



## **Comment on Establishing Experimental Populations Outside a Species' Historic Range**

Property and Environment Research Center (PERC)

Bozeman, Montana

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### **Main Points**

- Proactive measures are needed to recover imperiled species. Introducing species to quality habitat outside of their historic ranges is a useful approach to recovering species.
- Successful introduction efforts will require the cooperation of surrounding communities and landowners.
- Therefore, the Service should also establish policy through rule or guidance to ensure that experimental populations will not impose burdens on them.

### **Introduction**

The Property and Environment Research Center (PERC) respectfully submits this comment supporting the U.S. Fish and Wildlife Service's proposal allowing experimental populations to be established outside a species' historic range. This reform allows proactive recovery efforts for endangered and threatened species where their habitat will be in the future—not where it was in the distant past. Because experimental populations can impose costs on surrounding communities and landowners, this proposal has garnered opposition. Rather than dismissing these concerns, the Service should take a similarly forward-looking approach to addressing them. The Service has significant flexibility to make experimental populations an asset to communities and landowners, rather than a liability. It should establish a policy that communities and landowners will not be penalized for accommodating an experimental population but will instead be rewarded for their role in facilitating a species' recovery.

### **PERC**

PERC is a nonprofit conservation research institute located in Bozeman, Montana, that develops market-based solutions to environmental problems. Founded in 1980, PERC's mission is to improve environmental quality through markets, entrepreneurship, and property rights. PERC and its affiliated scholars have

produced extensive research on the Endangered Species Act, including research exploring the essential role of private landowners in conserving species and how punitive regulations can jeopardize recovery.<sup>1</sup>

### **Establishing experimental populations outside of a species' historic range is a sensible approach to recovering species**

Species' ranges are not set-in-stone but have constantly adjusted over time in response to changing climates, habitat conditions, and interactions with other animals (including people). Recovering endangered and threatened species—the ultimate goal of the Endangered Species Act<sup>2</sup>—requires efforts tailored to where species' habitat will be in the future, not where it was in the past. Allowing experimental populations to be established outside a species' historic range, therefore, is a sensible reform that will help the Fish and Wildlife Service implement a more forward-looking, recovery-focused approach to conservation.

Such an approach is urgently needed because, while the Endangered Species Act's regulatory provisions can reduce the risk of extinction, they do not encourage proactive recovery efforts.<sup>3</sup> Although 99% of the species regulated under the Act remain around today, only 3% of species have recovered over the last half-century.<sup>4</sup> The reason for these mixed results is simple: making species a liability for private landowners, rather than an asset, creates perverse incentives that discourage landowners from investing in habitat restoration and other recovery efforts.<sup>5</sup>

Because the goal of experimental populations is to proactively expand populations and their ranges, these populations are a critical tool for recovering threatened and endangered species. Limiting introductions to historical boundaries constrains the Service's ability to proactively address species' future needs. Removing this

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<sup>1</sup> See, e.g., Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 *Envtl. L. Rep.* 10,565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (April 2018), <https://www.perc.org/2018/04/24/the-road-to-recovery>; Hannah Downey, *Easements for Endangered Species: A Collaborative Approach to Saving the Lesser Prairie Chicken*, PERC Case Study (2017), <https://www.perc.org/2017/12/06/easements-for-endangered-species/>; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011); Terry Anderson & Reed Watson, *An Economic Perspective on Environmental Federalism: The Optimal Locus of Endangered Species Authority*, in *The Endangered Species Act and Federalism: Effective Conservation through Greater State Commitment* (2011); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (1995), <https://www.perc.org/sites/default/files/Endangered%20Species%20Act.pdf>.

<sup>2</sup> See 16 U.S.C. § 1532(3) (defining "conservation" as the steps "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").

<sup>3</sup> See *The Road to Recovery*, *supra* n.1.

<sup>4</sup> See Fish and Wildlife Service, *ECOS: Environmental Conservation Online System*, <https://ecos.fws.gov/ecp/>.

<sup>5</sup> See *The Road to Recovery*, *supra* n.1, at 14–15.

limitation may be an especially beneficial reform amidst a changing climate. For example, the Service's current regulation precludes establishment of an experimental population of endangered Key deer until their entire habitat in the Florida Keys is altered or destroyed, at which point recovering the species would be more difficult.<sup>6</sup> Asking instead where the species' future habitat is likely to be and establishing populations in those areas is one way to reorient ESA implementation toward recovery.

### **But Experimental Populations Can Impose Costs on Neighboring Communities and Landowners**

Although the proposed rule is sensible, it has nonetheless generated controversy.<sup>7</sup> Experimental populations can impose significant costs on surrounding landowners, by lowering property values or restricting activities. This is especially so when the experimental population is accompanied by a burdensome regulation or critical habitat designation.<sup>8</sup> Citing its experience with the Mexican gray wolf, for instance, the Catron County Commission opposes this reform because it “would not wish these sorts of harms on neighboring communities.”<sup>9</sup>

These concerns should not be dismissed because community and landowner opposition can sink plans to reintroduce species. Twenty-two years after the Service proposed to reintroduce grizzly bears to the Bitterroot ecosystem, not a single bear has been introduced.<sup>10</sup> “[S]ociopolitical factors were the reason no reintroduction has occurred,” according to the Environmental Policy Innovation Center.<sup>11</sup> While most people in the area have a favorable view of bears, they nonetheless opposed the reintroduction effort, keeping it from moving forward.<sup>12</sup>

In other cases, conflicts with neighboring communities and landowners have undermined the effectiveness of experimental populations. From 2003 to 2017, the Fish and Wildlife Service has spent more than \$50 million on experimental populations of Mexican gray wolf and red wolf.<sup>13</sup> Despite this expenditure, both populations have faced serious challenges, many related to opposition from surrounding communities and landowners.<sup>14</sup>

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<sup>6</sup> See Hunter Sapienza and Ya-Wei Li, *Reintroduction: An Assessment of Endangered Species Act Experimental Populations*, Env'tl. Policy Innovation Ctr. (2021), <https://static1.squarespace.com/static/611cc20b78b5f677dad664ab/t/614a4d4580a2092053732795/1632259399497/EPIC-Experimental-Population-Analysis.pdf>.

<sup>7</sup> See Michael Doyle, *ESA experimental population idea stirs clash over 'dramatic step'*, E&E News (Aug. 3, 2022).

<sup>8</sup> See *Critical Habitat's "Private Land Problem"*, *supra* n.1; *The Road to Recovery*, *supra* n.1.

<sup>9</sup> See Doyle, *supra* n.8.

<sup>10</sup> See *Reintroduction*, *supra* n.7, at 21.

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* at 17.

<sup>14</sup> See, e.g., Darryl Fears, *The effort to save red wolves in the wild is failing, a five-year review says*, Wash. Post (Apr. 25, 2018).

While habitat is the most important physical factor for recovering species, the policy environment is equally important. Private landowners provide a disproportionate amount of habitat for endangered and threatened species. Without policies that bring these landowners in as partners, not regulatory targets, experimental populations are not likely to achieve conservation goals.

To its credit, the administration has recognized this. Its America the Beautiful initiative identified several foundational principles to effective conservation, including that conservation should be locally-led and -designed, that it must respect private property rights, and that it should support voluntary stewardship by landowners and others.<sup>15</sup> Ultimately, conflict is the enemy of conservation. As Robert Bonnie, Under Secretary at the Department of Agriculture, observed in a recent speech echoing America the Beautiful's principles, conservation must be "done with private landowners, not to them."

### **Experimental population programs should make introduced species an asset to landowners, rather than a liability**

Fortunately, the Service has existing flexibility to address these concerns, thereby reducing conflict and improving the odds of recovering species. To provide assurances to communities and landowners, the Service should establish a policy through rule or guidance that experimental populations will not be a burden to neighboring communities and landowners.<sup>16</sup>

There is already significant precedent for this approach. California, for instance, protects neighboring landowners from additional regulatory burdens if conservation efforts carried out under a safe harbor agreement increase the presence of a regulated species on surrounding lands.<sup>17</sup> The Service itself has adopted this approach under 4(d) rules, including a rule for the Utah prairie dog that allows take within 0.5 miles of conservation lands to address spillovers from those lands.<sup>18</sup>

To promote proactive habitat restoration and other recovery efforts, experimental population programs should use incentives, not mandates, to obtain the cooperation of surrounding landowners. There are several essential components to such an approach.

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<sup>15</sup> See Nat'l Climate Task Force, *Conserving and Restoring America the Beautiful* (2021), <https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-thebeautiful-2021.pdf>.

<sup>16</sup> See *Reintroductions*, *supra* n.7, at 29.

<sup>17</sup> See Cal. Dept. of Fish and Wildlife, *Safe Harbor Agreements*, <https://wildlife.ca.gov/Conservation/CESA/Safe-Harbor-Agreements#56126935-details>. See also Hannah Downey, *The Role of Working Lands in Providing Public Conservation Benefits: Policy Challenges to Conservation* (2017), [https://www.perc.org/wp-content/uploads/old/PERC\\_CPLS\\_Part\\_2%20ESA.pdf](https://www.perc.org/wp-content/uploads/old/PERC_CPLS_Part_2%20ESA.pdf) (urging the Service to adopt this approach to safe harbor agreements).

<sup>18</sup> See Fish and Wildlife Serv., *Revising the Special Rule for the Utah Prairie Dog*, 77 Fed. Reg. 46,158 (Aug. 2, 2012).

First, the Service should use its authority under Sections 4(d) and 10(j) to limit the extent to which it regulates take of experimental populations. In particular, the Service should not regulate incidental take on state and private land. Doing so would avoid imposing unwanted burdens on landowners—and avoid the conflict and perverse incentives such burdens generate—while still protecting against intentional take of the species that could most directly frustrate reintroduction efforts.<sup>19</sup> The Service’s proposed rule for an experimental population of black-footed ferret, for instance, largely excludes incidental take from regulation to avoid burdening surrounding landowners and stoking opposition to the recovery effort.<sup>20</sup>

Second, the Service should not designate non-federal land as critical habitat for experimental populations.<sup>21</sup> The ESA explicitly forbids critical habitat designations for nonessential experimental populations.<sup>22</sup> While the law allows critical habitat designations for essential experimental populations, it doesn’t require them nor does it require that they include non-federal land. As the Service has previously recognized, prioritizing federal land in critical habitat designations respects “the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species.”<sup>23</sup> It also avoids the risk that landowners will preemptively destroy habitat features.

Designating private land as critical habitat can restrict the owners’ future use of the property and immediately lower its value due to what’s commonly referred to as critical habitat’s “stigma effect.”<sup>24</sup> According to a recent study, critical habitat designations have lowered property values by up to 73 percent.<sup>25</sup> This effect gives landowners a strong incentive to destroy habitat features to reduce future regulation and mitigate lost property value. Because experimental populations can be established only in areas not presently occupied by the species, surrounding landowners would likely be free to preemptively destroy any habitat on their land without first consulting with the Service.<sup>26</sup> Thus, failing to protect surrounding landowners from these burdens may very well doom a species’ reintroduction and set back its recovery.

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<sup>19</sup> In some cases, such as predators, relaxing restrictions on intentional take may also make sense to allay landowner concerns and community opposition.

<sup>20</sup> See Fish and Wildlife Serv., *Proposed Revision of a Nonessential Experimental Population of Black-Footed Ferrets (Mustela nigripes) in the Southwest*, 86 Fed. Reg. 33,613 (June 25, 2021).

<sup>21</sup> See *Critical Habitat’s “Private Land Problem”*, *supra* n.1.

<sup>22</sup> 16 U.S.C. 1539(j)(2)(C)(ii).

<sup>23</sup> Fish and Wildlife Serv., *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, 81 Fed. Reg. at 7,231 (Feb. 11, 2016).

<sup>24</sup> See *Critical Habitat’s “Private Land Problem”*, *supra* n.1.

<sup>25</sup> Maximilian Auffhammer, et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 *Land Econ.* 188, 206 (2020).

<sup>26</sup> See *Critical Habitat’s “Private Land Problem”*, *supra* n.1.

Experimental populations outside a species' historic range will likely also trigger anxieties over the Service's recent rescission of its "habitat" definition.<sup>27</sup> The American Farm Bureau, for instance, explicitly ties its opposition to this proposed rule to the uncertainty and conflict generated by the Service's rescission of the "habitat" definition.<sup>28</sup> A landowner whose property is designated for a species that has never been in the area and for which the features necessary to support the species are currently absent may reasonably perceive herself as unfairly targeted by the agency. Worse, such designations are likely to discourage landowners from creating these necessary features or allowing them to develop naturally, thereby undermining the species' recovery rather than advancing it.<sup>29</sup> A policy against designating private land as critical habitat for experimental populations would avoid these concerns.

Third, the Service should establish experimental populations in areas where states and private partners are willing to develop innovative programs to make the reintroduced species an asset to neighboring landowners, rather than a liability. This could be done through, for instance, a pay-for-presence program that financially rewards landowners for the documented presence of the introduced species on their land.<sup>30</sup> Compensating landowners for accommodating species or conserving habitat would align landowners' incentives with the interests of species and reduce conflict. The best program for a particular community or group of landowners will vary according to local preferences, the costs that a particular species imposes, and the goals of local conservation groups. Therefore, consistent with the values of America the Beautiful, the Service should allow these programs to be developed locally and collaboratively rather than imposing a top-down model. Nonetheless, the Service can encourage such collaboration and creativity by conditioning implementation of an experimental population on the development of a program to reward surrounding communities and landowners for their role in recovering the species.

Finally, the Service should ensure that, by introducing a species outside its current range, it is not creating an invasive species that will be difficult to manage in the future. Human introduction of wildlife and plant species has been the cause of many major invasive species, including giant salvinia, feral hogs, European starlings, and *Pterygoplichthys* catfishes. The possibility of a population explosion presents a liability to landowners, especially when regulations make it more difficult to control

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<sup>27</sup> See Fish and Wildlife Serv., *Final Rule Rescinding the "Habitat Definition"*, 87 Fed. Reg. 37,757 (June 24, 2022).

<sup>28</sup> See AFBF, Comments on FWS Proposed Rule on Experimental Populations (Aug. 8, 2022), [https://downloads.regulations.gov/FWS-HQ-ES-2021-0033-0412/attachment\\_1.pdf](https://downloads.regulations.gov/FWS-HQ-ES-2021-0033-0412/attachment_1.pdf).

<sup>29</sup> See PERC, Comment on Proposed Rescission of "Habitat" Definition (Nov. 26, 2021), <https://www.perc.org/wp-content/uploads/2021/12/jw-habitat-def-comment-12-2021.pdf>.

<sup>30</sup> See Catherine Semcer, Securing a Future for Wolves in the West, PERC Reports (2021), <https://www.perc.org/2021/12/06/securing-a-future-for-wolves-in-the-west/>.

populations. To minimize this liability, agencies should include plans to deal with excessive population growth that could be quickly implemented, if necessary.

### **Conclusion**

PERC appreciates the Service's efforts to improve its proactive efforts to recover species through experimental populations. To maximize these benefits, it will be essential to address community and landowner concerns head-on rather than dismissing them. The ideas discussed above would allow the Service to make introduced populations an asset to landowners providing habitat, rather than a liability, which would improve the likelihood of species recovery.