



## **Comment Regarding the Proposed Reintroduction of Grizzly Bears into the North Cascades Ecosystem**

Property and Environment Research Center (PERC)

Bozeman, Montana

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### **Main Points:**

- Species reintroductions, habitat restoration, and other proactive conservation efforts are essential to recovering endangered and threatened species. But in carrying out these efforts, federal agencies must work with, not against, states, communities, and private landowners. Trust between federal agencies and local stakeholders is critically important but has too often been lacking under the Endangered Species Act.
- Restoring grizzlies to the North Cascades ecosystem would move the species closer to recovery. But the proposal has provoked significant opposition from local communities and private landowners. To address these legitimate concerns, the National Park Service and U.S. Fish and Wildlife Service should consider additional and more creative approaches to mitigate the costs grizzlies would impose on communities and landowners.
- The Services should also plan for the reintroduction's success, including by providing more flexibility as the population grows and gradually transferring management responsibility to the state.

The Property and Environment Research Center (PERC) respectfully submits this comment regarding the National Park Service's and Fish and Wildlife Service's proposal to reintroduce grizzly bears into the North Cascades Ecosystem. Species reintroductions, along with habitat restoration and other proactive conservation efforts, are critical to the recovery of endangered and threatened species. To succeed, however, these efforts must be pursued with the local communities and landowners that are most affected, rather than be imposed on them.

The proposal to reintroduce grizzlies into the North Cascades has already stoked substantial local

opposition.<sup>1</sup> Such opposition has blocked previous efforts to reintroduce grizzlies and undermined the success of other species' reintroductions.<sup>2</sup> To ensure that the reintroduction can move beyond a mere plan into an on-the-ground reality, and that a reintroduced population can succeed, the Services must be open to more creative options that allow reintroduction to be done *with* local communities and landowners, not *to* them. That means that the Service should consider additional ways to reduce regulatory burdens and address other costs that the grizzly's return would impose. It should also plan for the population's ultimate recovery, including providing for even more flexibility and the transfer of management authority to the state as the population grows.

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

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. PERC has produced extensive research on how the Endangered Species Act could be better implemented to achieve its ultimate goal of recovering species by removing perverse incentives and encouraging habitat restoration and proactive recovery efforts.<sup>3</sup> Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

## **Recovery Takes Effort, Cooperation, and Trust**

The ultimate goal of the Endangered Species Act is to recover species to the point that they are no longer endangered or threatened with extinction.<sup>4</sup> This is no easy task. For most imperiled species, leaving them alone is not enough.<sup>5</sup> But proactive recovery efforts cannot easily be regulated into existence. Even the most well-intentioned regulation may discourage such efforts through perverse incentives.<sup>6</sup> As a consequence, the Endangered Species Act's results to date have been mixed. It has

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<sup>1</sup> See Ta'Leah Van Sistine, [‘Hell no to grizzlies’: Darrington locals give federal agencies an earful](#), The Everett Herald (Nov. 4, 2023); Jason Taylor, [Rep. Newhouse Filed Bill to Block Grizzly Bear Reintroduction](#), KPQ.com (Oct. 11, 2023).

<sup>2</sup> See Nicholas K. Geranios, [Feds scrap plans to reintroduce grizzlies to North Cascades](#), Associated Press (July 8, 2020). See also Hunter Sapienza and Ya-Wei Li, [Reintroduction: An Assessment of Endangered Species Act Experimental Populations](#), *Envtl. Policy Innovation Ctr.* 21 (2021).

<sup>3</sup> See, e.g., PERC, [A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It](#) (2023); Katherine Wright and Shawn Regan, [Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals](#), PERC.org (2023); 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 (2018).

<sup>4</sup> See U.S. Fish & Wildlife Serv., *ESA Basics: 50 Years of Conserving Endangered Species* (2023).

<sup>5</sup> J. Michael Scott et al., *Conservation-Reliant Species and the Future of Conservation*, 3 *Conservation Letters* 91 (2010) (finding that 84% of listed species are conservation reliant, including 51% that require active habitat maintenance).

<sup>6</sup> See *Field Guide*, *supra* n. 3.

been remarkably effective at one part of the recovery goal, preventing extinction so that recovery is still possible. Ninety-nine percent of listed species persist today, and hundreds of extinctions may have been avoided. But only 3% of listed species have recovered over the last half-century—far fewer than the Fish and Wildlife Service projected by now—and a similarly small percentage have populations that are improving.<sup>7</sup>

PERC supports the Fish and Wildlife Service’s efforts to facilitate more voluntary recovery efforts and undertake its own proactive efforts, including species reintroductions.<sup>8</sup> The long-term effectiveness of such efforts depends on building trust and goodwill with states, local communities, and landowners. It also depends on creating the right incentives for conservation. To that end, PERC has urged the Fish and Wildlife Service to be more creative in its regulatory decisions and recovery projects to make imperiled species an asset rather than a liability for the local stakeholders whose actions have the greatest impact on recovery.<sup>9</sup>

### **An Infinite Number of Options**

Restoring grizzly bears to the North Cascades would be a significant, positive step toward the recovery of grizzlies in the lower 48 states. But that reintroduction will come at a cost, including human deaths and maulings, lost livestock and increased costs to ranchers, mitigation costs to reduce conflict, and changes to the ecosystem and other wildlife populations. Without policies to reduce these costs or divide them more fairly among the public, these costs will fall disproportionately on local communities and landowners. This needlessly pits grizzlies against communities and landowners, which would be an obstacle to reintroduction and ultimate recovery.

This needn’t be so. The Fish and Wildlife Service has a unique degree of flexibility it should use to address costs on local communities and landowners, while also charting a path toward the long-term recovery of the species. The grizzly bear is listed as a threatened species, rather than endangered, a status which triggers no automatic regulation of private activity. Instead, for threatened species, Congress gave the Service “an almost infinite number of options” to design regulations necessary and advisable for the conservation, i.e. recovery, of the species.<sup>10</sup> For nonessential experimental populations, the

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<sup>7</sup> See *Missing the Mark*, *supra* n. 3; Department of the Interior, *2017/2018 Annual Performance Plan & 2016 Report* 15 (May 26, 2017).

<sup>8</sup> See, e.g., PERC, [Comment on the Proposed Establishment of a Nonessential Experimental Population of Gray Wolf in Colorado](#) (Apr. 18, 2023); PERC, [Comment on the Proposed Enhancement of Endangered Species Act Survival and Incidental Take Permits](#) (April 10, 2023); PERC, [Comment on Establishing Experimental Populations Outside a Species’ Historic Range](#) (Aug. 17, 2022); PERC, [Comment on the Revision of a Nonessential Experimental Population of Black-footed Ferrets in the Southwest](#) (Sept. 2, 2021).

<sup>9</sup> See *Field Guide*, *supra* n. 3.

<sup>10</sup> H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973. See 16 U.S.C. § 1433(d). See also 16 U.S.C. § 1432(3) (defining conservation in recovery terms).

Endangered Species Act also forbids the designation of critical habitat and does not presumptively regulate private activities but gives the Service flexibility to design a program to recover the reintroduced population. In other words, the Service has maximum flexibility to design a plan for grizzly reintroduction that addresses the concerns of local communities and landowners.

Despite this flexibility, the current proposal considers a narrow range of options. It considers 1) doing nothing; 2) reintroducing bears but applying existing regulations to them; or 3) reintroducing bears and issuing a less stringent regulation for the specific population, including very limited regulation of activities affecting bears on private land. Thus, the Fish and Wildlife Service has narrowed its “almost infinite number of options” to three.

Of these options, #3 is clearly the best and the Service deserves credit for designing it to address many concerns communities and landowners have about returning grizzly bears to the area. The Service’s proposal focuses reintroduction and recovery on federal land and imposes relatively limited regulation on private land. For instance, the proposed rule identifies three zones, with each playing a different role in the population’s recovery. Zone 1 is the primary area that will be used for reintroduction and contains the core habitat suitable for the species. Zone 2 contains suitable habitat for the species and would accommodate grizzly movement and dispersal as the population grows. And Zone 3 is everything else. Importantly, Zones 1 and 2, which would have the strictest regulations, are defined to explicitly exclude any state or private lands in these areas. All non-federal land, regardless of where it is, is considered part of Zone 3.

By classifying all state and private land as Zone 3, the Service would limit the extent to which reintroduced grizzlies are a regulatory liability for communities and landowners. For instance, incidental take would not be regulated on private land, nor would hazing and other deterrence efforts.<sup>11</sup> But the proposal would still make grizzlies a regulatory liability.

Ranchers have grazing privileges for federal lands within Zones 1 and 2 that may be essential to sustaining their operations. The proposed rule acknowledges, for instance, that there are eight active grazing permits authorizing nearly 20,000 privately owned animals to graze federal lands in Zone 1. In the event of a conflict between grizzlies and livestock, the proposed rule only allows the rancher to haze or otherwise deter the bear, presumably at the rancher’s expense. If deterrence is inadequate to prevent conflict, the proposed rule gives the Service the discretion—but no obligation—to relocate or otherwise take the bear involved in the conflict. And the proposed rule would only allow the Service

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<sup>11</sup> The Service notes, correctly, that mistaking a grizzly for another animal while hunting is not incidental take. Under the Constitution, the ESA, and Department of Justice policy, however, there are significant limits to the penalties that can be imposed for such takes committed by mistake. See Jonathan Wood, *Overcriminalization and the Endangered Species Act: Mens Rea and Criminal Convictions for Take*, 46 *Envtl. L. Rep.* 10,496 (2016).

this discretion if it is “not reasonably possible” to eliminate the conflict through deterrence and nonlethal measures, some of which would be at the rancher’s expense. Preferring nonlethal solutions to conflict is obviously better for grizzly recovery, but it’s also important to recognize that it can increase the regulatory liability bears represent to private parties.

On private lands, it would be easier to relocate or otherwise take a bear that poses a threat of conflict, since there’s no requirement to exhaust deterrence and non-lethal means first. But, again, the proposed rule merely gives the Service the discretion; the Service should instead commit to landowners that these tools will be used.

The proposed reintroduction may also affect forest restoration activities in the area, which includes a landscape identified in the National Forest’s Wildfire Crisis Strategy.<sup>12</sup> The proposed rule notes, correctly, that a nonessential experimental population designation limits the consultation requirement federal land management agencies would otherwise have under the Endangered Species Act because, for these purposes, the population is treated as a species merely proposed for listing. Even in the event that the agency is required to confer with the Service or a lawsuit is filed challenging compliance with that obligation, the Endangered Species Act allows the agency to move forward while it confers or defends litigation.<sup>13</sup>

But consultation is not the only way that the presence of grizzly bears might complicate the regulatory environment for forest restoration. Impacts to the reintroduced population would also have to be analyzed under the National Environmental Policy Act and interest groups could challenge the adequacy of that analysis. Being in the Greater Yellowstone Ecosystem, PERC is well aware that activists frequently do file such challenges against forest restoration projects.<sup>14</sup> Fortunately, Washington sees significantly less litigation against forest restoration than Montana.<sup>15</sup> But that would likely change with the introduction of a charismatic species like the grizzly bear.<sup>16</sup> And even if reintroduction doesn’t lead to more litigation, the species’ presence may slow down the process for evaluating and approving forest restoration projects, extending the years it already takes to get projects moving.<sup>17</sup>

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<sup>12</sup> See Forest Service, [Confronting the Wildfire Crisis: Expanding Efforts to Deliver on the Wildfire Crisis Strategy](#) (2023).

<sup>13</sup> See 16 U.S.C. § 1536(a)(4).

<sup>14</sup> See, e.g., Joshua Murdock, *Garnet forest project draws late criticism*, Missoulian (Jan. 8, 2023). See also Holly Fretwell & Jonathan Wood, [Fix America’s Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis](#), PERC Public Lands Report (2021);

<sup>15</sup> See *Fix America’s Forests*, *supra* n. 14 at 16.

<sup>16</sup> See e.g., Noah Greenwald, *Courtrooms are critical habitat for grizzly bears*, Daily Montanan (Sept. 13, 2023) (Center for Biological Diversity staffer oped bragging about the “[d]ozens of lawsuits” his and similar organizations have “filed during the last few decades to stop logging, mining, road building, livestock grazing” and other activities in areas occupied by grizzlies”).

<sup>17</sup> See Eric Edwards & Sara Sutherland, [Does Environmental Review Worsen the Wildfire Crisis?](#), PERC Policy Brief (2022).

PERC does not mean to suggest that this is a reason not to reintroduce grizzly bears to the North Cascades. But the potential regulatory consequences for forest restoration merit further attention than they have received in the proposed rule and environmental impact statement. It's also worth considering how supporters of the proposed reintroduction could help address this problem. It is well established that private parties can help perform or pay for the analysis required by NEPA.<sup>18</sup> In Northeastern Washington's "A to Z" project, for instance, Vaagen Brothers Lumber covered the cost of NEPA analysis for a forest restoration project under one of its stewardship contracts with the Forest Service. There's no reason that environmental organizations and other supporters of wolf reintroduction could not do the same.

Further analysis of this and the other issues identified above may help to minimize the proposal's legal risks. Under the National Environmental Policy Act, the National Park Service and Fish and Wildlife Service must consider a reasonable range of alternatives to its proposal, which should include a range of regulatory approaches for the reintroduced population. The Service must also demonstrate, under the Endangered Species Act, how any final regulation for the population is "necessary and advisable" for its conservation and recovery, a standard that requires consideration of these and other tradeoffs.

### **Make Grizzlies An Asset, Rather Than Liability**

Even with the perfect regulation in place, introducing an apex predator to the landscape will inevitably impose liabilities on neighboring communities and landowners. To the Park Service's and Fish and Wildlife Service's credit, they acknowledge these costs and don't attempt to downplay them by focusing on the initial small size of the reintroduced population.

To determine the losses that ranchers and sheep-herders might face due to direct predation, for instance, the Environmental Impact Statement considers the effect of having 200 bears in the ecosystem (the long-term goal of the reintroduction), rather than the short term goal of 25 bears.<sup>19</sup> According to the proposed rule, the expected loss of 19 cattle and 4 sheep per year to grizzly depredation in the area would cost ranchers and herders approximately \$21,000 annually.<sup>20</sup> While small compared to some other costs of the program—capturing and relocating grizzlies is anticipated to cost \$150,000 per year—these costs could be significant for ranchers, who average only \$25,000 per year in net income.<sup>21</sup> And this estimate only includes the direct costs of depredation. As the Services acknowledge, ranchers would also bear indirect costs, such as monitoring costs, mitigation or deterrence costs, and reduced weight of animals.

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<sup>18</sup> See *Fix America's Forests*, *supra* n. 14, at 26–27.

<sup>19</sup> See Environmental Impact Statement at 144.

<sup>20</sup> See 88 Fed. Reg. at 67,214.

<sup>21</sup> See Environmental Impact Statement at 138.

Fortunately, there are ways that the Services, states, and private parties can mitigate these costs and even make reintroduced populations an asset to communities and landowners. Recently, PERC and other conservation organizations partnered with a rancher in Montana’s Gravelly Range to reduce conflicts between grizzlies and livestock and the lethal take of grizzlies that commonly results from such conflict.<sup>22</sup> Under the agreement, the conservation organizations compensate the rancher for implementing strategies to reduce conflict, including adjusting the number of cattle on the allotment and timing of their presence, while increasing the profitability of the ranch.<sup>23</sup>

When wolves were reintroduced to the Greater Yellowstone Ecosystem, the Defenders of Wildlife raised money from its supporters to fund a private, voluntary program to compensate ranchers for livestock lost to wolf depredation.<sup>24</sup> This gave the organization a financial stake in the reintroduction and an incentive to work with ranchers to find new ways to mitigate the costs predators impose on livestock operations.<sup>25</sup> That model has since been expanded to include payments to ranchers and landowners who accommodate imperiled wildlife or provide habitat, with such “payments for presence” tied to the size of the population so that landowners directly benefit from its increase.<sup>26</sup> PERC has recently applied the payments for presence model to conserve elk migration in the Greater Yellowstone Ecosystem.<sup>27</sup>

To facilitate the recovery of a reintroduced population of black footed ferret, the Department of Agriculture compensates landowners for conservation practices that maintain or restore habitat.<sup>28</sup> In a recent revision to its regulation of the ferret population, the Fish and Wildlife Service emphasized the importance of these incentive programs to habitat restoration and, ultimately, species recovery.<sup>29</sup>

In the Environmental Impact Statement, the National Park Service notes that similar compensation might be applied to help the grizzly bear, “if private funds are available.”<sup>30</sup> Washington has a fund to compensate ranchers and farmers for losses caused by certain wildlife, including bears. Much of the funding and regulation for that program is addressed to wolves, so it’s not clear how much compensation might be available through this program for grizzly bear depredations. But, more importantly, it’s not clear why the Service does not take on this financial burden as part of the reintroduction rather than imposing it on the state. If losses max out at \$21,000 annually, as the Park

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<sup>22</sup> See PERC, [Grizzly Conflict Reduction Grazing Agreement](#).

<sup>23</sup> See *id.*

<sup>24</sup> See Hank Fischer, [Who Pays for Wolves?](#), PERC Reports (2001).

<sup>25</sup> See *id.*

<sup>26</sup> See Catherine Semcer, [Securing a Future for Wolves in Yellowstone](#), PERC Reports (2021).

<sup>27</sup> See PERC, [Elk Occupancy Agreements](#).

<sup>28</sup> See USDA Natural Resources Conservation Serv., [Black-footed Ferret Initiative–Colorado](#).

<sup>29</sup> 88 Fed. Reg. 69,054 (Oct. 5, 2023).

<sup>30</sup> EIS at 144.

Service estimates, compensation for these losses would be a small price to pay to facilitate the reintroduction, and less than 3% of the estimated annual budget for the program.<sup>31</sup>

The Services should also consider how its decision might encourage conservation organizations and others to provide those funds, if the Service declines to, and develop other innovative programs to make grizzlies an asset to local communities and landowners. There are numerous ways this could be done. Reintroduction could be conditioned on the availability of private funds or programs to reward landowners who mitigate conflicts. To maintain the motivation for these efforts after reintroduction, the stringency of the regulation could also depend on conservation organizations continuing to implement programs to reduce liabilities for landowners.

The above examples demonstrate that private conservation organizations can be part of the solution for wildlife conflict and species recovery. Compared to the ranchers in the area, our groups also have the resources to do this effectively.<sup>32</sup> It's only fair that proponents of grizzly reintroduction bear more of the costs of seeing their goals achieved, rather than foisting the costs on landowners who may oppose the effort. It's also better for the long-term success of the reintroduction effort by reducing conflict, which has been a significant hindrance to the success of other reintroduction efforts.<sup>33</sup>

### **Plan For Success**

Finally, the Services should consider how the proposed regulation should adapt as the reintroduced population grows and expands, especially how it might facilitate that recovery and the ultimate transfer of management to the state. The Fish and Wildlife Service has previously determined that 200-400 grizzly bears would likely need to be established in the North Cascades to meet the recovery goal for that population.<sup>34</sup> Yet, according to the draft Environmental Impact Statement, it will likely take 60–100 years for the proposed reintroduction to establish a population of 200 bears. It may be untenable to ask the state, communities, and landowners to accept decades of federal control over any activity in the area that affects a bear, even if the Service retains the flexibility in the proposed rule

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<sup>31</sup> See *id.* at C-2 (estimating \$740,000 in annual costs but identifying depredation compensation as “dependent on funding”).

<sup>32</sup> The environmental group that challenged the Fish and Wildlife Service’s previous decision not to reintroduce grizzlies to the North Cascades now opposes its efforts to reduce the regulatory burden a reintroduction would impose on local communities and landowners. However, this group has far deeper pockets than the modest ranchers in this area and could much more easily bear these costs. See Center for Biological Diversity, [Get Grizzlies Back to the North Cascades](#). See also Center for Biological Diversity, [990](#) (2021) (reporting \$36 million in income in 2021).

<sup>33</sup> See *Reintroduction*, *supra* n. 2.

<sup>34</sup> See Fish and Wildlife Serv., [Grizzly Bear Recovery Plan: North Cascades Ecosystem Recovery Plan Chapter](#) (1997). Subsequent science indicates that the upper bound of this estimate exceeds the ecosystems carrying capacity of approximately 278 bears. See Fish and Wildlife Service, [Grizzly Bear Recovery Program: 2021 Annual Report](#).



throughout that time.<sup>35</sup> And that's assuming that the population would promptly be delisted once it hit that goal, which has not been the case when other grizzly populations have hit their population targets.<sup>36</sup> To provide a better path for the recovery and ultimate delisting of the North Cascades population, the Service should provide in its rule that management responsibility for grizzly bears will transition to the state gradually as the population grows. That plan should proceed automatically as benchmarks are met, rather than be dependent on subsequent rulemakings by the Service and the litigation that could block them.<sup>37</sup>

## **Conclusion**

For decades, we've fallen short in fulfilling the Endangered Species Act's goal of recovering species so that they are no longer endangered or threatened with extinction. Proactive efforts like the proposed reintroduction are essential to improving the recovery rate. But it is also essential that those efforts be carried out in a way that is sensitive to the regulatory and practical burdens rare species can impose on private landowners. Ultimately, successfully recovering species depends on making them assets, rather than liabilities, to the communities and landowners that have the greatest influence on their long-term survival.

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<sup>35</sup> Of course, this rule wouldn't legally bind the Service in the future, even if it was finalized and bears flourished under it. It could always be amended to the detriment of communities and landowners—and the trust and cooperation needed for grizzly recovery in the long term. *See* Tate Watkins & Madison Yablonski, *Turn Reintroduced Species Into Assets* in *Field Guide*, *supra* n. 3 (discussing the Service's decision to terminate regulatory flexibilities for fishermen negotiated as part of a sea otter reintroduction effort).

<sup>36</sup> Brian Yablonski, [A Path Forward for the Grizzly Bear](#), PERC Reports (2023).

<sup>37</sup> *See* Jonathan Wood, *Chart Roadmaps to Recovery* in *Field Guide*, *supra* n. 3.