

**FEDERAL DELISTING OF THE GRAY WOLF:  
AN OREGON PERSPECTIVE ON THE  
FUTURE OF GRAY WOLF RECOVERY UNDER  
STATE ENDANGERED SPECIES ACTS**

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*“We don’t want wolves to come here, but if one goes to the trouble to get here, we’ll let it stay . . . . It’s a little like how [the United States] treats Cubans.”  
—John Esler, Chairman Oregon Wildlife Commission*

TABLE OF CONTENTS

I. Topic Overview .....	133
A. History of Wolves in the West .....	134
B. Wolves in Oregon.....	138
C. Gray Wolf Reintroduction.....	139
II. Background Law .....	143
III. Current Developments .....	146
A. The Movement to Change the Oregon ESA.....	148
IV. Possible Future Developments.....	158
V. Conclusion .....	164

I. TOPIC OVERVIEW

In response to the resounding success of the Yellowstone gray wolf recovery program the United States Fish and Wildlife Service delisted the gray wolf from the federal Endangered Species Act in parts of the United States. Under federal law the gray wolf is now classified as a threatened

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species throughout the western United States. As a result of federal delisting of the gray wolf, state law now governs the status of all gray wolves that enter Oregon. The Oregon Threatened or Endangered Wildlife Species Act classifies gray wolves as endangered species and requires that action be taken to assure gray wolf recovery. Currently, the state of Oregon is not taking any action in regard to gray wolf recovery or reintroduction. Gray wolves from the central Idaho reintroduction program are venturing into Oregon. The establishment of a breeding pack of gray wolves is in Oregon's near future. In fact, wolves may currently wander the mountains and valleys of Oregon.

Oregon's inaction has engaged ranchers and wolf advocates in a heated debate about the future of the gray wolf in Oregon. Ranchers argue that gray wolves are predatory nuisances, and that they are not native to Oregon because they have been eradicated from the state. Wolf advocates counter with scientific data suggesting wolves are not only native to Oregon, but could presently thrive on public land in Oregon. Both groups have petitioned the Oregon Division of Fish and Wildlife to change the status of the gray wolf under the Oregon Threatened or Endangered Wildlife Species Act. Several attempts have been made in the Oregon legislature to amend or create state laws that would affect the status of gray wolves in Oregon. Oregon, like many other states where gray wolves once thrived, has not addressed how they will manage expansion of the gray wolf population. Therefore, this Comment will analyze the current law regarding gray wolves through an Oregon perspective and provide guidance for Oregon and other states faced with structuring law and policy pertaining to gray wolf management.

#### *A. History of Wolves in the West*

“The gray wolf [*canis lupus*] is native to most of North America north of Mexico City.”<sup>1</sup> “The only areas of the contiguous United States that” may not have supported “gray wolves since the last glacial events are much of California and the Gulf” as well as the “Atlantic coastal plain south of Virginia.”<sup>2</sup> Biologists believe that at one time North America was the home

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1. Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 60,252, 60,252 (Nov. 22, 1994) (to be codified at 50 C.F.R. pt. 17).

2. Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43,450, 43,451 (proposed July 13, 2000) (to be codified at 50 C.F.R. pt. 17).

to “anywhere between 140,000 and 850,000 wolves.”<sup>3</sup> The gray wolf was found in “nearly every area . . . that supported populations of hoofed mammals (ungulates),” the gray wolf’s major food source.<sup>4</sup> Due to the large number of ungulates in the northern Rocky Mountains, wolves were historically found in this region of the western United States.<sup>5</sup>

“Wolves are social animals,” typically “living in packs of 2 to 10 members.”<sup>6</sup> These packs usually “consist[] of a breeding pair, their pups from the current year, [and] offspring from the previous year.”<sup>7</sup> An unrelated wolf will occasionally join the pack.<sup>8</sup> “[T]he top-ranking [(alpha)] male and female in each pack” are typically the only wolves that will produce pups.<sup>9</sup> Once these pups are yearlings they will “frequently disperse from their natal packs” and either “become nomadic” or “locate suitable unoccupied habitat and a member of the opposite sex and begin their own territorial pack.”<sup>10</sup> This type of wolf movement can produce the numbers of wolves that were once present in the United States, so long as human forces do not intervene.

Misguided human activities caused the extirpation of wolves from the conterminous United States. European colonization of the Americas was accompanied by fear of, and disdain for, the wolf.<sup>11</sup> Wolves were thought to be demonic, and stories of wicked wolves date back to the Bible.<sup>12</sup> Generations of children have learned about the evil qualities of wolves from

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3. Jennifer Li, *The Wolves May Have Won the Battle, But Not the War: How the West was Won Under the Northern Rocky Mountain Wolf Recovery Plan*, 30 ENVTL. L. 677, 681 (2000). 459 Fed. Reg. at 60,253. “Wild prey species in North America” could include white-tailed and mule deer, moose, elk, woodland caribou, bison, muskox, bighorn sheep, mountain goat, beaver, and snowshoe hare, “with small mammals, birds and large invertebrates sometimes being taken.” 65 Fed. Reg. at 43,451. Domestic animals that wolves may also prey upon “include horses, cattle, sheep, goats, pigs, geese, ducks, turkeys, chickens, dogs, and cats.” *Id.*

5. 59 Fed. Reg. at 60,253–54.

6. 65 Fed. Reg. at 43,451. Wolves also have the following characteristics: weight “[r]anges from 40 to 175 pounds”; speed from a 5mph trot to a 35 mph burst; life span of 8-12 years; and the “wolf’s jaw can exert 1,500 pounds of pressure per square inch, twice that of a German Shepard.” Michael McCabe, *Gray Wolves Heading to California—Defenders Seek Protection as Ranchers Howl*, S.F. CHRON., Feb. 5, 2002, at A1. For an in-depth discussion of wolf characteristics, see BARRY HOLSTUN LOPEZ, *OF WOLVES AND MEN* (1978).

7. 65 Fed. Reg. at 43,451.

8. *Id.*

9. *Id.*

10. *Id.*

11. See Li, *supra* note 3, at 681 (discussing the prejudices that early immigrants to North America held toward wolves).

12. Mathew 7:15 (King James) (“Beware of false prophets, which come to you in sheep’s clothing, but inwardly they are ravening wolves.”). See Daniel R. Dinger, Note & Comment, *Throwing Canis Lupus to the Wolves: United States v. McKittrick and the Existence of the Yellowstone and Central Idaho Experimental Wolf Populations Under a Flawed Provision of the Endangered Species Act*, 2000 BYU L. REV. 377, 384 (2000) (mentioning folklore of, and Bible reference to, the wolf).

fairy tales and fables.<sup>13</sup> One may “have heard about the boy who cried wolf once too often and lost his credibility.”<sup>14</sup> One may also “recall the wolf that huffed and puffed at the cottages of three little pigs, and the wolf that lured [L]ittle Red Riding Hood astray and gobbled up grandma.”<sup>15</sup> “The fascination with wolves also has an adults-only section” that includes Bruno Bettelheim’s description of Little Red Riding Hood “as a tale of girl’s sexual awakening,” with the wolf realizing “libidinous wishes.”<sup>16</sup> Gruesome tales also include an eighteenth-century French legend where “two wolves devour[] 64 people in the countryside.”<sup>17</sup> However, there is no evidence that a human “has ever been killed or eaten by a wolf in North America.”<sup>18</sup>

Historically, Native North Americans “looked . . . favorably upon wolves.”<sup>19</sup> In fact, “the mania for wolf control” brought on by early European settlers “appears to be an aberration, a temporary sickness that afflicted only some [humans], and which even some of the most avid wolf hunters came to regret.”<sup>20</sup> The combination of fear and greed caused the eradication of the gray wolf from North America. “By the mid-nineteenth century, wolf pelts” were a “valuable commodity.”<sup>21</sup> Hunters looking for buffalo hides on the Plains of North America quickly discovered that wolves would find abandoned buffalo carcasses an easy meal.<sup>22</sup> At first, this increase in carrion led to an increase in wolf numbers in the late nineteenth century.<sup>23</sup> Plains Indians were able to resourcefully kill wolves “for their warm, luxurious fur.”<sup>24</sup> “For a brief while, the Plains Indians enjoyed an era of affluence” like no other “in the history of America.”<sup>25</sup> Westward moving colonists exterminated almost every wolf they came across.<sup>26</sup> Thus the demise of the Plains Indian, the buffalo, and the long grass prairie is often recounted, while the fate of the gray wolf is not.<sup>27</sup>

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13. Judy Fahys, *Wolves Run Wild in Human Imagination*, SALT LAKE TRIB., Dec. 29, 2002, at A9.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. McCabe, *supra* note 6, at A1.

19. PETER STEINHART, *THE COMPANY OF WOLVES* 30 (1995).

20. *Id.*

21. Brent Israelsen & Skip Knowles, *Return of the Wolf*, SALT LAKE TRIB., Dec. 29, 2002, at A1.

22. *Id.*

23. *Id.*

24. Ewan Clarkson, *Wolf Country* 93 (1975).

25. *Id.* at 92.

26. *Id.* at 93.

27. *Id.* at 92–93.

Savvy hunters, sometimes called professional wolfers, would lace leftover buffalo carcasses with strychnine.<sup>28</sup> A wolfer utilizing this method could poison as many as sixty wolves in one night.<sup>29</sup> Between 1870 and 1877, approximately 385,000 gray wolves were killed by poisoning.<sup>30</sup> Other activities “such as the elimination of native ungulates,” the conversion of wilderness into agricultural land, ranches, or homesteads, “and extensive predator control efforts” contributed to the demise of the gray wolf.<sup>31</sup> Due to fewer ungulates to prey upon, the wolf turned to domestic livestock for subsistence.<sup>32</sup> Gray wolves were labeled an “economic scourge” by livestock owners as well as sportsmen, who blamed the wolf for sharp declines in big game.<sup>33</sup> “Ridding the landscape of wolves became” an integral “part of ‘taming’” the American frontier.<sup>34</sup> Wolves were eradicated from the eastern United States by 1900; and by 1926, wolves were nearly gone from the Plains.<sup>35</sup> By the 1930s, gray wolves were virtually exterminated from the United States altogether, the exceptions being the northern most points of the United States.<sup>36</sup>

By 1986, gray wolf reproduction had not been detected in the Rocky Mountains for fifty years.<sup>37</sup> This continuous absence led to the gray wolf being classified as an endangered species in the United States with the passage of the federal Endangered Species Act (federal ESA) in 1973.<sup>38</sup> In 1986, however, a gray wolf den was found in Glacier National Park near the Canadian border.<sup>39</sup> This southern movement of Canadian gray wolves fueled the gray wolf reintroduction movement.

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28. *Id.* at 93.

29. *Id.* at 94.

30. Dinger, *supra* note 12, at 385.

31. Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 60,252, 60,253 (Nov. 22, 1994) (to be codified at 50 C.F.R. pt. 17).

32. Israelsen & Knowles, *Return of the Wolf*, *supra* note 21.

33. *Id.*

34. *Id.*

35. Dinger, *supra* note 12, at 385.

36. Israelsen & Knowles, *Return of the Wolf*, *supra* note 21; *See* Dinger, *supra* note 12, at 385 (noting that Washington State saw its last wolf in 1940, and Colorado and Wyoming exterminated their’s by 1943); U.S. FISH & WILDLIFE SERV., ET AL., ROCKY MOUNTAIN WOLF RECOVERY 2001 ANNUAL REPORT (T. Meier, ed.), available at <http://westerngraywolf.fws.gov/annualrpt01/2001report.htm> [hereinafter 2001 ANNUAL REPORT].

37. Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 60,252, 60,253 (Nov. 22, 1994) (to be codified at 50 C.F.R. pt. 17).

38. *See* 16 U.S.C. §§ 1531–1599 (2000); Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.1–17.96 (1994); 2001 ANNUAL REPORT, *supra* note 36, at 1.

39. 59 Fed. Reg. at 60,253.

*B. Wolves in Oregon*

The gray wolf is an integral part of the Oregon ecosystem, but has been extirpated from Oregon since the 1950s.<sup>40</sup> During an expedition to compile a report on the territory of Oregon between 1828 to 1842, Charles Wilkes penned: “Abundance of game exists, such as elk, deer, antelopes, bears, wolves, foxes, muskrats, martins, beavers, a few grizzly bears, and sifflines.”<sup>41</sup> Wolves were even found in Oregon as far west as the Willamette Valley. On a government expedition to the Oregon Territory in 1846, Lieutenant Howison reported that: “[In] the Wilhamette [sic] [V]alley . . . [w]olves are numerous, and prey upon other animals, so that the plains are entirely in their possession.”<sup>42</sup> However, settlers began to descend upon Oregon during this time period,<sup>43</sup> and from 1834 to 1837 the Hudson Bay Company reported that 19,544 gray wolves were killed in Oregon for fur.<sup>44</sup>

Settling Oregonians were so concerned with wolves that in 1843 “[a] series of meetings, known as the Wolf Meetings, were held.”<sup>45</sup> The purpose of these meetings was to discuss and make plans for the extermination of wolves and other carnivores whose natural predatory instincts were sometimes the causes for the loss of settlers’ cattle.<sup>46</sup> Soon after these meetings, wolf numbers began to decline, leading to the eventual extermination of wolves in Oregon in the 1940s.<sup>47</sup> Lone wolves have been spotted in Oregon since the 1940s, but the last documented pre-reintroduction era wolf was shot and killed in 1963.<sup>48</sup> The continuous absence of the gray wolf has led the State of Oregon to consider the gray wolf an endangered species under the Oregon Threatened or Endangered Wildlife Species Act (Oregon ESA).

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40. OREGON DIV. OF FISH & WILDLIFE, AN INTRODUCTION TO OREGON WOLF ISSUES, available at [http://www.dfw.state.or.us/ODFWhtml/InfoCntrWild/gray\\_wolf/wolf\\_issues.htm](http://www.dfw.state.or.us/ODFWhtml/InfoCntrWild/gray_wolf/wolf_issues.htm) (updated Apr. 21, 2003).

41. Charles Wilkes, *Report on the Territory of Oregon*, 12 OR. HIST. Q. 269, 287 (1911).

42. Neil M. Howison, *Report of Lieutenant Neil M. Howison on Oregon, 1846*, 14 OR. HIST. Q. 1, 49 (1913).

43. Sidney Teiser, *A Pioneer Judge of Oregon—Mathew P. Deady*, 44 OR. HIST. Q. 61, 67 (1943) (stating that “by 1843 about 100 more Americans had arrived in Oregon”).

44. *Rekindling the Green Fire*, WILD OREGON (ONRC Fund Newsletter, Portland, Or.), Summer 1999, available at [http://www.onrc.org/wild\\_oregon/wo99/wosum99p2.html](http://www.onrc.org/wild_oregon/wo99/wosum99p2.html).

45. Teiser, *supra* note 43, at 67.

46. *Id.*

47. Memorandum from the Senate Natural Resource Committee, to the Honorable Co-Chairs Senator Ferrioli and Representative Close (April 16, 2002) (on file with author).

48. *Rekindling the Green Fire*, *supra* note 44, at 2.

### C. Gray Wolf Reintroduction

It is now generally accepted that “[t]he natural history of wolves and their ecological role was” misunderstood “during the period of their extermination in the conterminous United States.”<sup>49</sup> Once “considered a nuisance and threat to humans . . . the gray wolf’s role as an important and necessary part of natural ecosystems is better understood and appreciated” today.<sup>50</sup> Wolf advocates note that “[f]or wolves to come back completes a niche. It puts things back in balance. Otherwise you have a vacuum, a man-made situation where, throughout the United States, a very important predator has been eliminated.”<sup>51</sup>

In 1987, Congressman Wayne Owens of Utah surprised “his Western colleagues by introducing legislation requiring the reintroduction of wolves into Yellowstone National Park.”<sup>52</sup> This legislation stalled,<sup>53</sup> but later in 1987 a Yellowstone wolf “recovery plan was approved by the [United States Fish and Wildlife] Service” (USFWS).<sup>54</sup> The election of Arkansas Governor William J. Clinton in 1992 enabled the return of wolves to Yellowstone to come to fruition.<sup>55</sup> Wolf reintroduction efforts were made possible because of the Endangered Species Act Amendments of 1982. Congress amended the ESA with the addition of Section 10(j), “which provides for the designation of specific endangered species as ‘experimental.’”<sup>56</sup> Section 10(j) states that a reintroduced endangered species “may be treated as a threatened species” within a defined reintroduction area.<sup>57</sup> Labeling the wolves as “experimental,” and thus, “threatened,” makes management efforts easier because of the relaxed guidelines that accompany a status of “threatened” as opposed to “endangered.”<sup>58</sup> After eight years of wolf recovery efforts,<sup>59</sup> “the [USFWS] plan was finally implemented in the winter of 1994–1995, when [sixty-six] Canadian gray wolves were captured and released into” Yellowstone

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49. Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho and Montana, 59 Fed. Reg. 60,252, 60,253 (Nov. 22, 1994) (to be codified at 50 C.F.R. pt. 17).

50. *Id.*

51. Associated Press, *Gray Wolves Expected in Oregon*, COLUMBIAN, Dec. 6, 2001, at C5.

52. Israelsen and Knowles, *Return of the Wolf*, *supra* note 21.

53. *Id.*

54. 59 Fed. Reg. at 60,253.

55. Israelsen and Knowles, *Return of the Wolf*, *supra* note 21.

56. 59 Fed. Reg. at 60,252.

57. *Id.*

58. *Id.*

59. *See generally* Wolves for Yellowstone? A Report to the United States Congress Vol. 1-4 (1990-1992).

National Park and central Idaho.<sup>60</sup> The Yellowstone recovery area covers parts of Montana and Wyoming, while the Idaho recovery area is currently wholly contained within the borders of Idaho. These wolves are classified as “experimental populations” under the federal Endangered Species Act,<sup>61</sup> so long as they stay within the defined boundaries of these recovery areas. Until recently, if the wolves wandered outside these defined reintroduction areas they were fully protected as endangered species under the ESA. However, as a result of federal delisting, gray wolves that wander outside the defined reintroduction areas are now only protected as threatened species under the federal ESA.<sup>62</sup>

Wolf packs are flourishing. In 2001, the number of documented wolves in the Yellowstone recovery area was 218, and the Central Idaho recovery area had 261 documented wolves.<sup>63</sup> These numbers are likely unrepresentative of the overall success of the program since many wolves are not radio collared or observed by air counting methods and, therefore, are not counted in yearly totals.<sup>64</sup> Regardless of the number of wolves that

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60. Li, *supra* note 3, at 679; 2001 ANNUAL REPORT, *supra* note 36, at 1. See generally JAY ROBERT ELHARD, *WOLF TOURIST: ONE SUMMER IN THE WEST* (1996); THOMAS MCNAMEE, *THE RETURN OF THE WOLF TO YELLOWSTONE* (1997); Christopher T. Cook, Note, *Reintroduction of the Gray Wolf: The Battle Over the Future of Endangered Species Policies*, 5 DRAKE J. AGRIC. L. 487 (2000) (discussing the reintroduction of Yellowstone’s wolves).

61. 16 U.S.C. § 1539(j) (2000); Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43,450, 43,452 (proposed July 13, 2000) (to be codified at 50 C.F.R. pt. 17). For discussion of the specific provisions of the ESA that led to wolf recovery, see Brian Bramblett, Note, *Wolves in the West: The Triumphs of Section 10(j) of the Endangered Species Act*, 22 PUB. LAND & RESOURCES L. REV. 133 (2001) and Elizabeth Cowan Brown, Comment, *The “Wholly Separate” Truth: Did the Yellowstone Wolf Reintroduction Violate Section 10(j) of the Endangered Species Act?*, 27 B.C. ENVTL. AFF. L. REV. 425 (2000).

62. Final Rule to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15,804, 15,804 (Apr. 1, 2003) (to be codified at 50 C.F.R. pt. 17).

63. 2001 ANNUAL REPORT, *supra* note 36, at 1. Wolf numbers in the central Idaho recovery area were 14 in 1995, 42 in 1996, 71 in 1997, 114 in 1998, 141 in 1999, 192 in 2000, and 261 in 2001. *Id.* at tbl. 4. Early estimates are that there were 285 wolves in 10 breeding pairs in the Central Idaho recovery area in 2002. U.S. FISH & WILDLIFE SERV., *GRAY WOLF RECOVERY STATUS REPORTS: WEEKS OF 1/06 TO 1/17, 2003*, available at <http://www.r6.fws.gov/wolf/wk01172003.htm>. This is a decline in the number of breeding pairs in 2001. *Id.* This decline is largely attributed to an increased inability to accurately count the wolves in Idaho as they disperse over a greater range. *Id.* Wolf packs included in the central Idaho recovery area as of December 2001 were the Big Hole, Chamberlain Basin, Gold Fork, Gospel Hump, Jureano Mountain, Kelly Creek, Landmark, Marble Mountain, Moyer Basin, Orphan, Scott Mountain, Selway, Thunder Mountain, Twin Peaks, Whitehawk Mountain, Wildhorse, and Wolfgang packs. 2001 ANNUAL REPORT, *supra* note 36, at 16. The last of the original wolves moved into the Yellowstone recovery area died in the winter of 2002-2003. *Last of Original Wolves Moved to Park Dies*, ASSOCIATED PRESS, Jan. 7, 2003, available at 2003 WL 2924632.

64. U.S. FISH & WILDLIFE SERV., *GRAY WOLF RECOVERY STATUS REPORTS*, *supra* note 63. What was once considered an accurate count of wolves in the Central Idaho Recovery area is becoming

go undetected, those that have been counted allowed the USFWS to meet its goal for wolf recovery. The goal was to have “30 breeding pairs of wolves, with an equitable and uniform distribution throughout the” recovery areas for three consecutive years.<sup>65</sup> This goal was reached in 1999,<sup>66</sup> and caused the USFWS to propose removing the gray wolf from the list of endangered and threatened wildlife in portions of the conterminous United States.<sup>67</sup> Before the USFWS could delist the gray wolf, though, states were required to develop wolf management plans that “reasonably assur[ed] that the gray wolf would not become threatened or endangered again.”<sup>68</sup> Idaho finished its thirty-eight page wolf management plan in March of 2002.<sup>69</sup> Montana has also completed its plan.<sup>70</sup> Wyoming is in the process of completing its plan.<sup>71</sup> Meanwhile, the Federal government began the delisting process on April 1, 2003.<sup>72</sup> Now, as a result, wolves that enter Oregon have greater protection under the language of the Oregon ESA than they do under the federal ESA.

Gray wolves from the Central Idaho recovery area are the most likely to enter Oregon and establish breeding packs, if they have not already done so undetected.<sup>73</sup> Three lone wolves from Idaho’s recovery area have already

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more and more a rough estimate of wolf numbers and reproductive success. This is attributed to the wolf populations expansion in numbers, distribution in population, and the death of many of the original wolves that were equipped with radio collars—meaning that an increasing number of packs no longer have radio collared adults—making it harder to count them. *Id.*

65. 2001 ANNUAL REPORT, *supra* note 36, at 1; Israelsen and Knowles, *Return of the Wolf*, *supra* note 22.

66. *See* 65 Fed. Reg. at 43,450 (stating that the success of the wolf recovery program “show[s] that the species’ current classification is no longer appropriate throughout most of its range”).

67. *Id.*

68. 2001 ANNUAL REPORT, *supra* note 36, at 1.

69. IDAHO LEGIS. WOLF OVERSIGHT COMM., IDAHO WOLF CONSERVATION AND MANAGEMENT PLAN, 2nd Reg. Sess., (2002), available at [http://www2.state.id.us/fishgame/info/mgmtplans/wolf\\_plan.pdf](http://www2.state.id.us/fishgame/info/mgmtplans/wolf_plan.pdf) (last visited Apr. 22, 2004).

70. Robert W. Black, *Wyoming, Feds Still Split on Wolves*, SALT LAKE TRIB., Feb. 11, 2004, available at <http://www.sltrib.com/2004/Feb/02112004/utah/137857.asp>.

71. Robert W. Black, *Wolf-Management Bill in Wyoming Advances*, DESERT NEWS (Salt Lake City), Feb. 17, 2004, at B2.

72. 2001 ANNUAL REPORT, *supra* note 36. Public informational meetings and hearings have also been held regarding the delisting process. *See* Announcement of Public Informational Meetings and Public Hearings for the Proposal to Reclassify and Remove the Gray Wolf from the List of Endangered and Threatened Species, 65 Fed. Reg. 49,531, 49,531 (proposed Aug. 14, 2000) (to be codified at 50 C.F.R. pt. 17). *See also* Federico Cheever, *The Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without Winning the War*, 31 ENVTL. L. REP. 11302 (2001) (discussing the federal delisting process).

73. The central Idaho wolf recovery area is managed by the Nez Perce Indian Tribe. National Wildlife Federation, Questions and Answers: Inquisitive Elizabeth Asks about the Gray Wolf (Dec. 1999), available at <http://www.nwf.org/keepthewildalive/wolf/questions.cfm> (discussing the Tribes management of wolves).

been documented within Oregon's boundaries. The first was a lone female gray wolf known by her radio collar identification number, B-45.<sup>74</sup> B-45 entered Oregon in February of 1999 and was captured by a helicopter net gun crew near the Middle Fork John Day River and returned to Idaho in March of 1999.<sup>75</sup> In May of 2000, another "collared wolf from the Central Idaho recovery area was struck by a vehicle and killed on Interstate 84 south of Baker City," Oregon.<sup>76</sup> The third and latest documented visit by a wolf into Oregon was an uncollared wolf which was likely the offspring of Central Idaho wolves.<sup>77</sup> The wolf was found in October of 2000 between Pendleton, Oregon and Ukiah, Oregon, a location further west than was likely reached by the previous two wolves.<sup>78</sup> The wolf was found dead from a bullet wound.

As many as "sixty reports of wolf or wolf track sightings" were reported in Eastern Oregon in the two years after B-45 first arrived in Oregon.<sup>79</sup> Sightings have even been reported "as far west... [as] the Cascade Mountains near Crater Lake."<sup>80</sup> Biologists believe this is evidence that the wolves in the Central Idaho recovery area "have found a travel corridor to the west. Oregon could become the first state the wolves colonize outside their defined reintroduction area in Idaho."<sup>81</sup> Due to the fact that wolves breed quickly, travel far, and roam widely, Eastern Oregonians have conceded that they "don't think . . . we can keep [wolves] out, [because] there's enough of a [gray wolf] population in Idaho, [and] they're going to be looking for new territory."<sup>82</sup> Based on the sightings, the wolves have indicated that new territory is in Oregon.

The imminent threat of wolves returning to their native lands in Oregon does not sit well with many; especially cattle ranchers and Eastern Oregonians whose ancestors may have had a hand in the original narrow-

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74. Li, *supra* note 3, at 678; CNN, *Idaho Wolf Crosses into Oregon* (Feb. 24, 1999), available at <http://www.cnn.com/NATURE/9902/24/oregon.wolf.enn>.

75. OREGON DIV. OF FISH & WILDLIFE, AN INTRODUCTION TO OREGON WOLF ISSUES, *supra* note 40. In reaction to the sighting of B-45, the Oregon State police scrambled into a plane to follow her movements. Federal officials finally trapped the wolf and moved it back to Idaho at a cost of nearly \$20,000. Michael Milstein, *Agency Gears up for Wolf Visits*, PORTLAND OREGONIAN, Dec. 6, 2001, at C7.

76. Oregon Division of Fish & Wildlife, *An Introduction to Oregon Wolf Issues*, *supra* note 40.

77. Michael Milstein, *Genetic Tests Show Animal Shot Dead in Eastern Oregon was a Wild Wolf*, PORTLAND OREGONIAN, Feb. 3, 2001, at D1.

78. *Id.*

79. Oregon Division of Fish & Wildlife, *An Introduction to Oregon Wolf Issues*, *supra* note 40.

80. Don Thompson, *Coalition Fights to Keep Wolf Protections*, CONTRA COAST TIMES (Walnut Creek, Cal), Oct. 13, 2002, at 4.

81. Milstein, *Genetic Tests Show Animal Shot Dead in Eastern Oregon was a Wild Wolf*, *supra* note 77.

82. Michael Milstein, *When Wolves Move In*, PORTLAND OREGONIAN, Nov. 10, 2002, at A11.

minded extermination of wolves. Prior to delisting, wolves that wandered into Oregon were left alone by federal officials unless they caused problems, in which case they might be killed.<sup>83</sup> Since delisting, however, wolves that venture into Oregon will be protected as an endangered species under the Oregon ESA. Confusion as to how the Oregon ESA will affect wolves that enter the State of Oregon has led to a vigorous debate between ranchers and wolf lovers.<sup>84</sup> Ranchers have petitioned the State of Oregon to delist the gray wolf from the Oregon ESA, claiming that the gray wolf is not native to Oregon since it “has been extirpated for more than 50 years.”<sup>85</sup> Wolf-lovers petitioned the state claiming that the Oregon ESA requires the preparation of ‘survival guidelines’ detailing the potential for reintroduction of the gray wolf to Oregon.<sup>86</sup> Private conservation groups, scientists, ranchers, and others with an interest in the gray wolf have been lobbying for changes to state law and girding for hearings and, inevitably, lawsuits.<sup>87</sup> The potential for legal action in Oregon caused by federal delisting of the gray wolf requires an analysis of the Oregon ESA.

## II. BACKGROUND LAW

Wolves that venture into the state of Oregon are no longer classified as endangered species under the Federal ESA.<sup>88</sup> However, Oregon State law classifies the gray wolf as an endangered species and thus Oregon law, rather than federal, governs the migration of wolves into Oregon.<sup>89</sup> If gray wolves are roaming the hills of Eastern Oregon, as many biologists and

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83. U.S. Fish and Wildlife Service, Gray Wolf Recovery Status Reports: Weeks of 1/06 to 1/17, 2003, *supra* note 63; *see also*, Jeff Barnard, *The Gray Wolf: Terrorist or Savior*, SEATTLE POST-INTELLIGENCER, Aug. 9, 2002 (online edition), [http://seattlepi.nwsourc.com/local/81972\\_wolf09.shtml](http://seattlepi.nwsourc.com/local/81972_wolf09.shtml).

84. A poll of 600 Oregon voters in 1999 found 70 percent favored wolf recovery in Oregon, 76 percent of Americans support wolf recovery efforts. Renee Davidson, *Return of the Wolf: Oregon Wrestles With Controversy*, BEND BUGLE, Nov. 13, 2002, *available at* [http://www.bend.com/news/ar\\_view^3Far\\_id^3D6960.htm](http://www.bend.com/news/ar_view^3Far_id^3D6960.htm). *See also*, John Gibeaut, *Endangered Again*, 85 JULY A.B.A. J. 54 (July 1999) (discussing the rancher and wolf advocate battle in Yellowstone).

85. Petition from Glen Stonebrink, Oregon Cattlemen’s Association, to John Esler, Chair of the Oregon Fish and Wildlife Commission (May 22, 2002) (on file with author).

86. Petition from Peter M. Lacy, Oregon Natural Desert Association, to the Oregon Department of Fish & Wildlife before the State Fish and Wildlife Commission (June, 7 2002), *available at* <http://www.onda.org/projects/wolves/index.html#> (last visited Nov. 14, 2003).

87. Andrew C. Revkin, *Gray Wolf Clawing Way off Endangered Roster*, TIMES UNION (Albany), July 3, 2000, at A1.

88. *See* 16 U.S.C. §§ 1531–1599 (2000). *See generally*, Bramblett, *supra* note 61; Cheever, *supra* note 71; Cook, *supra* note 60; Cowan Brown, *supra* note 61; Dinger, *supra* note 12; Li, *supra* note 3 (examining the treatment of wolves under the Federal ESA).

89. Michael Milstein, *Wolves Rate Special Status Inside Oregon*, PORTLAND OREGONIAN, May, 29 2002, at A1.

wolf-advocates suspect, they may have found a remarkable refuge because they are strongly protected by the “little-known, little-understood” Oregon ESA.<sup>90</sup>

Through a process called grandfathering, the Oregon ESA provides that species of wildlife listed as threatened or endangered under the federal ESA as of May 15, 1987 are afforded the same status under the Oregon ESA if the species is native to Oregon.<sup>91</sup> Because the wolf was on the Federal ESA as of May 15, 1987, and is native to Oregon, the species falls within the category of species grandfathered into the Oregon ESA. Species that were grandfathered into the Oregon ESA may be delisted by the Oregon Division of Fish and Wildlife commission (the Commission or ODFW) at any time.<sup>92</sup> The Commission has evidenced its intent to keep the gray wolf an endangered species in Oregon by not removing it from the Oregon ESA. Furthermore, the Oregon legislature supports the Commission’s protection of the gray wolf under the Oregon ESA.

Because the gray wolf was grandfathered into the Oregon ESA, none of the listing requirements for the gray wolf have been fulfilled. The ODFW therefore has not specifically considered the status of gray wolves, and likely does not understand how the Oregon ESA applies. State officials concede there is a wolf recovery obligation, but they are still “trying to understand how that [obligation] might dovetail with other wildlife laws.”<sup>93</sup>

At least once every five years, the Oregon ESA calls for ODFW to review the status of endangered or threatened species to determine if substantial scientific evidence exists to justify reclassification or removal from the list.<sup>94</sup> The statute defines “substantial scientific evidence” as “that quantum of the best available documented information or evidence that a reasonable person would accept as adequate to support a conclusion. This includes information or evidence that may not have been reviewed by a scientific review panel, but that [ODFW] considers scientifically reliable.”<sup>95</sup> This is the standard which evidence of gray wolf activity within Oregon will be analyzed.

Under the Oregon ESA, the State can decide not to list a species that is secure outside Oregon or “not of cultural, scientific, or commercial significance” to Oregon residents.<sup>96</sup> The State may add, remove, or change

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90. *Id.*

91. OR. REV. STAT. § 496.176(1)(a) (2001).

92. *Id.* § 496.176(6)(a).

93. Milstein, *Wolves Rate Special Status Inside Oregon*, *supra* note 89, at A1.

94. Or. Rev. Stat. § 496.176(8) (2001).

95. OR. ADMIN. R. 635-100-0100(12) (2001).

96. Or. Rev. Stat. § 496.176(9) (2001).

the status of any species “upon a determination that the species is or is not a threatened or endangered species.”<sup>97</sup> Furthermore, in 1995 the Oregon ESA was amended, allowing the Commission to determine not to list any species previously listed under the Federal ESA. In other words, the Commission may choose not to list any species grandfathered into the Oregon ESA, such as gray wolves.<sup>98</sup> The Oregon ESA also provides that any person may petition the State to add, remove, or change the status of a species.<sup>99</sup> “A petition shall clearly indicate the action sought” and include a showing of “documented scientific information” justifying the requested action.<sup>100</sup> “If the petition is denied, the petitioner may seek judicial review . . . .”<sup>101</sup> When added to the list of threatened or endangered species, the 1995 amendments require the State to establish guidelines necessary to ensure the survival of individual members of the species. This includes take avoidance and protection of habitat critical to the survival of the species.<sup>102</sup> These survival guidelines must be completed at the time the Commission adds a species to the list.<sup>103</sup>

Recognizing that the use of state lands would be beneficial to the economic concerns of the State when recovering endangered or threatened species, the 1995 amendments allow the use of state land to achieve recovery when it can be done without significant impact on the primary use of that land.<sup>104</sup> It is up to the state land owning or managing agency to determine if state land can play a role in the conservation of the endangered species, keeping in mind the conservation needs of the particular species and the purpose of the land.<sup>105</sup> In conjunction with ODFW, the land owning agency is required to develop an endangered species management plan within eighteen months from when the species is listed as endangered.<sup>106</sup> The plan is to “be based on the statutes, rules, and policies applicable to the agency’s programs” while taking into account “social or economic impacts the plan may have on the state.”<sup>107</sup>

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97. *Id.* § 496.176(2).

98. *Id.* § 496.176(6)(a).

99. *Id.* § 496.176(5).

100. *Id.* § 496.176(5)(a).

101. *Id.* § 496.176(5)(e).

102. *Id.* § 496.182(2).

103. *Id.*

104. *Id.* § 496.182(1).

105. *Id.* § 496.182(8)(a)(B).

106. *Id.* § 496.182(8)(a)(C).

107. *Id.*

## III. CURRENT DEVELOPMENTS

ODFW has not undertaken sufficient measures under the Oregon ESA to prepare recovery guidelines or determine if state land provides a suitable habitat for migrating wolves entering Oregon from Idaho. ODFW explains that its Wildlife Diversity Plan directs the agency to reintroduce native species like extirpated gray wolves whenever possible.<sup>108</sup> However, the same plan “predicts that there is no year round habitat in Oregon that would allow wolves to exist without conflicts with land uses already in place . . . [including] livestock depredation, livestock harassment, and changes to deer and elk populations.”<sup>109</sup> ODFW contends that this is based on the large expanse of public land required for each wolf pack and the fact that more than one pack “would be needed to provide a viable population in Oregon.”<sup>110</sup> Thus, the agency says gray wolves will not be actively reintroduced into Oregon.<sup>111</sup> ODFW does not have a management plan for uninvited wolves that try to naturally reestablish or reintroduce themselves to their native lands in Oregon.<sup>112</sup> In fact, it has been the policy of ODFW to request the USFWS to capture any wolf that has strayed into Oregon and return it to its point of origin.<sup>113</sup> However, the USFWS has recently informed ODFW that the only wolves they will consider bothersome are those that kill livestock, which will be killed rather than removed.<sup>114</sup> Under this scenario, it is obvious that ODFW will soon be faced with migrating wolves as well as the social and biological impacts of naturally reestablishing gray wolf populations.<sup>115</sup> Although there are no known wolf packs to have established outside of the recovery areas in Montana, Wyoming, and Idaho, the USFWS reports that it is “almost certain that lone wolves have dispersed into and may still reside in Washington, Oregon, Utah, and possibly Nevada, and Colorado.”<sup>116</sup>

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108. Memorandum from the Senate Natural Resource Committee, to Senator Ferrioli and Representative Close, *supra* note 47.

109. Davidson, *supra* note 84, at 1.

110. Memorandum from the Senate Natural Resource Committee, to Senator Ferrioli and Representative Close, *supra* note 47.

111. Davidson, *supra* note 84, at 1.

112. *Id.*

113. Memorandum from the Senate Natural Resource Committee, to Senator Ferrioli and Representative Close, *supra* note 47.

114. *Id.*

115. *Id.*

116. U.S. Fish & Wildlife Serv., Gray Wolf Recovery Status Reports, *supra* note 63, at 2.

Rocky Mountain gray wolf packs typically occupy and defend from other packs a territory of up to four hundred square miles.<sup>117</sup> Lone wolves have been known to disband from the pack and set off on their own. For example, in October of 2002 an elk hunter in Utah reported seeing a gray wolf that he originally thought to be a coyote.<sup>118</sup> In November of 2002, a coyote trapper in northern Utah possibly captured the same gray wolf.<sup>119</sup> Federal officials returned the male gray wolf to its place of origin only because it had been captured.<sup>120</sup> Another set of wolf prints was found near where the animal had been trapped.<sup>121</sup> Wildlife officials believe that the other wolf was a female.<sup>122</sup> This suggests that wolves are beginning to pair off and travel longer distances, across state lines, to establish breeding pairs, and eventually packs of wolves throughout the west. The USFWS suggests that:

[I]t should not be surprising that [wolves] . . . would make it to Utah. The nearest . . . pack is only 130 miles away, and that distance is but a hop, skip and jump for a wolf. One wolf from a northern Michigan pack was recently killed hundreds of miles to the south in Missouri.<sup>123</sup>

States other than Oregon and Utah have also been gearing up for wolf arrival. In February of 2002, “a gray wolf wandered across from Montana into a town near Spokane, [Washington].”<sup>124</sup> Additionally, gray wolf

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117. Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43,450, 43,451 (proposed July 13, 2000) (to be codified at 50 C.F.R. pt. 17).

118. Brent Israelsen and Skip Knowles, *Will Utah Find Room for Wolves*, SALT LAKE TRIB., Dec. 31, 2002, at A1.

119. U.S. FISH & WILDLIFE SERV., GRAY WOLF RECOVERY STATUS REPORTS: WEEKS OF 11/30 TO 12/16, 2002, available at <http://www.r6.fws.gov/wolf/wk12162002.htm>. See also, Brent Israelsen, *Wolf Caught in Utah*, SALT LAKE TRIB., Dec. 3, 2002, at A1.

120. Israelsen, *Wolf Caught in Utah*, *supra* note 118, at A1.

121. *Id.*

122. *Id.*

123. Jerry Spangler, *Big, Bad Wolves may be in Utah*, DESERET NEWS, Nov. 13, 2002, at A1. Making the Utah wolf’s journey even more dramatic was the fact that it was a well-known Yellowstone wolf. The wolf had a limp that it had likely obtained from “learning how to topple an elk” when it was young. It was often spotted and watched by wolf watchers in Yellowstone. Even with this limp the wolf successfully made the journey south to Utah, leading one wolf expert to proclaim that wolves are “not like humans”, and that they “are conditioned to hardship”. Brent Israelsen, *Wandering Wolf is Well Known to Yellowstone Visitors*, SALT LAKE TRIB., Dec. 4, 2002, at A1.

124. Carolyn Nielsen, *Wolves Important to Ecosystem; Environment: Policies Needed to Establish what Man has Disrupted*, BELLINGHAM HERALD (Bellingham, Wash.), Nov. 7, 2002, at 11.

experts believe that wolves are on their way to California.<sup>125</sup> The optimism surrounding the return of the gray wolf to California is particularly encouraging to the Oregon wolf reintroduction movement; for gray wolves to wind up in northern California, they would have to establish packs in Oregon first.<sup>126</sup>

In response to the likelihood that a breeding pair of wolves could soon begin repopulating Oregon, two petitions were filed with ODFW in 2002 that could have a marked impact on the future of gray wolves in Oregon.<sup>127</sup> In light of these petitions, and to help clarify its stance regarding the Oregon ESA, and the petitions, the Oregon Department of Justice (ODOJ) released a preliminary analysis detailing the legal issues concerning wolves in Oregon in July of 2002.<sup>128</sup> The ODOJ noted that USFWS proposed delisting the gray wolf and that in Oregon the gray wolf could be down-listed from endangered to threatened status under the federal ESA.<sup>129</sup> The ODOJ analysis clarified that under the Oregon ESA gray wolves would still be an endangered species. However, the ODOJ believes that “the [ODFW] commission could . . . adopt rules that would allow essentially the same types of take (hazing, relocation, and killing) that the [USFWS] has proposed for dealing with problem wolves. In other words, the Oregon ESA already provides the Commission with a range of management options.”<sup>130</sup> This wide range of management options is of little consolation to those who seek a clear definition of what the fate of Oregon wolves will be in the wake of federal delisting.

#### A. *The Movement to Change the Oregon ESA*

On May 22, 2002, a petition (OCA petition) was filed pursuant to section 496.176(5) of the Oregon Revised Statutes (“ORS”) by representatives of the Oregon Cattlemen’s Association (OCA),<sup>131</sup> the

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125. McCabe, *Gray Wolves Heading to California / Defenders Seek Protection as Ranchers Howl*, *supra* note 6 at 2.

126. *Id.*

127. Petition from Stonebrink, to Esler, *supra* note 85. Petition from Lacy, to Oregon Department of Fish & Wildlife, *supra* note 86.

128. Memorandum from William R. Cook, Assistant Attorney General, Oregon Department of Justice, to the Joint Interim Committee on Natural Resources (July 9, 2002) (on file with author).

129. *Id.*

130. *Id.*

131. The purpose of the Oregon Cattlemen’s Association is to “advance the economic, political, and social interests of the Oregon cattle industry and to enjoy all rights and privileges accorded such non-profit corporations under the laws of the State of Oregon.” Oregon Cattlemen’s Association, Mission Statement, *available at* <http://www.orbeef.org/oca.htm#mission> (last visited Apr. 10, 2004).

Oregon Farm Bureau,<sup>132</sup> the Oregon Hunter's Association,<sup>133</sup> and the Oregon State Grange.<sup>134</sup> The OCA petition called for the State Fish and Wildlife Commission of Oregon to officially remove gray wolves from Oregon's threatened and endangered species list.<sup>135</sup> The OCA petition argues that because "the [g]ray [w]olf has been extirpated/extinct from . . . Oregon for over fifty (50) years, it cannot be threatened or endanger [sic] of becoming extinct because *it is extinct*."<sup>136</sup> The petition further argues that the gray wolf is not protected by the Oregon endangered species act because the act protects only "native" species, not "introduced" species.<sup>137</sup> Thus, the gray wolf can be listed as neither be "threatened" nor "endangered" because the act does not cover introduced species.<sup>138</sup> The OCA petition concedes that under the grandfather clause, listing the gray wolf was required when the Oregon ESA. The OCA petition argues that it should now be removed from the list.<sup>139</sup> Substantial scientific evidence detailing why the gray wolf should be removed from the list was not provided in the OCA petition.<sup>140</sup> Instead, the OCA petition argues that "there was no scientific information provided upon listing" of the gray wolf in 1987 because it was extinct, and therefore any scientific evidence brought forth would have no comparative value.<sup>141</sup> The OCA petition argues that the Commission is required to remove the gray wolf from the list because: (1) there was no available scientific evidence to justify the

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132. "Oregon Farm Bureau is the state's largest general agriculture organization. The non-partisan, not-for-profit Farm Bureau is a grassroots organization dedicated to finding positive solutions to the challenges facing today's family farmers and ranchers, and others in the natural resource community." Oregon Farm Bureau, About Oregon Farm Bureau, *available at* <http://www.oregonfb.org/aboutofb.htm> (last visited Apr. 10, 2004).

133. The Oregon Hunter's Association (OHA) mission is "to [p]rovide an abundant huntable wildlife resource in Oregon for present and future generations, enhancement of wildlife habitat and protection of hunter's rights." Oregon Hunter's Association, Our Mission, *available at* [http://www.oregonhunters.org/about\\_oha.htm](http://www.oregonhunters.org/about_oha.htm) (last visited Apr. 10, 2004). "OHA's current focus is insuring sound and scientific management of all hunted wildlife species. However, our financial resources are split between wildlife, habitat and a legislative agenda. *Id.* OHA will strive to increase hunter access to private lands statewide." *Id.*

134. "The Oregon State Grange is a part of one of America's foremost grassroots, volunteer organizations. Oregon State Grange website, *available at* <http://www.grange.org/Oregon> (last visited Apr. 10, 2004). The Grange is comprised of families and individuals who share common interests in community, agriculture and cooperation. *Id.* Every Grange reflects the interests and talents of its members." *Id.*

135. Petition from Stonebrink, to Esler, *supra* note 85, at 1.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See generally* Petition from Stonebrink, to Esler *supra* note 85.

141. *Id.* at 2.

listing of the gray wolf at the time of enactment, and (2) the gray wolf was merely grandfathered into the Oregon ESA.<sup>142</sup> This argument was clarified in testimony before the Joint Natural Resources Committee: “[b]ecause there is no verifiable scientific information available (DNA) about the Oregon wolves prior to their extirpation, there is no possible way to be sure those wolves straying [into Oregon] from the Idaho population that originated in Canada were ‘native’ to Oregon as is required by Oregon Law.”<sup>143</sup>

Other arguments advanced in the OCA petition are that because of gray wolf recovery successes in Idaho, the gray wolf is “flourishing” outside the state of Oregon and is thus secure outside Oregon under ORS section 496.176(9).<sup>144</sup> Furthermore, the OCA petition argues that because County Commissions in every county in Oregon are opposed to having wolves in Oregon, the wolf is of “no cultural, scientific, or commercial significance to the people” of Oregon, meaning that taxpayers should not have to bear the cost of wolf recovery.<sup>145</sup> However, the OCA petition concedes that if the Commission continues to list the gray wolf, “then the Commission is required . . . to work towards [wolf] recovery.”<sup>146</sup>

A July 12, 2002 addendum to the original OCA petition argues that the Commission has the power under ORS section 496.176(6)(a) to determine to remove any species that is grandfathered into the Oregon ESA.<sup>147</sup> The OCA petition addendum references audio tapes of hearings in 1995, which shows that the intent of the 1995 amendment to the Oregon ESA is to “get [Oregon] out of the business [of protecting endangered species] if the feds are involved in listing these species. The biggest concern is . . . [having] a duplication of effort.”<sup>148</sup> This argument has been significantly weakened by the federal delisting of the gray wolf from the federal ESA.

Ranchers in Oregon are against the reintroduction of wolves into the Oregon wilderness in any form. Ranchers declare that “livestock producers

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142. *Id.*

143. Release from Glen Stonebrink, Oregon Cattlemen’s Association, Testimony Before the Joint Natural Resources Committee (July 10, 2002), available at <http://www.onda.org/projects/wolves/index.html#>.

144. Petition from Stonebrink, to Esler, *supra* note 85, at 2.

145. *Id.*

146. *Id.* See also Release from Stonebrink to Esler, *supra* note 143 (stating that “if the Commission decides to allow the [gray wolf] to remain on the Oregon ESA: the Commission and the ODFW must establish and implement a Recovery Plan.”).

147. Petition from Stonebrink, to Esler, *supra* note 85.

148. Addendum to Petition from Glen Stonebrink, Executive Director, Oregon Cattlemen’s Association, to John Esler, Chair of the Oregon Fish and Wildlife Commission (July 12, 2002) (on file with author).

cannot live with wolves,”<sup>149</sup> and “the livestock industry [will] have zero tolerance for wolves in Oregon.”<sup>150</sup> Ranchers believe that [w]olves were extirpated from the West because it was abundantly clear that we could not have an economically viable livestock industry and share the range with a large, efficient livestock killer.”<sup>151</sup> Oregon Ranchers also believe that the wolves in the Idaho recovery area should altogether be sent back to Canada.<sup>152</sup> Cattle owners’ claim that wolves will increasingly cost Oregon taxpayers money, inflict severe economic loss upon the cattle industry in Oregon, send rural communities into bankruptcy, create lawsuits, deplete big game herds, and cause “destruction and depredation on more populated areas of the public.”<sup>153</sup> Oregon ranchers are also concerned that the underlying agenda of so called wolf advocates is to force Oregon ranchers off public land.<sup>154</sup>

In response to these worries, the cattle industry and some rural Oregonians have tried to change Oregon law regarding wolves. In 2001, Oregon House Bill 3363 was introduced by Representative Greg Smith of Heppner, at the request of the OCA.<sup>155</sup> House Bill 3363 would have classified wolves as a “predatory animal” that could be hunted, trapped, and poisoned.<sup>156</sup> The Bill was amended to include only the term “wolf hybrids,” and passed without any reference to gray wolves.<sup>157</sup> However,

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149. Release from Stonebrink to Esler, *supra* note 143.

150. Sharon Beck, Editorial, *In Response the Howling: Feds’ Wolf Plan is Disingenuous*, PORTLAND OREGONIAN, Dec. 12, 2001, at C11.

151. *Id.*

152. *See id.* (claiming that the experiment of reintroducing wolves into Idaho has failed and that the federal government “needs to . . . get these wolves out”).

153. Release from Stonebrink to Esler, *supra* note 143.

154. Amalie Young, *Oregon Ranchers Fear Wolf’s Return*, SEATTLE TIMES, Feb. 17, 2002, at B4. In fact this is likely the case as one wolf lover commented, “[w]e do not see any gray areas . . . . We want livestock off of public land.” *Id.*

155. H.B. 3363, 2001 Leg., 71st Assem., Reg. Sess. (Or. 2001) as proposed:

As used in this chapter, ‘predatory animal’ or ‘predatory animals’ includes coyotes, *wolves*, wolf hybrids, rabbits, rodents and birds which are or may be destructive to agricultural crops, products and activities, but excluding game birds and other birds determined by the State Fish and Wildlife Commission to be in need of protection.

(emphasis added).

156. Michael Milstein, *Public Hearings Scheduled on Wolves*, PORTLAND OREGONIAN, Mar. 30, 2001, at D4.

157. H.B. 3363, 2001 Leg. 71st Assem., Reg. Sess. (Or. 2001) as passed.

Be It Enacted by the People of the State of Oregon:

SECTION 1. OR. REV. STAT. § 610.002 is amended to read:

610.002. As used in this chapter, ‘predatory animal’ or ‘predatory animals’ includes coyotes, wolf hybrids, rabbits, rodents and birds which are or may be destructive to agricultural crops, products and activities, but excludes game birds

“the ultimate showdown may come in [Oregon’s 2003 and 2004 legislative sessions because] wolf opponents [have had time to mobilize efforts] to revise or repeal [the Oregon ESA].”<sup>158</sup> Lawmakers from Eastern Oregon, whom are backed by ranchers and wolf opponents, control many of the key committees in the Oregon legislature.<sup>159</sup>

In the Oregon 72nd Legislative Assembly (2003), gray wolf opponents introduced two bills that would eliminate the gray wolf from the Oregon ESA,<sup>160</sup> and one of these bills now has no effect on the gray wolf because of federal delisting.<sup>161</sup> Oregon Senate Bill Number 97, introduced on January 21, 2003, defined the gray wolf as a predatory animal, not an endangered species, within the borders of Oregon.<sup>162</sup> The effect of this bill would be to remove the gray wolf from the Oregon ESA. Oregon House Bills 2458 and 2468 were both introduced January 28, 2003.<sup>163</sup> House Bill 2458 directs the Commission to remove species from the Oregon ESA at the time they are removed from the Federal ESA.<sup>164</sup> If this bill were to become law, the gray wolf would retroactively be removed from the Oregon ESA because it has already been reclassified as threatened under the Federal ESA. Thus, passage of House Bill 2458 would likely leave the gray wolf a threatened species under the Oregon ESA. House Bill 2468 would prohibit the Commission from listing threatened and endangered species on the Oregon ESA that are listed as such under the Federal ESA.<sup>165</sup> Since the gray wolf is no longer listed as threatened under the federal ESA this bill, would have no effect on the gray wolf under the Oregon ESA. The 2003 Oregon legislature could disregard the intent of previous legislatures

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and other birds determined by the State Fish and Wildlife Commission to be in need of protection.

158. Michael Milstein, *Groups Spar Over Returning Wolves*, PORTLAND OREGONIAN, June 11, 2002, at B5.

159. Harry Esteve, *The Legislature’s Key Issues: A Faltering Economy Means Continued Budget Problems in Oregon*, PORTLAND OREGONIAN, Jan. 10, 2003, at A10.

160. H.B. 2458, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003); H.B. 2468, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003).

161. H.B. 2468, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003).

162. S.B. 97, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003) (adding the following to the Oregon ESA: “the Commission may not include *Canis lupus*, commonly known as the gray wolf, on the lists of threatened species or endangered species.”).

163. H.B. 2458, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003); H.B. 2468, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003).

164. H.B. 2458, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003) (adding the following to the Oregon ESA: “[t]he list of threatened species or endangered species . . . may not include those species that are removed from the federal Endangered Species Act of 1973.”).

165. H.B. 2468, 2003 Leg., 72nd Assem., Reg. Sess. (Or. 2003) (eliminating the grandfathering portion of the Oregon ESA, and also adding that the Commission may not list a species as endangered or threatened so long as it is listed as such under the federal ESA).

and remove the gray wolf from the Oregon ESA. This reality is made even more probable because of the current budget crisis in the state of Oregon.<sup>166</sup> While these bills will likely fail in 2003, they will probably resurface in years to come.

The pro-wolf petition regarding the status of the gray wolf in Oregon was filed with the Commission in June of 2002 by representatives of the Oregon Natural Desert Association,<sup>167</sup> the Hells Canyon Preservation Council,<sup>168</sup> the Humane Society of the United States,<sup>169</sup> the Siskiyou Regional Education Project,<sup>170</sup> Cascadia Wild,<sup>171</sup> the Southern Oregon Forest Coalition,<sup>172</sup> the Oregon Sierra Club,<sup>173</sup> the Oregon Natural Resources Council,<sup>174</sup> and the Oregon Wildlife Federation (“ONDA

166. Michelle Cole, *Cost of ‘Green’ Initiatives May Color Lawmakers’ Decisions*, PORTLAND OREGONIAN, Apr. 18, 2003, at D1.

167. The Oregon Natural Desert Association (ONDA) is “an Oregon non-profit public interest organization of approximately 1500 [sic] members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA was established to protect, defend, and restore forever, the health of Oregon’s native deserts. ONDA actively participates in state and federal agency proceedings and decisions concerning the management of public lands in eastern Oregon.” Petition from Lacy to Oregon Department of Fish & Wildlife, *supra* note 86 at 2.

168. The Hells Canyon Preservation Council (HCPC) is “a nonprofit corporation of approximately 2,400 members, based in La Grande, Oregon. For over thirty years, HCPC has involved itself in land management issues and decisions that affect the Blue Mountains . . . and the Hells Canyons ecosystems. HCPC’s mission is the protection and restoration of these ecosystems, and their associated wildlife, including the grey [sic] wolf.” *Id.*

169. The Humane Society of the United States (HSUS) is “a national animal protection organization based in Gaithersburg, Maryland and with ten regional offices. The HSUS has over 7 million members and constituents, including more than 70,000 who reside in Oregon. The HSUS works actively to protect and conserve wildlife species and habitat through participation in state and federal agency actions, legislation, and legal action. In particular the HSUS has had a long-standing interest in the recovery of the gray wolf and the ecosystem in which the species plays a vital role.” *Id.*

170. The Siskiyou Regional Education Project (SREP) is “an Oregon non-profit public interest organization of approximately 1400 [sic] members with approximately 950 residing in Oregon. SREP’s mission is to defend and permanently protect the globally significant Siskiyou Wild Rivers area of Southwest Oregon and Northwest California . . .” *Id.*

171. Cascadia Wild is “an environmental education organization focused on teaching animal tracking and nature awareness to both youth and adults. Cascadia Wild is particularly focused on continuing to track . . . wolves in the Pacific Northwest and western United States.” *Id.* at 3.

172. The Southern Oregon Forest Coalition is “comprised of the Rogue Group Sierra Club, Headwaters, Siskiyou Project, Klamath Siskiyou Wildlands group, Provolt Grange, Deer Creek Valley Natural Resources Association, Humbug Creek Watershed Council, Takilma Watershed Council, The Endangered Little Applegate Valley association and SEEDS. The Coalition members are working to reestablish healthy and fully ecologically functioning forest ecosystems in Southern Oregon.” *Id.*

173. The Oregon Sierra Club’s mission and primary objective are “maintaining and improving the health of Oregon’s forests and watersheds and protecting wildlife.” *Id.*

174. The Oregon Natural Resources Council (“ONRC”) is a “non-profit conservation group dedicated to protecting and restoring of Oregon’s wildlands, waters, and wildlife. ONRC actively pursues permanent protection of roadless lands and works to enforce the Endangered Species Act.” *Id.*

petition”).<sup>175</sup> This petition calls for the ODFW’s State Fish and Wildlife Commission to comply with mandatory requirements of the Oregon ESA by developing “survival guidelines” under ORS section 496.172(3), and ORS section 496.182(8)(A)(a), and by making a “determination as to whether state lands may play a role in the recovery of [gray wolves] in Oregon.”<sup>176</sup> Although ORS section 496.172(3) was amended in 1995, the ONDA petition argues that the requirements of the original Oregon ESA are still applicable.<sup>177</sup> The ONDA petition asserts that by not acting upon the requirements of the Oregon ESA as it pertains to gray wolves, the ODFW frustrates the legislative intent behind the Oregon ESA.<sup>178</sup>

The ONDA petition concludes by instructing the Commission to comply with the mandatory conservation requirements of the Oregon ESA before it delists or changes the status of the gray wolf in Oregon.<sup>179</sup> The petition explains that “[w]ith no ‘quantifiable and measurable guidelines’ in place, and no public rulemaking process to consider and establish such survival guidelines, the Commission has left its hands tied with respect to future actions under the Oregon ESA affecting the gray wolf.”<sup>180</sup> Under the Oregon ESA, when a species like the gray wolf is native to Oregon, and found within the state, the Commission is required to determine the following before removing a species from the Oregon ESA:

(1) The species is not, or is not likely to become within the foreseeable future, in danger of extinction throughout any significant portion of its range in this state, or is not at risk of becoming endangered throughout any significant portion of its range in this state.

(2) That the natural reproductive potential of the species is not in danger of failure due to limited

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175. The Oregon Wildlife Federation (“OWF”) purpose is “to conserve, preserve, and restore Oregon’s fauna, flora, and their habitat. 500 OWF members live throughout the state of Oregon.” *Id.*

176. *Id.* Other groups are calling for the Restoration of the gray wolf to Oregon as well. The Defenders of Wildlife has the following petition available for signature on its website: “We, the undersigned, support the restoration of wolves in Oregon. We encourage the U.S. Fish and Wildlife Service and the Oregon Department of Fish & Wildlife to move forward on developing management plans and actions that will secure wolf protection and support the long-term restoration or wolves in Oregon. We fully oppose any action to remove wild wolves (uninvolved in livestock losses) from Oregon.” DEFENDERS OF WILDLIFE, PETITION, RESTORE THE GRAY WOLF TO OREGON (on file with VERMONT JOURNAL OF ENVIRONMENTAL LAW).

177. Petition from Lacy to Oregon Department of Fish & Wildlife, *supra* note 86, at 6.

178. *Id.* at 7.

179. *Id.* at 8.

180. *Id.*

population numbers, disease, predation or other natural or human-related factors affecting its continue [sic] existence; and

(3) The species no longer qualifies for listing under [the regulatory listing criteria].<sup>181</sup>

None of these prerequisites has been fulfilled by the Commission. The ONDA petition guides the state towards achieving the end-goal of the Oregon ESA. The first step is to collect scientific information on wolves in Oregon and set survival guidelines and management standards in order to know how to achieve the goal of eventually delisting the gray wolf from the Oregon ESA.<sup>182</sup>

The ONDA petition calls for survival guidelines that: “(1) protect migrating wolves from harassment; (2) allow for establishment and recovery of viable populations in appropriate habitat; (3) prevent direct taking or habitat degradation with very limited exceptions; and (4) involve survey and monitoring for wolves before irreversible commitments of resources are made.”<sup>183</sup> ONDA is aware that recovery and eventual delisting of the gray wolf are goals of the Oregon ESA.<sup>184</sup> “However,” ONDA argues that “without [sufficient] survival guidelines and a recovery plan in place, and without knowing the role state and other public lands [can] play in the wolf’s recovery in Oregon, there is no [foundation] of information or plan of action,” from which to make an informed, scientifically defensible, decision regarding delisting gray wolves.<sup>185</sup> Wolf advocates and ONDA believe that much of Oregon’s public land is “prime wolf habitat.”<sup>186</sup> Although required by the Oregon ESA, the ODFW has failed to address how Oregon’s public land could facilitate recovery of the gray wolf.

The Commission reviewed both of the petitions and voted unanimously to deny each on the theory that “neither petition met the procedural

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181. OR. ADMIN. R. 635-100-0112 (2001); *see also*, Petition from Lacy to Oregon Department of Fish & Wildlife, *supra* note 86.

182. Petition from Lacy to Oregon Department of Fish & Wildlife, *supra* note 86 at 1–2.

183. Press Release, Testimony of Peter M. Lacy, Oregon Natural Desert Association, before the Joint Legislative Natural Resources Committee, at 2 (July 10, 2002), *available at* <http://www.onda.org/projects/wolves/index.html#> (on file with author).

184. *Id.* at 2–3.

185. *Id.* at 1, 3.

186. Young, *supra* note 154.

requirements identified in the Oregon Administrative Rules.”<sup>187</sup> Although this was a blow to both groups’ efforts, at least one Commissioner proclaimed “[t]his is certainly not the end of the discussion on wolves in Oregon.”<sup>188</sup> In a memo dated August 6, 2002, William R. Cook, Assistant Attorney General for the Natural Resources Section, outlined the legal issues that the Commission considered in reaching these decisions.<sup>189</sup> With regard to the OCA petition the memo declares that it does not specifically address the requirements of Oregon Administrative Rule 635-100-0110(1) and (2).<sup>190</sup> Oregon Admin. R. 635-100-0110 provides the procedure for listing species and calls for a petitioner to provide specific pieces of information classified as substantial scientific evidence, including discussions on the existence, destruction, or modification of habitat and the natural reproductive potential of the species petitioned for.<sup>191</sup> In denying the OCA petition, the ODFW determined that

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187. Press Release, Oregon Department of Fish & Wildlife, *Fish & Wildlife Commission Bans Import of Live Deer and Elk*, (Aug. 9, 2002), available at <http://www.dfw.state.or.us/public/NewsArc/2002News/August/081302news.htm> (on file with author).

188. *Id.*

189. Memorandum from William R. Cook, Assistant Attorney General Natural Resources Section, Department of Justice, to the Oregon Fish & Wildlife Commission (Aug. 6, 2002) (on file with Vermont Journal of Environmental Law).

190. *Id.*

191. OR. ADMIN. R. 635-100-0110 (2003). The Rule states:

- 1) Any person may petition the commission to list, reclassify or remove wildlife species on the state list. The petition shall be in writing and shall include the following information:
  - (a) The action sought; and
  - (b) Documented scientific evidence about the species’ biological status to support the requested action.
- (2) The documented scientific evidence under subsection (1)(b) of this rule shall include the following:
  - (a) Common and scientific names of the species and any taxonomic problems or questions;
  - (b) A discussion of the existence, or lack thereof, of past, present or threatened destruction, modification or curtailment of the species’ habitat or geographical distribution, describing and documenting:
    - (A) Threats, or lack thereof, to the species’ habitat and distribution;
    - (B) The species’ historical and presently known distribution;
    - (C) Any changes in habitat and reasons for such changes, such as overutilization for commercial, recreational, scientific or educational purposes, if known;
    - (D) Any land use practices adversely or positively affecting the species’ habitat; and
    - (E) Measures that have been or could be taken to alleviate a reduction in habitat of the species.
  - (c) A discussion of the existence, or lack thereof, of present or threatened danger or failure of the natural reproductive potential of the species including:
    - (A) The species’ present population status;

“[t]he petition does provide information responsive to requirements (1)(a) (the action sought) and (2)(c)(A) (the species’ present population status). However, the OCA petition does not provide all of the information required by the Commission’s rule. The OCA may file a new petition to address the requirements of the rule.”<sup>192</sup>

Regarding the ONDA petition, the ODFW determined that both Oregon Admin. R. 635-100-0130, “Requirement for Survival Guidelines,” and Oregon Admin. R. 635-100-0135, “Survival Guidelines for Species Listed as Threatened or Endangered,” do not apply to the gray wolf.<sup>193</sup> These administrative rules provide that the requirement to adopt survival guidelines for a species applies only to species placed on the Oregon ESA after 1995. The Commission interprets the 1995 amendments to the Oregon ESA and the Oregon Administrative Rules to mean that because the gray wolf was grandfathered into the Oregon ESA in 1987, the Oregon Administrative Rules bar the Commission from adopting survival guidelines or determining agency roles regarding the gray wolf.<sup>194</sup> However, the ODFW website proclaims that “the Commission has the flexibility to adopt survival guidelines or use other management tools for those species listed under the state’s ESA before 1995.”<sup>195</sup>

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(B) Any changes in population, and the reasons for such changes, such as disease, predation, or overutilization of the species or its habitat, if any, for commercial, recreational, scientific or educational purposes, if known;

(C) Any land use practices adversely or positively impacting or having impacted the species;

(D) Measures that have been or could be taken to alleviate a reduction in population of the species;

(E) A discussion of other natural or human-related factors affecting the continued existence of the species, including:

(i) Climatic, successional, reproductive, genetic or other factors such as competition with an introduced species affecting the species existence;

(ii) The effects of environmental pollution and other human-related factors on the continued existence of the species; and

(iii) The relative impact of human actions on the continued existence of the species, as compared to nonhuman impacts. *Id.*

192. Memorandum from William R. Cook, to the Oregon Fish & Wildlife Commission, *supra* note 190.

193. *Id.*

194. *Id.*

195. Press Release, Oregon Department of Fish & Wildlife, *supra* note 188.

## IV. POSSIBLE FUTURE DEVELOPMENTS

As the evidence suggests, the gray wolf is poised to return to many states it once inhabited. This same evidence shows that Oregon will be one of the first states to see the establishment of a gray wolf population. In response, the OCA is likely in the process of trying to submit a revised OCA petition which will distort this evidence, or cite to other evidence, supporting its position that gray wolves are not in Oregon. Whether the OCA will be able to gather substantial scientific evidence that would meet all of the requirements of Oregon Admin. R. 635-100-0110 is unlikely since the scientific evidence available would support the conclusion that wolves could survive, and may already be present, in Oregon. The mountains of Oregon are prime territory for wolves. The abundance of deer, elk, and uninhabited land make Oregon an ideal location for wolves relocating from the Idaho recovery area. Once the gray wolf is back in the Oregon ecosystem, all of the species within Oregon would have the potential to become “more robust [and] more genetically diverse.”<sup>196</sup> Possibly because the OCA understands that the scientific evidence pertaining to wolves in Oregon is contrary to its anti-wolf position, the OCA and other anti-wolf groups have begun an assault in the Oregon legislature on the Oregon ESA and the gray wolf.

Oregon lawmakers will likely resist the proposed changes to the Oregon ESA urged by eastern Oregon legislators. The ranching industry may control the key committees in the Oregon legislature, but the proposed changes are too drastic, leaving the gray wolf with no protection under the Oregon ESA. The Oregon legislators must realize that the gray wolf is a valuable species to the state of Oregon. After all, the gray wolf was grandfathered into the Oregon ESA in 1987. Oregon lawmakers, ranchers, and wolf lovers should look to the wolf management plan proposed in the 2003 Utah legislative session.<sup>197</sup> This resolution was sponsored by Representative Michael Styler, of Delta, Utah, who believes that “the wolf could be managed as well as other large predators, such as cougars and bears.”<sup>198</sup> Cooperation between ranchers and wolf lovers, similar to what is occurring in Utah, is necessary to bring wolves back into Oregon and eventually delist the gray wolf from the Oregon ESA. Other state

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196. Young, *supra* note 154.

197. Resolution Providing Management of Wolves in Utah, *available at* <http://www.wildlife.utah.gov/wolf/pdf/hjr012.pdf> (last visited Apr. 15, 2004). *See also* DWR position on wolves in Utah *available at* <http://www.wildlife.utah.gov/wolf/position.html> (last visited Apr 15, 2004).

198. Brent Israelsen, *Proposal for Wolf Management Advances*, SALT LAKE TRIB., Feb. 5, 2003, at A5.

legislatures impacted by gray wolf population growth should also follow the Utah legislature in stimulating rancher and wolf lover cooperation.

The Oregon Natural Desert Association and other groups that have petitioned the Commission will continue the effort to bring wolves back into Oregon. The Oregon ESA provides judicial review for denial of a petition to add, remove, or change the status of a species on the list, effectively seeking the same as the ONDA petition.<sup>199</sup> By requesting ODFW to establish survival guidelines for the gray wolf, the ONDA petition was asking the Commission to implement required actions that would have eventually lead to the delisting of the gray wolf in Oregon, a change in status from its current endangered listing. Thus, because the Commission incorrectly applied Oregon law in denying the ONDA petition, it should be ripe for judicial review under the Oregon ESA. Furthermore, if substantial evidence that the gray wolf is in Oregon can be gathered, an Oregon court or the Commission would have to look to that evidence in reviewing the Commission's initial decisions.<sup>200</sup>

The Commission incorrectly denied the ONDA petition asking for the ODFW to implement survival guidelines and to begin working to determine if state land could play a role in gray wolf recovery. By finding it unnecessary to adopt survival guidelines for the gray wolf, the Commission created a class of species that was grandfathered into the Oregon ESA before 1995 that has no protection under the 1995 amendments. Thus, the gray wolf is in a state of limbo under the Oregon ESA, because ODFW did nothing to recover the gray wolf from the time the gray wolf was listed on the Oregon ESA in 1987 to the time of the 1995 amendments to the Oregon ESA. Basically, the Commission believes that because the gray wolf was grandfathered into the Oregon ESA, it is not a species which requires recovery under the 1995 amendments. Interpreting the 1995 amendments in this manner leaves the gray wolf without any means of species recovery. This is at odds with the long term goal of the Oregon ESA as it was enacted. The statute's goal is to "manage the species and their habitats . . . to a point where listing is no longer necessary,"<sup>201</sup> which is precisely what the ONDA petition asks the ODFW to do.<sup>202</sup> It is illogical, if not absurd, to think that the legislature of Oregon would consider the gray wolf worth recovering in 1987, only to then freeze recovery efforts due to ODFW inaction by enacting amendments that did not apply to those species

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199. OR. REV. STAT. § 496.176(5)(e) (2001).

200. *See* *Reguero v. Teacher Standards & Practices Comm'n*, 822 P.2d 1171 (Or. 1991) (holding that in Oregon agency decisions must be supported by substantial evidence).

201. OR. ADMIN. R. 635-100-0080 (2001).

202. Petition from Lacy to Oregon Department of Fish & Wildlife, *supra* note 86.

grandfathered into the list. Nowhere does the Oregon ESA as amended or the Oregon Administrative Rules suggest this was the intent of the Oregon legislature.

Because no recovery efforts or management plans were ever put into effect regarding the gray wolf, it contravenes the purpose and goal of the Oregon ESA to determine that gray wolves do not fall within the 1995 amendments' protections. The reason there was no recovery plan—or even a thought about the status of gray wolves in Oregon prior to 1995—was because there were no gray wolves in Oregon between 1987 and 1995 due to the extirpation of the species. However, even with an absence of gray wolves, attempt after attempt to reclassify the gray wolf as a predator has failed to pass muster in the Oregon legislature in recent years. The inference must be drawn that by acting as it has, the Oregon legislature considers the gray wolf worth recovering into the wilderness of Oregon. If this is not the case, the Oregon legislature should clearly manifest its intent on how Oregon will treat the gray wolf in light of the recent federal delisting. The Oregon legislature appears reluctant to proceed with wolf reintroduction because of the enormous costs that would be associated with a Yellowstone-like gray wolf recovery effort. Yet, this type of reintroduction is not necessary due to recent events relating to wolf dispersal into Oregon from the Idaho recovery area.

Wolves are poised to re-enter Oregon again, and the Commission is buckling under the pressure of cattlemen and hunters who fear that the gray wolf will impair their livelihoods or sports. Among those groups, no legitimacy is given to the fact that the gray wolf is native to Oregon, listed as an endangered species, or is currently developing breeding populations within Oregon or very close to state borders. If the Commission has the flexibility to adopt survival guidelines, or to use other management tools for those species listed under 1987 Oregon ESA, then it should use this flexibility to begin forming survival guidelines for gray wolves.<sup>203</sup> In this respect, the Commission has a number of options. These options are to (1) “[a]ctively reintroduce [gray] wolves into [Oregon],” (2) “[a]llow the [gray] wolf to recolonize [the state] naturally and unregulated,” or (3) to “[a]llow [gray wolf] recolonization but with active management, such as killing

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203. The ODFW is in the process of compiling public opinion about the gray wolf. Fourteen “wolf town hall meetings” were held in the fall of 2002 attracting approximately 1,600 people. Brent Israelsen, *Oregon Brings Public Into Wolf Debate*, SALT LAKE TRIB., Dec. 31, 2002, at A6. Wildlife officials presented a short “history of wolves in Oregon, their current biological and legal status, and the issues surrounding their migration into Oregon.” In Brief, *Meetings to Focus on Wolves in Oregon*, STATESMAN J., Dec. 7, 2002, at B8.

wolves that cause problems.”<sup>204</sup> The Commission should begin implementing survival guidelines or a wolf management plan that would allow for recolonization from Idaho, but with strict management of problem wolves. In order to ensure delisting when the gray wolf sufficiently repopulates Oregon, a count of the wolves in Oregon is necessary. The ODFW has already purchased much of the equipment required to conduct counts to determine when wolves have recolonized sufficiently to allow delisting from the Oregon ESA.<sup>205</sup>

These wolf management guidelines would not need to be costly or burdensome for the state of Oregon. It is possible to form survival guidelines that would give wolf advocates a chance to hear a gray wolf howl in the wilderness of Oregon, while at the same time allowing ranchers to maintain their livelihoods in those same hills. To be cost efficient, the survival guidelines or wolf management plan must rest on the condition that reintroduction draws wolves into Oregon from other recovery areas. It is not necessary to have a costly and burdensome Yellowstone-like recovery effort which would entail transplanting Canadian wolves into Oregon. The wolves from the Idaho recovery area need protection in Oregon under the Oregon ESA so long as they are not problem wolves. This would allow the wolves to gain a foothold in Oregon and establish breeding pairs. Once the first breeding pair arrives in Oregon, that first pack should take about three years to become sufficiently large enough to allow lone wolves to disband and form new packs.<sup>206</sup> Of course, these lone wolves may stray back into Idaho or move into Washington or California, thereby slowing the process. However, other breeding pairs may move into Oregon from Idaho, thereby accelerating the process.

“Problem wolves” would be those identified wolves that have a conflict with ranchers. The Commission should determine strict guidelines for what constitutes a conflict. This could be done in a manner which is beneficial to Oregon ranchers. Ranchers should be allowed to shoot on sight any wolf that is caught in the act of killing or attempting to kill any form of livestock. This has been the status quo in Yellowstone.<sup>207</sup> Oregon could implement a plan where the rancher must call the ODFW upon shooting a gray wolf, so that ODFW can determine whether the wolf was terminated for the proper reason. If it were determined that the wolf was terminated for reasons other

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204. Israelsen & Knowles, *Will Utah Find Room for Wolves*, *supra* note 118.

205. Milstein, *Agency Gears up for Wolf Visits*, *supra* note 75.

206. Yellowstone and Idaho gray wolf recovery data was used to determine how long it would take the first breeding pack of wolves in Oregon to become large enough for lone wolves to leave the pack. *See generally* 2001 ANNUAL REPORT, *supra* note 36.

207. *Id.*

than protection of livestock, the rancher should be cited. To ease these burdens, Oregon could take advantage of livestock compensation programs such as the Bailey Wildlife Foundation Wolf Compensation Trust administered by the Defenders of Wildlife.<sup>208</sup> Implementing this program could ease the financial burden on Oregon ranchers and on state commitment of funds.

Further, Oregon should promote gray wolf recovery by creating an incentive for ranchers to abide by these proposed rules. Essentially, this system would reward ranchers for allowing gray wolves to use the same public land as ranchers. An incentive for ranchers to comply with these proposed wolf management guidelines could be garnered by instituting a point or merit system. Under this system, ranchers could be compensated by the state for having a low number of wolf conflicts. Legally shooting a wolf that was harming a rancher's livestock would not count against that rancher. Rather, Oregon wildlife officials would monitor wolf movement through counts and determine which ranchers were taking wolves and not reporting the losses. Finding an unreported wolf kill on a rancher's property would be the type of infraction that would count against the rancher in this proposed merit-based point system. At the end of the year, the ranchers who helped most to restore the gray wolf to Oregon would be compensated for their efforts. Any burden to ranchers that would accompany this plan is a small inconvenience in comparison to the ranchers' allowance to use public lands to earn a living.

The number of incidents between wolves and livestock would be minimal under this plan. It is documented that in the greater Yellowstone recovery area, reports of wolf depredation have been low: "[s]ince 1987 the [USFWS] has confirmed wolves in Montana, Wyoming and Idaho have killed 188 cattle, 494 sheep and 43 dogs."<sup>209</sup> During this time 103 of the 563 documented wolves that inhabited the three states were killed for control purposes.<sup>210</sup> The number of livestock killed by the gray wolf in these areas is reasonable for such a large three-state recovery area. Furthermore, the Defenders of Wildlife compensated ranchers for each documented livestock wolf kill.<sup>211</sup> It is true that monetary compensation

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208. Defenders of Wildlife, The Bailey Wildlife Foundation Wolf Compensation Trust, available at <http://www.defenders.org/wolfcomp.html> (last visited Sept. 30, 2003).

209. Barnard, *supra* note 83; *see also*, Davidson, *supra* note 84.

210. Davidson, *supra* note 84; *see also*, 2001 ANNUAL REPORT, *supra* note 36 (stating that the "[e]stimates of wolf numbers at the end of 2001 were 261 wolves in the Central Idaho Recovery Area, 218 in the Greater Yellowstone Recovery Area, and 84 in the Northwest Montana Recovery Area . . . . By state boundaries, there were an estimated 251 wolves in the state of Idaho, 189 in Wyoming and 123 in Montana").

211. Davidson, *supra* note 84.

does not replace all lost cattle or sheep, or replace the lost genes that result from the wolf kill,<sup>212</sup> but compensation is available to ranchers and it is from a non-public source.

Oregon cattlemen claim that as many as “eighty percent of wolf kills are never found,” and that the payout to ranchers has been disappointingly low.<sup>213</sup> However, the low payout is more likely because the numbers of depredations have declined. To the dismay of ranchers, the Defenders of Wildlife program is not meant to make cattlemen rich off of wolf kills, but rather to supplement what has been lost. But given the low numbers of documented livestock losses in the Yellowstone recovery area, ranchers could be compensated at a value higher than the current market rate.

Cattlemen could also change ranching habits in order to help their own cause in relation to wolf conflicts. Many issues with wolves can be solved with proper livestock management. For example, “[c]attle ranchers can breed their cattle earlier in the year so the calves are bigger when they are moved to public land.”<sup>214</sup> If the ODFW follows this proposed wolf management plan, and ranchers obey the necessary guidelines, the return of the gray wolf to Oregon should have a minimal, if any, impact on the Oregon cattle industry.

Hunters are also crying wolf about the potential destruction they claim will accompany the reintroduction of the gray wolf into Oregon. However, destruction of elk and deer herds is not occurring in the greater Yellowstone recovery area and will not occur in Oregon. In fact, elk, deer, and moose are learning to be wary in Yellowstone; “they are simply [behaving] differently with wolves in the picture.”<sup>215</sup> “A predation process that was missing without the [gray wolf] has returned,” and animals are wary of predators.<sup>216</sup> At least one Oregon hunter has declared that:

I wouldn't be a thinking person if I thought I was the only hunter with a right to be out there . . . One of the reasons we hunt is the connection to wildness and the land. Wolves, . . . add to that, they don't detract from it. When you sterilize the landscape by taking

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212. Robert H. Schmidt, *The Wolves are Coming to Utah; We Must Plan How to Get Along*, SALT LAKE TRIB., May 6, 2001, at A7.

213. Davidson, *supra* note 84.

214. *Id.*

215. Schmidt, *supra* note 212.

216. *Id.*

components out, what you're left with isn't much better than a game farm.<sup>217</sup>

Oregon hunters may actually benefit from wolves being in the hills, as the hunt would be more fulfilling knowing that they had taken an animal that had the savvy and alertness not to become prey to the wolves. The sport of the hunt would be increased.

Wolves would also thrive under the proposed plan. The gray wolf will establish itself in Oregon if it is sufficiently protected as set forth in this wolf management plan. There is ample public land to support wolf packs in Oregon. The guidelines for determining when recovery is successful in Yellowstone can also be used in Oregon. The goal in Oregon should be to delist the gray wolf from the Oregon ESA once ten breeding pairs of gray wolves is documented in Oregon. During this time, the wolves within the Yellowstone and Idaho recovery area will continue to recolonize other areas in the western United States. Thus, by the time Oregon reaches the proposed goal of ten breeding pairs of gray wolves, they should have a significant foothold in the western United States. Under this plan, gray wolves will return to Oregon and other states for generations to come.

## V. CONCLUSION

Gray wolves are native to the western United States, including Oregon. Although gray wolves have been extirpated from Oregon for over fifty years, they are poised to return to Oregon from the Central Idaho wolf recovery area that was part of the Yellowstone wolf reintroduction program. As a result of federal delisting of the gray wolf, the Oregon ESA governs the status of gray wolves in Oregon because it considers them an endangered species. Yet, the Commission is intent on not allowing the gray wolf to realize the protections due under the Oregon ESA. In misinterpreting the intent of the Oregon legislature to protect and recover the gray wolf in Oregon, the Commission has denied a petition from wolf lovers to create survival guidelines and determine whether state land is available for the reintroduction of wolves in Oregon. Cattle ranchers are decidedly opposed to the reintroduction of wolves into Oregon. However, it is feasible to implement a wolf management plan that would appease both wolf lovers and ranchers. The wolf management plan would require the Commission and the State of Oregon to properly recognize the intent of the Oregon legislature to protect the gray wolf when it was grandfathered into

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217. Milstein, *When Wolves Move In*, supra note 82.

the Oregon ESA. The guidelines which accompany this wolf management plan would allow flexibility in the manner ranchers and private property owners protect their assets from problem wolves, while at the same time sufficiently giving the wolves the chance to re-populate in Oregon. Cooperation between lawmakers, ranchers, and wolf lovers is essential to the implementation of this plan, as each side to the gray wolf debate must give some ground.

The first step in implementation of this wolf management plan, or any wolf recovery plan under Oregon law, is for the Commission to recognize its mistaken application of the Oregon ESA. Second, the Commission should implement the Oregon Administrative Rules in the context of the ONDA petition and proceed with the development of survival guidelines or creation of a wolf management plan. This wolf management plan could serve as a model for other states, such as Oregon, that will soon be facing the imminent return of the gray wolf. If the Commission implements this proposed wolf management plan, the ODFW will have the ability to allow both the gray wolf and ranchers to co-exist in Oregon.