Of Wolves and Welfare Ranching

by

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I. INTRODUCTION

European cultures traditionally have viewed wolves as darkness incarnate, the devil barely disguised. For the past 400 years, Euro-Americans have sought to exterminate the beast. That campaign has been so successful that the wolf is now listed as an endangered species and protected by federal law. But efforts to protect the wolf have been met by resistance from the western livestock industry. The wolf represents a threat—both philosophically and economically—to the industry's entrenched subsidies. In attempting to placate this politically powerful industry, the agency charged with protecting the wolf has itself violated the Endangered Species Act.

II. OUR HERITAGE

A. Killing Wolves and Saving Souls

Wolves engender passion. They are the beasts of fable and fairytale: the wolf of Aesop, of Little Red Riding Hood, of Peter and the Wolf, the wolf at the door. They are beasts of myth and magic: Beowulf and werewolves and Fenris, who will devour heaven and earth at the end of time. Human beings have long seen something of the wolf in themselves and much of themselves in the wolf: witness the wolf of the wolf whistle, of wolfing food, the insatiable beast.[1]

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* Professor of Law, University of Idaho. J.D., University of Oregon; A.B., Columbia College. Part of the research used in this Article was prepared for a report by the Forest Policy Analysis Group, University of Idaho: CARLA WISE, JEFFREY J. YEO, DALE GOBLE, JAMES M. PEEK, & JAY O'LAUGHLIN, WOLF RECOVERY IN CENTRAL IDAHO (Feb. 1991). My co-authors may disagree with the views expressed here, and they should not be held accountable for them. Thanks to Don Baur for reality checks and to Carol Bradford for poetry.

1. *See* BARRY H. LOPEZ, OF WOLVES AND MEN 203–77 (1978); JACK D. ZIPES, THE TRIALS AND TRIBULATIONS OF LITTLE RED RIDING HOOD (1983); *cf.* JIM HARRISON, WOLF (1971).

This was the image that Europeans brought with them to this new world. It was an image expressed in a set of myths, myths that reflected their history as herders, their religion's symbolic glorification of sheep, and their fears of all things wild. This "hidious [sic] and desolate wildernes [sic], full of wild beasts and willd [sic] men"[2] was a wildness they felt it their birthright and manifest destiny to subdue. The Bible made it moral, their belief in their own specialness made it natural.[3]

This special mission from God—this errand into the wilderness—required the conversion of wild men and the cultivation of wild lands if the new Americans were to achieve their destiny in this new Eden.[4] It required the domination of the wilderness and the destruction of the wolf, that "beast of waste and desolation,"[5] the ultimate symbol of wildness both in the wilderness and in human psyches. It was the Christian thing to do, for the wolf was the devil in disguise,[6] and the conquest of the wilderness was a morality tale in which the European played the hero's role.

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2. WILLIAM BRADFORD, HISTORY OF PLYMOUTH PLANTATION 96 (William T. Davis ed., 1908) (written 1730–1748); *cf. Luke* 10:3 (Jesus' admonition: "Behold, I send you forth as lambs among wolves"). As Roderick Nash has noted, the word "wilderness" etymologically signifies "the place of wild beasts." RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 2 (3d ed. 1982).

3. As Robert Gray stated in a sermon in 1609:

> The Lord hath given the earth to the children of men, yet . . . is the greater part of it possessed and wrongfully usurped by wild beasts, and unreasonable creatures, or by brutish savages, which by reason of their godles [sic] ignorance, and blasphemous Idolatrie [sic], are worse then those beasts which are of most wilde [sic] and savage nature.

ROBERT GRAY, A GOOD SPEED TO VIRGINIA (Wesley F. Craven ed., 1957) (1609), *quoted in* Alden T. Vaughan, *"Expulsion of the Salvages": English Policy and the Virginia Massacre of 1622*, 35 WM. & MARY Q. (3d Ser.) 57, 61 (1978). Gray was, of course, merely iterating Christian theology. After all, God gave man "dominion over . . . all the earth and over every creeping thing that creepeth upon the earth," *Genesis* 1:26, and commanded him to "fill the earth and subdue it; and have dominion over . . . every living thing that moves upon the earth," *id.* 1:28; *see also Ecclesiastes* 17:1–4; *Genesis* 9:2–3; *Psalm* 8:6–8.

4. PERRY MILLER, *Errand into the Wilderness*, *in* ERRAND INTO THE WILDERNESS 1, 1 (1956); *see also* LEO MARX, THE MACHINE IN THE GARDEN (1964); HENRY N. SMITH, VIRGIN LAND (1950).

5. 2 THEODORE ROOSEVELT, THE WILDERNESS HUNTER 188 (Dakota ed. 1907).

6. *E.g.*, JOHN MILTON, PARADISE LOST book IV, lines 181–87 (Merritt Y. Hughes ed., Odyssey Press 1962) (S. Simmons 2d rev. ed. 1674). If not the devil, the wolf was perhaps one of his trusted lieutenants: Horace Greeley thought of the wolves he encountered on his transcontinental journey as impudent "prairie lawyers." HORACE GREELEY, AN OVERLAND JOURNEY FROM NEW YORK TO SAN FRANCISCO IN THE SUMMER OF 1859, 77 (Charles T. Duncan ed., 1964) (1st ed. 1860).

The colonists in Virginia combined the tasks of conversion and cultivation with admirable efficiency, offering the natives a cow for every eight wolves they killed, thus "introducing among them the idea of separate property" as a "step to civilizing them and to making them Christians."[7] The Rhode Island government introduced another attribute of civilization by requiring each Indian to pay a tax of two wolf skins.[8]

If the natives objected or refused to conform to English notions of proper civility, the "willd men" were treated as wild beasts, as wolves. The frontier attitudes towards the two groups were the same: the only good wolf or Indian was a dead one. A New England preacher, for example, could rely upon the similarity to justify the use of mastiffs to hunt Indians: "They act like wolves and are to be dealt withal as wolves."[9]

Native Americans might not have found the simile inappropriate. To them, Wolf is a fellow spirit, the big brother of Coyote, the trickster; he is a creator of the Earth and its inhabitants.[10] In Sioux he is *shunkmanitu tanka*, "the animal that looks like a dog [but] is a powerful spirit."[11]

B. Killing Wolves and Saving Cows

The European settlers and their descendents coupled their fear of wildness—of which the wolf was both symbol and exam-

7. The Act of Mar. 10, 1655–1656, 1 Va. Stat. 393, 395. The statute was grandly labeled a "Plan for civilizing the Indians by introducing among them the idea of separate property." *Id.* William Cronon has admirably demonstrated that conceptions of property and ownership have a profound influence on how societies construct boundaries to their ecologies. WILLIAM CRONON, CHANGES IN THE LAND (1983).

8. 1 SAMUEL G. ARNOLD, HISTORY OF THE STATE OF RHODE ISLAND AND PLYMOUTH PLANTATION 315 (New York, Providence, Preston & Rands 1859).

9. Letter from Solomon Stoddard to Joseph Dudley (Oct. 22, 1703), *quoted in* James Axtell, *The Scholastic Philosophy of the Wilderness*, 29 WM. & MARY Q. (3d Ser.) 335, 344 (1972). The similarity of attitudes towards wolves and Indians was pervasive. A Plymouth Colony statute of 1638 imposed a five shilling fine on "whoever shall shoot off a gun on an unnecessary occasion, or at any game except at an Indian or a wolf." STANLEY P. YOUNG, THE WOLF IN NORTH AMERICAN HISTORY 76 (1946). Even when the natives were not viewed as game, their kinship with wild animals was a common theme. For example, Indians who "do but run over the grass" like "wild beasts" had no more claim to ownership than did the beasts. Robert Cushman, *Reasons and Considerations Touching the Lawfulness of Removing Out of England into the Parts of America*, *in* CHRONICLES OF THE PILGRIM FATHERS 243 (Boston, Alexander Young 1841).

10. *See* LOPEZ, *supra* note 1, at 102–34; Jeannette Ross, *Indian Legends*, *in* WOLF! 39 (Wolves in American Culture Committee ed., 1986).

11. LOPEZ, *supra* note 1, at 110.

ple—with the presumption that the government had a responsibility to kill wolves. Even when *laissez-faire* was the dominant economic policy, protecting private property and removing barriers to private economic activity were considered to be legitimate governmental functions.[12]

Historically, a common example of governmental action in support of private economic activity was the placing of a bounty on the wolf. In 1630, Massachusetts Bay Colony offered the first bounty: one penny per wolf.[13] Despite continual problems with fraud and the perverse incentive to protect a breeding stock for the future, bounties were employed for over three centuries.[14] The fact that the practice survived for so long despite its shortcomings suggests that this form of subsidy—encouraging private actions—reinforced the prevailing *laissez-faire* myths of individual autonomy and self-reliance.

The second principal strategy has been direct government action. William Penn hired a professional wolf hunter in 1705, and the federal government still employs "Animal Damage Control Specialists."[15] Employing persons to kill wolves embodies a fundamentally different perception of the proper role of government than does offering bounties to private persons. When the government hires a hunter, killing wolves becomes a governmental service like police and fire protection.[16]

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12. *See, e.g.*, JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 6–8 (1956); *see also* DURWOOD L. ALLEN, OUR WILDLIFE LEGACY 230–33 (rev. ed. 1962); Stanley A. Cain, *Predator and Pest Control, in* WILDLIFE AND AMERICA 379, 379–80 (Howard P. Brokaw ed., 1978); George C. Coggins & Parthenia B. Evans, *Predator's Rights and American Wildlife Law*, 24 ARIZ. L. REV. 821, 826–27 (1982).

13. *See* 1 RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND 81 (Nathaniel B. Shurtleff ed., Boston, William White 1853); *see also* STANLEY P. YOUNG & EDWARD A. GOLDMAN, THE WOLVES OF NORTH AMERICA 340 (1944).

14. *See* CRONON, *supra* note 7, at 132–34; THOMAS A. LUND, AMERICAN WILDLIFE LAW 32–34 (1980); YOUNG & GOLDMAN, *supra* note 13, at 337–68. Alaska had a bounty on wolves until 1984. ALASKA STAT. § 16.35.050 note (1990).

15. ALLEN, *supra* note 12, at 264; Cain, *supra* note 12, at 279–88; Michael Milstein, *Coyote Slaughter: A Federal Killing Machine Rolls On*, HIGH COUNTRY NEWS, Jan. 28, 1991, at 1.

16. This approach is also more likely to eliminate the target species because of the changed nature of the economic incentive: A bounty will lead to kills only as long as the amount of bounty exceeds the costs of killing. A government hunter, on the other hand, will be paid regardless of the number of predators killed and thus is more likely to kill the last wolf. *See* Coggins & Evans, *supra* note 12, at 829.

Until recently, there was a consensus that the public benefited from ridding the world of wolves and other predators because increased economic activity redounded to everyone's benefit. A growing body of data, however, supports a different conclusion: predator control programs are an economically inefficient subsidy to the western livestock industry that, at best, produce mixed ecological results.[17]

C. Killing Wolves and Saving Wolves

The errand into the wilderness was pursued with religious zeal and with Yankee ingenuity, with poisons and with steel traps. If godliness is measured by success in exterminating wolves and wilderness, the Euro-Americans have indeed been a godly people. When Europeans arrived in North America, wolves could be found from the Mexican Plateau near Mexico City to the islands of the Canadian Arctic.[18] At present there are fewer than 2000 wolves in the coterminous United States, scattered in small pockets of wildness along the Canadian border.[19]

But success in taming wilderness and killing varmints gradually led to different visions of both wilderness and wolves. Wildness became something to be cherished and preserved.[20] Congress responded by creating Yellowstone and other National Parks;[21] states established bag limits and hunting seasons.[22] "Conservation" became a rallying cry.[23]

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17. For example, the size of a litter varies with population densities so that litter size increases as wolf control measures increase. *See* L. DAVID MECH, THE WOLF 58–67 (1970); FREDERIC H. WAGNER, PREDATOR CONTROL AND THE SHEEP INDUSTRY 57–61 (1988). *See generally* Milstein, *supra* note 15, at 13.

18. MECH, *supra* note 17, at 31–36; YOUNG & GOLDMAN, *supra* note 13, at 9.

19. Most of the remaining wolves are located in northern Minnesota, with a handful in Idaho, Michigan, Montana, Washington, and Wisconsin. Carol Brady, *Wolves May Dance in Northwest Again*, THE IDAHO STATESMAN (Boise), Mar. 25, 1991, at 1A. While there is no accurate count of the number of wolves killed, this count must have numbered in the millions: between 1883 and 1918 the carcasses of 80,730 wolves were turned in for bounty in Montana alone. LOPEZ, *supra* note 1, at 183; *see also* YOUNG & GOLDMAN, *supra* note 13, at 339–68.

20. *See* NASH, *supra* note 2.

21. *See* ALFRED RUNTE, NATIONAL PARKS (2d ed. 1987).

22. *See* THOMAS R. DUNLAP, SAVING AMERICA'S WILDLIFE 8–17 (1988).

23. *E.g.*, SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959).

Game laws, however, protected only "good" animals; conservation did not include wolves or other predators.[24] Protection for such beasts has been a relatively recent event. For example, while non-threatening songbirds were protected by the Migratory Bird Treaty Act of 1918,[25] predatory hawks were not protected under the Act until 1972.[26] As late as 1970, twenty states still had bounties on wolves even though the species had been virtually extinct in the coterminous United States for fifty years.[27] Even now, with the gray wolf listed as an endangered species,[28] the protection remains tentative[29] and schizophrenic. One federal statute authorizes the extermination of wolves while another prohibits harming or harassing them.[30]

The wolf remains a mythic category. Once the very essence of lust, greed, and violence, it is now the latest emblem of environmentalism—an "endangered species."

III. The Endangered Species Act: A Brief Outline

The decision to list the wolf as endangered under the Endangered Species Act ("ESA")[31] was a decision that the predator control programs had been successful and the species was "in danger of extinction throughout all or a significant portion of its range."[32] In enacting the ESA, Congress adopted a biological per-

24. *See* Dunlap, *supra* note 22.

25. 16 U.S.C. § 703 (1988).

26. *See* United States v. Richards, 583 F.2d 491, 493–94 (10th Cir. 1978); *see also* George C. Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. Colo. L. Rev. 165, 170–79 (1979).

27. Dunlap, *supra* note 22, at 6 n.2.

28. 50 C.F.R. § 17.11(h) (1990). In Minnesota the species is listed as threatened. *Id.*

29. The support for wolf reintroduction is, of course, less than unanimous. The western livestock industry continues to oppose any protection for predators and is particularly vociferous in its opposition to wolves. *See, e.g.*, *Biologists, Ranchers Watch for Wolves*, The Idaho Statesman (Boise), Apr. 9, 1990, at 1C; Bert Lindler, *Two Views of the Wolf in Montana*, High Country News, July 16, 1990, at 12. Others continue to present the wolf as a bloodthirsty demon, T.R. Mader, Wolf Reintroduction in the Yellowstone National Park: A Historical Perspective (1988), or urge control as necessary to protect populations of "good" species, Lester J. McCann, Time to Cry Wolf! (1972).

30. *Compare* Animal Damage Control Act of 1931, 7 U.S.C. § 426 (1988) *with* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (1988).

31. 16 U.S.C. §§ 1531–1543 (1988).

32. *Id.* § 1532(6) (definition of endangered species).

spective that sought to protect not only plants and animals but also "the ecosystems upon which endangered species and threatened species depend."[33] Furthermore, it specifically sought to minimize the role played by economics. For example, the decision to list a species such as the wolf is to be based "solely upon biological criteria"—"economic considerations have no relevance to determinations regarding the status of species."[34] As the Supreme Court recognized, Congress intended to protect endangered species "*whatever the cost.*"[35]

The decision to list a species has three primary effects. First, all "persons" are required to refrain from conduct that will "take" a listed species.[36] Second, all federal agencies are to "insure" that actions that they undertake or permit do not "jeopardize the continued existence" of a listed species.[37] Finally, in addition to this duty to refrain from conduct that will harm a listed species, federal agencies are under an affirmative obligation to take action to increase the population of a species.[38]

The most expansive obligation imposed by the ESA is the duty imposed upon all "persons" to refrain from conduct that will "take" a listed species.[39] The breadth of the prohibition stems from the all-inclusive definitions of the two crucial terms. "Person" is defined to include not only individuals, but all business and government entities;[40] "take" is defined in "the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife,"[41] including conduct that will "harass, [or] harm."[42] Indeed, the drafters intended the pro-

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33. *Id.* § 1531(b).

34. H.R. REP. No. 567, 97th Cong., 2d Sess. 19, 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2819, 2820; *see also* 16 U.S.C. § 1533(b)(1)(A) (listing decision to be made "solely on the basis of the best available scientific and commercial data available"); Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988) (decision "to list a species [is to be] . . . based solely on an evaluation of the biological risks faced by the species, to the exclusion of all other factors").

35. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978) (emphasis added); *see also id.* at 172–74.

36. 16 U.S.C. § 1538(a)(1)(B), (C).

37. *Id.* § 1536(a)(2).

38. *Id.* §§ 1531(c)(1), 1536(a)(1).

39. *Id.* § 1538(a)(1)(B), (C).

40. *Id.* § 1532(13).

41. S. REP. No. 307, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

42. 16 U.S.C. § 1532(19) (defining "take"); *see also* Palila v. Hawaii Dep't of Land

hibition to be broad enough to authorize the Secretary of the Interior "to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young."[43] In short, the ESA does not require dead snail darters floating on the impoundment behind Tellico Dam—all that is required for the ESA to reach agency and individual conduct is that the impoundment will make it more difficult for snail darters to reproduce.[44]

The taking prohibition is backed up with substantial civil and criminal sanctions. A person who "knowingly"[45] takes an endangered species is subject to criminal sanctions up to $50,000 and one year in jail.[46] Civil penalties up to $25,000 may also be assessed.[47] Finally, a conviction can lead to the loss of all federal licenses, leases, and hunting permits, and forfeiture of any equipment involved in the violation.[48]

In addition to the obligation to refrain from conduct that takes a listed species, the Act imposes further duties on federal agencies and their permittees. All agencies are required to evaluate the effects of their proposed actions on listed species.[49] If the proposal

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& Natural Resources, 649 F. Supp. 1076–77 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988); 50 C.F.R. § 17.3 (1990) (defining "harm" and "harass"). *See generally* Michael E. Field, *The Evolution of the Wildlife Taking Concept from Its Beginning to Its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457 (1984).

The Act does create one exception to the taking prohibition: the Secretary may authorize an "incidental take" in conjunction with a federal project that is determined not to jeopardize the continued existence of the species. 16 U.S.C. §§ 1536(o)(2), 1539(a)(1)(B).

43. H.R. REP. No. 412, 93d Cong., 1st Sess. 11 (1973), *reprinted in* SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 140, 150 (1982).

44. Tennessee Valley Authority v. Hill, 437 U.S. 153, 165–66 n.16, 184–85 n.30 (1978); *Palila*, 649 F. Supp. at 1076 n.22.

45. The term "knowingly" does not require proof of specific intent to violate the Act; all that is required is intentional conduct leading to the violation. United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988) ("The critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting . . . . [T]hus, defendant could only claim accident or mistake if he did not intend to discharge his firearm, or the weapon malfunctioned, or similar circumstances occurred."); *see also* United States v. Billie, 667 F. Supp. 1485, 1492–94 (S.D. Fla. 1987); H.R. REP. No. 1625, 95th Cong., 2d Sess. 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9476.

46. 16 U.S.C. § 1540(a)(1).

47. *Id.* § 1540(b)(1).

48. *Id.* § 1540(b)(2), (e)(4)(B). The Act recognizes few defenses. Penalties will not be imposed if the violator proves that he "was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm." *Id.* § 1540(a)(3), (b)(3). Defense of property, however, does not preclude prosecution. *See* Christy v. Hodel, 857 F.2d 1324, 1329 n.4, 1331 (9th Cir. 1988), *cert. denied sub nom.* Christy v. Lujan, 490 U.S. 1114 (1989).

49. Toward this end, the Act establishes a three-stage consultation process. 16

will affect the species, the Act prohibits the proposed action unless the agency can "insure" that it "is not likely to jeopardize the continued existence" of the species or "result in the destruction or adverse modification" of its critical habitat.[50] Thus, federal agencies are prohibited from permitting or carrying out actions that are likely to reduce the possibilities of survival and recovery of a species "by reducing the reproduction, numbers or distribution" of the species.[51]

In addition to the ESA's prohibitions against taking a listed species or jeopardizing its continued existence, the Act also reflects a congressional recognition that merely refraining from harming a listed species is in itself insufficient. Accordingly, the Act imposes additional, affirmative obligations on the federal government. The broadest of these affirmative duties requires all federal agencies to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation" of listed species.[52] The magnitude of this obligation is revealed by the Act's expansive definition of "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[53] Thus, all federal agencies are obligated to take affirmative actions to increase populations of listed species.

The third major obligation imposed by the ESA is the recovery planning process. Congress recognized a need for a coordinated recovery program. To this end, the Act requires the Secretary to

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U.S.C. § 1536(b), (c). *See generally* Thomas v. Peterson, 753 F.2d 754, 763–64 (9th Cir. 1985) (discussing procedural requirements). Consultation is an ongoing procedural responsibility. As a federal project develops over time, the agency must reinitiate formal consultation if it receives new information suggesting that the action might jeopardize a listed species. *See, e.g.*, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987). The Act also requires consideration of indirect or secondary effects of the agency action. *See, e.g.*, Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985); National Wildlife Fed. v. Coleman, 529 F.2d 359 (5th Cir.), *cert. denied sub nom.* Boteler v. National Wildlife Fed., 429 U.S. 979 (1976).

50. 16 U.S.C. § 1536(a)(2); *see also* Tennessee Valley Authority v. Hill, 437 U.S. at 153; Nebraska v. Rural Electrification Admin., 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978).

51. 50 C.F.R. § 402.02 (1990) (definition of "jeopardize").

52. 16 U.S.C. § 1536(a)(1); *see also id.* § 1531(c)(1) ("it is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act").

53. *Id.* § 1532(3); *see also* H.R. CONF. REP. No. 740, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 3001, 3002.

"develop and implement" recovery plans "for the conservation and survival" of listed species.[54] This requirement is intended to insure that the Secretary takes the steps necessary to bring the species to the point at which it may be removed from the list.[55]

The ESA thus embodies a coherent statement of national policy. Species facing extinction are to be listed as endangered or threatened regardless of the economic consequences of the decision.[56] A listed species is not only to be protected against conduct that threatens its existence, but also is to be the beneficiary of a program designed to restore its population. As the Supreme Court has noted, the Act "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species," a national policy that is plainly intended "to halt and reverse the trend toward species extinction, whatever the cost."[57]

IV. THE WOLF RECOVERY PLAN

Despite the statutory requirement that the Secretary prepare a recovery plan for listed species, fourteen years passed between the listing of the gray wolf and the publication of the *Northern Rocky Mountain Wolf Recovery Plan* ("*Wolf Recovery Plan*").[58] As finally written, the plan is to be "a 'road map' to the recovery of the wolf in the Rocky Mountains. The primary goal is to remove the Northern Rocky Mountain wolf from the endangered and threatened species list."[59] To achieve this goal, the *Wolf Recovery Plan* establishes three areas in which recovery activities will be

54. 16 U.S.C. § 1533(f); *see also* H.R. REP. No. 1625, 95th Cong., 2d Sess. 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9469; H.R. CONF. REP. No. 1804, 95th Cong., 2d Sess. 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9495 (discussion of requirements for recovery plans).

55. *See* S. REP. No. 240, 100th Cong., 2d Sess. 9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2709.

56. *See supra* notes 34–35 and accompanying text.

57. Tennessee Valley Authority v. Hill, 437 U.S. 153, 154, 184 (1978).

58. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1987) [hereinafter WOLF RECOVERY PLAN] (on file with the *Harvard Environmental Law Review*). The northern Rocky Mountain subspecies of gray wolf was listed as endangered in 1973. Amendments to Lists of Endangered Fish and Wildlife, 38 Fed. Reg. 14,678 (1973). The Fish and Wildlife Service ("FWS") in conjunction with the Northern Rocky Mountain Wolf Recovery Team published the *Wolf Recovery Plan* in 1987.

59. WOLF RECOVERY PLAN, *supra* note 58, at v.

undertaken: northwest Montana, central Idaho, and Yellowstone National Park. It "emphasizes gray wolf recovery through natural processes," such as dispersal southward from Canada into the Montana and Idaho recovery areas.[60] Since natural recolonization is unlikely in Yellowstone because of its isolation, the *Wolf Recovery Plan* proposes to actively transplant wolves into the area. The transplanted wolves will be listed as an "experimental population."[61] This allows the Fish and Wildlife Service ("FWS") greater flexibility in managing the animals because experimental populations generally are treated as "threatened" rather than "endangered," and thus are exempt from the automatic application of the Act's taking prohibitions.[62]

Noting that "an important factor limiting wolf recovery in the Northern Rocky Mountains is human-induced mortality," FWS proposes to kill wolves itself, thus demonstrating "to those concerned about the impact of wolf recovery on the livestock industry that responsible Federal agencies will act quickly to alleviate depredation problems."[63] This is to be accomplished through a concentric, three-zone management scheme within each recovery area.[64] Protection for wolves decreases as they move outward from the core area, Zone I. Within Zone III any wolf "frequenting a livestock area and representing a threat to livestock" may be "controlled."[65] Since "control" is defined to include "live capturing and relocating, holding in captivity, or *killing* the offending animal(s),"[66] a wolf loitering in the vicinity of livestock in Zone III

60. *Id.* at iv, v. The *Wolf Recovery Plan*'s authors also specify criteria for reclassifying the species. Reclassification will proceed through three stages. When at least 10 breeding pairs have survived in a specific recovery area for at least three years, the wolves in that area will be listed as threatened rather than endangered. When at least 10 breeding pairs have survived in each of two recovery areas for at least three years, the wolf will be listed as threatened rather than endangered in the entire region. Finally, when at least 10 breeding pairs have survived for at least three years in all three areas, the species will be entirely delisted. *Id.* at 19.

61. *Id.* at v. An "experimental population" is defined as any individual members of a listed species introduced into areas outside their current range as well as the offspring of these individuals. 16 U.S.C. § 1539(j)(1) (1988).

62. *See* 16 U.S.C. § 1539(j)(C)(i). *See generally* H.R. REP. No. 567, 97th Cong., 2d Sess. 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833–34 (discussing experimental populations).

63. WOLF RECOVERY PLAN, *supra* note 58, at 9.

64. *Id.* at 31.

65. *Id.* at 33.

66. *Id.* at v (emphasis added). The authors of the *Wolf Recovery Plan* acknowledge that the control program has two primary purposes: protection of the western livestock industry and maintenance of large herds of big game species for hunters. *Id.* at 33.

may be deemed a problem and killed. Even within Zone I, wolves will be killed "if depredations on lawfully present domestic livestock occur" and other control methods are inappropriate.[67]

V. The Persistence of Economics

The authors of the *Wolf Recovery Plan* use an odd combination of language. Mixed in with descriptive statements on population biology and habitat ecology are prescriptive statements of moral censure.[68] The language suggests a persistence of mythology, a continuance of "wolf" as moral category in what was to be a strictly biological document.[69] Yet closer examination reveals that the morality is only a veneer. Wolves are no longer "bad" for intrinsic reasons, they are "bad" because they may pose a risk to the economic interests of beef and wool producers.

Economics rather than biology has become the driving force of wolf recovery. The *Plan*'s management strategies focus less on the biological needs of the wolf than on the pecuniary desires of the livestock industry. Placating the industry has produced a "recovery plan" in which endangered species will be killed to protect the economic interests of ranchers.[70] Maintenance of the subsidies enjoyed by beef and wool producers is the central political reality of the *Wolf Recovery Plan*.

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67. *Id.* at 33. The criteria for instituting control measures within Zone I are more restrictive than those within Zone III. Nonetheless, the Agency specifically envisions situations in which wolves will be killed in their core habitat.

68. *Compare, e.g., id.* app. 3 at 62–76 (appendix on wolf ecology and behavior) *with, e.g, id.* at v, 33–36 (repeated references to "problem" wolves).

69. Robert Culbert & Robert Blair, *Recovery Planning and Endangered Species*, Endangered Species UPDATE, Aug. 1989, at 2, 3; *see also* 16 U.S.C. § 1533(f) (statutory requirements for recovery plans).

70. "Any wolf frequenting a livestock area [loitering] and representing a threat to livestock as determined by authorized State or Federal personnel may be controlled." Wolf Recovery Plan, *supra* note 58, at 34. The program has already produced dead wolves. Following reports of wolf depredations on the Blackfeet Indian Reservation east of Glacier National Park in the spring of 1987, federal agents took control actions. By that fall, four of the seven members of the pack had been killed and the others removed from the wild. Peter Steinhart, *A Wolf in the Eye*, Audubon, Jan. 1988, at 79; George Wuerthner & Mollie Matteson, *Wolf Recovery Is Stopped Dead*, High Country News, Nov. 23, 1987, at 10. *But c.f.* Christy v. Hodel, 857 F.2d 1324, 1329 (9th Cir. 1988) (defense of property is not defense to prosecution under ESA), *cert. denied sub nom.* Christy v. Lujan, 490 U.S. 1114 (1989).

A. Biology Over Dollars: Congress's Choice

When it enacted the ESA, Congress endorsed a biological perspective as a basis for the preservation of threatened and endangered species: the Act was intended "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[71] The Act therefore required a species to be listed as endangered or threatened on the basis of biological information[72] and the accompanying congressional reports focused on "the need for biological diversity."[73] In 1982, Congress reemphasized and strengthened the biological basis of the Act by specifically precluding the Secretary from considering economic factors in the listing decision. That decision, Congress stressed, is to be based "solely upon biological criteria."[74] As the Supreme Court has stated, Congress intended to protect listed species "*whatever the cost.*"[75]

In contrast, the authors of the *Wolf Recovery Plan* accord economics the dominant role. The criteria for selecting recovery areas and for defining the boundaries of the three management zones within each recovery area stress the potential conflicts with

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71. Endangered Species Act of 1973, Pub. L. No. 93-205, § 2(b), 87 Stat. 884, 885 (codified at 16 U.S.C. § 1531(b)); *see also id.* § 7, 87 Stat. at 892 (codified at 16 U.S.C. § 1536) (requiring federal agencies to insure that actions do not "result in the destruction or modification of habitat . . . determined . . . to be critical"). In 1978 Congress amended the Act to require the Secretary to designate "critical habitat" for species at the time they are listed as endangered or threatened. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (codified at 16 U.S.C. § 1533(b)).

72. Endangered Species Act of 1973, Pub. L. No. 93-205, § 4(a)(1), (b)(1)(A) (codified at 16 U.S.C. § 1533(a)(1), (b)(1)(A)).

73. S. REP. No. 307, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

74. H.R. REP. No. 567, 97th Cong., 2d Sess. 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2819. The amendment was a result of the use of cost-benefit analyses in the listing process by James Watt's Department of the Interior—a process that the legislative history rejects in a lengthy statement that notes that the use of "any factor not related to the biological status of the species" was precluded by the amendment. *Id.* at 20, *reprinted in* 1982 U.S.C.C.A.N. at 2820.

75. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978) (emphasis added); *see also* Pacific Legal Found. v. Andrus, 657 F.2d 829, 835–36 (6th Cir. 1981) (lack of discretion in listing decision precludes need to prepare environmental impact statement); Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988) (listing decision to be based solely on biology).

other land uses rather than the species' biological requirements.[76] For example, the criteria for designating core wolf habitat (Zone I) is stated in terms of land ownership and uses: less than ten percent of the lands should be private, non-railroad lands and less than twenty percent of the lands should be grazed by livestock.[77] While economics may be considered in the designation of critical habitat,[78] under the ESA economics remains secondary to biology because areas may be excused from critical habitat only if the Secretary determines that the exclusion will not result in the extinction of the species: biology thus is a limit on economics.[79] The *Wolf Recovery Plan*, however, does not designate any critical habitat.[80] Furthermore, its authors repeated emphasis on potential social and economic impacts as the key decisional elements reverses the Act's requirement that biology limit economics.[81]

The dominance of economic considerations is also apparent in the proposed wolf management strategies. Within each recovery area, the *Wolf Recovery Plan* proposes a concentric, three-zone management scheme with decreasing protection as wolves move out of Zone I. For example, in Zone I, management decisions are to "favor the needs of the wolf when wolves or wolf habitat needs and other land-use values compete."[82] On the other hand, in the buffer zone, when "wolf populations and/or habitat use and other high-priority land uses are mutually exclusive, the other land uses may prevail in management considerations."[83] Finally, in Zone III, other land uses are controlling: habitat requirements and "coor-

76. For example, the *Wolf Recovery Plan* defines Zone I in terms of "its low potential for conflict with other land uses" and Zone III as "the area where wolf recovery will not be promoted *due to the high potential for conflict with existing land uses*." WOLF RECOVERY PLAN, *supra* note 58, at v (emphasis added); *see also id.* at 22, 31 (specifying economic criteria as a basis for management zone determinations).

77. *Id.* at 31.

78. 16 U.S.C. § 1533(b)(2).

79. *Id.*

80. The ESA requires compliance with the informal rulemaking provisions of section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), to designate critical habitat. The adoption of the *Wolf Recovery Plan* did not comply with the procedures required to promulgate a rule. *See infra* notes 85–88 and accompanying text.

81. *See* WOLF RECOVERY PLAN, *supra* note 58, at v, 22, 31.

82. *Id.* at 32.

83. *Id.* Other high-priority uses are likely to prevail over wolf requirements, because "[i]f wolf population and/or habitat use represents needs that are so great (necessary to normal needs or survival of the species or a segment of its population) that they should prevail in management considerations, then the area should be reclassified under Management Zone I." *Id.* at 32–33.

dination of multiple use activities with wolf management are not management considerations."[84]

It is difficult to square this management scheme with the ESA's emphasis on biology and habitat protection. While the Act includes a procedure for designating critical habitat,[85] the *Wolf Recovery Plan* was not formulated in compliance with that procedure.[86] This is troubling since, as Congress recognized, conservation of listed species requires the conservation of the ecosystems upon which the species depend.[87] The *Plan*'s failings are, however, more fundamnetal than simply a failure to designate critical habitat: its repeated preference for economic intrests over the biological needs of the species is directly contrary to the ESA's requirement that species be protected "whatever the cost."[88] The statutory goal is to establish and maintain a viable population of wolves in the northern Rocky Mountains—*not* to insure that wolf recovery does not affect other land uses. In fact, the ESA prohibits other land uses that may take or jeopardize wolves.

The management strategies of the *Wolf Recovery Plan* reflect FWS's apparent desire to placate the western livestock industry which depends upon public land grazing and associated subsidies.[89] A consistent undertone in the *Plan* is the presumption that cattle and sheep rather than wolves are the rightful users of the public lands. This presumption forms the basis for the use of lethal control measures: "wolves must be killed to protect *lawfully present* livestock."[90] Yet the fact that livestock is lawfully present is not the

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84. *Id.* at 33.

85. 16 U.S.C. § 1533(a)(3), (b)(6)(C). The Act defines "critical habitat" as the specific areas which contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection." *Id.* § 1532(5)(A)(i).

86. The Act requres critical habitat to be designated through the informal rulemaking provisions of section 4 of the Administrative Procedures Act, 5 U.S.C. § 553. *See* 16 U.S.C. § 1533(a)(3), (b)(6)(C).

87. 16 U.S.C. § 1531(b).

88. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978).

89. The Agency candidly acknowledges that the *Wolf Recovery Plan* seeks to placate the livestock industry. *See, e.g.*, WOLF RECOVERY PLAN, *supra* note 58, at 33 ("This plan is to fully recognize the interests of . . . the western livestock industry."). The *Wolf Recovery Plan*'s authors also express concern for the interests of big game hunters, another powerful economic and political interest: "If predation on big game herds is determined to be in significant conflict with management objectives of a State wildlife agency, wolf control that would not jeopardize recovery will be considered [in all zones]." *Id.* at vi; *see also id.* at 33.

90. *Id.* app. 8 at 117 (emphasis added).

point. The Agency's statement blurs the distinction between a sale of grass and the industry's desire for a predator-free environment.

This desire for a predator-free environment is a desire to shift some of the costs of producing beef and wool to the public by forcing the public to bear the cost of protecting the livestock.[91] Since most ranchers simply turn their livestock loose on the public lands, they avoid the costs associated with herding, fencing, or otherwise protecting the animals. As Professor Rodgers has pointed out, wolf damage "is merely another form of just loss not unlike that inflicted by a wide variety of natural hazards."[92] In other words, losses to predators, like losses to drought and disease, are among the risks the industry faces; they are costs of doing business in the western environment. A homeowner has no claim against the government when his house is destroyed by a flood that the government could have prevented by damming a river. Similarly, a rancher should have no claim if her cow is killed by wolves. Self-help arguments are also inapposite: just as the homeowner has no right to dam the river without federal authorization, so the rancher has no inherent right to kill wolves to protect her property.[93] By requiring the federal government to remove or kill "offending wolves," the *Wolf Recovery Plan*'s "control" program provides an additional subsidy to an already heavily subsidized industry.[94]

The *Wolf Recovery Plan* also imposes other, less easily quantifiable costs on the public. For example, the costs of the impaired integrity of an ecosystem lacking predators are difficult to measure. Similarly, the *Plan* completely disregards the value of wolf howls and the knowledge that the animals are present; it ignores the value of feeling "wildness." The fact that such environmental costs are difficult to quantify does not mean they are not real.

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91. Proposals, such as that by Defenders of Wildlife, to compensate ranchers for losses caused by wolves are also attempts to shift production costs away from the producers. *See* Hank Fischer, *Restoring the Wolf*, FOREST WATCH, May 1989, 21–23 (Defenders of Wildlife compensation proposal). Such proposals also reinforce the basic presumption that cows and sheep belong on the public lands while wolves do not.

92. William H. Rodgers, Jr., *Building Theories of Judicial Review in Natural Resources Law*, 53 U. COLO. L. REV. 213, 224 (1981).

93. *Cf.* Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1428 n.8 (10th Cir. 1986) (en banc) (damage to property caused by wildlife is not compensable taking despite governmental prohibition on killing wildlife), *cert. denied*, 480 U.S. 951 (1987).

94. *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT CURRENT FORMULA KEEPS GRAZING FEES LOW (GAO/RCED-91-185BR) (1991); George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 71–75 (1982).

The wolf control program is the clearest example of the dominance that economics has achieved over biology in the *Wolf Recovery Plan*. It is, therefore, hardly surprising that the Agency has had a difficult time attempting to formulate a coherent, noneconomic justification for its claimed authority to kill endangered species.

B. Dollars Over Biology: The Agency's Choice

The ESA's principal prohibition is the requirement that all "persons"[95]—including FWS—refrain from conduct that will "take" an endangered species.[96] While FWS repeatedly emphasizes that its control program is designed to kill the minimum number of wolves necessary to resolve conflicts with livestock, big game herds, or other land uses, it is impossible to reconcile *any* reliance on lethal control measures with the Act's flat prohibition on the taking of an endangered species. FWS initially acknowledged that the prohibition against taking an endangered species prevented the killing of wolves.[97] The Agency subsequently has reversed itself and attempted to justify the *Wolf Recovery Plan*'s reliance on lethal control of "problem" wolves.[98]

The Agency's first justification for its lethal control program was based on the similar zone-management system in Minnesota.[99] This justification, however, ignores a crucial distinction: wolves in

95. "The term 'person' means an individual . . . or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State." 16 U.S.C. § 1532(13).

96. *Id.* § 1538(a)(1)(B), (C). *See generally supra* notes 36–48 and accompanying text.

97. In a discussion of the wolf control program in Minnesota, the *Wolf Recovery Plan* begins by noting that in 1974 "wolves in Minnesota were afforded complete protection as an endangered species under the Act." WOLF RECOVERY PLAN, *supra* note 58, app. 4 at 88. At that time, the control program was limited to live-trapping wolves because the "Service was prohibited by the Act from killing these wolves." *Id.* at 89. In 1978, the wolf in Minnesota was reclassified from endangered to threatened and "[t]his rule . . . allowed livestock-depredating wolves to be killed." *Id.*

98. The Agency has offered two attempted justifications for lethal control measures. The first is contained in the Agency's statements on the comments that it received on the proposed recovery plan. *See id.* app. 8 at 111. (The Agency's initial conclusion that it lacked authority to kill endangered wolves is contained in the draft that was circulated for comment. *See id.* app. 4 at 84.) The Agency's second justification is contained in an interim control plan that it subsequently formulated. FISH & WILDLIFE SERV., U.S. DEP'T. OF THE INTERIOR, INTERIM WOLF CONTROL PLAN FOR NORTHERN ROCKY MOUNTAINS OF MONTANA AND WYOMING (1988) [hereinafter WOLF CONTROL PLAN] (on file with the *Harvard Environmental Law Review*).

99. WOLF RECOVERY PLAN, *supra* note 58, at 88–90; *see also* 50 C.F.R. § 17.40(d) (1990) (description of the Minnesota management system).

Minnesota are listed as "threatened," while the Northern Rocky Mountain population is listed as "endangered."[100] The different status precludes similar treatment of the two populations. The Secretary has discretion over the management of threatened species that she lacks over endangered species. The taking prohibition applies to endangered species by explicit statutory command; it applies to threatened species only if the Secretary makes it applicable by regulation.[101] Thus, while the ESA does not automatically preclude killing "threatened" wolves in Minnesota, it does prohibit such actions in the northern Rocky Mountains where the wolves are "endangered."

The Agency nonetheless contends that it is authorized to kill endangered species when it concludes that the taking is necessary to control "specific 'problem' animals" to protect "lawfully present livestock."[102] The Agency bases its assertion on its expertise and the judicial deference that courts traditionally accord such expertise, arguing that fears of a successful judicial challenge to a control program "backed by sound biological information and built on a sound administrative record are largely unfounded."[103] Beyond such generalities, however, the Agency's rationale amounts to little more than repeated assurances that it has the authority it claims. The lack of a persuasive argument is not surprising since the Agency's previous attempts to authorize the killing of listed species was rejected by the courts in *Sierra Club v. Clark*[104]—and the authority claimed in *Sierra Club* was even less expansive than that asserted in the *Wolf Recovery Plan*.

Sierra Club was a challenge by conservationists to Secretary of the Interior James Watt's attempt to establish a sport trapping season for Minnesota's threatened population of wolves. The Secretary sought to justify his proposal by relying upon the distinction

100. 50 C.F.R. § 17.11 (1990).

101. *Compare* 16 U.S.C. § 1538(a)(1)(B) (taking prohibition) *with id.* § 1533(d) (discretion to adopt regulations prohibiting takings). While the Secretary of the Interior or the Secretary of Commerce may forbid any act prohibited with respect to endangered species, she is not required to do so. *E.g.*, Christy v. Hodel, 857 F.2d 1324, 1332–33 (9th Cir. 1988) (discussing open hunting season on grizzly bears, a threatened species), *cert. denied sub nom.* Christy v. Lujan, 490 U.S. 1114 (1989).

102. WOLF RECOVERY PLAN, *supra* note 58, app. 8 at 117–18. The Agency's "argument" is presented only indirectly in distinguishing the decision in Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984), *aff'd*, 755 F.2d 608 (8th Cir. 1985). The Agency does not acknowledge the crucial distinction between endangered and threatened species. WOLF RECOVERY PLAN, *supra* note 58, app. 8 at 117–18.

103. WOLF RECOVERY PLAN, *supra* note 58, app. 8 at 117.

104. 755 F.2d. at 611.

between the statutory protection accorded endangered and threatened species. The Secretary contended that denying him the discretion to implement the trapping plan "destroyed" this distinction:

> The Secretary claims that while Congress imposed in 16 U.S.C. § 1538(a)(1) a set of mandatory prohibitions regarding *endangered* species, including the taking of such species, it sought to protect *threatened* species by providing that "the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species . . . ." Thus, argues the Secretary, Congress granted him the discretion to determine whether to impose section § 1538(a)(1) prohibitions, including the prohibition on taking, for a threatened species.[105]

While acknowledging that the Act distinguishes between endangered and threatened species, the court concluded that the Secretary's discretion as to the latter was qualified by the requirement that the taking must further the "conservation" of the species. The opinion stated that:

> The plain language of the statute, including its definitional provisions, compels us to agree with the district court "that before the taking of a threatened animal can occur, a determination must be made that population pressures within the animal's ecosystem cannot otherwise be relieved." Otherwise, such taking would not constitute an act of conservation under the Act and would fall without the scope of authority granted to the Secretary.[106]

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105. *Id.* at 612 (emphasis in original).

106. *Id.* at 613 (quoting Sierra Club v. Clark, 577 F. Supp. at 787). The section authorizing the Secretary to adopt regulations to protect threatened species requires that the regulations be "necessary and advisable to provide for the conservation" of the species. 16 U.S.C. § 1533(d). As the court correctly noted, "conservation" is defined as those "methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." *Id.* § 1532(3). This may include, "in the extraordinary case where population pressure within a given ecosystem cannot be otherwise relieved, . . . regulated taking." *Id.* The court's conclusion is supported by the legislative history which emphasizes that in

> extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, this "conservation" might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur—it is just to say that the authority exists in the unlikely event that it ever becomes needed.

H.R. CONF. REP. NO. 740, 93d Cong., 1st Sess. 23 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989. 3002.

Accordingly, the court held that the Secretary's discretion to authorize the taking of a *threatened species* was limited: the Secretary cannot authorize the taking of a threatened species in the absence of an "extraordinary" justification.[107] Therefore, it follows that the Secretary's power to authorize the taking of an *endangered species* is even more restricted, because the Secretary lacks any discretion to determine which protections are applicable to endangered species.[108] This conclusion led the court to reject the Secretary's contention that the Act created a scheme "in which 'endangered species can be taken under strictly controlled circumstances only when their numbers exceed the carrying capacity of their ecosystems' while 'threatened species can be taken pursuant to regulatory measures which address the problems contributing to the species' decline.'"[109]

Although acknowledging that the Act established different levels of protection for threatened and endangered species, the court rejected the Secretary's interpretation of the protection the Act required.[110] It held that while threatened species may be killed only when justified by biological concerns, endangered species may not be killed on even biological grounds.[111]

Thus, the court in *Sierra Club* rejected a position that accorded the Agency even less discretion than it has claimed under the *Wolf Recovery Plan*. In *Sierra Club*, the court rejected the Agency's argument that it had the authority to kill an endangered species when the population of the species exceeded its habitat's

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107. Sierra Club v. Clark, 755 F.2d at 613–14.

108. While all of the Act's taking prohibitions are applicable by their terms to endangered species, only one of the prohibitions is automatically applicable to a threatened species. The applicable prohibition is the violation of a regulation covering that species. *See* 16 U.S.C. § 1538(a)(1)(B). *Compare id.* § 1538(a)(1) (taking prohibition) *with id.* § 1533(d) (discretion to adopt regulations applicable to threatened species).

109. Sierra Club v. Clark, 755 F.2d at 614.

110. In statutory terms, the Secretary argued that the definition of "conservation" allows the taking of an endangered species and that this authority conditions the taking prohibition in 16 U.S.C. § 1538(a)(1). The court rejected this contention: "The definition of 'conservation' in section 1532 does not nullify the provision of section 1538 that prohibits the taking of an endangered species . . . . The Secretary simply ignores the language of the Act and the statutory definitions that Congress adopted to give it force." *Id.* at 614–15.

111. *Id.* The restrictive interpretation of the Agency's discretion to authorize takings of threatened species was recently reaffirmed by the District Court for the District of Columbia in a decision enjoining Montana's grizzly bear hunting season. "Under the ESA, the FWS can authorize a sport hunt of a threatened species such as the grizzly bear only in the 'extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved.'" Fund for Animals, Inc. v. Turner, 1991 WL 206232, at *3 (D.D.C. Sept. 27, 1991) (quoting 16 U.S.C. § 1532(3)).

carrying capacity.[112] In the *Wolf Recovery Plan*, the Agency presumes that it is authorized to take an endangered species when it concludes that the taking is necessary to control "specific 'problem' animals" to "protect 'lawfully present livestock.'"[113] If the inability of the habitat to support additional animals will not justify the killing of an endangered species, the desires of the livestock industry should not do so.

More recently, in its *Interim Wolf Control Plan* ("*Wolf Control Plan*"), FWS has sought to buttress its claimed authority with an argument based upon section 10 of the ESA.[114] Section 10, which contains a series of exceptions to the section 9 taking prohibition, provides in part that "[t]he Secretary may permit . . . any act otherwise prohibited by section 9 of this Act . . . to enhance the propagation or survival of the affected species."[115] Relying upon this language, the Agency argues that killing wolves responsible for livestock predation will enhance the survival of the species because:

> Removal of problem animals does more than stop the depredation. It relieves the pressures or antagonisms directed toward the total population by the landowner(s) incurring the losses or other members of the public. Consequently, the local [wolf] population is in less danger from potential nonselective illegal attempts at damage control.[116]

Killing "bad" wolves, in other words, will protect "good" wolves, because people who are less adept at making the necessary "moral" distinctions then will become less likely to kill all wolves.

In support of this argument, the Agency points to a footnote in *Sierra Club* stating that the exception gives "the Secretary discretion to permit removal of depredating animals or the culling of diseased animals from a population."[117] The Agency, however, once again ignores the distinction between "endangered" and "threatened." The Minnesota case involved the management of a

112. Sierra Club v. Clark, 755 F.2d at 614.

113. WOLF RECOVERY PLAN, *supra* note 58, app. 8 at 117–18.

114. WOLF CONTROL PLAN, *supra* note 98, at 4–5.

115. 16 U.S.C. § 1539(a)(1)(A).

116. WOLF CONTROL PLAN, *supra* note 98, at 5.

117. *Id.*, *supra* note 98, at 4–5; *see* Sierra Club v. Clark, 755 F.2d 608 at 614 n.8; *see also* Brian B. O'Neill, *The Law of Wolves*, 18 ENVTL. L. 227 (1988) (describing Minnesota program).

population of threatened wolves. Reading the footnote to apply to endangered species is inconsistent with the court's stringent interpretation of the duty imposed on the Secretary to protect endangered species: *Sierra Club* held that not even the need to relieve population pressures sufficiently justifies killing endangered species.[118]

While neither the specific legislative history of section 10's language[119] nor the history of the regulations implementing that language[120] provide much assistance, the Act's fundamental goal

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118. Sierra Club v. Clark, 755 F.2d at 614 (quoting Sierra Club v. Clark, 577 F. Supp. at 788).

119. Section 10(a), as originally enacted, provided that "[t]he Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species." Endangered Species Act of 1973, Pub. L. No. 93-205, § 10(a), 87 Stat. 884, 896 (1973). This language was drafted in the Conference Committee to replace language from the Senate bill which had authorized takings "[u]pon a finding that the excepted conduct will not adversely affect the regenerative capacity of the involved species in a significant portion of its range or habitat or otherwise affect the survival of the wild population of such species." S. 1983, 93d Cong., 1st Sess. § 11(a) (1973); *see also* H.R. CONF. REP. No. 740, 93d Cong., 1st Sess. 27–28, *reprinted in* 1973 U.S.C.C.A.N. 2989, 3001, 3006.

Section 10(a) was based upon § 3(c) of the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, 276 (repealed 1973). That section provided that:

> The Secretary may permit, under such terms and conditions as he may prescribe, the importation of any species or subspecies of fish or wildlife listed in the Federal Register under this section for zoological, educational, and scientific purposes, and for the propagation of such fish or wildlife in captivity for preservation purposes, unless such importation is prohibited by any other Federal law or regulation.

120. After initially republishing regulations adopted under § 3(c) of the Endangered Species Conservation Act of 1969, 39 Fed. Reg. 1,444 (1974), the Agency acknowledged that "[i]t has recently become apparent that there are a number of conflicts between Part 17 [of the January 1974, regulations] and the Endangered Species Act of 1973." 40 Fed. Reg. 21,977 (1975). Among the conflicts noted was that the regulations cover only the importation of endangered species while the ESA "regulates many activities in addition to importation." *Id.* Similarly, the ESA "does not authorize the importation of endangered species for zoological and educational purposes." *Id.* at 21,978. The Agency, therefore, proposed to amend the regulations to avoid

> the misleading effect of the present section, by referring specifically to the types of permits available under section 10(a) of the Act. That section authorizes permits for scientific research, or for purposes which will enhance the propogation [sic] or the survival of the species. *This is a more restrictive permit provision than under the previous act, which authorized permits for "zoological" and "educational" purposes, as well as those described above.*

Id. (emphasis added). To accomplish these goals, the Agency restructured the permit system and tightened up the issuance criteria. *See id.* at 28,712, 28,717–18 (1975) (codified at 50 C.F.R. §§ 17.21, 17.22); *id.* at 44,412 (1975).

of increasing the population of listed species so that they may be removed from the Act's protection[121] compels a distinction between nonlethal takings such as trapping and relocating, on the one hand, and lethal takings, on the other. This distinction finds support in the Act, its general legislative history, the regulations, and common sense. The ESA's definition of "conservation" draws precisely this distinction: while trapping and relocating individual animals are cited as normal management actions, killing individuals is restricted to "the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved."[122] The legislative history reinforces the point; it declares that the use of lethal management techniques is an "extreme" and "unlikely situation."[123] Finally, common sense points to the same conclusion:

The 1975 regulations envisioned an individualized process that would require a permit for each action. In 1976 the Agency proposed to change this because "many scientific or conservation programs, such as bird banding, require the repetitive handling and taking of listed species over an extended period of time." 41 Fed. Reg. 10,912 (1976). As a result, the Agency proposed "a flexible concept of permits in which one permit could authorize a series of transactions over a period of time" so that an application would not be necessary for each individual taking. *Id.* The rulemaking was finalized without change. *Id.* at 19,224 (1976) (codified as amended at 50 C.F.R. § 17.22 (1990)). Subsequent amendments have not significantly changed the provisions. *See* 47 Fed. Reg. 30,782 (1982); 50 Fed. Reg. 39,681 (1985).

The genesis of the regulations demonstrates that the Agency thought its authority under § 10(a) was limited. Not only did it explicitly state this point, but the entire thrust of the regulations—like the ESA itself—distinguishes between lethal and nonlethal takings. *See, e.g.*, 50 C.F.R. § 17.21(c)(3)(iv) (1990) (taking of individual animal that constitutes "a demonstrable . . . threat *to human safety* . . . may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed") (emphasis added); *id.* § 17.21(c)(5)(i) (state agency in state with cooperative agreement not required to have permit for taking unless it is anticipated to result in "death or permanent disabling of the specimen").

121. This goal is stated most succinctly in the Act's definition of "conserve" as "[t]he use of all methods and procedures which are necessary to bring any endangered species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3) (1988).

122. *Id.* Furthermore, a narrow interpretation of § 10(a) is structurally consistent with the ESA, which is characterized by broad prohibitions and narrow, well-defined exceptions. The FWS's new interpretation of the population enhancement exception differs markedly from this pattern. For example, the provisions allowing an exception for Alaskan natives—which were the primary focus of the debate in 1973—specify in great detail when a species may be taken, by whom it may be taken, the purposes for which it may be taken, and the use to which it may be put. *See id.* § 1539(e). Other exceptions are similarly restrictive. *See, e.g., id.* § 1539(f) (providing a narrow exception for existing sperm whale oil and scrimshaw); *id.* § 1539(h) (providing a narrow exception for importation of antique articles at least 100 years old). The specificity of these exceptions counsels against a broad construction of the "survival enhancement" language.

123. The legislative history states that lethal takings are authorized only in

> extreme situations, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other

there is a difference between lethal and nonlethal control measures when addressing species that are "in danger of extinction."[124]

Finally, even if section 10(a) does qualify the duty to conserve by expanding the situations in which killing an endangered species may be permitted, such killing remains inconsistent with the Act's basic purpose of increasing the number of individuals to the point at which the species may be delisted. As such, the justification offered for lethal control must be strictly scrutinized. While removal of sick animals from the population of an endangered species may help conserve the species by removing a potential threat, any conservation resulting from killing "offending" wolves arises from preventing a fundamentally different threat, that is, the risk to the species of illegal acts by humans. Yet the Act already seeks to prevent that human threat by establishing penalties for such illegal conduct. Nevertheless, the Agency seeks to turn the statutory structure on its head: a threat to a species is remedied not by prosecuting the persons posing the threat, but by the Agency itself killing the animals.[125] At a minimum, the Agency should explain why it does not rely upon enforcement of the ESA's stiff criminal and civil sanctions to deter illegal killings.

The crucial point is that the Agency's new interpretation of section 10(a) is inconsistent with the Secretary's fundamental duty under the ESA—the duty to conserve.[126] This duty necessarily limits the Secretary's discretion. Reliance upon lethal control as a primary management method is fundamentally inconsistent with an Act premised on the prohibition of killing a listed species absent an "extraordinary" situation.[127]

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feasible way; this 'conservation' might include the authority for carefully controlled taking of surplus members of the species. This is not to state that this extreme situation is likely to occur—it is just to say that the authority exists in the unlikely event that it ever becomes needed.

H.R. CONF. REP. No. 740, 93d Cong., 1st Sess. 23 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 3002.

124. 16 U.S.C. § 1532(6) (definition of "endangered species").

125. FWS explicitly refers to this linkage, noting that "an important factor limiting wolf recovery in the Northern Rocky Mountains is human-induced mortality," and proposes to kill the wolves to demonstrate "to those concerned about the impact of wolf recovery on the livestock industry that responsible federal agencies will act quickly to alleviate depredation problems." WOLF RECOVERY PLAN, *supra* note 58, at 9.

126. 16 U.S.C. §§ 1532(3), 1536(a)(1).

127. *Id.* § 1532(3).

VI. Conclusion: Making the World Safe for Endangered Species

The Agency's deference to the interests of welfare ranchers is only one example of its lack of serious commitment to the Endangered Species Act. FWS has never effectively enforced the provisions of section 9.[128] Indeed, the *Wolf Control Plan* proposes to have the Agency kill wolves instead of prosecuting those who do so. Moreover, the Agency has failed to provide legal listing, and thus protection, for a significant number—between 600 and 3000—of biologically threatened or endangered species.[129] As a result, at least twenty species of animals have become extinct since 1980.[130] One species actually became extinct notwithstanding the fact that its only habitat was a wildlife refuge managed by FWS.[131] Similarly, the Agency has failed to implement recovery plans[132] and routinely issues "no-jeopardy" opinions in the face of declining populations.[133]

The litany of the Agency's failures could easily be extended—and the problems are not restricted to FWS. The National Marine Fisheries Service,[134] for example, has proposed listing the Snake River Fall Chinook Salmon run as threatened rather than endangered based upon promises of future actions by governmental

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128. *See, e.g.*, Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. Colo. L. Rev. 109 (1991).

129. Office of Inspector General, U.S. Dep't. of the Interior Report No. 90-98, Audit Report on the Endangered Species Program, U.S. Fish and Wildlife Service 5 (1990).

130. *Id.* at 23.

131. *See* Final Rule to Delist the Dusky Seaside Sparrow and Remove Its Critical Habitat Designation, 55 Fed. Reg. 51,112 (1990).

132. *E.g.*, Harry R. Bader, *Wolf Conservation: The Importance of Following Endangered Species Recovery Plans*, 13 Harv. Envtl. L. Rev. 517 (1989).

133. The grizzly bear is the most obvious example. *See, e.g.*, Diana F. Tomback, *Gold and Grizzlies: A Bad Combination*, High Country News, Dec. 3, 1990, at 11; *see also* Coggins & Evans, *supra* note 12, at 871–74; David Gaillard, *Grizzly Recovery Plan: Blueprint for Decline*, Greater Yellowstone Report, Winter 1991, at 9; Keith J. Hammer, *Grizzlies at Risk*, Forest Watch, Jan. 1991, at 12; *cf.* Fund for Animals, Inc. v. Turner, 1991 WL 206232, at *4 (D.D.C. Sept. 27, 1991) (FWS lacks sufficient data to determine whether grizzly bear population is declining, stationary, or increasing).

134. The National Marine Fisheries Service has responsibility under the ESA for commercially exploited species of migratory fish. *See* 16 U.S.C. § 1532(15).

agencies and private economic interests—despite the fact that less than 100 wild fish returned in 1990.[135]

These accumulating failures have become particularly apparent during the Reagan-Bush, Watt-to-Lujan Department of the Interior. None of the Secretaries have been strong defenders of the Act. Indeed, many have questioned the need to protect every endangered species.[136] Thus, the *Wolf Recovery Plan*'s conclusion that the Agency has the discretion to kill endangered species is another example of an agency that has succumbed to political expediency. As one court recently noted, there has been

> a deliberate and systematic refusal by the Forest Service and the FWS to comply with laws protecting wildlife. This is not the doing of scientists, foresters, rangers, and others at the working levels of these agencies; it reflects decisions made by higher authorities in the executive branch of government.[137]

VII. EPILOGUE: RETURN OF THE WOLF

Since 1981 the gray wolf has been expanding into unoccupied habitat in the northern Rockies. In that year a male wolf crossed the border from Canada into Montana's North Fork drainage, the western boundary of Glacier National Park. He subsequently was joined by a female, and the pair had a litter of pups just north of the border in the spring of 1982. A second pack established a transboundary territory in Waterton-Glacier National Parks in 1984. The number of wolves increased and the pack split into

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135. The Agency estimates that only 78 wild fall Chinook returned to the Snake River in 1990. *See* National Marine Fisheries Service, Proposed Threatened Status for Snake River Fall Chinook Salmon, 56 Fed. Reg. 29,547, 29,549–50 (1991). Calculations of run sizes before the arrival of Europeans vary between 928,000 and 2,391,000 fish. *See* NORTHWEST POWER PLANNING COUNCIL, COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN (rev. draft Dec. 2, 1985). The Service decided not to list the run as endangered "after taking into account those efforts being made to protect the species." 56 Fed. Reg. at 29,550.

136. *See, e.g.*, Warren E. Leary, *Interior Secretary Questions Law on Endangered Species*, N.Y. TIMES, May 12, 1990, § 1, at 8 (Secretary Lujan quoted as saying, "Do we have to save every subspecies? The red squirrel is the best example. Nobody's told me the difference between a red squirrel, a black one or a brown one."); *see also Interior Official Chides Environmental "Nuts,"* N.Y. TIMES, Mar. 23, 1991, § 1, at 6 (statement of T.S. Ary, head of Bureau of Mines). *See generally* George C. Coggins & Doris K. Nagel, *"Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).

137. Seattle Audubon Soc'y. v. Evans, 1991 WL 155506, at *9 (W.D. Wash. May 23, 1991).

three, each producing a litter in the spring of 1987. One pack established a territory on the eastern slopes of the Rocky Mountains on the Blackfoot Indian Reservation adjacent to Glacier Park. In May 1987 two wolves killed a cow and Animal Damage Control personnel swung into action at the request of its owner. By that fall, federal trappers had killed the dominant male and female as well as two pups.[138] Private killings have also occurred.[139]

Despite the illegal killing, three packs currently spend at least part of the year in Montana: the Camas Pack in Glacier Park, the Wigwam Pack located in southeastern British Columbia and the Kootenai National Forest in northwest Montana, and the Ninemile Pack in the Ninemile Valley northwest of Missoula.[140] Wolf activity has also increased in Idaho: in April two wolves killed an elk in northern Idaho, and an injured female was captured in central Idaho in August.[141]

The gray wolf has not waited for the politicians—or the wildlife biologists.

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138. By that fall four of the seven members of the pack had been killed by Federal Animal Damage Control agents. Steinhart, *supra* note 70, at 82; George Wuerthner, *Wolves Return to Montana*, HIGH COUNTRY NEWS, Feb. 17, 1986, at 10; Wuerthner & Matteson, *supra* note 70, at 22; *see also* Jon R. Luoma, *New Approaches Bring Predators Back to the Wild*, N.Y. TIMES, Mar. 14, 1989, at C1.

139. The dominant female of the Ninemile Pack was killed in late May 1990; her mate was subsequently struck and killed by an automobile. Bill Loftus, *Wolf Recovery: Killing of Female Wolf in Montana Draws Outcry*, LEWISTON (IDAHO) MORNING TRIBUNE, July 19, 1990, at E1; Lilly Tuholske, *Why the Saving of Six Orphan Wolf Pups Matters*, HIGH COUNTRY NEWS, Dec. 3, 1990, at 6.

140. *See* Lindler, *supra* note 29; Tuholske, *supra* note 139.

141. Bill Miller, *The Call of the Wild Comes Closer*, THE IDAHO STATESMAN (BOISE), Aug. 3, 1991, at 1A. The female subsequently died from injuries. *Wolf Tracks at Site of Elk Kill in North Idaho Elate Biologists*, THE IDAHO STATESMAN (BOISE), Apr. 2, 1991, at 1C.