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The Gray Wolf Delisting Rider and State Management Under the Endangered Species Act

Somerset Perry

In April 2011, Congress passed a rider ordering the Fish and Wildlife Service to reissue a rule removing the gray wolf in Montana and Idaho, overturning an earlier court decision invalidating the rule. The rider was part of a wider effort by conservative lawmakers to reduce the protections that the Endangered Species Act affords to species whose continued survival is in doubt. While the biological justification for the delisting is debatable, the rider revealed a weakness of the Endangered Species Act: limited state participation in endangered species management reduces its political popularity, leaving it open to challenges and possibly harming conservation outcomes. While certain programs for state involvement have been implemented by the Fish and Wildlife Service and the National Marine Fisheries Service, section 6 of the Endangered Species Act provides for more robust state authority in endangered species management. After discussing the history of the gray wolf in the Northern Rocky Mountains, this Note asserts that fuller utilization of section 6 to increase state involvement in endangered species management would increase political favorability of the Endangered Species Act and thereby improve conservation outcomes. The Note then considers how a fuller use of section 6 could have affected the gray wolf in the Northern Rockies.

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Congress passed the Endangered Species Act (ESA) in 1973 with near unanimous approval: the House passed the bill on a vote of 390 to 12 while the Senate voted 92 in favor with no opposition, a degree of bipartisan support unheard of in today’s Washington.1 Soon thereafter, the Supreme Court referred to the law as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”2 In passing the ESA, Congress enshrined biodiversity as a legally protected value in the United States.

Since then, however, political support for the ESA has waned. Since the Tellico Dam controversy in 1975, which pitted a small local fish against a federally funded dam project, some have come to view the ESA as unjustifiably inhibiting economic growth and proscribing private property rights.3 More

recently, in 2011 members of Congress proposed bills and amendments that would reduce ESA protections in various ways, including prohibiting the listing of the bluefin tuna and eliminating funding for any listing actions. A total of twenty-three bills reducing ESA protections have been proposed in the most recent Congress, although only one passed: the gray wolf delisting rider, included as part of the Department of Defense and Full-Year Continuing Appropriations Act of 2011, successfully reduced ESA protections. It ordered the United States Fish and Wildlife Service (FWS) to reissue its 2009 Final Rule removing ESA protections from the gray wolf in Montana and Idaho. The rider represented a setback for the Act—it was the first instance of legislative removal of ESA protections.

A deficiency in current ESA implementation catalyzed the rider: states are unable to significantly participate in major decision making necessary under the Act. This is true in the context of the gray wolf and in the context of endangered species more generally. Politicians in Idaho, Montana, and Wyoming repeatedly called for gray wolf delisting to allow for state management of the wolves, while members of Congress from other states have objected to possible listings of other species, alleging that the FWS is ignoring local conservation efforts.

This Note argues that increased use of section 6 of the ESA could ameliorate the problems created by the current lack of state involvement in ESA implementation. Such a use would in fact align more closely with the intent of the Act’s original drafters. Although policies exist to allow state
involvement and a degree of state control, they have proven insufficient. Delegating greater ESA authority to the states under section 6 would reduce political opposition against the Act by changing its image as a federal intrusion on traditional state authority and allowing state agencies with knowledge of local conditions to make conservation decisions that are less burdensome to citizens. Improving political outcomes would improve conservation outcomes by averting legislative interference with the Act’s implementation.

Any devolution would require a federal floor requiring a minimum amount of protection for endangered species. The ESA has not eliminated the justifications for federal control of conservation policy, such as the difficulties of managing interstate species and the possibility of a race-to-the-bottom cycle of diminished regulation. However, the implementation of the ESA could be modeled after that of the Clean Air Act with the federal government setting the required outcome and the states deciding how to achieve it. While the different challenges addressed by the ESA and pollution laws would make implementation of this scheme more difficult, it would nonetheless be possible.

The passage of the ESA and the return of the gray wolf to the Northern Rockies were political victories, and they must be defended as such. Increasing state involvement in conservation decisions is one way to defend the ESA politically. By enabling greater state involvement in ESA implementation, section 6 would improve the political standing of the Act and thereby improve conservation outcomes.

I. A HISTORY OF THE GRAY WOLF IN THE NORTHERN ROCKIES

A. Endangered Species Act Provisions Relevant to the Gray Wolf in the Northern Rockies

The gray wolf’s path towards recovery began in 1973 when Congress resoundingly passed the ESA. The Act mandates protecting endangered species from extinction but also allows for flexibility in the achievement of that goal. This Part gives an overview of the ESA, focusing on sections relevant to the gray wolf in the Northern Rockies.

The initial step towards a species’ ESA protection is the identification of endangered and threatened species under section 4 of the Act. Based on the “best scientific and commercial data available,” the Secretary is required to determine which species are endangered or threatened. Species is defined as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature,” which allows for the differential classification of subspecies with

11. See LEGISLATIVE HISTORY, supra note 1.
different ranges. Endangered species are defined as “any species which is in danger of extinction throughout all or a significant portion of its range” while threatened species are defined as “any species which is likely to become endangered within the foreseeable future.” Section 4 requires the development of conservation plans, with conservation defined circuitously as “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.” Finally, section 4(d) permits the Secretary to promulgate regulations for threatened species but limits the application of these protections in states that have entered into cooperative agreements with the FWS.

Section 9, the Act’s most well-known section, contains the take provisions that directly protect endangered species, making it the ESA’s most impactful section. Section 9(a)(B) makes it unlawful to “take” an endangered species. For the purposes of the Act, take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” The take prohibitions make the Act enforceable against people whose actions threaten the survival of endangered species. Take has been further interpreted to include habitat destruction or modification, which limits development in endangered species’ ranges and creates the greatest impact on citizens’ everyday lives.

Section 10, titled “Exceptions,” provides the Secretary with flexibility in enforcing section 9’s strict take prohibitions. It allows the Secretary to issue permits allowing take of endangered species if certain conditions are met. Section 10(a)(1)(A) gives the Secretary authority to allow takes if it enhances the “propagation or survival of the affected species,” while section 10(a)(1)(B) gives the Secretary the authority to permit takes if they are “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”

Another part of section 10 allows for the release of experimental populations of “an endangered species . . . outside [its] current range” if the Secretary determines that “such release will further the conservation” of the

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14. Id. § 1532(16).
15. Id. §§ 1532(6), 1532(20).
16. Id. § 1533(f).
17. Id. § 1532(3).
18. Section 4(d) regulations apply only to threatened species, not endangered species. Id. § 1533(d). See infra Part II.
20. Id. § 1538.
21. Id. § 1538(9)(a)(1)(B).
22. Id. § 1532(19).
23. “Harm in the definition of take in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3(c)(3) (2011).
25. Id. §§ 1539(a)(1)(A), (B).
species and that the experimental population is “wholly separate geographically from nonexperimental population of the same species.” When authorizing the release of an experimental population, the FWS must determine whether the experimental population would be “essential to the continued existence” of the species. Experimental populations are treated as threatened under the Act, regardless of the listing status of the species’ nonexperimental populations. If they are deemed nonessential, the ESA provisions requiring federal agency consultation and the designation of critical habitat do not apply.

Finally, section 6—the section central to this Note—provides a framework for federal and state cooperation in managing endangered species. Section 6(c) mandates that the Secretary enter cooperative agreements with states that have submitted endangered species management plans that meet specific requirements. States that have submitted adequate plans are shielded from the take provisions of section 9.

B. From Abundance to Extirpation

The history of the gray wolf in the Northern Rocky Mountains and the wolf’s relationship with federal and state governments since the westward expansion of the United States can be described as circular. Initial management by states pursuant to their traditional authority over wildlife resulted in extirpation in the area by the 1930s, followed fifty years later by reintroduction and management by federal authorities. Now, the gray wolf is being returned, once again, to state management.

Before European colonization, the gray wolf’s range extended across most of the contiguous United States. As the western United States, including the Northern Rockies, was settled by Europeans, wolves were the target of settlers and government-sponsored extermination campaigns. During the first half of the nineteenth century, over 35,000 wolves were estimated to inhabit the Yellowstone region, a staggering number considering the original gray wolf recovery plan defined recovery as ten breeding pairs (approximately 300 wolves) in the Yellowstone region as well as two other areas. In the second

26. Id. § 1539(j)(2)(A).
27. Id. § 1539(j)(2)(B).
28. Id. § 1539(j)(2)(C).
29. Id. §§ 1539(j)(2)(C)(i)-(ii).
30. Id. § 1535.
31. Id. § 1535(c) (2006); see infra Part II.E.
32. 16 U.S.C. § 1535(g)(2).
35. Id. at 12.
half of the nineteenth century, an increase in the value of wolf pelts led to the advent of professional hunting. Wolfers poisoned buffalo carcasses and then made easy work of the wolves that died after ingesting the poisoned meat.\textsuperscript{37}

The elimination of bison by hunters and the introduction of cattle to the Northern Rockies in the 1870s and 1880s laid the foundation for the conflict between wolves and humans that continues today.\textsuperscript{38} With bison—one of their main sources of prey—depleted, wolves came to rely on game species and livestock for food.\textsuperscript{39} Hunters disliked wolves because they competed for elk and moose, while ranchers resented wolves because they preyed on livestock.\textsuperscript{40}

At the time, ranchers were the main landowners. With land came political power, which ranchers used to target wolves. In Montana, for example, the state legislature instituted a bounty for wolf pelts, persuaded in part by ranchers’ associations.\textsuperscript{41} After a brief period of protecting wolves, Congress followed suit in 1914, allocating funds to the National Biological Survey to “[destroy] wolves . . . other animals injurious to agriculture and animal husbandry.”\textsuperscript{42} At Yellowstone National Park, the National Park Service did their part as well by killing wolves to protect prized game species.\textsuperscript{43} This programmatic persecution as well as accompanying habitat destruction\textsuperscript{44} resulted in the extirpation of wolves from the Northern Rocky Mountain area by the 1930s.\textsuperscript{45}

\section*{C. Reestablishment and Reintroduction}

In 1986, a wolf den was discovered in Glacier National Park in Montana, just south of the Canadian border.\textsuperscript{46} While wolves had been observed in the Northern Rockies in previous years, the den’s discovery was the first documented observation of breeding wolves in the western United States in over fifty years.\textsuperscript{47}

Prior to this discovery, the FWS was already considering the possibility of reintroducing gray wolves to the Northern Rockies and had composed a recovery plan to do so.\textsuperscript{48} The Northern Rocky Mountain Wolf Recovery Team

\begin{itemize}
\item \textsuperscript{37} Fischer, supra note 34, at 13.
\item \textsuperscript{38} Thomas McNamee, The Return of the Wolf to Yellowstone 30 (1997).
\item \textsuperscript{39} Fischer, supra note 34, at 16.
\item \textsuperscript{40} Id. at 18–20.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id. at 21.
\item \textsuperscript{43} Id. at 22.
\item \textsuperscript{44} Reclassification of the Gray Wolf in the United States and Mexico, with Determination of Critical Habitat in Michigan and Minnesota, 43 Fed. Reg. 9607 (Mar. 9, 1978) (to be codified at 50 C.F.R. pt. 17).
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Fischer, supra note 34, at 48.
\item \textsuperscript{48} Id. at 47; 16 U.S.C. § 1533(f) (2006).
\end{itemize}
was assembled in 1975 to fulfill the recovery plan requirement of the ESA. The 1983 version of the recovery plan stated that wolf recovery could not take place without reintroduction. Despite an antiwolf FWS chief, the recovery plan was finally approved in 1987 after the FWS chief recognized that wolves dispersing from Canada into the United States could lead to greater restrictions than a reintroduction. The plan posited a recovery goal of ten breeding pairs of wolves inhabiting each of three proposed recovery areas—northwestern Montana, central Idaho and the Greater Yellowstone Area—for three consecutive years. The FWS determined this goal in consultation with U.S. and Canadian wolf experts assisting the recovery team. Despite FWS approval of the recovery plan, the reintroduction nonetheless faced opposition from certain local interests and Congressional representatives. For example, livestock owners feared that reintroduction would decimate their stocks. The environmental impact statement (EIS) produced in conjunction with the plan attempted to address these concerns. In producing the EIS, the FWS sought input from the states and local citizens. The FWS held over fifty “open houses” to discuss the reintroduction plan, most of them in Montana, Idaho, and Wyoming, and distributed information about the EIS process and the potential reintroduction through mailings and newspaper ads. The FWS demonstrated that it was cognizant of the state’s desire for authority during the process leading up to reintroduction. The Idaho Department of Fish and Game, the Wyoming Game and Fish Department, and the Montana Department of Fish, Wildlife, and Parks, all participated in the preparation of the EIS on the wolf reintroduction. In the EIS process, the FWS indeed considered the alternative of immediate delisting and total state management of wolves, but rejected it “because of the conflicting intent and uncertain direction of state

49. Fischer, supra note 34, at 47. The Wolf Recovery Team included members from the Montana Department of Fish, Wildlife and Parks and the Idaho Department of Fish and Game. FWS Wolf Recovery Plan, supra note 36. Recovery plans are mandated by Section 4 of the ESA: “The Secretary shall develop and implement [recovery plans] for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f) (2006).

50. McNamee, supra note 38, at 32.

51. See FWS Wolf Recovery Plan, supra note 36; Fischer, supra note 34, at 95–96.

52. Id. at 12.

53. Id. at 19.

54. McNamee, supra note 38, at 34–35. Significantly, McNamee’s book, as well as Fischer’s, focuses mainly on federal politicians and not state or local politicians. This is understandable because federal politicians have the most influence on FWS actions, but it is also indicative of the relative lack of influence of state and local officials.

55. Id. at 19.


58. Id. at viii.

59. Id. at vii; see id. at ch. 5, pp. 11–12, 19–27.
Ultimately, the EIS concluded that the preferred action was the reintroduction of wolves from Canada into central Idaho and Yellowstone National Park where they would receive full endangered protection under federal law.\textsuperscript{61}

The FWS’s engagement with local governments and citizens during the EIS process proved successful. No state government opposed the reintroduction, and the majority of public comments favored the reintroduction.\textsuperscript{62} Congressional representatives opposed to wolf reintroduction begrudgingly accepted the “nonessential experimental” designation\textsuperscript{63} as preferable to the reintroduction of fully protected wolves, especially considering that, without reintroduction, dispersing wolves from Canada would be fully protected. Newspaper editorials described it as a reasonable compromise.\textsuperscript{64} Livestock groups began to moderate their resistance.\textsuperscript{65} Secretary of the Interior Bruce Babbit approved the EIS and its recommendations in June 1994, thus setting the stage for reintroduction.\textsuperscript{66}

The 1982 revisions to the ESA, which added the experimental population language to section 10, aided the FWS’s decision to restore wolf populations.\textsuperscript{67} The amendments were expected to allow the release of predators outside of their current ranges, as they would later be used with the gray wolf.\textsuperscript{68} The FWS used the section 10(j) provisions to allow greater flexibility in the management of the reintroduced wolves.\textsuperscript{69} They determined that a reintroduced gray wolf population would be a “nonessential” population, reducing the administrative burden on other federal agencies because the consultation provisions would not apply.\textsuperscript{70} They also promulgated regulations allowing for wolves that attacked livestock to be “noninjuriously harassed” on private land and, if the problem persisted, ultimately killed.\textsuperscript{71}

\begin{itemize}
  \item \textsuperscript{60} Id. at xi.
  \item \textsuperscript{61} Id. at xiii.
  \item \textsuperscript{62} The FWS endeavored to solicit maximum public input on the EIS. The FWS received 160,000 comments, believed to be the greatest number of public comments for any similar document at that time in United States history. FISCHER, supra note 34, at 152–53.
  \item \textsuperscript{63} See id.; 16 U.S.C. § 1539 (2006).
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Id.
  \item \textsuperscript{68} KRISTINA ALEXANDER & M. LYNNE CORN, CONG. RESEARCH SERV., RL 34238, GRAY WOLVES UNDER THE ENDANGERED SPECIES ACT (ESA): DISTINCT POPULATION SEGMENTS AND EXPERIMENTAL POPULATIONS 4 (2011).
  \item \textsuperscript{71} Id. at 60,270.
\end{itemize}
Although wolf advocates seemed poised for success, dissension among their ranks and the remnants of livestock owners’ opposition led to another challenge to reintroduction, this time in the courts. The Wyoming Farm Bureau and environmental groups, such as the Sierra Club Legal Foundation, sued to block the reintroduction of wolves.\textsuperscript{72} Although their motives were different, they both argued that the reintroduction plan violated section 10(j) by reintroducing an experimental population within the existing range of the gray wolf, relying on occasional wolf sightings in Yellowstone and Idaho.\textsuperscript{73} Because they were seeking an injunction against the release of the wolves, the plaintiffs were required to show that their members would suffer irreparable harm if the wolves were released.\textsuperscript{74} In January 1995, the District Court of Wyoming found that neither the environmental groups nor the livestock groups met that burden and denied the motion.\textsuperscript{75}

Following the District Court’s ruling, the FWS implemented its wolf reintroduction plan. Wolves were captured in Canada before being flown and trucked to the designated release points in Yellowstone and central Idaho.\textsuperscript{76} However, an unforeseen legal roadblock remained between the wolves and the open space of the Northern Rockies. After waiting until the last minute—when the wolves were en route to the release points—the Wyoming Farm Bureau Federation filed an emergency appeal to the Tenth Circuit Court of Appeals, forcing the FWS to keep the wolves in their traveling cages until the court considered the appeal.\textsuperscript{77} This final attempt to derail the wolf reintroduction failed. The Tenth Circuit denied the motion, and the FWS released the imported wolves from their cages into acclimation pens in Yellowstone and directly into the wilderness in central Idaho.\textsuperscript{78} In the following weeks, the FWS released more wolves in both states.\textsuperscript{79} After sixty years, the gray wolf once again roamed the slopes of the Northern Rockies.

\textbf{D. Recovery?}

In 2000, the FWS determined that the gray wolf had met the recovery goals necessary for changing the wolf’s classification to threatened: 1999 was the third year in a row that over twenty reproducing wolf packs inhabited the Northern Rockies.\textsuperscript{80} Despite concerns about human threats to the gray wolf population, the FWS issued a Final Rule in 2003, which established a Northern

\begin{footnotesize}
\begin{enumerate}
\item FISCHER, supra note 34, at 155–56.
\item Wyo. Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224, 1233 (10th Cir. 2000).
\item FISCHER, supra note 34, at 157.
\item Id. at 158–59.
\item Id. at 161.
\item Id. at 162.
\item Id. at 163.
\item Id. at 166.
\end{enumerate}
\end{footnotesize}
Rocky Mountain (NRM) distinct population segment (DPS), and downlisted the newly formed DPS from endangered to threatened.

Environmental plaintiffs, led by Defenders of Wildlife, filed suit to enjoin and vacate the Final Rule, alleging that it violated the ESA and FWS policy. Specifically, the plaintiffs asserted that the FWS had improperly assessed the factors for downlisting and that the designated DPSs violated the ESA. The district court in Oregon agreed with the plaintiffs and issued a ruling vacating the Final Rule and granting the plaintiffs’ request for an injunction, citing the possibility of irreparable harm to endangered wolves. Following their defeat in court, the FWS withdrew the 2003 Final Rule.

In 2005, the FWS published a new 10(j) Rule, replacing the original 1994 10(j) Rule promulgated for the wolf reintroduction. In terms of treatment of wolves, the rule maintained the 1994 Rule’s section 9 take exceptions allowing for noninjurious harassment and culling. However, the Rule also enabled states with approved wolf management plans to petition the FWS for “lead management authority for experimental wolves consistent with this rule.” Upon publication, the new Rule applied in Montana and Idaho, which are states that had prepared management plans that were approved by the FWS, but not in Wyoming, whose management plan the FWS had not approved. The FWS determined that state management plans would “be the most appropriate means of maintaining a recovered wolf population and of providing adequate

84. Id. at 1159.
85. Id. at 1174.
88. Id. at 1299–1302.
89. Id. at 1286.
90. Id.
regulatory mechanisms postdelisting."\textsuperscript{91} Thus, state management plans under section 4(d) would set the foundation for eventual delisting.\textsuperscript{92} Under this rule, Montana and Idaho assumed lead authority for wolf management under the 4(d) Rule.

In 2008, the FWS published a rule for total delisting of the NRM DPS, relying on Wyoming’s revision of their own wolf management plan and a change in Wyoming state law that asserted wolves would be adequately protected in the state.\textsuperscript{93} Environmental groups again sued, alleging that the FWS had acted (1) arbitrarily by delisting the gray wolf without evidence of genetic exchange\textsuperscript{94} between the subpopulations and (2) arbitrarily and capriciously by approving the revised Wyoming wolf management plan despite the plan’s “malleable trophy game area” and its failure to commit to managing fifteen breeding pairs.\textsuperscript{95} In \textit{Defenders of Wildlife v. Hall},\textsuperscript{96} the district court judge agreed with the environmental groups and granted a preliminary injunction reinstating ESA protections for the NRM gray wolf.\textsuperscript{97}

In 2009, the FWS attempted to transfer full management authority over wolves to Montana and Idaho, publishing a Final Rule delisting the gray wolf in those states.\textsuperscript{98} The FWS reexamined Wyoming’s wolf management statute and plan in light of the \textit{Hall} decision and determined that Wyoming’s statute and plan did not provide adequate protection to justify delisting under the ESA.\textsuperscript{99} However, in their 2003 Final Rule, the FWS had stated that “[they could not] use a boundary between States to subdivide a single biological population in an effort to artificially create a discrete population.”\textsuperscript{100} In light of this inconsistency, Defenders of Wildlife and other organizations filed suit in the District of Montana, alleging among other claims that the FWS had violated the ESA by partially delisting an endangered population along state boundaries.\textsuperscript{101} In the \textit{Defenders of Wildlife v. Salazar} ruling of July 2010,

\begin{itemize}
\end{itemize}
Judge Molloy agreed with the plaintiffs and vacated the rule, while acknowledging the political difficulty of the problem. 102 He wrote, “[T]he rule delisting the gray wolf must be set aside because, though it may be a pragmatic solution to a difficult biological issue, it is not a legal one.” 103

E. The Passage of the Gray Wolf Delisting Rider

Soon after the Salazar ruling, Congressional lawmakers began considering legislative action to remove the gray wolf from ESA protection. 104 By December 2010, Congressional representatives had introduced four separate bills that would completely remove ESA protections for the gray wolf throughout the United States. 105 For example, Senator Max Baucus of Montana introduced a bill that would remove protections in Idaho and Montana and, after passage of the bill, any state with an approved wolf management plan. 106

While none of those bills passed during the 111th Congress, legislative pressure continued into 2011. Six different bills introduced during the first half of the 112th Congress included provisions to delist the gray wolf. 107 Attempting to avert legislative interposition, the plaintiffs in Salazar agreed to a settlement that would essentially reinstate the 2009 Final Rule. The court held, however, that it could not approve a settlement that violated the ESA. 108

Although no stand-alone bill passed, a provision added to the Defense Appropriations bill by Senator Jon Tester of Montana was approved by Congress and signed by President Obama in April 2011. 109 The “wolf rider,” as it has been referred to, directed the FWS to reissue the 2009 Final Rule delisting the wolf in Montana and Idaho and shielded the reissued rule from judicial review. 110 Consequently, ESA protections were removed from the gray wolf in Montana and Idaho. 111 State and federal politicians from Montana and

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102. Id. at 1210.
103. Id. at 1211.
110. Id.
111. Endangered and Threatened Wildlife and Plants; Reissuance of Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the
Idaho praised the wolf rider’s passage as an appropriate transfer of wildlife management authority to state control.112

Environmental groups claimed that the rider would set a precedent for legislatively ordered delistings lacking scientific justification, undermining the ESA.113 In Alliance for the Wild Rockies v. Salazar, environmental groups challenged the rider’s constitutionality under the separation of powers doctrine.114 Judge Molloy upheld the rider’s constitutionality, but criticized it sharply: “Inserting environmental policy changes into appropriations bills may be politically expedient, but it transgresses the process envisioned by the Constitution by avoiding the very debate on issues of political importance said to provide legitimacy.”115 The environmental plaintiffs’ appeal to the Ninth Circuit awaits review.116

Four months after the rider passed, the FWS tentatively approved Wyoming’s revised wolf management plan117 and, in October, the FWS released a proposed rule that would delist the wolf in Wyoming, allowing management by Wyoming under the approved plan.118 Under the plan, wolves would be managed as trophy game in an area surrounding Yellowstone National Park, and would be classified as “predatory animals” throughout the remaining 90 percent of the state.119 The plan includes changes to Wyoming statutes that the Wyoming Legislature must approve prior to the publication of


115. Id. at 1125.


119. WYO. GAME AND FISH COMMISSION, WYOMING GRAY WOLF MANAGEMENT PLAN 3 (2011).
a final rule for delisting.\textsuperscript{120} Assuming those changes are made and a final rule is published, all gray wolves in the Northern Rockies will soon be under state management.

II. STATE INVOLVEMENT UNDER THE ENDANGERED SPECIES ACT

Although the ESA was passed with minimal opposition, legislators were nonetheless concerned with the proper division of authority between federal and state governments.\textsuperscript{121} The ESA significantly expanded federal authority of wildlife management, an area traditionally under state control.\textsuperscript{122} While some environmentalists believed that total federal control was necessary to achieve conservation goals, the ESA ultimately included provisions permitting state cooperation and involvement in the management of endangered species.\textsuperscript{123}

A variety of mechanisms have been used to allow state involvement in ESA implementation. The FWS also has developed policies not explicit in the Act that allow state involvement in the ESA’s administration, including Candidate Conservation Agreements (CCA) or Candidate Conservation Agreements with Assurances (CCAA),\textsuperscript{124} Safe Harbor Agreements (SHA),\textsuperscript{125} and Habitat Conservation Plans (HCP).\textsuperscript{126} Special 4(d) rules are also used to tailor protections for threatened species with state input.\textsuperscript{127} Finally, section 6(d) is used to allocate funds to state conservation plans.\textsuperscript{128}

A. Candidate Conservation Agreements (with Assurances)

CCAs and CCAAs address candidate species, which are defined as “species for which FWS has sufficient information . . . to support issuance of proposed listing rules”\textsuperscript{129} but for whom listing is “precluded by other higher

\textsuperscript{120} Id.
\textsuperscript{122} Shannon Petersen, Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act, 29 ENVTL. L. 463, 474 (1999). In Abby Dodge v. United States, the Supreme Court explicated the state ownership doctrine, holding that “states retained public trust ownership of wildlife.” YAFFEE, supra note 121, at 33 (quoting Abby Dodge v. United States, 223 U.S. 166, 174 (1912)).
\textsuperscript{123} YAFFEE, supra note 121, at 54.
\textsuperscript{124} Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706, 32,707 (June 17, 1999) (to be codified at 50 C.F.R. pts. 13, 17).
\textsuperscript{125} Id. at 32,707.
\textsuperscript{126} FISH AND WILDLIFE SERV., U.S. DEP’T OF THE INTERIOR, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK (1996), [hereinafter HCP HANDBOOK].
\textsuperscript{127} 16 U.S.C. § 1533(d) (2006); Fischman & Hall-Rivera, supra note 121, at 122.
\textsuperscript{128} 16 U.S.C. § 1535(d).
\textsuperscript{129} Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706, 32,734.
priority listing activities."130 Candidate species receive no statutory protection under the ESA, but the possibility of future listing creates an incentive for potentially affected stakeholders to act preemptively to avoid listing.131 The goal of CCAs and CCAAs is to “remove enough threats to the covered species to preclude the need to list them as threatened or endangered under the Act.”132 Section 10(a)(1)(A) of the Act provides the statutory basis for this policy by allowing the Secretary to permit “any act otherwise prohibited by [section 9’s take restrictions] . . . to enhance the propagation or survival” of an endangered species.133 The FWS enters a CCA or CCAA to gain specific conservation measures from another party or parties.134 If a proposed CCA or CCAA is approved, the applicant receives an “enhancement of survival” permit.135

CCAs and CCAAs differ in the guarantees offered to the non-Service participants. Because CCAs provide no guarantees against future restrictions on land use, CCAs provide no distinct incentive for participants to join.136 As a result, the majority of CCAs are between the FWS and other Federal agencies. Under the “no jeopardy” provisions of section 7 of the ESA, Federal agencies are required to proscribe their activities to those that do not jeopardize endangered species.137 CCAs provide the federal agencies with certainty that their actions will satisfy the “no jeopardy” requirement in the future.

In contrast, CCAAs offer incentives to nonfederal participants: if a landowner agrees to undertake conservation measures in a CCAA, the Service guarantees that there will be no further restriction on the landowner’s land use activities if the candidate species in question is later listed.138 For the FWS to enter a CCAA, the conservation measures must be substantial enough so that, if those measures “were implemented on other necessary properties,” the need to list the species would be precluded.139 Thus, in return for a guarantee against future restrictions, the Service secures benefits for candidate species, most often in the form of improved or expanded habitat.

States are involved in CCAs and CCAAs. For example, Texas and Louisiana entered into a CCA agreement with the FWS to protect the Louisiana

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131. Id.


135. Id. at 32,708.

136. Id. at 32,727; 16 U.S.C. § 1536(a)(2).


139. Id.
pine snake, whose habitat has been degraded by fire suppression, while Arkansas entered a CCAA for the preservation of the Yellowcheek Darter fish that implements livestock management techniques to maintain stream habitat. To achieve the goals of CCAAs, states generally use their land-use powers to assist habitat preservation efforts.

B. Safe-Harbor Agreements

SHAs encourage landowners to undertake habitat restoration for threatened and endangered species by protecting the landowner from future land use restrictions that could result from the return of listed species to their property or increased use by endangered species of their property. SHAs thus create incentives for property owners to “restore, enhance or maintain habitats and/or populations of listed species that result in a net conservation benefit to these species.” Similar to CCAs, SHAs give landowners a guarantee against future property use restrictions if the property owner meets the terms of the agreement. Like CCAs, they are based on section 10(a)(1)(A) of the ESA.

For the FWS to enter into a SHA, it must determine that the conservation measures in the proposed plan will result in a “net conservation benefit” for the species covered by the agreement. For a plan to result in a net conservation benefit, the “cumulative benefits of the management activities” in the proposed SHA must “contribute, either directly or indirectly, to the recovery of the covered species.” A proposed SHA must include a measurement of “baseline conditions,” meaning the population and distribution of endangered species on the covered land at the time of the agreement, as well as the “characteristics and determined area” of habitat covered by the agreement. Once the agreed-upon conservation measures are executed, the property owner may engage in activities that result in incidental take of the covered species so


143. *Id.* at 32,721.

144. *Id.* at 32,717.


147. *Id.*

148. *Id.*
long as the activities do not result in a population or habitat decrease below "baseline conditions."^{149}

Because the implementation processes of SHAs and CCAs are similar, state involvement with the programs is also similar. It is so similar, in fact, that the two types of agreements can be included in one binding document. For example, the Arkansas CCAA protecting the Yellowcheek Darter is combined with an SHA protecting the endangered speckled pocketbook fish. Because the same pressures are putting both species at risk, Arkansas and the FWS were able to use the same protection measures to preserve the two candidate species.

C. Habitat Conservation Plans

In 1982, Congress added section 10(a)(1)(B) to the Act, following the example set by private landowners and local governments in the San Francisco Bay Area that created conservation plans to preserve the Mission blue butterfly.^{150} This section allows the Secretary to permit "any taking otherwise prohibited by [section 9] if such taking is incidental to, and not the purpose of, an otherwise lawful activity."^{151} To implement this provision, the FWS developed HCPs.^{152} Interior Secretary Bruce Babbit began to emphasize habitat conservation plans, compelled in part by a Congress hostile to ESA protections,^{153} and the FWS published the Habitat Conservation Planning and Incidental Take Permit Processing Handbook ("HCP Handbook") in 1996.^{154}

The HCP Handbook states that the purpose of the HCP process is to "authorize the incidental take of threatened or endangered species" and "ensur[e] that the effects of the authorized incidental take [are] adequately minimized and mitigated to the maximum extent practicable."^{155} The process achieves these goals by issuing permits authorizing take of endangered species if it is incidental to otherwise lawful activities.^{156} The permits are issued to state and local governments and private parties that have submitted a conservation plan, either individually or collectively, that meets the statutory requirements of section 10.^{157}

To obtain a permit, an applicant must submit a conservation plan stating: (1) the impacts likely to result from the proposed take, (2) what the applicant will do to mitigate those impacts and what funding is available for mitigation,

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149. Id. at 32,717.
152. HCP HANDBOOK, supra note 126, at 1-1.
155. HCP HANDBOOK, supra note 126, at 1-1.
156. Id. at 1-2.
157. Id.
and (3) other considered actions and why those actions were not taken. The plan must also include other actions deemed “necessary or appropriate” by the Secretary, which often are additional conservation measures.

Before issuing an incidental take permit, the Secretary must find that

(1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the effects of such taking; (3) the applicant will ensure that adequate funding for the plan will be provided; the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (4) the measures [deemed ‘necessary or appropriate’] will be met.

The Secretary must receive adequate assurances that the plan will be implemented and may revoke the permit if the applicant fails to adhere to the terms of the approved plan.

States frequently use HCPs to secure protection from the ESA’s take prohibitions. For example, when the northern spotted owl was listed as “endangered” in the late 1990s, the Washington Department of Natural Resources developed a HCP that allowed for continued logging while maintaining sufficient habitat to protect the bird. By permitting incidental take of endangered species, HCPs augment states’ abilities to manage land use within their borders while still complying with the ESA.

D. Special 4(d) Rules

Section 4(d) of the ESA allows the Secretary to issue regulations “necessary and advisable” for threatened—but not endangered—species. Section 4(d) requires the Secretary to promulgate “regulations . . . for the conservation of” threatened species and permits the Secretary to extend the “no take” prohibitions of section 9 to threatened species. In states that have entered into section 6 cooperative agreements, the regulations only apply, however, to the extent that they have been adopted by the state.

As stated above, the Secretary has discretion to promulgate regulations as the Secretary sees fit for threatened species. By regulation, section 9’s take prohibitions have been extended to apply to all threatened species that are not subject to special 4(d) rules. With certain species, however, FWS has used special 4(d) rules to allow greater flexibility in species management. Because

159. Id. § 1539(a)(2)(A)(iv).
160. Id. § 1539(a)(2)(B).
161. Id. §§ 1539(a)(2)(B)(v)-(C).
164. Id.
165. Id.
166. Id.
167. 50 C.F.R. § 17.31(a) (2011).
special 4(d) rules are necessarily species specific, the content of individual special 4(d) rules varies depending on the species being regulated and the cause of the “threatened” status. For example, one special 4(d) rule that applies to the grizzly bear allows for humane taking of a bear if live capture and release has proven ineffective, so long as the FWS is notified. Another provides a blanket exemption from ESA prohibitions for the incidental take of threatened bog turtles in the southeastern United States. In these cases, special 4(d) rules have been used to allow flexibility outside of the section 9 take provisions while still protecting threatened species.

Professor Robert L. Fischman has proposed the expansion of 4(d) rules to address habitat loss and to capture the benefits of cooperative federalism. Fischman has described how 4(d) rules can be used to harness state land-use authority and thereby gain the benefits of cooperative federalism. In two examples, he describes how California and Oregon adjusted land-use decisions in conjunction with 4(d) rules that allowed take in specified instances to accommodate the coastal California gnatcatcher and the Puget Sound Chinook salmon. In this way, the states were able to participate in the management of threatened species. Fischman is right that the use of 4(d) rules should be expanded to allow greater state involvement in ESA implementation. However, because they cannot apply to endangered species, their reach is limited.

E. Section 6 Funding and Management Agreements

Titled “Cooperative Agreements,” section 6 explicitly provides for state cooperation in implementing the ESA. In order to be eligible for a section 6 agreement, the Secretary must find and annually confirm that (1) the state agency implementing the program has authority to conserve endangered species; (2) “the State agency has established acceptable conservation programs, consistent with the purposes of [the ESA]”; (3) the State agency is authorized to investigate the “status and requirements for survival” of resident endangered species; (4) “the State agency is authorized to establish programs, including [habitat acquisition], for the conservation” of endangered species; and (5) “provision is made for public participation in designating resident species of fish or wildlife” as endangered. If the state satisfies the preceding

168. \textit{Id.} § 17.40(b).
169. \textit{Id.} § 17.42(f).
171. Fischman & Hall-Rivera, \textit{supra} note 121, at 93.
172. \textit{Id.} at 94.
174. \textit{Id.} § 1535.
175. \textit{Id.} § 1535(c).
conditions, the Secretary is required to enter into a cooperative agreement with the state. 176

Section 6 is used most frequently to fund grants, through the Cooperative Endangered Species Act Conservation Fund, to states undertaking conservation actions. 177 These grants are divided into four main categories. Conservation Grants fund the implementation of conservation projects such as habitat restoration and public education. 178 Recovery Land Acquisition Grants fund land acquisition for recovery plans. 179 Habitat Conservation Planning Assistance Grants provide funding for the preparation of HCPs, and Habitat Conservation Plan Land Acquisition Grants provide funds for land acquisition that supports mitigation measures contained within HCPs. 180

In certain states, section 6 has been used to transfer more extensive management authority to states, going beyond the more prevalent funding agreements. In these section 6 management agreements, the responsibility for monitoring and carrying out wildlife recovery is transferred from federal to state wildlife agencies. These agreements, however, generally only allow the state to administer regulations promulgated by the FWS instead of allowing states to create their own regulations. For example, Arizona entered a Master Memorandum of Understanding with the regional FWS office to “facilitate joint participation, communication, coordination, and collaboration . . . [in] implementation of the ESA” in Arizona. 181 As discussed above, Montana and Idaho both entered similar agreements specific to the gray wolf after the FWS began the delisting process. 182 Generally, however, section 6 is used more regularly for funding agreements.

176. Id. (“Unless [the Secretary] determines, pursuant to this paragraph that the State program is not in accordance with this Act, [the Secretary] shall enter into a cooperative agreement with the State . . . .”).


179. Id.

180. Id.


III. USING SECTION 6 TO DEVOLVE SUBSTANTIVE ESA AUTHORITY TO THE STATES

Instead of its current limited use, section 6 could be used to devolve full ESA authority to the states. Such delegation would allow states to make all management decisions necessary under the ESA. It would improve ESA political outcomes in two ways. First, in a substantive sense, decisions made by state agencies with more knowledge of local concerns would make decisions that are more palatable to the citizens directly affected. Second, devolution would return wildlife management and land-use regulations to their traditional place—under state control—reducing symbolic opposition.183

A. Legislative Expectations for State Management Under the ESA

Section 6 and the role of the states was one of the primary subjects of debate prior to the passage of the ESA.184 Certain legislators emphasized the importance of state involvement in the implementation of the Act.185 Senator Ted Stevens said that section 6 would be the “backbone” of the Act,186 while Representative James Grover said that Congress “has adequately protected legitimate State interests, powers, and authorities . . . by providing for concurrent Federal/State jurisdiction and permitting the States to enact their own, more restrictive laws, if so desired.”187

Given its significant impact on land development and other activities, the unanimous passage of the ESA suggests a lack of understanding on the part of legislators of how far-reaching the Act would be. The congressional record supports this inference, as there is little indication that members of Congress considered the extent of the Act’s effects on economic interests.188 Fischman asserts that “the law likely would not have passed by such overwhelming majorities” without senators and representatives believing that states would play a large role in implementation.189

The ESA’s text itself suggests that legislators expected a much larger role for states in endangered species management. Section 6(g) is titled “Transition” and provides for an “establishment period” of 120 to 150 days during which the Secretary can institute emergency protections for a species facing “a significant risk” to its survival.190 This section was meant to provide states a grace period in which to enact adequate endangered species programs or to demonstrate that their current programs were sufficient in order to avoid federal regulation.

183. Petersen, supra note 122, at 465.
185. Petersen, supra note 122, at 474.
186. LEGISLATIVE HISTORY, supra note 1, at 362.
187. Id. at 199.
188. Petersen, supra note 122, at 478.
State management was also emphasized in hearings and floor speeches on the ESA. Senator John Tunney of California, the floor manager of the Act, stated that the ESA “is designed to permit and encourage State endangered species programs that act in concert with the purposes of this act.”\(^\text{191}\) In regards to the transition period provided by section 6(g), he said that “[p]rovisions of this act governing the taking and management of endangered species go into effect 15 months after the passage of this act only for those States where [an endangered species program] have not been approved by the Secretary.”\(^\text{192}\)

One official from the Department of the Interior said that “the legislation was drafted with the intent that those states which now have programs for effective management of endangered species would not be affected.”\(^\text{193}\) The Senate version of the bill sent to the conference committee gave primary authority for endangered species management to the states.\(^\text{194}\) Taken together, the legislative history indicates that legislators intended states to be meaningfully involved in the implementation of the ESA and that section 6 was meant to provide an avenue for their involvement.

### B. The Structure of Section 6

Section 6 is titled “Cooperative Agreements” and begins with a general mandate compelling the Services to involve states in endangered species management: “The Secretary shall cooperate to the maximum extent practicable with the States.”\(^\text{195}\) As discussed above, to enter a cooperative agreement, the Secretary must determine that certain requirements are met by the candidate state’s endangered species program.\(^\text{196}\) If the Secretary finds that these requirements are met, he is mandated to enter the cooperative agreement.\(^\text{197}\)

Section 6(d) gives the FWS authority to “provide financial assistance to any State . . . which has entered a cooperative agreement.”\(^\text{198}\) This section supplies the statutory basis for the Conservation Grant program and for the factors considered by the Secretary in dispensing funding to states under those programs.

The key provision of section 6 is section 6(g)(2).\(^\text{199}\) It provides that the “no take” provision of section 9(a)(1)(B) and the threatened species regulations of section 4(d) do not apply to any state that has entered a cooperative agreement. This allows states who have entered cooperative agreements to

\(^{191}\) LEGISLATIVE HISTORY, supra note 1, at 359.

\(^{192}\) Id.


\(^{194}\) LEGISLATIVE HISTORY, supra note 1, at 450.

\(^{195}\) 16 U.S.C. § 1535(a).

\(^{196}\) Id. § 1535(c)(1).

\(^{197}\) Id.

\(^{198}\) Id. § 1535(d).

\(^{199}\) Id. § 1535(g)(2).
create regulations exempt from the strict prohibitions of section 9, thus creating
an incentive for states to enter into cooperative agreements.

Section 6(f) addresses conflicts between state and federal laws. It says that
the Act “shall not . . . be construed to void any State law or regulation which is
intended to conserve . . . fish or wildlife.”200 It also states that “[a]ny state law
or regulation respecting the taking of an endangered species or threatened
species may be more restrictive than [the Act’s protections] but not less
restrictive.”201

C. Robust Section 6 Agreements

Taken together, section 6’s structure and legislative history indicate that it
could enable more substantial state involvement in endangered species
management. State involvement would take the form of section 6 agreements
between the FWS and state wildlife agencies, and implementation of the
agreements would require various decisions on how much authority to devolve
and how to coordinate state and federal duties. To reap the political benefits of
devolution, however, the state partner would need to be fully committed to the
biodiversity goals of the ESA.

Under section 6, the federal government could devolve varying degrees of
ESA decision making and implementation authority to the states. Although
total devolution, including listing and delisting authority, would not be
permissible under the provisions of the ESA, three general degrees of
devolution are possible under section 6.202 Funding agreements, the most
limited degree of devolution, have been discussed supra. More substantially,
limited section 6 agreements could allow state wildlife management agencies to
implement FWS regulations on the ground. Beyond this, section 6 agreements
could allow states to make their own decisions regarding how best to protect
endangered species outside section 9’s restrictions.

A limited devolution, though still more substantial than funding
agreements, would involve collaboration agreements between the FWS and
state wildlife agencies. This type of agreement has already been implemented
in certain states. One example is a 2008 Master Memorandum of
Understanding between the FWS and the Arizona Fish and Game
Commission.203 Under this Memorandum of Understanding, the Arizona

200. Id. § 1535(f).
201. Id.
202. See id. § 1535.
203. Arizona MOU, supra note 181, at 1; see also Cooperative Agreement Between the U.S. Dep’t
of the Interior Fish and Wildlife Serv. and Fla. Fish and Wildlife Conservation Comm’n for the
Conservation of Endangered and Threatened Fish and Wildlife (July 1, 2011), available at
%206_Agreement_EA_Attach-1.htm. The cooperative agreements made between FWS and Montana
and Idaho’s wildlife agencies also fall into this category but do not provide the best example because
of unique requirements of wolf conservation and their limitation to a single species. See Montana
Agreement, supra note 182; Idaho MOA, supra note 182.
Ecological Services Office of the FWS retains “primary responsibility for implementation of the Endangered Species Act,” but the FWS agrees to involve the Arizona Game and Fish Department in candidate assessments; candidate conservation actions including CCA approval; listing petition review; rulemaking including listing, delisting and reclassification; and recovery plan drafting and implementation. It allows the Arizona Game and Fish Department to be the lead agency conducting postdelisting monitoring. Under the Memorandum of Understanding, the Arizona Game and Fish Department also agrees to aid the FWS in conducting public hearings.

The Arizona Memorandum of Understanding and similar agreements are an important step towards increasing state involvement in ESA implementation. Nonetheless, these agreements do not devolve any substantive control over ESA implementation to states. However, this type of agreement could be combined with robust section 6 agreements to allow the states full oversight of endangered species protection.

Among the different possible degrees of devolution, the best opportunity for securing political benefits while maintaining the ESA’s conservation goals is by devolving to states the fullest possible extent of authority under section 6. Since section 6(g) allows for the suspension of the section 9(a)(1)(B) and section 4(d) take prohibitions, it can be used to allow states to decide how to achieve the ESA’s biodiversity goals. Since the strict take prohibitions of section 9 would not apply, states would have wide latitude in mapping a path toward recovery goals. Thus, states could either permit takings that would otherwise be prohibited under federal regulation or could replicate the stringent restrictions of section 9. In these robust section 6 agreements, the FWS would be responsible for identifying which species require ESA protections and setting the targets for delisting; the states would be responsible for determining how to reach those targets.

In designing their endangered species programs, states would be able to make decisions using their traditional land use powers to permit the loss of certain habitat areas, while restoring or preserving habitat elsewhere. For example, a state could allow development in one area while prohibiting logging in another area to ensure the existence of adequate habitat. Since habitat destruction is the primary driver of extinction, land use regulation is an important way to maintain the viability of endangered species. On the statewide level, such arrangements would still be statutorily required to contribute to the recovery of endangered species, but the suspension of section 9 would give

205. Id. at 7.
206. Id. at 5.
208. Id.
209. Fischman & Hall-Rivera, supra note 121, at 136.
states land use flexibility without going through the piecemeal HCP or SHA process.

Under these agreements, the states could also choose whether to use the section 10(a) model for incidental take permitting and, if they did, would be able to issue those permits. Incidental take permits are necessary when section 9’s take prohibitions apply. Because those prohibitions would not necessarily apply in states with robust section 6 agreements, the states could choose to apply those restrictions and then operate their own incidental take permitting system. This would be a simple and efficient way for states to gain control over the flexibility of section 10’s take prohibition exceptions, while also demonstrating the sufficiency of their endangered species program.

D. Political Advantages of Robust Section 6 Agreements

Devolving ESA authority to the states through section 6 agreements would reduce political pressure against the ESA in four main ways. First, by allowing greater flexibility and local input in decision making, it would result in conservation measures that are more palatable to local citizens. Second, increasing state authority would reduce the stigma of the ESA as a federal intrusion on the traditional state prerogative of wildlife management and counter political arguments based on that belief. Third, it would create incentives for states and state politicians to work towards effective conservation measures instead of resisting them. Fourth, it would utilize the American federalism scheme to capture any possible innovation in conservation techniques.

Because state and local agencies are more aware of local interests than federal agencies, they would be able to protect biodiversity in a manner that is more sensitive to local concerns. As discussed above, state agencies would be able to make distributive decisions regarding activities that result in takes. Doing so would make the ESA less burdensome on local residents and businesses, and thus would reduce negative impressions of the Act. Because constituents prefer to interact with state or local agencies as opposed to federal agencies, state implementation also would be more agreeable to local citizens.

The Clean Air Act (CAA) has benefited from a similar federalism scheme and has not faced significant calls for legislative repeal or reduced protections. While it is true that the CAA’s protection of human welfare makes it more likely to garner political support, part of its political success can be attributed to

212. 16 U.S.C. § 1535(g).
the strong cooperative federalism framework through which it is implemented. Under the CAA, states are required to submit state implementation plans to meet the National Ambient Air Quality Standards set by the EPA.215 In the state implementation plans, state pollution regulation agencies set limits on the total amount of pollution permissible in a given air basin and then allocate portions of that limit to pollution sources within the air basin.216

Similarly, under the ESA, state wildlife management agencies could allocate takes among different individuals or organizations whose behavior causes takes. For species whose main threat is habitat loss, the state agency could allocate limited licenses allowing habitat degradation, so long as the overall loss of habitat did not put the species at risk. This could take the form of a state-implemented incidental take program, as discussed in Part II.C.

If authority is devolved to the states, state politicians will have different incentives when they find problems with ESA implementation. Instead of criticizing the federal government, these politicians will be able to work with the state agency that is implementing the endangered species program in order to achieve a more amenable result. This would increase accountability of local politicians, as they would be responsible for implementation and thus would not be able to blame federal authorities as they can now. However, devolution cannot mean putting species at risk. State and local politicians’ ability to affect endangered species will be constrained by FWS oversight of the state’s program.

A robust section 6 program would take advantage of an age-old advantage of the American federalism scheme: utilizing the states as “laboratories of democracy” to capture the benefits of policy innovation.217 States would be free to innovate in their conservation strategies, and if a certain strategy proved successful, that strategy could be utilized by other states confronting similar conservation problems.

Two important differences would make section 6 agreements more politically beneficial than the current possibilities for state involvement in ESA implementation.218 First, because only states would be able to enter these agreements, section 6 agreements would respect states’ dignity by giving them a distinct role in the ESA implementation process. In permitting programs based on section 10, states are equal partners with federal agencies and private landowners.219 Through section 6 agreements, states would be placed in a unique position not available to private landowners or other stakeholders. This would respect the states’ special role within the federalist system. Second, it would avoid the difficulties of the piecemeal multiparty approach required for

217. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Markell, supra note 213, at 354.
218. The current possibilities are discussed supra Part II and include HCPs, CCAs, SHAs, and special 4(d) rules.
219. See supra Parts II.A–C.
HCP, SHA, and CCA planning. Instead, the state could use its land-use authority to unilaterally enforce appropriate land-use restrictions without going through the burdensome permitting process.

As discussed above, in order to maintain a federal safety net protecting against the possible negative effects of ineffective state management, any section 6 agreement would need to incorporate mechanisms allowing federal oversight and federal intervention if state management proved inadequate. Ineffective state management of a species or its ecosystem could result in irreparable harm to the species’ survival chances, which is an unacceptable outcome in light of the goals of the ESA.220

To ensure proper oversight, section 6 agreements should include terms that require FWS approval for any substantial changes to a state’s approved endangered species management program. While the ESA requires the FWS to confirm annually that a state’s management program is adequate,221 requiring approval of substantial changes would assure that potentially harmful state actions are avoided. FWS also may incorrectly determine a state endangered species management program to be adequate or a state management program may become inadequate because of, for example, a drop in funding, loss of expertise, or change in administration. In order to assure that federal regulators would be able to intervene in these circumstances, FWS should require all section 6 agreements to include clauses that allow FWS to take immediate control of ESA implementation within the state. This two-tiered oversight approach is considerably more stringent than CAA oversight by the EPA.222 It is necessary because, while a failure to meet NAAQS under the CAA results in negative health consequences and environmental degradation, failure to meet ESA standards could result permanent harm to a species’ viability in the wild or, in a worst-case scenario, extinction.

E. Obstacles to State Devolution

Certain difficulties exist in devolving ESA authority to the states in order to reap the political benefits from devolution while also maintaining conservation goals. First, legal precedent may reduce flexibility in section 6 agreements.223 Second, coordination and burden sharing between states required for interstate species may be difficult to negotiate. Finally, unwilling states would be unlikely to present adequate conservation plans, limiting the reach of a devolution plan.

A threshold problem is whether robust section 6 devolution would be permissible in light of Swan View Coalition, Inc. v. Turner.224 In Swan View Coalition, environmental groups sued the FWS and the U.S. Forest Service,

221. Id. § 1535(c)(1).
224. Id.
challenging the FWS’s biological opinion on the grizzly bear and gray wolf in Montana’s Flathead National Forest.225 The Intermountain Forest Industry Association entered the suit as defendant-intervenors and argued, separately from the federal defendants, that “Montana law is controlling in this case because Montana is a party to a ‘full-authority’ cooperative agreement under § 6 of the ESA.”226 Citing the “overwhelming priority Congress has given to the preservation of threatened and endangered species,” the court held that the federal ESA preempts Montana’s less-restrictive take regulations. 227 However, this reading renders section 6(g) superfluous, making its ultimate holding debatable. Given the emphasis placed on state involvement in the legislative history of the Act and the explicit exceptions to section 9 in section 6(g), another court could very well disagree.

Robust section 6 agreements would also need to confront the difficulties of endangered species that exist in multiple states. Implementation of the agreements for such species would require coordination between states and burden sharing that could be difficult to negotiate. States could disagree about what proportion of support for a species’ survival they are required to provide. When devolving authority through section 6 agreements, the FWS would need to be cognizant of these difficulties and facilitate negotiation between states.

Finally, states that are not committed to biodiversity protection likely will not have adequate conservation programs to allow the FWS to enter section 6 agreements. Therefore, ESA authority would not be devolved to these states. Wyoming’s gray wolf policies demonstrate a minimal commitment to maintaining the species, and thus it would not be an appropriate state for devolution. On the other hand, states whose political opposition is based on unresponsive federal implementation, as opposed to a lack of support for biodiversity protection, would have strong incentives to enter into these agreements in order to reduce federal intrusion and to make implementation of the ESA more amenable to their preferences.

IV. STATE ENDANGERED SPECIES MANAGEMENT AND THE GRAY WOLF

Since its designation as endangered in 1975, the gray wolf has presented a distinct challenge to the ESA and to conservation advocates—a challenge that continues today. While the delisting rider could be viewed as a step back for wolf restoration, the gray wolf is nonetheless a success story for the ESA. Its reintroduction has restored balance to the Northern Rocky ecosystems that it now inhabits228 and has brought joy to visitors that have been able to observe the wolf in its natural habitat.

225. Id. at 926.
226. Id. at 938.
227. Id.
The reintroduced Northern Rocky Mountain wolf did not spend an extended amount of time under ESA protections. It was under federal management for five years before the FWS determined that the wolf had met recovery goals, and eight years before the FWS published its first Final Rule for delisting.\(^{229}\) Ultimately, Montana and Idaho wolves were under federal management for sixteen years;\(^{230}\) in Wyoming, federal management will likely end after seventeen years.\(^{231}\)

Nonetheless, much of the political pressure in favor of delisting the gray wolf was based on appeals to the traditional state authority of wildlife management.\(^{232}\) Devolution was difficult, however, because existing devolution mechanisms are mainly focused on habitat protection and, therefore, are not suited to predators whose primary threat is human persecution. Furthermore, opposition within Wyoming, manifested in their wolf management plans, essentially made devolution impermissible under the ESA because of a lack of support for the species.\(^{233}\)

The beneficial effects of section 6 agreements in the specific circumstances of the wolf could be limited for the same reasons that made state involvement difficult in the first place. However, state management under section 6 agreements could have led to a more harmonious political outcome to the controversy. Increasing state involvement could have decreased the political pressure that led to the wolf rider and continues to drive the push to delist the wolf in Wyoming. In a best-case scenario, section 6 agreements may have averted the wolf rider altogether.

A. Existing State Involvement Mechanisms and the Gray Wolf

Several aspects of the gray wolf’s history in the Northern Rockies limited the potential for state involvement in the management of the gray wolf prior to


\(^{233}\) See supra text accompanying note 94.
reintroduction. Since the gray wolf was already extirpated when the ESA was passed, CCAs could not be used to prevent its listing. Other existing programs, including HCPs, SHAs, and section 6 funding agreements, were not suited to confronting the conservation challenges of the gray wolf because those programs only address habitat destruction and not persecution by humans, one of the major drivers of the gray wolf’s extirpation.234 The reintroduction areas were chosen specifically because they contained enough suitable habitat to support viable wolf population. 235 Habitat destruction did not contribute significantly to the extirpation of the gray wolf in the Northern Rockies.236

Nonetheless, the states were involved with gray wolf management to a degree. Although there are no statutory mechanisms for state involvement in reintroduction programs, the states were involved in the process preceding the decision to reintroduce wolves. State wildlife agencies participated in the EIS process that recommended reintroduction.237 In 2005, Montana and Idaho entered section 6 agreements with the FWS that allowed them to implement and enforce the amended 2005 10(j) Rule.238 Under these agreements, the states had the authority to issue permits, but not to determine what was required to obtain a permit.239 Thus, while Idaho and Montana were not able to make substantive decisions as to when a taking was permissible, they were able to administer the regulations promulgated by the FWS.

B. Robust Section 6 Agreements and the Gray Wolf

Through section 6 agreements, the FWS could have changed the dynamics of gray wolf politics in the Northern Rockies and potentially effected better conservation outcomes. If they had joined robust section 6 agreements, Montana and Idaho would have been able to create their own take exceptions. By giving Montana and Idaho authority to create their own regulations, devolution could have reduced political pressure for delisting as it would have fulfilled their desire to substantively manage the wolves. By serving as examples of the benefits inuring from increased protections, these agreements with Montana and Idaho would have also increased pressure on Wyoming to make a stronger commitment to wolf protection, resulting in a better outcome for wolves in Wyoming.

235. Id. at 60,269.
236. McNamee, supra note 38, at 174.
237. GRAY WOLF EIS, supra note 57, at vii.
239. Id.
A robust section 6 agreement would allow the states to make substantive decisions about wolf management within their borders, thereby fulfilling their expressed political desires. Under section 6 agreements, the states could make certain distributive decisions as long as they maintained the federal breeding pair baseline. For example, in portions of the state with more livestock, the requirements necessary to justify a taking in defense of livestock could be lowered. Or, if a state desired to have an extensive hunt, it could eliminate the exception allowing for a killing if in defense of livestock and instead implement other livestock protection measures. States could also leverage their funds to gain section 6 funding agreements for the maintenance of a livestock compensation fund. In many ways, the states’ management authority would be equivalent to their current authority under delisting. Since much of the political opposition centered around the states’ desire to manage their own wildlife, this presumably would have met their needs.

While the conflicts between the different stakeholders in gray wolf management that led to the delisting could also occur under section 6 agreements, the agreements could be crafted to minimize or ameliorate those conflicts. As with delisting, wolf advocates might fear state management would cause too many wolf fatalities. This could be addressed by including a trigger that the FWS could invoke if wolf populations fell below the federal baseline included in the original agreement. Upon invoking the trigger, general endangered species protections would be returned for the wolf. The agreement would further provide that if a state challenged the FWS justification for invoking the trigger, endangered protections would remain until the litigation was resolved. This provision would be reasonable for the states because they would be gaining expanded management authority. Section 6 agreements could also be implemented more quickly than delisting because the FWS would not have to go through the full delisting procedure.

A significant question for gray wolf section 6 agreements would be whether hunting is allowed. The major difference between federal management and state management has been the wolf hunts, which continue to be opposed by environmentalists. Under the ESA, if Montana and Idaho had entered into agreements, they could have permitted hunting as long as it was part of an “adequate and active program for the conservation of endangered species and threatened species.” If they had used robust section 6 agreements, it is possible that the wolf would have remained officially endangered while being hunted, an incongruous outcome. However, since this flexibility was important to the states, it could and would be considered as long as it did not threaten the wolves’ recovery.


Ultimately, like any delegation of endangered species management under the ESA, gray wolf section 6 agreements would only be successful if the states were committed to maintaining proper protections for the wolves to ensure that their survival was not threatened. While some environmentalists have justifiably questioned the states’ commitment to providing adequate protection for the gray wolf, the flexibility of section 6 agreements could have provided a more flexible devolution of management authority than the delisting as it occurred, allowing for a swifter transfer of management authority to the states but also swifter reversion of management authority to the FWS if state management did not provide adequate protections.

C. Comparing Montana and Wyoming Under Robust Section 6 Agreements

Comparing Wyoming and Montana and the effects of the gray wolf delisting rider demonstrates the potential effectiveness of robust section 6 agreements.242 Because Montana’s gray wolf management plans were sufficient under the FWS’s determination,243 wolf management authority could have been devolved through a robust section 6 agreement to the Montana Fish, Wildlife, and Parks Department. Conversely, management authority would not have been devolved to Wyoming because their management plan was insufficient. As a result, Montana would be able to manage the wolves according to their plan, including hunting, while Wyoming’s wolves would remain subject to full ESA take protections.

The result would be similar to the settlement agreed upon by certain environmental plaintiffs and the federal defendants in the Salazar v. Defenders of Wildlife litigation.244 That settlement was a pragmatic response to the political circumstances of the gray wolf in the Northern Rockies at that time and not necessarily the preferred outcome of wolf advocates.245 However, it nonetheless would have been better than the passage of the gray wolf rider, whose momentum has continued in the form of another rider to delist the wolf in Wyoming.246

CONCLUSION

Fundamentally, the passage of the ESA was a political act. Although its protections are based on science, they are enabled by a political determination

242. For the purposes of this comparison, I have excluded Idaho as its actions in regards to the wolf have generally been parallel to those of Montana.
that biodiversity is worth protecting despite the impediments that its protection places on economic growth and private property rights. Because of this, the protections of the ESA can only be maintained if political support for biodiversity protection is also maintained. If the ESA loses political support, its protections will be lost as well.

Similarly, the reintroduction of the gray wolf was a political act and was only accomplished when wolf advocates amassed sufficient political support. While the passage of the gray wolf delisting rider was achieved through questionable legislative tactics, it marked a diminution of support for gray wolf protections, though not necessarily for gray wolf reintroduction and recovery.

The current wave of legislation against ESA protections, chief among them the wolf rider, shows that support for the ESA has ebbed. While the failure of other riders\textsuperscript{247} indicates that there is solid support for the ESA in general, the anti-ESA riders should compel environmental advocates to assess ways to improve the Act’s political standing.

This Note proposes that more substantial section 6 agreements could improve the political viability of the ESA while still working toward the Act’s biodiversity goals. For states committed to biodiversity protection, section 6 agreements would allow for more flexibility and awareness of local concerns than federal implementation. Section 6 agreements could also shift public perceptions of the ESA—from an overbearing federal intrusion into state authority to a state-federal partnership to protect a vital part of our wilderness. The legislative history of the Act suggests that stronger section 6 agreements would be more in line with the intent of the Act’s drafters. These agreements would also take better advantage of state power over land-use decisions. In these ways, Section 6 agreements could strengthen the Act both substantively and politically.

This proposal, however, relies on the states’ commitment to biodiversity. Ultimately, this proposal can only be successful if states are willing to create adequate conservation programs. It is not proposed naively: there may be little commitment to biodiversity among state governments. States that are opposed to the underlying goals of the ESA cannot be permitted to put the irreplaceable treasure that is America’s wild flora and fauna at risk. Nonetheless, a good-faith effort by FWS to increase state participation in the ESA process could reduce political opposition to the Act and thereby assure that its protections continue to protect our country’s natural heritage, including the gray wolf, for future generations.


We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org.

Responses to articles may be viewed at our website, http://www.boalt.org/elq.