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Hearing on the Endangered Species Act at 50
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Main Points

- While thankfully few species regulated by the Endangered Species Act have gone extinct over the last 50 years, the statute has fallen far short in its ultimate goal of recovering endangered and threatened species.
- The principal reason that only 3% of listed species have recovered is that the statute penalizes landowners who accommodate rare species or conserve their habitats, creating perverse incentives.
- This failing recovery rate can't be explained away with claims that the ESA simply needs more time. The recovery rate for species the Fish and Wildlife Service predicted would recover by now is a mere 4%.
- To recover more species, the ESA and its implementation must be reformed to improve incentives for states, tribes, and landowners to invest in habitat restoration and proactive recovery efforts.

Introduction

Chairman Bentz, Ranking Member Huffman, and members of the committee, thank you for the invitation to participate in this important and timely discussion of the Endangered Species Act on the 50th anniversary of its enactment. Over the last half-century, less than 1% of listed species have gone extinct, a significant and laudable accomplishment. But Congress set a more ambitious goal in the ESA: to recover species so that they were no longer at risk. Unfortunately, the ESA has not been effective at recovering species, with only 3% of listed species achieving this goal. This summer, the Property and Environment Research Center will publish a report analyzing the Fish and Wildlife Service's progress in recovering species, some of the findings from which are previewed below.[1] One of our key findings is that the Service has recovered only 13 of the 300 species it predicted would recover by now, a 4% recovery rate for those species. This suggests that the failing recovery rate can't be excused by claims that it is too soon to judge the ESA's effectiveness at recovering species.

Instead, the lack of recoveries—even among those species projected to recover by now—is due to a more fundamental problem. Incentives matter. And the ESA too often gets them wrong. It imposes regulations that penalize landowners who conserve rare species and their habitats, making them liabilities rather than assets. As

[1] *See* Katie Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals* Property & Environment Research Center (forthcoming 2023).

Michael Bean, former EDF and Obama admin official, has observed, "anyone who wishes to improve the law's results should start by addressing the[] need [for] positive incentives" to engage in recovery efforts.[2]

To the Biden administration's credit, it has recognized the importance of incentives in many of its initiatives, including America the Beautiful, and committed to pursue conservation in ways that "honor private property rights and support voluntary stewardship."[3] PERC has proudly supported the administration when it has acted consistent with this commitment, including a proposed ESA rule streamlining permitting for voluntary conservation efforts.[4] Unfortunately, the administration's vision of conservation as something "done with private landowners, not to them"[5] has not been borne out in its implementation of the ESA. Several high-profile regulatory decisions and proposals have needlessly provoked conflict with states and landowners while doing nothing to benefit species or—worse—directly undermining incentives to restore habitat and recover species.

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana. Through research, law and policy, and innovative applied conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. With many of the most prominent ESA conflicts in our own backyard, , PERC and its affiliated scholars have long advocated reforms to the ESA and its implementation to empower states to take the lead in recovering species, to remove perverse incentives for private landowners that set species back, and to create the positive incentives needed to spur habitat restoration and proactive recovery efforts.[6]

An emergency room that doesn't heal and discharge patients

The ESA is generally effective at preventing extinctions, with 99% of listed species remaining around today. This doesn't necessarily mean that the statute can be credited with "saving" all of these species from extinction, of course. That would only be true if every listed species would have gone extinct without the ESA. According to the Center for Biological Diversity, at least 83% of domestic listed species would have persisted without the act.[7]

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[2] *See* Eric Holst, *The "dean of endangered species protection" on the past, present, and future of America's wildlife*, EDF Growing Returns (2017).

[3] *See, e.g.,* Conserving and Restoring America the Beautiful (2021).

[4] *See* PERC, Comment Supporting FWS' Proposed Conservation Benefit Agreement Rule (Apr. 10, 2023). *See also* PERC, Comment Supporting the BLM's Proposed Conservation Leasing Rule (July 5, 2023); Brian Yablonski, *New Big-Game Migration Partnership Highlights Incentives for Private Working Lands*, PERC.org (May 31, 2022); Brian Yablonski, *A Strong Start to America the Beautiful*, PERC.org (May 19, 2021).

[5] *See* Robert Bonnie, Keynote Address for the University of Wyoming's 150th Anniversary of Yellowstone Symposium: The Importance of Private, Working Lands to Yellowstone in the Twenty-First Century (May 20, 2022).

[6] *See Missing the Mark*, *supra* n. 1; Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 Envtl. L. Rep. 10,565 (2021); Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (2018).

[7] *See* Noah Greenwald, et al., *Extinction and the U.S. Endangered Species Act*, PeerJ (2019).

Thus, the ESA may have saved as many as 291 species from extinction.[8] That is a significant achievement, even if considerably more modest than the oft used 99% figure suggests.

But the ESA's goal isn't merely to prevent extinctions. "In a word, the Act's goal is recovery," Michael Bean has observed.[9] Congress made this clear by declaring the ESA's purpose to "conserve" endangered and threatened species,[10] and by defining conservation in recovery terms: as the steps necessary "to bring any [listed species] to the point at which [ESA regulations] are no longer necessary."[11] Virtually every operative provision of the ESA is tied to this recovery mandate.[12]

Unfortunately, the ESA hasn't succeeded at recovering imperiled species. Over the last 50 years, only 3% of listed species have recovered and been delisted.[13] And only 58 species have improved to the point that their status could be upgraded from endangered to threatened.[14] But this may actually overstate the ESA's success because roughly half of these recoveries and status upgrades were foreign or plant species subject to relatively little regulation under the ESA. Still other species, like the bald eagle, recovered for reasons unrelated to the ESA.[15]

One reason commonly offered for the ESA's anemic recovery rate is that recovery takes a long time and 50 years is too soon to judge the law's effectiveness. To test this assertion, my PERC colleagues have analyzed the Service's success at recovering species that it previously predicted could recover by now.[16] From 2006 to 2014, the Service reported to Congress projections of when species would recover, including 300 domestic species projected to recover by 2023.[17] To date, only 13 of those species have recovered.[18] This is a mere 4% recovery rate for the

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[8] *See id.* This should be thought of as an upper limit, rather than a reliable estimate of the number of extinctions avoided. The CBD study assumed that listed species would have the same extinction rate as species identified as endangered on the IUCN Red List. *See id.* at 2. But the IUCN's endangered category covers species more vulnerable than those listed as endangered—much less those listed as threatened—on the ESA list. *See, e.g.*, J. Berton C. Harris, et al., *Conserving imperiled species: a comparison of the IUCN Red List and U.S. Endangered Species Act*, 5 Conservation Letters 64 (2012).

[9] *See* Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, in The Year in Ecology and Conservation Biology, Annals of the New York Academy of Science (2009)

[10] *See* 16 U.S.C. § 1531(b) (identifying the ESA's purposes as to "conserve" ecosystems, endangered and threatened species, and species covered by treaties and international commitments).

[11] 16 U.S.C. § 1532(3).

[12] *See* 16 U.S.C. §§ 1532(5) (definition of critical habitat), 1533(d) (standard for threatened-species regulations), 1533(f) (standard for recovery plans), 1534 (standard for land acquisition), 1535 (standard for collaborating with states), 1536 (standard for inter-agency consultation), 1539(j) (standard for establishing experimental populations).

[13] *See* FWS Environmental Conservation Online System, *Delisted Species*.

[14] *See* FWS Environmental Conservation Online System, *Reclassified Species*.

[15] *See* Jonathan Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in Rebuilding the Ark: New Perspectives on Endangered Species Act Reform (2011).

[16] *See Missing the Mark*, *supra* n. 1.

[17] *See* FWS, *Recovery Reports to Congress*. *See also Missing the Mark*, *supra* n. 1.

[18] *Compare* FWS, *Recovery Reports to Congress with* FWS, *ECOS: Delisted Species*. *See Missing the Mark*, *supra* n. 1. This data was used in an earlier study to claim that 90 percent of listed species recover by their projected recovery date. *See* Kieran Suckling, et al., *On Time, On Target*, Center for Biological Diversity (2012). However, that study considered a nonrandom selection of a mere 10 species with projected recovery dates. Its results can't be reproduced by scientifically rigorous means.

species that should have recovered relatively quickly. That this rate isn't materially different from the overall recovery rate suggests a more fundamental problem than a mere lack of time. And the gap between the recoveries the Service predicted and what has been achieved is growing, even when the 44 recovered species without projected recovery dates are included.

Even looking at incremental progress toward recovery paints a bleak picture. For decades, the Service reported to Congress whether listed species were improving, stable, or declining, a practice it abruptly ended in 2012. According to those reports, the number of species declining was 2–8 times the number improving.[19] Another measure of incremental progress would be the percentage of recovery actions identified in recovery plans that have been completed or partially completed. On the ESA's 30th anniversary, the Service reported that it has achieved less than 25% of the recovery objectives for 76% of species.[20] To update this result, my PERC colleagues have calculated the percent of species with less than 25% of recovery actions marked "complete" or "partially complete" in the Service's ECOS database. That number has increased over the last 20 years, to 85%.[21] Thus, by any reasonable measure, the ESA is falling significantly short in achieving its primary goal of recovering species.

The other reason often given for the lack of recoveries is inadequate funding. Funding to provide positive incentives for voluntary recovery instead of regulations that create perverse incentives for private landowners could boost the recovery rate.[22] But calls for more funding tend to favor paperwork and bureaucracy over conservation. A recent Defenders of Wildlife paper, for instance, recommends doubling the Service's budget to nearly $850 million but would allocate only 30% of that money to on-the-ground recovery efforts.[23] Moreover, focusing on the Service's budget ignores the huge contributions of other federal agencies, states, and private parties. Prior to 2020, the Service reported government spending on endangered and threatened species each year.[24] According to these reports, federal agencies and states spent more than $14 billion on listed species from 2011–2020. The Service was responsible for only 13% of the spending. If the costs borne and investments made by private landowners and conservation groups were included, this share would fall even further.

Efforts to recover the grizzly bear are a good example. In 1993, the Service estimated that it could recover most grizzly populations by 2023 and all populations by 2033 for $26 million.[25] From 1994 to 2020, the Service spent nearly $35 million on grizzlies, adjusted for inflation.[26] But states and federal agencies spent another $100 million. Despite the grizzly receiving more than five times the anticipated funding, no populations have been

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[19] See Langpap, et al., *The Economics of the U.S. Endangered Species Act: A Review of Recent Developments*, 12 Rev. of Enviro. Econ. & Pol'y 69, Fig. 3 (Dec. 2017).
[20] FWS, *Recovery Report to Congress Fiscal Years 2003-2004* 24 (2004).
[21] *See* FWS, *ECOS: Species With Recovery Plans*. *See also Missing the Mark, supra* n. 1.
[22] *See, e.g.,* Wood & Watkins, *supra* n.2 (advocating the purchase of habitat or incentives for habitat restoration instead of designating land as critical habitat).
[23] *See* Megan Evansen, et al., *Funding Needs for the Fish and Wildlife Service's Endangered Species Programs: 2024* (2022).
[24] *See* FWS, *Endangered and Threatened Species Expenditures Reports*.
[25] FWS, *Revised Grizzly Bear Recovery Plan* (1993).
[26] *See* FWS, *Endangered and Threatened Species Expenditures Reports*.

delisted.[27] And while two of the populations are biologically recovered and may be delisted in the near future, the other four populations are not on track to meet their 2033 projected recovery date.

Incentives Matter

Too few species have recovered due to the failure to account for the incentives of states, tribes, and private landowners whose cooperation is essential to recovering species. The law imposes strict regulations on land where rare species and their habitats are found, effectively penalizing landowners who accommodate rare species and conserve their habitats. Sam Hamilton, former Director of the Service, summed up the problem well: "the incentives are wrong here. If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears."[28] As a consequence, the ESA can create perverse incentives for landowners to "shoot, shovel, and shut up" or preemptively destroy habitat before a species' presence triggers regulatory consequences. These perverse incentives matter because two-thirds of listed species depend on private land for habitat.[29]

Reforming the ESA and its implementation to provide positive incentives to states, tribes, landowners, and conservationists who conserve rare species and contribute to their recoveries would better serve both people and wildlife. Even modest tweaks could address perverse incentives and reward recovery progress, thereby making a big difference in species recovery without sacrificing the ESA's effectiveness at preventing extinctions. Three of those opportunities are discussed below.

1. **Tailor regulations for threatened species to better align the incentives of states, tribes, and landowners with the interests of imperiled species**

In the ESA, Congress authorized the designation of two categories of species: 1) endangered, those currently at risk of extinction; and 2) threatened, those likely to become endangered in the foreseeable future. Congress intended these two categories to be treated very differently but, due to a misguided and illegal Service policy, that hasn't been the case for almost all of the last 50 years. Instead, both categories have been largely treated the same, undermining incentives for states, tribes, and landowners to recover species.

Congress explicitly limited the statute's burdensome "take" prohibition to endangered species. It did so, according to the bill's Senate floor manager, John Tunney (D-CA), because it wished to "minimiz[e] the use of the most stringent prohibitions," which it believed should "be absolutely enforced only for those species on the brink of extinction." Instead, for threatened species, Congress designed the ESA to "facilitate regulations that are tailored to the needs of the animal" and encourage states to "to promote the[ir] recovery."[30] Congress even

[27] *Cf.* Leah Gerber, *Conservation triage or injurious neglect in endangered species recovery*, 113 PNAS 3,563 (2016) (finding that government allocation of recovery spending bears little relationship to species' needs or the effectiveness of that spending).
[28] Betsy Carpenter, *The Best Laid Plans*, U.S. News and World Report, vol.115, no.13 (1993), p. 89.
[29] *See* FWS, *ESA Basics: 50 Years of Conserving Endangered Species* (2023).
[30] *See* Congressional Research Service, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 358 (statement of Sen. Tunney).

gave states the power to veto threatened-species regulations to encourage them to develop their own programs, although Service policy has effectively nullified that provision.[31]

Unfortunately, the Service has ignored this congressional direction for most of the ESA's history. Instead, it has operated under an illegal rule, known as the "blanket" 4(d) rule, regulating threatened species as if they were endangered without regard to whether that approach fit the needs of the animal or encouraged recovery.[32] In 2018, PERC published a report showing that this rule undermined incentives for states, tribes, and private landowners to recover species.[33] If regulations loosened gradually as species recovered, as Congress originally envisioned, states, tribes, and landowners would have an incentive to contribute to their recovery. Fortunately, the Service repealed this regulation in 2019, explaining that this reform would "incentivize conservation for both endangered species and threatened species" by giving "[p]rivate landowners and other stakeholders . . . more of an incentive to work on recovery actions" through the promise of reduced regulation.[34]

However, last month, the Service proposed to restore the blanket rule and eliminate these incentives.[35] The move is puzzling because the Biden administration's own actions demonstrate that this change would be bad for species. The rescission of the blanket rule does not stop the Service from imposing endangered-level regulations on a threatened species if that's what's best for the species. So the administration could have taken that approach with any of the 12 wildlife species it has listed as threatened. It has rejected that approach *in every case*, finding less restrictive regulation better encourages species recovery. The Service doesn't reconcile its proposal to restore the blanket rule with its consistent rejection of that rule's approach when it has considered what's best for species. Nor does the Service dispute its earlier determination that discarding the blanket rule in favor of less restrictive, tailored regulations produces better conservation incentives. Indeed, the Service doesn't even address recovery incentives in the proposed rule.

That the Biden administration has consistently rejected the blanket rule's approach when it has considered what's best for species is neither a coincidence nor should it be a surprise. The National Marine Fisheries Service has never had a blanket rule but has always tailored threatened-species regulations to the needs of the species. It has found it appropriate to impose endangered-level regulation for threatened species only 3% of the time.[36] Indeed, NMFS has far more often found no regulation of threatened species to be the better approach.[37] It simply doesn't make sense to reflexively regulate threatened species as if they were endangered when federal agencies virtually always reject that approach whenever they consider what's best for species. But perhaps most

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[31] *See* Temple Stoellinger, *Wildlife Issues are Local—So Why Isn't ESA Implementation?*, 44 Ecology Law Q. 681 (2017).
[32] *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015).
[33] *See Road to Recovery*, *supra* n. 6.
[34] *See* 84 Fed. Reg. 44,753, 44,757 (Aug. 27, 2019).
[35] *See* 88 Fed. Reg. 40,742 (June 22, 2023).
[36] *See* Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, Defenders of Wildlife White Paper 1 (2017).
[37] NMFS has issued regulations governing take of only 19 of the 47 threatened species under its charge. *See* NMFS, *Protective Regulations for Threatened Species Under the Endangered Species Act* (last visited July 10, 2023).

alarming about the Service's proposal is that if the unscientific, one-size-fits-all blanket rule is restored the Service has announced that it will no longer consider what's best for each species before applying it.[38]

The Service has also not used its authority to tailor regulations for threatened species to its fullest potential. When it passed the ESA, Congress described the Service as having ""an almost infinite number of options"[39] to design rules that encourage states, tribes, and landowners to recover species. But the Service's rules have been more cookie-cutter than creative, pervasively regulating take with a few recurring exemptions for activities with trivial impacts, regulated under other federal laws, or approved by the Service through other means.[40]

In crafting tailored rules, the Service hasn't generally considered whether its rules penalize voluntary conservation by private landowners. When it proposed to list the lesser prairie chicken population in Kansas, Colorado, Oklahoma, and North Texas as threatened, it proposed to strictly regulate ranching through the region. PERC and other conservation organizations objected that this would irrationally punish the very landowners who were voluntarily conserving the bird's grassland habitat.[41] While the Service ultimately decided, in response to our comments, to regulate ranchers less strictly than it had originally proposed, it also rejected any obligation to consider "the costs of [its] rules on landowners, assessment of previous conservation provided by landowners and other groups, and calculation of what incentives for conservation [its] rules provide."[42] If the Service were focused on crafting threatened-species rules that put species on the road to recovery, as the ESA requires, it would never ignore whether it is encouraging or discouraging recovery efforts.

Nor has the Service considered how tailored rules might encourage recovery efforts by giving effect to recovery plans. Although the ESA requires the Service to prepare recovery plans for every species, these plans are non-binding. Indeed, recovery plans are generally treated as an afterthought, prepared only after key regulatory decisions are made and battle-lines drawn. FWS Director Martha Williams has, in an article co-authored with former Obama administration officials, argued that prioritizing regulatory decisions before recovery plans "is a missed opportunity" for those regulations to support "a larger conservation strategy."[43]

A more effective approach to designing regulations for threatened species would be to use them to further the goals identified in a recovery plan. Rules that automatically reduce federal regulation as recovery goals are met

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[38] *See* 88 Fed. Reg. at 40,747 ("If this proposal is finalized, for threatened species that use the blanket rules found at 50 CFR 17.31(a) and 17.71(a), we will not make necessary and advisable determinations for the use of those blanket rules in future proposed or final listing rules.").
[39] H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973.
[40] *See* Li, *supra* n. 31.
[41] *See* PERC, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Sept. 1, 2021); National Wildlife Fed'n, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Aug. 31, 2021); Turner Enterprises & Turner Endangered Species Fund, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Aug. 16, 2021); The Nature Conservancy, Comment on Proposed Lesser Prairie Chicken 4(d) Rule (Aug. 2, 2021).
[42] *See* 87 Fed. Reg. 72,674, 72,717 (Nov. 25, 2022).
[43] *See* David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 Envtl. L. Rep. 10,671, 10,672 (2013).

would give effect to recovery plans, better encourage voluntary recovery efforts, and reduce conflict over the delisting of recovered species. If this approach had been used for the grizzly bear, for instance, more of its populations would likely be recovered or on their way and much conflict could have been avoided.[44] When the species was listed, there were a mere 136 grizzlies in the Greater Yellowstone Ecosystem. When the Service set a recovery goal of 500 bears in this ecosystem, it could have designed a regulation that would gradually transfer management authority to states as each population made progress toward their recovery goals, with federal regulation fading entirely once recovery goals were met. This would have encouraged recovery efforts and have allowed the states to build trust with the conservation community over time. Instead, federal regulations for the grizzly bear are indifferent to progress toward the species' recovery and, despite the Greater Yellowstone population now exceeding 1,000 bears, efforts to delist it are fraught due to some conservation group's distrust of state management.

Recovery recommendations:
1) Permanently ditch the blanket 4(d) rule and tailor regulations to the needs of each threatened species.[45]
2) Use threatened-species rules more creatively to give effect to recovery plans and reward states and landowners for incremental progress toward recovery.[46]
3) To reduce delisting conflict, automatically transfer management to states when recovery goals are met.[47]
4) Revive the ESA's federalism provisions by encouraging states to develop recovery programs and restoring state's veto of federal threatened-species regulations.[48]

2. Only designate areas as critical habitat if the designation is likely to produce a net conservation benefit for the species

Often critical habitat designations offer little conservation upside but can have large conservation costs, including perverse incentives for landowners to destroy habitat, to prevent habitat features from developing naturally, and to forgo investments in habitat restoration. In fact, Service officials have long taken a dim view of critical habitat designations. Director Williams, in the co-authored article mentioned above, observed that critical habitat designations "have very little impact" from a "conservation perspective."[49] Bruce Babbitt, the Secretary of the Interior during the Clinton administration, once even remarked that the ESA's critical habitat provisions could be eliminated with "no real world consequences" for species.[50]

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[44] *See, e.g.,* David Willms, *Unlocking the Full Power of Section 4(d) to Facilitate Collaboration and Greater Species Recovery*, in The Codex of the Endangered Species Act: Volume II: The Next Fifty Years (forthcoming 2023).
[45] *See Road to Recovery*, *supra* n. 6.
[46] *See id.* Jonathan Wood, *Testimony on the Recovering America's Wildlife Act*, U.S. Senate Comm. on Environment and Public Works (December 8, 2021).
[47] *See* Willms, *supra* n. 44.
[48] *See* Stoellinger, *supra* n. 33.
[49] Hayes, Bean, & Williams, *supra* n. 48.
[50] *See* Julie Cart, *Species Protection Act 'Broken'*, LA Times (Nov. 14, 2003).

The reason that critical habitat designations may do more harm than good is that they make the presence of habitat features (or the potential to create them) a significant liability for landowners while often providing no protection to those features. Studies have found that designations reduce the value of private land by as much as 70%.[51] And, unless use of land designated as critical habitat requires some sort of federal permit or approval, a landowner is as free to rid their land of any habitat feature after the designation as they were before. That is, in many cases, a perfect formula for preemptive habitat destruction and foregone investments in habitat restoration, especially when it comes to private land or land that requires active habitat management or restoration.[52]

Despite broad recognition of the limited role critical habitat designations can play, recent decisions from the Service needlessly provoke landowners and threaten to encourage counter-productive designations. For instance, the Service recently rescinded its definition of "habitat," which had limited critical habitat designations to areas currently suitable for a species.[53] That definition was adopted in response to a *unanimous* Supreme Court decision holding that land can't be designated as critical habitat unless it first qualifies as habitat for the species.[54] In that case, a timber company and forest landowners challenged the designation of 1,500 acres of private land in Louisiana as critical habitat for the dusky gopher frog, despite the fact that the land couldn't support the frog unless the landowner converted the forest to longleaf pine, repeatedly burned the land to limit understory growth, and managed a shallow pond as breeding habitat.[55] The Nature Conservancy's efforts to restore frog habitat in Mississippi demonstrate just how difficult and costly an undertaking this would have been for the landowners, if they were inclined to pursue such an effort.[56]

The dusky gopher frog critical habitat designation gave the landowners no reason whatsoever to pursue such efforts, however. If anything, it prevented future collaboration by alienating the landowners. And even if a federal permit were someday required to use the land, the absence of habitat features means that the permit could not be conditioned on creating any such features. As the Service recently acknowledged, the Constitution limits the conditions that can be imposed on land-use permits to the mitigation of any harm the permitted activity poses to existing habitat features.[57] Permits can't be used to compel landowners to create habitat where there isn't any. Instead, as the Supreme Court recognized nearly 3 decades ago, purchasing land or compensating states and landowners for habitat restoration are the proper means "for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species."[58]

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[51] Auffhammer, et al., *supra* n. 31. *See* Wood & Watkins, *supra* n. 5.
[52] *See* Wood & Watkins, *supra* n. 5.
[53] *See* 87 Fed. Reg. 37,757 (June 24, 2022)
[54] *See Weyerhaeuser v. Fish and Wildlife Serv.*, 139 S. Ct. 361, 368–69 (2018). I was one of the attorneys representing the private landowners in *Weyerhaeuser*.
[55] *See* Wood & Watkins, *supra* n. 5.
[56] *See id.*
[57] *See* 88 Fed. Reg. 31,000, 31,001 (May 15, 2023).
[58] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702-03 (1995)

To be effective, the critical habitat program should directly consider whether designations encourage landowners to conserve and restore habitat or create perverse incentives. Congress has directed the Service to consider the costs critical habitat designations impose on states, tribes, and private landowners. Because these costs affect whether landowners conserve and restore habitat—or preemptively destroy it[59]—they are a critical factor in determining whether critical habitat designations contribute to the species recovery.

Consider the Service's recent designation of 10,000 acres of forestland owned by the Skipper family in Alabama as critical habitat for the black pinesnake.[60] The apparent reason the Skipper's land was selected is that they had partnered with the state of Alabama to establish a wildlife management area and voluntarily managed their timber harvesting to benefit longleaf pine, white tail deer, and other species. After the Service penalized this voluntary conservation, the family withdrew from the program. The Service took this step despite concluding that the critical habitat designation would impose costs on the Skippers without any benefit to the species.[61] It also didn't consider how penalizing the Skippers' voluntary conservation would encourage them and others to restore habitat or engage in recovery efforts.

Instead, the Service resists any obligation to engage in this sort of analysis before imposing burdensome critical habitat designations on private landowners. Indeed, it has recently proposed to eliminate a regulatory requirement that it determine, before designating unoccupied areas like the Skippers's land, that the area "will contribute to the conservation of the species."[62] Yet it has offered no explanation why it would want to designate private land as critical habitat if it won't contribute to conservation.

Recovery recommendations:
1) Define "habitat" to limit critical habitat designations to areas currently suitable for a species.[63]
2) Account for perverse incentives directly in the critical habitat designation process.[64]
3) Purchase land that contains valuable habitat or potential habitat, rather than regulating it.[65]
4) Compensate private landowners for restoring habitat or meeting benchmarks for species recovery.[66]

3. Reward investments in recovery by promptly delisting species

The list of endangered and threatened species is sometimes referred to as "Hotel California," after the popular Eagles' song, because once species get on the list, they seemingly "can never leave." While the limited progress in

[59] *See* Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003).
[60] *See* Complaint, *Skipper v. Fish and Wildlife Serv.*, Case No. 21-cv-94 (D. Ala. filed Feb. 26, 2021).
[61] *See* Industrial Economics, *Screening Analysis of the Likely Economic Impacts of Critical Habitat Designation for the Black Pinesnake* (Oct. 22, 2014).
[62] *See* 88 Fed. Reg. at 40,769.
[63] *See* Wood & Watkins, *supra* n. 6.
[64] *See id.*
[65] *See id.*
[66] *See id.*

recovering species is mostly due to the Endangered Species Act's lack of incentives to restore habitat and undertake other proactive recovery efforts, it also reflects an unnecessarily slow and ineffective process for upgrading the status of recovered species. The recurring conflict over delisting is puzzling because no recovered species transferred back to state management has ever regressed and ended up back on the list. Claims that states can't sustain recovery progress without federal oversight have no evidence to support them.

There are several reasons why biologically recovered species may loiter on the list. The Service may set an objective recovery target only to move the goalpost once it's met. Or it may determine a species has met a recovery target and its status should be changed but then not follow through with a proposal to upgrade the species' status. Or it may move forward with a delisting only to be hamstrung for years by litigation.

The gray wolf is the poster child for these problems. When the Service reintroduced wolves to Yellowstone National Park in 1995, it set a recovery target of 100 wolves each in Idaho, Montana, and Wyoming. Within a decade, this target had been far surpassed, with a total of 835 wolves in the Northern Rockies in 2004.[67] Rather than the recovered population being promptly delisted, it took 14 years of petitions, analysis, litigation, more analysis, more litigation, congressional intervention, more analysis, and more litigation before wolves in all three states were delisted. Today, after a decade of state management, there are nearly 3,000 wolves in this population, yet the Secretary of the Interior has threatened to move the goalposts by relisting them in response to controversial state hunting regulations.[68]

Bureaucratic and legal hurdles would be merely frustrating if they didn't affect the incentives to recover species. But, thanks in part to the Service's failure to use threatened-species rules creatively to encourage recovery, the primary incentive for states and landowners to invest in recovery efforts under the Endangered Species Act is the prospect that success will be rewarded by delisting the species, removing burdensome federal regulations, and returning management to states and tribes. If prompt delistings aren't perceived as a realistic outcome, recovery efforts will be discouraged.

The only interests that benefited from the years of conflict over wolf delisting were the litigation groups paid more than $600,000 in attorney's fees by the government.[69] Litigation has been a recurring and unfortunate problem under the ESA. According to the Forest Service, for instance, ESA litigation threatens to hamstring the

[67] Endangered and Threatened Wildlife and Plants; Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment From the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10514, 10523 (February 27, 2008).
[68] *See* Deb Haaland, *Wolves have walked with us for centuries. States are weakening their protections.*, USA Today (Feb. 7, 2022).
[69] Joint Stipulation, Defenders of Wildlife v. Salazar, 09-cv-77 (D. Mont. 2013); Order, Defenders of Wildlife v. Gould, 08-cv-56 (D. Mont. 2009).

agency's ability to protect habitat from catastrophic wildfires in 87 national forests.[70] The lucrative attorney's fees offered to environmental litigants, which can greatly exceed their actual litigation costs, has created perverse incentives for environmental organizations to prioritize litigation over on-the-ground conservation.

In 2014, for instance, Oregon sold 355 acres of state trust land in the Elliott State Forest. Any conservation organization could have purchased the entire parcel for $787,000, or a little over $2,000 per acre.[71] Instead, several litigation groups threatened to sue anyone who purchased the property. When a timber company bought the land, they carried through on that threat, arguing that an ESA permit was required to harvest trees on 49 of the acres due to the presence of marbled murrelets.[72] When they won an injunction, they filed an attorney's fees motion seeking $1.2 million from the private landowners.[73] From a conservation perspective, it is absurd to spend more than $24,000 an acre litigating over an ESA permit and the speculative conservation benefits it might provide when the land could have been permanently conserved for a small fraction of that cost. Yet the ESA encourages precisely this result by subsidizing litigation at the expense of on-the-ground conservation.

Conflict over delistings can also undermine recovery efforts more directly. In 2020, Colorado voters narrowly approved a referendum calling for the reintroduction of wolves to the state. At the time, wolves were proposed for delisting nationwide and the Service had acknowledged the current delisting was unlawful, so it was assumed the plan would proceed free of any ESA obstacles. But that wasn't to be so. In 2022, a court overturned the delisting, throwing Colorado's plan into doubt. The plan has been further complicated by the arrival of a reproductively active pack from Wyoming in 2021. Because the wolves naturally returning to Colorado and the wolves to be introduced are all from the recovered Northern Rocky Mountain population, there is no bona fide ESA concern here. Instead, the problem is that the ESA penalizes recovery progress by regulating recovered populations as endangered when they grow enough to cross state lines.[74] Similar problems have arisen from wolves expanding into California, Oregon, and Washington.

Recovery recommendations:

1) Propose status changes immediately when recommended in a status review.[75]
2) Use post-delisting monitoring as a cooling-off period for litigation.[76]
3) Courts should overturn delistings only on proof that the species remains endangered or threatened.[77]

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[70] *See* Statement by Chris French, Deputy Chief, Forest Serv., Before the House Natural Resources Committee, Federal Lands Subcommittee, on H.R. 200, 1473, 1567, & 1586 (Mar. 23, 2023) (ESA litigation threatens forest restoration work throughout 87 national forests).
[71] *See* Zach Urness, *Elliott State Forest sale closes amid controversy*, Statesman Journal (June 12, 2014).
[72] *See* Center for Biological Diversity, *Court Halts Logging of Elliott State Forest Tract Sold to Private Timber Company* (June 28, 2022).
[73] *See* Faith Williams, *Wildlife Org. Attys Seek $1.2M Fees In Marbled Murrelet Fight*, Law360 (July 12, 2022).
[74] *See* PERC, Comment on the Proposed Establishment of an Experimental Population of Gray Wolf (Apr. 18, 2023).
[75] *See* Jonathan Wood, *Modernization of the ESA*, PERC.org (Sept. 16, 2018).
[76] *See* Willms, *supra* n. 44.
[77] *See* Amicus Brief of Pacific Legal Foundation and PERC, *Crow Indian Tribe v. United States*, No. 18-36030 (9th Cir. filed May 30, 2019).