



**Statement of  
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**Congressional Western Caucus  
Endangered Species Act Forum**

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**Main Points**

- The Endangered Species Act has, to its credit, been effective at avoiding extinctions but it has fallen short in meeting the law's ultimate goal of recovering species.
- Achieving this goal will require reforms that improve incentives for private landowners to restore habitat and undertake other recovery efforts.
- It will also require reforms encouraging states to develop innovative conservation programs and to build trust with the conservation community.

**Introduction**

Chairman Newhouse, members of the Congressional Western Caucus, thank you for hosting this important and timely forum. As the Endangered Species Act ends its first half-century and enters its second, this is an opportune time to reflect on what the law has done well and where it has proven lacking. In brief, the law has been effective at avoiding extinction but not at spurring the proactive habitat restoration and other conservation efforts needed to recover species. This is because the law gets the incentives wrong, punishing landowners for the presence of an imperiled species and its habitat rather than rewarding contributions toward recovery. To achieve the ESA's ultimate goal of recovering species, reforms are needed to reduce conflict, to encourage collaboration, to reward proactive recovery efforts, and to make imperiled species an asset rather than a liability to the private landowners who provide most habitat.

## **The Property and Environment Research Center**

I am the vice president of law and policy with the Property and Environment Research Center (PERC), a conservation research institute based in Bozeman, Montana. PERC is dedicated to improving environmental quality through property rights and markets. For four decades, PERC's research has explored the critical role of private property, incentives, and innovation in successful conservation. It has emphasized the importance of making species an asset for landowners, rather than a liability, and the dire consequences for wildlife when we get the incentives wrong. And PERC has studied how policies can encourage collaboration between federal and state wildlife agencies, private landowners, and conservation organizations—or can create endless and counterproductive conflict. In addition to research, PERC also puts its ideas into practice, through legal and policy engagements and innovative strategies to advance on-the-ground conservation.

### **“The incentives are wrong here.”**

The ESA is perhaps the nation's most popular environmental law. And for good reason. It seeks to advance the laudable goals of conserving and recovering imperiled species in the United States and around the world, like the California condor, Yellowstone grizzly, and African lion. Thus, it should be no surprise that public opinion surveys reveal broad, bipartisan support for the ESA.<sup>1</sup>

However, this reflects more on public support for the ESA's aims than its real-world results. Surveys also show that respondents know little about how the ESA works, the species it regulates, or how those species are doing.<sup>2</sup> Given the importance of conserving and recovering endangered species, the ESA's effectiveness at achieving these goals is an essential question. And, unfortunately, the law's results have been decidedly mixed.

To the ESA's credit, it has been effective at preventing extinction. Ninety-nine percent of listed species remain around today. Indeed, this understates the law's effectiveness at preventing extinctions, since many in the one percent were likely

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<sup>1</sup> See, e.g., Tulchin, et al., *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, Tulchin Research Memo (July 6, 2015), <https://earthjustice.org/sites/default/files/files/PollingMemoNationalESASurvey.pdf>.

<sup>2</sup> See Press Release, Association of Zoos and Aquariums, U.S. Americans Greatly Underestimate How Many Animals on the Endangered Species List, Study Shows (May 14, 2018), <https://www.aza.org/aza-news-releases/posts/us-americans-greatly-underestimate-how-many-animals-on-the-endangered-species-list-study-shows>.

extinct before they were first regulated under the Act.<sup>3</sup> By some estimates, 150-300 extinctions may have been avoided thanks to the ESA.<sup>4</sup>

However, the ESA has fallen short in achieving its ultimate goal of recovering species. Only 3 percent of listed species have recovered to be delisted under the Act. Unfortunately, this overstated the ESA's success at recovering species, because species deemed recovered may instead have simply been listed based on incomplete and unreliable information that was corrected once a species was listed.<sup>5</sup> Still others may have recovered for reasons unrelated to the ESA. Recovery of the bald eagle, for instance, is largely credited to the pre-ESA banning of DDT.<sup>6</sup>

The disappointing recovery rate is due to the fact that, as former Fish and Wildlife Service Director Sam Hamilton once observed, “the incentives are wrong here. If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears.”<sup>7</sup> The ESA restricts the use of land where rare species and their habitats are found, in effect penalizing landowners for having conserved them. These provisions are exclusively punitive; they do not encourage and reward past or future habitat restoration or other recovery efforts. Thus, the ESA can make species and their habitats a significant liability that landowners do well to avoid, rather than an asset to conserve and enhance.

As a consequence, the ESA is not the “emergency room” for endangered species that it is often analogized to. An emergency room provides urgent care to patients and discharges them. For the ESA to operate that way, its incentives must be recalibrated to recover species. Landowners responsible for conserving habitat and recovering species must be rewarded, not punished, for their efforts. States must play a bigger role in recovering species and be encouraged to innovate. And the Services' decisions should be explicitly guided by whether they improve incentives

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<sup>3</sup> See 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>.

<sup>4</sup> See, e.g., Greenwald N, Suckling KF, Hartl B, A Mehrhoff L. *Extinction and the U.S. Endangered Species Act* PeerJ. 22;7:e6803. doi: 10.7717/peerj.6803; Mark W. Schwartz, *The Performance of the Endangered Species Act*, 39 Annual Rev. of Ecology, Evolution, and Systematics 279 (2008).

<sup>5</sup> See Rob Gordon, *Correcting Falsely “Recovered” and Wrongly Listed Species and Increasing Accountability and Transparency in the Endangered Species Program*, Heritage Foundation Backgrounder (2018).

<sup>6</sup> See 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).

<sup>7</sup> Betsy Carpenter, *The Best Laid Plans*, 115 U.S. News and World Report 89 (1993).

to collaborate on recovery efforts, rather than stoking conflict and undermining these incentives.

Below are five practical reforms to the ESA and its implementation that could improve the incentives for recovering species, without sacrificing the law's effectiveness at preventing extinctions. The common thread for all of them is to align the incentives of federal agencies, states, tribes, and private parties toward recovering and delisting species.

## **Recovery-Focused Reforms to the ESA**

### **I. Recovery plans should be a priority and inform regulatory decisions**

One of the ESA's shortcomings is summed up by Benjamin Franklin's observation that "failing to plan is planning to fail." Congress directed the agencies that implement the ESA to develop recovery plans for every species and to review their progress toward recovering the species at least every five years.<sup>8</sup> According to a 2007 study, proactive recovery efforts funded or carried out under recovery plans are responsible for virtually all of the ESA's benefits to species.<sup>9</sup> A recovery-focused approach to the ESA would, therefore, prioritize the development and implementation of practical and effective recovery plans.

Regrettably, that has not been the case over the last half century. According to a 2018 study, a quarter of listed species had no recovery plan, half of recovery plans were not developed until more than 5 years after the species was listed, and most existing recovery plans were far out of date.<sup>10</sup> Moreover, according to the Defenders of Wildlife, the Fish and Wildlife Service has not done a status review for half of the species under its charge during the last 5 years.<sup>11</sup>

Even when recovery plans are developed, they come only after the Services first impose all punitive regulations governing that species, including regulations for threatened species and critical habitat. This "fire, aim, ready" approach can alienate landowners who own habitat, thereby limiting flexibility and preempting partnerships that may later be critical in recovering the species.

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<sup>8</sup> 16 U.S.C. §§ 1533(f), (g).

<sup>9</sup> Paul J. Ferraro, Craig McIntosh, and Monica Ospina, *The Effectiveness of the US Endangered Species Act: An Econometric Analysis Using Matching Methods*, 54 J. of Env'tl. Econ. & Management 245–61 (2007).

<sup>10</sup> Jacob Malcom and Ya-Wei Li, *Missing, Delayed, and Old: The Status of ESA Recovery Plans*, 11 Conservation Letters e12601 (2018).

<sup>11</sup> See Defenders of Wildlife, *Timeliness of Five Year Reviews under the Endangered Species Act*, <https://defenders-cci.org/publication/five-year-review/> (last visited 7/22/22).

So long as recovering species is treated as a secondary priority, the recovery rate is unlikely to increase. Therefore, Congress should add renewed emphasis to recovery planning and give the Services strong incentives to undertake it. This could be done by conditioning the Services' regulatory authority on the completion of a recovery plan and consistency with that plan. Or they could be given more time and resources for recovery planning by addressing litigation that often allows outside groups to control the Services' time and priorities.

## **II. Regulations for threatened species should establish clear roadmaps for recovering species**

While the ESA imposes stringent prohibitions on private activities that affect endangered species, Congress chose not to apply these to threatened species, which face more remote risks.<sup>12</sup> Yet the Fish and Wildlife Service has, under a misguided and illegal regulation, eroded the ESA's distinctions between endangered and threatened species.<sup>13</sup> According to PERC's research, the Service's one-size-fits-all approach undermines incentives to recover species.<sup>14</sup> Restoring the ESA's original two-step approach would be a positive step. But Congress should go further and direct the Services to develop roadmaps for recovering each threatened species that include clear, objective benchmarks and reward states and landowners for hitting them.

Congress' choice to regulate endangered species more strictly than threatened species makes intuitive sense. Regulations that relax as species recover—and tighten should a species decline—align the incentives of landowners and the interests of species better than across-the-board prohibitions.<sup>15</sup> In effect, states, landowners, and others are rewarded under this approach with regulatory relief when habitat restoration and other recovery efforts allow a species to be upgraded from endangered to threatened and from threatened to delisted.

But these incentives have been thwarted for most species because the Fish and Wildlife Service has since 1975 applied a regulation that purports to override Congress' decision to treat endangered and threatened species differently.<sup>16</sup> Under

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<sup>12</sup> 16 U.S.C. § 1538. See Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23, 30–37 (2015).

<sup>13</sup> See *Road to Recovery*, *supra* n.3. See also *Take It to the Limit*, *supra* n.14.

<sup>14</sup> See *Road to Recovery*, *supra* n.3.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

that regulation, all of the prohibitions for endangered species automatically apply to threatened species as well, unless the Service issues a species-specific regulation saying otherwise.<sup>17</sup> In 2019, the Fish and Wildlife Service rescinded this regulation, explaining that restoring the ESA's distinctions between endangered and threatened species "will incentivize positive conservation efforts to improve the species' status such that it no longer warrants listing."<sup>18</sup> Earlier this month, however, a federal court in California voided the 2019 rule and restored the regulation treating these categories the same.<sup>19</sup> Congress should restore the ESA's original design by codifying the 2019 threatened species rule and requiring regulations for threatened species to be tailored to the needs of each threatened species.

But this may not be enough considering how the Fish and Wildlife Service has interpreted the standard for issuing regulations for threatened species. Under that interpretation, it has proposed regulations for the lesser prairie chicken, for instance, that penalize ranching and conversion of croplands to rangelands, despite acknowledging that conserving and restoring grasslands are essential to the species' recovery.

The ESA says that regulations should be issued for a threatened species only if "necessary and advisable for the conservation of such species."<sup>20</sup> The ESA defines "conservation" as the steps necessary to bring a species "to the point at which the measures provided pursuant to this chapter are no longer necessary."<sup>21</sup> In other words, regulations for threatened species should be designed to recover and delist species rather than broadly assert federal authority over them.

To ensure that threatened species regulations are calibrated to recovery, Congress should direct that they be designed as roadmaps to recover the species. What I mean by this is that the Fish and Wildlife Service should identify intermediate steps in a species recovery at which point it will gradually reduce the extent of federal control. If, for instance, a species' population currently sits at 1,000 and it would be delisted at 10,000, a roadmap to recovering the species might provide that

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

<sup>18</sup> Fish and Wildlife Serv., 84 Fed. Reg. 44,753, 44,757 (Aug. 27, 2019).

<sup>19</sup> *Ctr. for Biological Diversity v. Haaland*, 19-cv-5206, ECF No. 168 (July 5, 2022). Notably, the nixed the rule without determining the rule was unlawful and without questioning its conservation benefits. Instead, it did so merely because there was a change in administration and the new administration had expressed interest in revisiting the rule.

<sup>20</sup> 16 U.S.C. § 1533(d).

<sup>21</sup> 16 U.S.C. § 1532(3).

the federal agency will cede specific regulatory authorities back to states when the population reaches 4,000, 6,000, and 8,000.<sup>22</sup>

Identifying these incremental steps in a species' recovery could encourage states and landowners to undertake more proactive conservation efforts by offering more immediate benefits to them compared to waiting for an uncertain and delayed delisting. It can also reduce conflict over delistings by letting states resume management of a species gradually. The final stage prior to delisting could cede full management authority to states, for instance, allowing them to demonstrate how they would manage the species and their ability to do so. This would allow states to build trust with the conservation community which is more difficult under the current approach where authority is suddenly transferred to states when a species is delisted.

### **III. Critical habitat designations should be based on whether they help or hinder habitat conservation and restoration**

The ESA's could also be reoriented to recover species by changing how the Services designate critical habitat. Critical habitat can make habitat features a significant liability for landowners, yet may provide little or no protection to these features.<sup>23</sup> Because of this, the evidence is that designating private land as critical habitat actually increases development pressure.<sup>24</sup> Thus, in designating private land as critical habitat, the Services should be required to first consider how the designation affects the incentives for landowners to conserve or restore habitat, a key consideration which typically plays little or no role in these decisions.

The ESA directs the Services to designate critical habitat for listed species, unless doing so is imprudent or critical habitat is indeterminable.<sup>25</sup> A critical habitat designation triggers additional scrutiny and mitigation requirements if any activity in the designated area requires a federal permit, funding, or other agency involvement.<sup>26</sup> Thus, if developing land designated as critical habitat requires a

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<sup>22</sup> These roadmaps could be developed through recovery plans, if they were prioritized. For species upgraded from endangered to threatened, this could be done while the species was still listed as endangered, signaling to states and private landowners what they could gain from improving the species' prospects. For species listed as threatened in the first instance, the recovery plan could proceed regulation of the species or an interim regulation could be developed that would expire automatically after the recovery plan is completed and a roadmap to recovery designed.

<sup>23</sup> See Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 *Envtl. L. Rep.* 10,565, 10,571 (2021).

<sup>24</sup> See *id.* See also Adler, *supra* n.6.

<sup>25</sup> 16 U.S.C. § 1533(a)(3).

<sup>26</sup> See 16 U.S.C. § 1536.

Clean Water Act permit, the Army Corps of Engineers must consult with the Fish and Wildlife Service over how that development could avoid or mitigate impacts to the habitat. But if no federal permit or funding is required, the landowner is as free to bulldoze the habitat features after the designation as she was the day before.<sup>27</sup>

This is a problem because a critical habitat designation immediately lowers the value of designated land because any prospective purchaser would account for the regulatory risk when making an offer. Studies of critical habitat's "stigma effect" have found that designations reduce land values by as much as 73 percent.<sup>28</sup> Thus, landowners may be strongly encouraged to reduce this risk by quickly eliminating habitat features or the ability to restore them. Indeed, no species for which private land has been designated critical habitat has recovered to be delisted.<sup>29</sup>

Despite acknowledging this stigma effect, the Fish and Wildlife Service does not meaningfully account for this perverse incentive problem when designating critical habitat. This explains the controversial critical habitat designation for the dusky gopher frog at issue in the Supreme Court's *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* decision.<sup>30</sup>

There, the Service designated approximately 1,500 acres of private land as critical habitat for the frog despite the land lacking most of the frog's habitat requirements and, therefore, requiring substantial and costly restoration effort before it could support the frog.<sup>31</sup> The designation gave the landowner no reason to undertake this effort, but immediately reduced the value of the land. Unsurprisingly, the designation did not produce any restoration effort or otherwise benefit the frog.<sup>32</sup> Instead, it produced only years of conflict and litigation, consuming resources that under a different approach might instead have been put to the species' recovery.

A recovery-focused approach to critical habitat would begin with the question whether a designation would create incentives for landowners to conserve and restore habitat, including consideration of the opportunity costs of the designation. This approach would lead the Fish and Wildlife Service to prioritize designation of

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<sup>27</sup> See *Critical Habitat's "Private Land Problem," supra* n.25.

<sup>28</sup> Maximilian Auffhammer, et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 *Land Econ.* 188, 206 (2020).

<sup>29</sup> FWS Environmental Conservation Online System, *Delisted Species*, <https://ecos.fws.gov/ecp/report/species-delisted> (last visited July 1, 2022).

<sup>30</sup> 39 S. Ct. 361 (2018).

<sup>31</sup> See *Critical Habitat's "Private Land Problem," supra* n.25, at 10,567–69.

<sup>32</sup> See Tate Watkins, *If a Frog Had Wings, Would It Fly to Louisiana?*, 37 *PERC Rep.* 26 (2018).



federal land over state and private land, an approach the agency recently restored.<sup>33</sup> It would also prioritize areas occupied by the species over unoccupied areas, because the ESA's take prohibition provides some protection to habitat in occupied areas.<sup>34</sup> And the agency would take care to avoid designating areas that require active habitat restoration or maintenance to support the species, as designating such areas is more likely to discourage this activity than to encourage it.<sup>35</sup>

Congress could direct the Services to follow this approach by clarifying the standard for designating critical habitat. Currently, the ESA provides that the Services should “tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.”<sup>36</sup> This sets up an unfortunate and false dichotomy between conservation benefits and economic costs. The reality is that these impacts may affect whether landowners are encouraged to conserve or degrade habitat and they should be analyzed in those terms.

Congress could also clarify the meaning of “habitat” with these factors in mind. While the Supreme Court held unanimously in *Weyerhaeuser* that land must qualify as “habitat” to be designated as critical habitat, it declined to define this term, which the ESA also fails to define. In 2020, the Services adopted a definition, which looked at an area's current ability to sustain a species.<sup>37</sup> But they recently rescinded this definition without replacing it with any other standard.<sup>38</sup> Thus, critical habitat designations will be governed by no consistent standard.

**IV. State leadership and innovation should be recognized and rewarded**  
Resuscitating the ESA's federalism provisions could also improve the rate at which we recover species. States have primary regulatory responsibility for wildlife. While other federal environmental laws have tapped the benefits of federalism, the ESA's federalism provisions have been thwarted. Reviving these provisions may spur creative approaches to recovering species and increase accountability.

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<sup>33</sup> See *Critical Habitat's "Private Land Problem,"* *supra* n.25, at 10,571–72. See also 87 Fed. Reg. 43,433, 43,440 (July 21, 2022).

<sup>34</sup> See *Critical Habitat's "Private Land Problem,"* *supra* n.25, at 10,572. See also Environmental Policy Innovation Center, *Endangered Species Act: 2018 Administrative Reform* 7 (2018).

<sup>35</sup> See *Critical Habitat's "Private Land Problem,"* *supra* n.25, at 10,572–73.

<sup>36</sup> 16 U.S.C. § 1533(b)(2).

<sup>37</sup> 85 Fed. Reg. 81,411 (Dec. 16, 2020).

<sup>38</sup> 87 Fed. Reg. 37,757 (June 24, 2022).

The ESA's chief federalism provisions are Sections 4 and 6. Section 6 requires the Services to enter into cooperative agreements with any state that develops a program to conserve listed species if such program satisfies five criteria.<sup>39</sup> If a state obtains a cooperative agreement, Section 4(d) provides that federal regulations governing take of threatened species apply “only to the extent that such regulations have also been adopted by such State.”<sup>40</sup> By offering states this say over federal regulation, Senator Tunney explained, Congress wished to “encourage[]” states “to use their discretion to promote the recovery of threatened species” by developing their own innovative strategies.<sup>41</sup>

Restoring states to this role could encourage more collaboration on recovering species. Surveys show that state conservation initiatives enjoy far greater support among voters and landowners than do federal programs. A 2020 nationwide survey by the Duke Nicolas Institute for Environmental Policy Solutions, for instance, found that 65 percent of rural voters prefer environmental issues to be resolved by state and local governments, compared to only 25 percent support for federal regulation.<sup>42</sup> The survey found that urban and suburban voters similarly prefer state and local solutions.<sup>43</sup>

This preference is also reflected in the extent to which landowners are willing to work with state or federal agencies. A survey of Utah landowners found that 84 percent were willing to partner with a state university and 63 percent willing to partner with the state wildlife agency.<sup>44</sup> Only 50 percent, however, were willing to work with the Fish and Wildlife Service.<sup>45</sup> Another survey of forest landowners suggests that such disparities are due to the sort of Endangered Species Act conflicts discussed above.<sup>46</sup> That survey, like the others, found that landowners highly value conservation but are wary of partnering with the Fish and Wildlife Service. “The apparent contradiction between favorable views of wildlife conservation and negative views of endangered species conservation,” the authors

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<sup>39</sup> 16 U.S.C. § 1535(c).

<sup>40</sup> *Id.* § 1533(d).

<sup>41</sup> Congressional Research Service, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 358 (statement of Sen. Tunney).

<sup>42</sup> See Robert Bonnie, et al., *Understanding Rural Attitudes Toward the Environment and Conservation in America*, Duke Nicolas Institute for Environmental Policy Solutions 19–20 (2020),

<sup>43</sup> See *id.*

<sup>44</sup> See Megan E. Hansen et al., *Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species*, Center for Growth and Opportunity at Utah State University, Policy Paper No. 2018.003 (2018).

<sup>45</sup> See *id.*

<sup>46</sup> See Lauren K. Ward et al., *Family Forest Landowners and the Endangered Species Act: Assessing Potential Incentive Programs*, 116 J. Forestry 529 (2018).

explain, “may indicate the need for policy changes in the protection of listed species on private lands.

Restoring the ESA’s original approach to regulating threatened species and clarifying the standards for states to obtain a cooperative agreement could facilitate proactive recovery efforts by channeling these efforts through state wildlife agencies rather than the Fish and Wildlife Service. The federal government contributes substantial funding to state conservation programs and is considering expanding this funding substantially.<sup>47</sup> Therefore, Congress has a vested interest in ensuring the success of these programs.<sup>48</sup>

#### **V. Once species biologically recover, they should promptly be delisted**

Finally, when a species biologically recovers, its delisting should be a cause for celebration, rather than renewed conflict. Promptly delisting recovered species allows the Services to reallocate their limited resources to the species that need them most. And it rewards those who contributed to the species’ recovery. In several prominent cases, however, delistings have instead provoked dismay and litigation.

The Greater Yellowstone Ecosystem grizzly, for instance, has been biologically recovered for more than a decade. Successive administrations of both political parties have sought to delist the species and give wildlife managers more flexibility to manage conflicts created by an expanding carnivore population.<sup>49</sup> But this bipartisan effort has been stymied by repeated rounds of litigation because of which the grizzly remains on the list to this day.<sup>50</sup>

While the grizzly’s experience is by no means the norm, it is nonetheless alarming for the signal it may send to states, tribes, and private parties working to recover other species. If they cannot reasonably rely on their success being rewarded with a delisting, they may be discouraged from undertaking recovery efforts.

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<sup>47</sup> See U.S. Fish and Wildlife Serv., *FY2021 Pittman-Robertson Apportionment*, <https://www.fws.gov/wsfrprograms/Subpages/GrantPrograms/WR/WRFinalApportionment2021.pdf>; U.S. Fish and Wildlife Serv., *FY2021 Dingell-Johnson Apportionment*, <https://www.fws.gov/wsfrprograms/subpages/grantprograms/sfr/SFRFinalApportionment2021.pdf>. See also S. 2372, The Recovering America’s Wildlife Act.

<sup>48</sup> See Testimony of Jonathan Wood, Property and Environment Research Center, U.S. Senate Committee on Environment and Public Works Hearing on S. 2372, The Recovering America’s Wildlife Act (Dec. 8, 2021), <https://www.perc.org/wp-content/uploads/2021/12/Jonathan-Wood-Written-Testimony-EPW-Hearing.pdf>.

<sup>49</sup> See 82 Fed. Reg. at 30,516, 30,517-19 (Trump administration delisting rule); 81 Fed. Reg. 13,174 (Mar. 11, 2016) (Obama administration proposed delisting rule); 72 Fed. Reg. 14,866, 14,875-78 (Mar. 29, 2007) (Bush administration delisting rule).

<sup>50</sup> See, e.g., *Crow Indian Tribe v. United States*, 965 F.3d 662 (9th Cir. 2020).

Some of the ideas discussed above could help reduce conflict over delisting species. Another helpful improvement would be to confirm that the standards for listing and delisting species are the same.<sup>51</sup> Courts should not put a thumb on the scale against delisting, as several have.<sup>52</sup>

### **Conclusion**

Thank you for the opportunity to contribute to this forum. Preserving what the ESA does well (preventing extinctions) while improving it as a tool to recover species is an essential and achievable goal. The key to achieving this goal is to ensure that policies are designed to encourage states, landowners, and conservationists to proactively restore habitat and undertake other recovery efforts. An overly punitive approach penalizes these efforts and will only hold species back.

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<sup>51</sup> See 84 Fed. Reg. 45,034, 45,020 (Aug. 27, 2019) (clarifying that the same standard applies to listing and delisting decisions), *vacated by Ctr. for Biological Diversity v. Haaland*, 19-cv-5206, ECF No. 168.

<sup>52</sup> See *Crow Indian Tribe*, 343 F. Supp. 3d at 1014 (N.D. Ca. 2019) (asserting that the standard is different “when a species is already listed” (quoting *Humane Soc’y*, 865 F.3d at 601)).