 U.S.C. § 9613(h).

federal government must find a way to manage its land outside the political process. One way to do this would be through the appointment of a non-political board or committee, like the Council on Environmental Quality (CEQ) established under NEPA.

IX. Proposal

As discussed above, military testing and training programs require more land than ever. New weapons and new national security missions develop daily. Just as training is requiring more and more land, Congress is closing bases and other agencies are asking the military to help them complete their missions. "...DoD installations want to be good neighbors," but the military's primary mission must be protected. The following proposals are designed to allow the continued sharing of resources among agencies, while protecting the military's training and national security missions.

In addition, federal land managers at all levels are struggling to implement the "multiple-use" policy without a nation-wide land use plan. The complicated issues these managers face should be addressed at a national level to ensure consistency and vision in the allocation of our limited federal lands. The final proposal is designed to provide: integration of the regional planning efforts

currently underway; a role for DoD in the national planning effort; and a multi-disciplined approach to the question of land allocation.

A. Amendments to the ESA. I propose three amendments to the ESA to improve the experimental population provisions under ESA Section 10(j). Draft Conference Report language is attached at Appendix A.

1. Loss of Non-essential Designation. One of the protections given to land owners who host experimental populations is the "non-essential" designation. If the species declines after the reintroduction, that designation could be changed to essential, which would place more stringent demands on the land owner.

I propose to amend the ESA to address just such a contingency. The amendment would provide a "safe harbor" to land owners by retaining the special treatment given non-essential populations to those later redesignated as essential. Draft legislation is attached at Appendix B.

2. Wildlife Refuge Exemption. Non-essential experimental populations are treated as candidate species for purposes of Section 7 consultations, except when the species is on a National Wildlife Refuge. Congress intended to give greater protection to experimental populations on wildlife refuges, because wildlife refuges are designated

for conservation purposes. Congress did not address wildlife refuges on military installations. This gap in the legislation places an unintended burden on the military. I propose to amend the ESA to exempt wildlife refuges on military property from the heightened protection. Draft legislation is attached at Appendix B.

3. Timing of Review. Citizens may challenge experimental population designations and governing regulations under the Administrative Procedure Act. Citizens may also challenge the accompanying NEPA documentation. Citizens should not, however, be permitted to challenge reintroductions after the animals are released. I propose to amend the ESA to rescind federal court jurisdiction to review reintroductions after the action is taken. Draft legislation is attached at Appendix B.

B. Creation of a DoD Wildlife Czar. It is unlikely that any central point of contact is aware of all introductions of endangered species and individuals onto military property. Even the military departments have a hard time keeping track. If the "right hand does not know what the left hand is doing," DoD is in danger of losing more land to wildlife than it intends.

When each request is handled at the local level, the request may seem minor, and there will be a natural tendency for the local commander to want to be "a good neighbor."

But when taken together, these piecemeal requests may begin to erode DoD's ability to control its own land.

I propose the creation of a DoD Wildlife Coordinator, or Wildlife Czar, to coordinate all DoD wildlife and endangered species conservation efforts. I propose new legislation which would create this position within DoD. The Wildlife Czar would be appointed by the President with the advice and consent of the Senate for a term of six years.

The Czar would bring a national perspective to local wildlife issues, and ensure that local decisions are consistent with DoD plans and policy. Draft legislation is attached at Appendix C.

C. Creation of a Federal Land Management Council. The U.S. needs a federal land management policy and a way to implement it. Currently, land management agencies plan for land use at the regional level, but there is little coordination of the regional efforts at the national level, and even less coordination between the agencies. As the Supreme Court acknowledged in *U.S. v. Grimaud*, it is "impracticable for Congress to provide general regulations for these various and varying details of management."[440] Political appointees are also ill suited to the task, since policy and direction could change every four years.

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[440] U.S. v. GRIMAUD, 220 U.S. 506, 517 (1911)

The ESA is increasingly used as a land management tool. The Endangered Species Committee, commonly known as the "God Squad," used the ESA to institute a land management plan for the old growth forests in the northwest under the guise of spotted owl protection. This approach is practical, but should be entrusted to a committee designed to make this type of decision, with input from all federal land management agencies. The same committee could do much more to implement a national vision for federal land management. DoD should be included in these efforts.

I propose to abolish the Endangered Species Committee and establish the National Trustee Board (NTB) to develop and coordinate national land use policy. The NTB is patterned after the NEPA Council on Environmental Quality (CEQ) and the Base Realignment and Closure (BRAC) Commission. I propose a five member Board, appointed by the President with the advice and consent of the Senate, for a term of eight years each. Five additional, non-voting members, would be appointed to assist the NTB. These members would include the DoD Wildlife Czar, and similar appointees from BLM, FWS, the Forest Service, and the National Park Service. Each member would be "a person who, as a result of training, experience, and attainments, is exceptionally well qualified to analyze and interpret land use issues."

The Board would formulate, coordinate, and implement national policies regarding management of federal land;

integrate agency planning efforts; and settle disputes between federal agencies regarding land use conflicts. The Board would publish, within three years, an integrated, nation-wide, land management plan, followed by bi-annual amendments thereafter. This plan would implement MUSY, FLPMA, and the ESA.

The Board would also replace the Endangered Species Committee. Appeals previously addressed to the Endangered Species Committee would now be heard by the NTB. The NTB would be better situated to hear ESA appeals by virtue of its role as the senior federal land management organization. The NTB would also hear disputes between agencies regarding land management.

The tasks facing the NTB would be daunting. The BRAC Commission, however, appointed to cut through a similarly volatile, seemingly inscrutable, political process has succeeded. The NTB, as a non-political body, could craft a national policy, and fill the obvious void which currently frustrates all of our land use management planning attempts. Draft legislation is attached at Appendix C.

X. Conclusion

The U.S. is still a land of vast resources, but it is no longer a land of unlimited resources. Environmental and land-use laws evolved to meet the changing needs of the

country. In the west, these new laws are met with resentment and contempt by some. Our current policy of "multiple-use" requires federal land managers to administer our public trust lands "for the people of the whole country,"[441] but does not tell these managers what the people want or how to do it.

As federal land managers scramble to meet conflicting demands with finite resources, they increasingly call on the military to help. Bolstered by the ESA, which assigns a broad conservation mission to all federal agencies, these land managers are successfully taking military land for non-military functions.

This rush to take military land is symptomatic of a larger problem. That problem is our lack of a federal land use policy and the means to implement it. This lack is "the wolf at the door," which threatens both the availability of our military lands for training and the wise use of our public trust lands.

We can protect the military by making the ESA more flexible and by giving the military a voice in federal land use management decisions. We can protect our public lands by creating a Board to settle disputes between agencies, to replace the Endangered Species Committee, and to develop and implement national land-use policy.

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[441] LIGHT v. U.S., 220 U.S. 523 (1911).

Land "is the only thing that lasts,"[442] but no one can make more of it. We must begin to plan the use of our land at the national level. Only a national land use policy will ensure that our lands truly are administered "for the people of the whole country."[443]

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[442] GONE WITH THE WIND, *supra*, at FN 2.

[443] LIGHT v. U.S., 220 U.S. 523 (1911).

Appendix A

Conference Report. The following language is proposed for inclusion in the Conference Report accompanying the ESA amendments:

"The Congress recognizes that the Experimental Population provision of the Endangered Species Act, added to the Act as an amendment in 1982, has been successful in returning populations of endangered animals to the wild. That amendment provided a more flexible management approach in order to encourage the acceptance of reintroduced populations.

This amendment is designed to provide a "Safe Harbor" to land owners agreeing to host experimental populations. These land owners include private parties and federal agencies, particularly DoD and the Forest Service, which make possible the reintroduction of experimental populations on land outside the National Park and National Wildlife Refuge Systems.

Under this amendment, these land owners are protected from unforeseen, more stringent restrictions on the use of their land, should the "non-essential" designation be changed, either by regulation or judicial decision, to "essential." At the same time, the Fish and Wildlife Service will receive an automatic permit to allow the capture and removal of the animals to a more suitable, more protected, location. In this way, both the land owner, the

Service, and the species, is protected, and the release of experimental populations is further facilitated.

In addition, experimental populations introduced to wildlife refuges on military installations will be treated as experimental populations found outside wildlife refuges and national parks. This amendment places military installations on a equal footing with other land owners, and ensures that military departments are not penalized, or unduly burdened by, the wildlife refuge designation on portions of the property they administer in support of national defense. The original provision for enhanced protection on wildlife refuges and national parks did not take military installations into account.

Finally, the amendment protects experimental populations and land owners hosting experimental populations by preventing lawsuits after a population is released. Citizen suits are still permitted under NEPA and the Administrative Procedures Act up until the time the population is released.

Appendix B

Proposed Amendment to the ESA. The Endangered Species Act of 1973 (As Amended) is amended by adding after 16 U.S.C. § 1539(j)(3) the following:

"(4) If a population determined by regulation to be a non-essential, experimental population is later redesignated an essential population --

(A) The Fish and Wildlife Service shall prepare, within thirty days of the redesignation, an amended recovery plan, detailing the manner in which the Service will respond to the redesignation; and

(B) The population will continue to be treated as a threatened or candidate species, as provided under this Section, so long as it remains on land outside the National Wildlife Refuge System and the National Park System.

(I) On land outside the National Wildlife Refuge and National Park Systems, the population will continue to be protected by the regulations adopted when the population was designated "non-essential."

(ii) Upon redesignation as an essential population, the Fish and Wildlife Service will automatically receive an incidental take permit under this section for the capture, removal, and transportation of the animals to an alternate location. Such capture, removal, and transportation shall be left to the discretion of the Service, and is not required.

(iii) Owners of land hosting such population (whether federal or private) will not be subject to more stringent requirements for the protection of the population than adopted when the population was designated "non-essential." Owners will cooperate with the Service in the event the Service elects to remove the animals.

(5) Experimental Populations released onto DoD property will be treated as a threatened or candidate species, in accordance with subparagraph (2) of this section, even if portions of the DoD property have been designated as part of the National Wildlife Refuge System.

(6) No Federal court shall have jurisdiction to review any challenges to introduction, maintenance, management, or removal of an experimental population, or to review any regulation promulgated under this section, after the introduction of one or more individuals belonging to the experimental population.

Appendix C

Title 43, United States Code, is amended by adding after Section 2246 the following new Chapter:

Title 43-Public Land

NATIONAL TRUSTEE BOARD

NATIONAL TRUSTEE BOARD ACT OF 1996

(43 U.S.C. §§ 2247 to 224-)

Chapter xx--National Trustee Board

§ 2247. Congressional Declaration of Policy

(a) The Congress declares that it is the policy of the United States that--

(1) effective management of the public lands requires management on a national level;

(2) the various land management agencies should cooperatively manage the lands for which they serve as trustees;

(3) effective and consistent implementation of federal land management policy, such as: the Multiple-Use, Sustained Yield Act of 1960 (16 U.S.C. S 528), the National Forest Management Act of 1976 (16 U.S.C. S 1600), the Federal Land Policy and Management Act (43 U.S.C. S 1701), the National Environmental Policy Act of 1969 (42 U.S.C. S 4321), and the Endangered Species Act (16 U.S.C. S 1536), requires coordinated planning efforts among the various trustees;

§ 2248. Establishment of the National Trustee Board

(a) There is established a National Trustee Board for the management of federal lands.

(b) The National Trustee Board shall be composed of five voting members and five non-voting members.

(1) Voting members.

(A) The voting members shall be appointed by the President with the advice and consent of the Senate.

(B) The President shall designate one voting member to serve as chairman.

(C) Each voting member shall be a person who, as a result of training, experience, and attainments, is exceptionally well qualified to analyze and interpret land use issues.

(2) Non-voting members.

(A) There is created within each of the following agencies a federal land use coordinator, who will serve as a non-voting member of the National Trustee Board:

(1) The U.S. Forest Service

(2) The Bureau of Land Management

(3) The U.S. Fish and Wildlife Service

(4) The National Park Service.

(B) There is created within the Department of Defense a Wildlife Coordinator. The DoD Wildlife Coordinator shall:

(1) Coordinate Endangered Species Act compliance within DoD;
(2) Coordinate wildlife conservation programs within DoD;
(3) Serve as a non-voting member of the National Trustee Board.

(C) Each non-voting member shall be a person who, as a result of training, experience, and attainments, is exceptionally well qualified to analyze and interpret land use issues.

(c) Each voting and non-voting member shall be appointed for a term of eight (8) years.

§ 2249. Duties and Responsibilities of the National Trustee Board.

The National Trustee Board shall:

(a) Assume the role and responsibilities of the Endangered Species Act Committee as detailed at 16 U.S.C. § 1536(e). 16 U.S.C. § 1536(e) is incorporated by reference, with the exception of § 1536(e)(3), which is repealed.

(b) Prepare, within three years of appointment of all voting and non-voting members, a "National Land Management Plan," which shall:

(1) contain the following:

(A) a national plan for the allocation of resources under the control of the U.S. Forest Service;
(B) a national plan for the allocation of resources under the control of the Bureau of Land Management;
(C) a national plan for the allocation of resource under the control of the National Park Service;
(D) a national plan for the allocationof resources under the control of the Fish and Wildlife Service;
(E) a national plan for the allocation of resources on public lands not previously classified, withdrawn, set aside, or otherwise designated for one or more uses;
(E) an inventory of the resources contained on the lands under the control of the Department of Defense, including training areas, administrative areas, wildlife conservation areas, and areas not otherwise classified.

(2) be based on the following:

(A) the principles of multiple use and sustained yield set forth in this and other applicable law;

(B) a systematic interdisciplinary approach considering physical, biological, economic, and other sciences;

(C) a consideration of present and potential uses of the public lands;

(D) a consideration of long-term and short-term benefits to the public.

(c) Prepare, on a biannual basis, revisions to the National Land Management Plan. The first revision shall be published not later than twenty-four (24) months after publication of the National Land Management Plan. Later revisions shall be published not later than twenty-four (24) months after publication of the previous revision.

(d) Hear disputes between or among federal agencies upon the written request of one or more Secretaries.

§ 2250. Employment of personnel, experts, and consultants.

(a) The National Trustee Board may employ such officers and employees as may be necessary to carry out its functions

under this Chapter. In addition, the Board may employ and fix the compensation of such experts and consultants as may be necessary for carrying out the functions under this Chapter.

(b) The Board may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Board.

§ 2251. Public Involvement.

(a) Not later than two (2) years after the appointment of all voting and non-voting members, the National Trustee Board shall publish in the federal register a notice of availability of the "Draft National Land Management Plan."

(b) The notice shall provide a forty-five (45) day period during which public comments may be submitted to the Chairman.

(c) No public hearing will be required.

(d) The National Trustee Board shall consider all comments submitted on the Draft National Land Management Plan in developing the Final Plan.

(e) The Administrative Procedure Act shall not apply to any action taken under this section.

§ 2252. Publication of the National Land Management Plan and Revisions.

(a) Publication of "Notice of Availability" in the Federal Register shall constitute publication of the National Land Management Plan and Revisions.

(b) Upon publication of the "Notice of Availability" in the Federal Register, the National Land Management Plan and Revisions shall be available at the Library of Congress, and at each regional office of Departments of Agriculture and the Interior.

§ 2253. Reports to Congress.

The President shall transmit the National Land Management Plan and all Revisions to the Congress at least 10 days prior to publication.

§ 2254. Applicability of the National Land Management Plan and Revision.

(a) The U.S. Forest Service, the National Park Service, the Bureau of Land Management, and the U.S. Fish and Wildlife

Service shall incorporate the policy and directives contained in the National Land Management Plan and Revisions thereto. The National Land Management Plan and Revision shall not govern the use of property under the control of the Department of Defense.

(b) With respect to the Department of Defense, the policy and directives contained in the National Land Management Plan and Revisions thereto shall be advisory in nature.