

## ANIMAL POLITICS: MONEY, POWER, AND THE ENDANGERED SPECIES ACT

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## I. INTRODUCTION

Political and economic interests have played a significant role in the conservation of endangered species.<sup>1</sup> Endangered species have been a cause for concern in the United States since the 1800s.<sup>2</sup> For example, widespread hunting led to the deterioration of the bison population and forced the American public to consider protecting the species.<sup>3</sup> In 1872, Lieutenant Colonel A.G. Brackett of the Second United States Cavalry wrote that “[i]t [wa]s an abuse of language to call the killing of . . . buffaloes sport.”<sup>4</sup> The creation of Yellowstone National Park, perhaps the first political effort concerning species preservation, helped protect the bison.<sup>5</sup> Congress took further measures in 1874, making it illegal to kill female bison in the United States.<sup>6</sup> While this bill was strongly

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<sup>1</sup> See Delaney P. Boyd & C. Cormack Gates, *A Brief Review of the Status of Plains Bison in North America*, 45 J. OF WILDERNESS 15, 15 (2006) (suggesting reasons for the diminished bison population in the 1800s included the transaction of railroads and political motivations).

<sup>2</sup> See generally BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY* 8 (2001) (describing the public concern for endangered species in the 1800’s); Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUD. S609, S610 (2002) (explaining from 1850 to 1890, the bison population diminished on the Great Plains from ten million to merely one thousand). Conservationists allege that the bison were nearly extinguished due to the value of robes made from their fur. Lueck, *supra* at S610. In fact, it was during the high point of the bison market that its demise was greatest. Lueck, *supra* at S610. Despite the dramatic decrease in bison population, it has never been considered an endangered species. Lueck, *supra* at S611. Most of the current bison population exists in private herds in the United States. Lueck, *supra* at S611.

<sup>3</sup> See CZECH & KRAUSMAN, *supra* note 2, at 8 (indicating the hunting of buffalo herds forced wildlife protection into the public eye); Peter Morrisette, *Is There Room for Free-Roaming Bison in Greater Yellowstone?*, 27 ECOLOGY L.Q. 467, 468 (2000) (explaining that in 1902, free-roaming bison in the United States were limited to two dozen located in Yellowstone National Park). The saving of the free-roaming bison is considered one of the greater stories in conservation efforts. Morrisette, *supra* at 468. Yellowstone is currently home to 3,500 free-roaming bison. Morrisette, *supra* at 468.

<sup>4</sup> A.G. Brackett, *Buffalo Slaughter*, N.Y. TIMES, Feb. 7, 1872, <http://query.nytimes.com/mem/archive-free/pdf?res=FB0A17FB3A5A1B7493C5A91789D85F468784F9>. See generally Lloyd Burton, *Wild Sacred Icon or Woolly Cow? Culture and Legal Reconstruction of the American Bison*, 23 POL. & LEGAL ANTHROPOLOGY REV. 21, 21 (2001) (explaining the bison is also commonly referred to as the buffalo).

<sup>5</sup> See CZECH & KRAUSMAN, *supra* note 2, at 8 (suggesting one of the reasons Yellowstone National Park was created was to preserve bison and that Yellowstone represented the first national political effort toward the preservation of species, and stating one estimate indicates about twenty-five bison remained in the United States by 1900, all of which were located in Yellowstone National Park); KATHRYN A. KOHM, *BALANCING ON THE BRINK OF EXTINCTION* 11 (Kathryn A. Kohm ed., 1991) (stating hunting was prohibited in Yellowstone National Park by 1894).

<sup>6</sup> See Shannon Petersen, *Bison to Blue Whales: Protecting Endangered Species Before the Endangered Species Act of 1973*, 22 ENVIRONS: ENVTL. L. & POL’Y J. 71, 76 (1999)

supported, it was not unopposed.<sup>7</sup> One Congressman who opposed the bill called the bison “as uncivilized as the Indian.”<sup>8</sup> There is speculation that President Ulysses S. Grant vetoed the bill when he was advised that the extermination of the bison was an effective way to force Native Americans into agriculture while simultaneously destroying their way of life.<sup>9</sup> Grant’s military advisors informed him that the extermination of the bison would force the Indians to surrender to the United States Army.<sup>10</sup> The bison was consequently nearly extinguished due to political considerations, despite an

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(claiming the bill was passed to save the bison from extermination). The bill exempted Indians from restriction. *Id.*

<sup>7</sup> See generally *id.* at 77 (explaining how most Congressmen opposed the bill because it affirmed the lifestyles of the Indian). Congressmen opposing the bill felt it interfered with the indoctrination of the Indian into white civilization. *Id.*

<sup>8</sup> *Id.* See Marlene Affeld, *The Extermination of the American Buffalo*, YAHOO! VOICES (Oct. 30, 2011), (claiming the destruction of the buffalo population was a “diabolical plot by the United States Government . . . to starve the population of the Plains Indians”); Robert C. Kennedy, *The Last Buffalo*, N.Y. TIMES, <http://www.nytimes.com/learning/general/onthisday/harp/0606.html> (last visited Oct. 3, 2012) (explaining that Congressmen imposed a hard line Indian policy and viewed the extermination of the buffalo as strengthening that position).

<sup>9</sup> See Affeld, *supra* note 8 (suggesting the United States Government knew the buffalo was essential to the survival of the Plains Indians); Kennedy, *supra* note 8 (stating that President Grant had vetoed the 1874 bill). *But cf.* Burton, *supra* note 4 (explaining that recently buffalo have been referred to more as livestock than wild animals); *contra* Petersen, *supra* note 6, at 77 (explaining no record exists as to why Grant vetoed the bill). Not a single part of the buffalo was wasted when hunted by Plains Indians. Kennedy, *supra* note 8. John Fire Lane Deer discussed the effect of the white man’s extermination of the buffalo on Native Americans:

The buffalo gave us everything we needed. Without it we were nothing. Our tipis were made of his skin. His hide was our bed, our blanket, our winter coat. It was our drum, throbbing through the night, alive, holy. Out of his skin we made our water bags. His flesh strengthened us, became flesh of our flesh. Not the smallest part of it was wasted. His stomach, a red-hot stone dropped into it, became our soup kettle. His horns were our spoons, the bones our knives, our women’s awls and needles. Out of his sinews we made our bowstrings and thread. His ribs were fashioned into sleds for our children, his hoofs became rattles. His mighty skull, with the pipe leaning against it, was our sacred altar. The name of the greatest of all Sioux was Tatanka Iyotake—Sitting Bull. When you killed off the buffalo you also killed the Indian—the real, natural, “wild” Indian.

Affeld, *supra* note 8. Native Americans used bows and arrows to hunt buffalo, but also used tactics such as driving them off a cliff. Kennedy, *supra* note 8. The Plains Indians centered their cultures on the buffalo, and even their religious beliefs were based on the animal. Affeld, *supra* note 8. Today, Indian tribes are active leaders in bison conservation and in maintaining the animal’s “wild” status in an effort to maintain their culture. Burton, *supra* note 4, at 21.

<sup>10</sup> See Kennedy, *supra* note 8 (claiming Grant’s chief military advisors William Sherman and Philip Sheridan told Grant the Indians would be forced to surrender to the army once the buffalo was extinct in the plains).

obvious need to protect the animal.<sup>11</sup>

Another example of political and economic factors affecting wildlife conservation is the snail darter case.<sup>12</sup> Environmental groups sued the Tennessee Valley Authority (“TVA”) attempting to enjoin them from completing work on a dam in the Little Tennessee River.<sup>13</sup> This river was home to a new species of fish that was found fortuitously by Dr. David Etnier.<sup>14</sup> The fish was dubbed the “snail darter.”<sup>15</sup> A law student, Hank Hill, wrote a paper on the snail darter and its potential for listing under the Endangered Species Act.<sup>16</sup> His Professor, Zygmund Plater, encouraged the paper, and began to take an interest in the project by working with Hill to find a way to prevent the dam from being completed and destroying the snail darter.<sup>17</sup> This project proved to be difficult, as the TVA had spent millions of dollars on the dam and was determined to complete the

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<sup>11</sup> See *supra* text accompanying notes 2–11.

<sup>12</sup> See KENNETH M. MURCHISON, *THE SNAIL DARTER CASE: TVA VERSUS THE ENDANGERED SPECIES ACT 167* (Peter Charles Hoffer & N.E.H. Hull, eds., 2007) (suggesting President Carter did not veto a proposed amendment affecting the snail darter in fear of Congressional retaliation).

<sup>13</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 166 (1978). See also MURCHISON, *supra* note 12, at 81–82 (explaining how a student, Hank Hill, whose name appears on the caption, and a law professor, were also plaintiffs in the case).

<sup>14</sup> See MURCHISON, *supra* note 12, at 80 (claiming Dr. Etnier was looking for other endangered fish in the river that might affect TVA). Dr. Etnier, in an effort to prepare for possibly being called as a witness in a National Environmental Policy Act litigation, traveled to the Little Tennessee River with a graduate student to further search for endangered fish. MURCHISON, *supra* note 12, at 80. Dr. Etnier found none of these fish, but found a small darter. MURCHISON, *supra* note 12, at 80. He remembered being ecstatic that he might have made a discovery that would save the river. MURCHISON, *supra* note 12, at 80.

<sup>15</sup> See MURCHISON, *supra* note 12, at 81 (claiming Dr. Etnier named the fish the “snail darter” because the fish survived by eating snails). The snail darter reaches a maximum length of three and one half inches. MURCHISON, *supra* note 12, at 81. The snail darter’s lifespan is considered to be a maximum of four years. MURCHISON, *supra* note 12, at 81.

<sup>16</sup> See MURCHISON, *supra* note 12, at 81–82 (discussing how a law student at the University of Tennessee wrote a ten-page paper on the snail darter related to the ESA); ZYGMUNT J.B. PLATER FACULTY PROFILE, <http://www.bc.edu/schools/law/fac-staff/deans-faculty/platerz.html> (last visited Oct. 5, 2012) (explaining how Professor Plater served as lead counsel for the plaintiffs in the TVA litigation). Hill and his paper convinced Professor Plater that the ESA precluded TVA from completing the dam in the Little Tennessee River. MURCHISON, *supra* note 12, at 82. Professor Plater eventually argued the case in front of the Supreme Court of the United States. MURCHISON, *supra* note 12, at 82.

<sup>17</sup> Zygmund Plater, *Electric Power in a Carbon Constrained World: Classic Lessons from a Little Fish in a Pork Barrel – Featuring the Notorious Story of the Endangered Snail Darter and the TVA’s Last Dam*, 32 UTAH ENTL. L. REV. 211, 229 (2012) [hereinafter Plater, *Little Fish in a Pork Barrel*].

project.<sup>18</sup> At the trial court level, the judge declined to issue an injunction on the construction of the dam, despite acknowledging that the dam would destroy the snail darter.<sup>19</sup> The Sixth Circuit reversed and granted the injunction, and the case was brought before the Supreme Court.<sup>20</sup> During oral arguments, the Attorney General presented the Court with a vial containing a dead snail darter, ostensibly to show the diminutive size of the fish.<sup>21</sup> Zygmund Plater, acting as counsel for the team of plaintiffs, presented the Court with images of the darter in its natural habitat.<sup>22</sup> The majority opinion, authored by Chief Justice Warren Burger, determined that, due to separation of powers concerns, the Endangered Species Act of 1973 (“ESA”) forced the Court to defer to congressional intent and grant the injunction.<sup>23</sup> Justice Powell’s

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<sup>18</sup> See Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REFORM 805, 806 (1986) (explaining the hydroelectric dam in the Little Tennessee River cost \$150,000,000). *Contra Tenn. Vall. Auth.*, 87 U.S. at 210 (Powell, J., dissenting) (suggesting the cost of the dam was \$53 million).

<sup>19</sup> *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 763–64 (E.D. Tenn. 1976).

<sup>20</sup> *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1074–75 (6th Cir. 1977). TVA tried to argue that Congress, in appropriating money for the completion of the dam *after* the snail darter issue was raised, displayed its intent to continue the project, rather than to abandon it to save the snail darter. *Id.* at 1073. The Sixth Circuit refused to find that two appropriations by Congress overrode the clear, legislative authority found in the ESA. *Id.* at 1073–74.

<sup>21</sup> Plater, *Little Fish in a Pork Barrel*, *supra* note 17, at 229. Justice Brennan, during oral arguments, asked the Attorney General if the snail darter was alive. Plater, *Little Fish in a Pork Barrel*, *supra* note 17, at 229.

<sup>22</sup> Plater, *Little Fish in a Pork Barrel*, *supra* note 17, at 229–30 (suggesting the images of the snail darter in its natural habitat may have swayed at least one Justice’s vote).

<sup>23</sup> See *Tenn. Valley Auth.*, 437 U.S. at 194–95 (majority opinion) (explaining how the Court does not sit as a “committee of review . . . with the power of veto”). Chief Justice Burger expressed further concern in his concluding paragraph, writing: “We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’ Our Constitution vests such responsibilities in the political branches.” *Id.* at 195. Burger emphasized that once a congressional enactment has been interpreted and has been deemed constitutional, “[t]he judicial process comes to an end.” *Id.* at 194. Once the Court determined the intent of Congress was to prevent species from extinction, “[w]hatever the cost,” the decision was obvious to Burger and the majority to uphold the injunction imposed by the Court of Appeals. *Id.* at 184. Burger also stated that Congress omitted language that was included in previous endangered species legislation, and that this omission made it clear that Congress made a “conscious decision . . . to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 185. Though Congress did not foresee such an instance as TVA presented, Burger warned:

It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been

dissenting opinion suggested Congress would take action to avoid such drastic economic conflicts.<sup>24</sup> Justice Powell, speaking with clairvoyance, was correct, as Congress amended the ESA in 1978 to create a committee that has the power to grant authoritative exceptions to the Act.<sup>25</sup> After the committee surprisingly decided to deny an exemption for TVA, Congress went to work again.<sup>26</sup>

The House of Representatives amended the Energy and Water Development Appropriation Act of 1980 (“EWDA”) to include an exemption for TVA to complete the dam.<sup>27</sup> Many in the Senate

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anticipated. In any event, we discern no hint in the deliberations of Congress relating to the 1973 Act that would compel a different result than we reach here.

*Id.* at 185.

<sup>24</sup> *Id.* at 210 (Powell, J., dissenting). Powell stated he had “[l]ittle doubt that Congress [would] amend the Endangered Species Act to prevent the grave consequences made possible by [the] decision.” *Id.* at 210. Powell expressed further concern relating to the intent of Congress, doubting that this result is what the legislature intended. *Id.* at 210. He saw the decision as a greater issue for the future of federal projects in an “[e]conomically depressed era.” *Id.* at 210.

<sup>25</sup> See generally MURCHISON, *supra* note 12, at 151–57 (discussing how the 1978 amendments created a committee with the power to grant exemptions to federal actions threatening endangered species and their habitats); Plater, *supra* note 18, at 812–13 (explaining how the committee was mockingly dubbed “The God Committee”). The committee needed to analyze three criteria and reach a five-member majority before granting an exemption. MURCHISON, *supra* note 12, at 153. The criteria are:

[1] [T]here are no reasonable and prudent alternatives to the agency action; [2] [T]he benefits of the action “clearly outweigh the benefits of alternative courses of action consistent with conserving the species, and such action is in the public interest”; [3] [T]he proposed action is one of regional or national significance.

MURCHISON, *supra* note 12, at 153.

<sup>26</sup> See MURCHISON, *supra* note 12, at 164 (discussing why the committee ultimately decided to deny TVA the exemption). Chairman of the Council of Economic Advisors Charles Schultze moved for the committee to deny the exemption because there were alternatives to the reservoir project and he could not agree that the benefits of the project outweighed the benefit of alternative measures for the snail darter. MURCHISON, *supra* note 12, at 164. The motion passed unanimously. MURCHISON, *supra* note 12, at 165.

<sup>27</sup> See MURCHISON, *supra* note 12, at 165 (stating Representative John Duncan proposed a rider to the EWDA in front of a nearly vacant House); Plater, *supra* note 18, at 813 (explaining how the House of Representatives amended the EWDA). Plater’s description of the events following the committee’s denial of an exemption for TVA is heart-wrenching:

A few months later, the pork-barrel proponents, in forty-two seconds, in an empty house chamber, were able to slip a rider onto an appropriations bill, repealing all protective laws as they applied to Tellico and ordering the reservoir’s completion. Despite a half-hearted veto threat by President Carter and a last-minute constitutionally-based lawsuit brought by the Cherokee Indians, the TVA was ultimately able to finish

opposed the bill, and after much political maneuvering, the bill finally edged its way to President Jimmy Carter's desk.<sup>28</sup> President Carter, who previously expressed concern when the ESA was amended in 1978 to create the committee, declined to veto the bill and it was passed.<sup>29</sup> An article in *The Washington Post* suggested that Carter considered other political issues when deciding to sign the amended EWDA.<sup>30</sup> Politics, again, played a substantial role in the conservation of a species, or in the lack thereof, and somehow, the clear intent of the legislature was sidestepped.<sup>31</sup>

This article examines the effect political considerations have on endangered species and how the warranted but precluded designation interferes with the intent of the legislature. Part II offers a brief history of congressional intervention related to endangered species regulation.<sup>32</sup> Part III explains the process for listing a species under the ESA and provides information regarding protection afforded to listed species.<sup>33</sup> Part IV discusses specific animals affected by either the warranted but precluded designation or political influences.<sup>34</sup> Part V discusses the landmark settlement

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the dam, close the gates, and flood the valley on November 28, 1979.

Plater, *supra* note 18, at 813–14. The amendment violated House rules by attempting to change the law by appropriation act. MURCHISON, *supra* note 12, at 165. However, “[n]o opponent of the dam raised a point of order.” MURCHISON, *supra* note 12, at 165.

<sup>28</sup> See MURCHISON, *supra* note 12, at 166–67 (discussing how the Senate approval of the bill was difficult to reach). The Senate proposed to amend the bill to delete the Tellico exemption, and it passed 53–45. MURCHISON, *supra* note 12, at 166. The House then refused to accept the Senate's version of the bill, and it went to a committee. MURCHISON, *supra* note 12, at 166. Six senators changed their votes and the House's version of the bill, including the Tellico exemption, passed 48–44. MURCHISON, *supra* note 12, at 166. The bill was then sent to President Carter for approval. MURCHISON, *supra* note 12, at 166–67.

<sup>29</sup> MURCHISON, *supra* note 12, at 157, 166–67. Murchison discusses President Carter's role in the Tellico exemption and notes that he originally opposed the God Committee because, in the past, agencies worked together to resolve conflicts. President Carter asked the committee to be cautious in providing exemptions. MURCHISON, *supra* note 12, at 157. However, when the time came to veto the House bill providing an exemption to Tellico, Carter chose not to do so. MURCHISON, *supra* note 12, at 166. President Carter expressed regret that this was the “[w]ill of Congress.” MURCHISON, *supra* note 12, at 167.

<sup>30</sup> MURCHISON, *supra* note 12, at 167 (“*The Washington Post* suggested Carter's decision to sign the bill was influenced by a fear that Congress would retaliate against his Panama Canal Treaty and the creation of the Department of Education”).

<sup>31</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (finding the clear intent of the legislature was to prevent species' extinction); Petersen, *supra* note 6 (claiming political motivations were behind the failure to protect the American bison).

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See *infra* Part III.

<sup>34</sup> See *infra* Part IV.

between the Center for Biological Diversity (“CBD”) and the United States Fish and Wildlife Service (“FWS”), and how it failed to solve the issue at hand.<sup>35</sup> Part VI explains the current state of endangered species politics.<sup>36</sup> Part VII argues that eliminating the warranted but precluded designation would avoid political maneuvering around legislative intent. If purging that designation is truly not feasible, Part VII proposes alternative methods of removing politics from the conservation of endangered species.<sup>37</sup> Part VIII concludes by reminding people that these animals are cohabitants of the Earth and are imperiled at least partly due to our economic and social evolution.<sup>38</sup>

## II. A HISTORY OF LEGISLATIVE ACTION

Congress entered the field of wildlife regulation in 1900 by enacting the Lacey Act.<sup>39</sup> Congress passed the Lacey Act after noticing a trend in which commercial entities usurped the efforts of individual states to enforce wildlife regulations by killing a significant portion of a species and then quickly transporting them to another state.<sup>40</sup> Prior to the Lacey Act, which included provisions for federal species conservation, Congress had not recognized the preservation of species as a national issue.<sup>41</sup> That all changed

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<sup>35</sup> See *infra* Part V.

<sup>36</sup> See *infra* Part VI.

<sup>37</sup> See *infra* Part VII.

<sup>38</sup> See *infra* Part VIII.

<sup>39</sup> 16 U.S.C. § 3372(a) (2012). See Kohm, *supra* note 5, at 10 (stating the Lacey Act was a significant entry into wildlife regulation); Wesley Ryan Shelley, *Setting the Tone: The Lacey Act’s Attempt to Combat the International Trade of Illegally Obtained Plant and Wildlife and its Effect on Musical Instrument Manufacturing*, 42 ENVTL. L. 549, 550 (2012) (explaining the Lacey Act was passed in 1900 to make it a “federal crime to illegally hunt game in one state and profit from its sale in another state”). The Lacey Act was amended in 1969 to include amphibians, reptiles, and crustaceans. *Id.* at 551. In 1981, the Act was further amended to increase the civil penalty and decrease the requirements for criminal liability. *Id.* The Act makes it illegal to “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.” 16 U.S.C. § 3372(a) (2012).

<sup>40</sup> See Kohm, *supra* note 5, at 10 (stating Congress passed the Lacey Act initially to help states enforce existing wildlife regulations); Shelley, *supra* note 39, at 552. Another concern of Congress was the introduction of alien species into new ecosystems. Shelley, *supra* note 39, at 551.

<sup>41</sup> Kohm, *supra* note 5, at 10; see Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND & RESOURCES L. REV. 27, 36 (1995) (explaining the Lacey Act was first introduced to the House of Representatives in 1900); Kohm, *supra* note 5, at 11 (indicating the Lacey Act was Congress’ first recognition that the extinction of a species was a national concern). Iowa Congressman John Lacey proposed the Lacey Act mainly to enhance the

following the Lacey Act, as Congress passed several acts focused on the preservation of wildlife in the United States.<sup>42</sup> However, it was not until 1966, when Congress passed the Endangered Species Preservation Act (“ESPA”), that Congress developed a comprehensive program for the protection of endangered species.<sup>43</sup>

Seven years after the enactment of the ESPA, after a global meeting in Washington, D.C. regarding the import and export of endangered animals, Congress enacted the ESA.<sup>44</sup> The purpose of the ESA was to provide a means to preserve ecosystems and develop methods of conservation for endangered and threatened species.<sup>45</sup> In 1978, Congress amended the ESA, requiring the U.S. Fish and Wildlife Service (“FWS”) to list a species’ habitat concurrently with the species.<sup>46</sup> Congress further amended the ESA in 1982, requiring

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protection of agriculture. Anderson, *supra*, at 36–37. Lacey had a personal passion for birds that benefited agriculture and protecting against the extinction of exotic species. Anderson, *supra*, at 37.

<sup>42</sup> See Kohm, *supra* note 5, at 11 (listing several acts enacted by Congress concerning the preservation of species). The Migratory Bird Act of 1913 was the first federal statute attempting to regulate taking animals. Kohm, *supra* note 5, at 11. Another such act was the Fish and Wildlife Coordination Act of 1934, which was the first federal law to force other government agencies to consider environmental effects before acting. Kohm, *supra* note 5, at 11.

<sup>43</sup> See Kohm, *supra* note 5, at 11 (indicating the authors of the act meant to create a method of species protection encompassing a range of species rather than on a species by species basis); U.S. Fish & Wildlife Serv., *A History of the Endangered Species Act of 1973* 1 (2011) [hereinafter HISTORY OF THE ESA], [http://www.fws.gov/endangered/esa-library/pdf/history\\_ESA.pdf](http://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf) (“Congress passed the Endangered Species Preservation Act in 1966”). *But see* Winston Harrington, *The Endangered Species Act and the Search for Balance*, 21 NAT. RESOURCES J. 71, 71 (1981) (suggesting the Endangered Species Act of 1973 was the nation’s first program regarding endangered species with a comprehensive scheme).

<sup>44</sup> See HISTORY OF THE ESA, *supra* note 43 (stating Congress enacted the Endangered Species Act of 1973 after a meeting of 80 nations in Washington, D.C. was held to adopt a convention to conserve Endangered Species).

<sup>45</sup> See 16 U.S.C. § 1531(b) (2012) (“The purposes of this [Act] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . . .”); Matthew Gerhart, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 ECOLOGY L. Q. 167, 171 (2009) (suggesting every Federal agency must contact a “consulting agency,” such as the FWS, to determine whether any endangered, threatened, or candidate species exists in the area before proceeding with action); Kevin D. Hill, *The Endangered Species Act: What Do We Mean by Species?*, 20 B.C. ENVTL. AFF. L. REV. 239, 241 (1993) (stating the Act provided a “comprehensive species protection program.”). Congress extended its policies to include utilizing authorities for the conservation of endangered and threatened species as well as Federal cooperation with State and local agencies in furthering the conservation of endangered and threatened species. Gerhart, *supra* at 170.

<sup>46</sup> See HISTORY OF THE ESA, *supra* note 43 (requiring designation of a species’ critical

the listing of a species to be determined solely on biological information and without regard for the economic effects of the decision.<sup>47</sup> In 1988, Congress required the monitoring of “candidate” species and developed the emergency listing process for those species facing a rapidly accelerating risk.<sup>48</sup> While the amendments to the ESA advanced the preservation of species, there still existed a major hurdle to receiving these benefits: the listing process.<sup>49</sup>

### III. ESA PROCEDURE AND PROTECTION

#### A. *The Listing Process*

The FWS designates warranted species as “endangered” or “threatened.”<sup>50</sup> An “endangered species” is defined as “any species which is in danger of extinction throughout all or a significant portion of its range.”<sup>51</sup> A “threatened species” is a “species which is likely to become an endangered species within the foreseeable future . . . .”<sup>52</sup> There are five factors used in determining whether a species is endangered or threatened: “(A) the present or threatened

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habitat when “prudent” or “economic”).

<sup>47</sup> M. Lynne Corn & Pamela Baldwin, *Endangered Species Act: The Listing and Exemption Process*, in *ENDANGERED SPECIES: ISSUES AND ANALYSES* 29, 32 (Paul Foreman ed., 2002) (suggesting economic factors may be considered only after a listing determination is made); *cf.* *HISTORY OF THE ESA*, *supra* note 43 (“[T]rade information,” however, can be considered in conjunction with biological information).

<sup>48</sup> *HISTORY OF THE ESA*, *supra* note 43. Congress implemented several recovery plans as well in the 1982 Amendment. *HISTORY OF THE ESA*, *supra* note 43.

<sup>49</sup> *See* Kohm, *supra* note 5, at 16 (stating the National Marine Fisheries Service is responsible for listing marine species while the FWS administers all other plants and animals).

<sup>50</sup> U.S. FISH & WILDLIFE SERV., *LISTING A SPECIES AS THREATENED OR ENDANGERED* 1 (2011) [hereinafter *LISTING A SPECIES*], available at <http://www.fws.gov/endangered/esa-library/pdf/listing.pdf>. To preserve genetic diversity, the ESA defines “species” to include subspecies and “distinct populations.” *Id.*

<sup>51</sup> 16 U.S.C. § 1532(6) (2012). The code states that “endangered” species do not include “species of the Class Insecta [insects] determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.” *Id.*

<sup>52</sup> 16 U.S.C. § 1532(20) (2012); *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1277–79 (D.N.M. 2005). In *Norton*, the FWS argued that “significant portion of its range” meant any range “so important to the continued existence of a species that threats to the species in that area can have the effect of threatening the viability of the species as a whole . . . .” *Id.* at 1278. The plaintiffs, the Center for Biological Diversity, argued that the FWS’s definition is extremely limited and does not consider the historic range of the animal, which will in effect result in rejecting the listing of a species on loss of historic habitat alone. *Id.* at 1279. The Court upheld the FWS’s definition, stating the “plaintiffs misstate the [FWS’s] position.” *Id.*

destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”<sup>53</sup> Currently, the FWS lists 494 species as endangered and 200 species as threatened in the United States.<sup>54</sup>

The FWS may initiate, and any citizen or organization may petition for, a species to be added to the list.<sup>55</sup> First, when the FWS initiates the listing of a species, the species is designated as a “candidate” species.<sup>56</sup> Second, the FWS must publish notice in the Federal Register a minimum of ninety days before listing.<sup>57</sup> Finally, within one year of publishing notice, the FWS must either withdraw the proposed listing, make a final ruling, or give notice of no longer than a six month necessary extension.<sup>58</sup>

If a citizen initiates the listing of a species, the individual must file a petition backed by biological data.<sup>59</sup> The ESA requires the FWS or the National Marine Fisheries Service (“NMFS”) to conduct an analysis and within ninety days publish a report on the petition finding whether there is “substantial information” indicating listing

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<sup>53</sup> 16 U.S.C. § 1533(a)(1)(A)–(E) (2015); see K. Mollie Smith, *Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory?*, 19 SOUTHEASTERN ENVTL. L.J. 119, 123–24 (2010) (enumerating the five factors relevant in determining whether a species should be listed); LISTING A SPECIES, *supra* note 50. Any factor alone is enough to determine a species is “endangered” or “threatened.” LISTING A SPECIES, *supra* note 50. Additionally, listing decisions must be made based on the best scientific and commercial data available. Smith, *supra*, at 124.

<sup>54</sup> U.S. FISH & WILDLIFE SERV., *Species Reports*, [http://ecos.fws.gov/tess\\_public/pub/Boxscore.do](http://ecos.fws.gov/tess_public/pub/Boxscore.do) (last updated October 17, 2015). Additionally, 574 species are listed as endangered and 77 as threatened in foreign jurisdictions for a grand total of 1345 species (including U.S. species). *Id.*

<sup>55</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180–81 (1978) (suggesting the ESA encourages citizen involvement by allowing interested persons to bring suits regarding the enforcement of the ESA and by providing a means to petition for an animal to be listed); Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 GA. L. REV. 413, 427 (1999) (stating the statute provides a provision allowing citizens to issue petitions for the inclusion of a species); LISTING A SPECIES, *supra* note 50. A “petition” is defined as a “formal request” to list a species. LISTING A SPECIES, *supra* note 50.

<sup>56</sup> See Smith, *supra* note 53, at 124 (stating the FWS’s first action is to identify a species that merits listing and then to designate said species as a candidate).

<sup>57</sup> 16 U.S.C. § 1533(b)(5)(A) (2015); see Smith, *supra* note 53, at 124 (stating the FWS must additionally take comments from the public regarding the report).

<sup>58</sup> 16 U.S.C. § 1533(b)(6)(A) (2015).

<sup>59</sup> See 16 U.S.C. § 1533(b)(3)(A) (2015) (suggesting the Secretary must review a petition by an interested person).

the species is warranted.<sup>60</sup> However, at this point, the species is merely under review.<sup>61</sup> If substantial information is found, the FWS or NMFS must, within one year, decide whether listing the species is “warranted.”<sup>62</sup> Before a positive determination regarding the listing of a species or its critical habitat becomes effective, the agency must publish a report in the Federal Register.<sup>63</sup> But due to a ranking system, a warranted finding does not guarantee a species protection under the ESA.<sup>64</sup>

The process of determining whether a species is warranted for listing involves intense analysis that prioritizes proposed additions to the list based on “the magnitude of threats they face, the immediacy of the threats, and their taxonomic uniqueness.”<sup>65</sup> Species are ranked by priority from one to twelve; if a species is ranked one, it faces the most severe and immediate threats.<sup>66</sup> At this point, the species of higher rankings are proposed first.<sup>67</sup> If a species is found not to be of the highest priority, it is declared “warranted but precluded” and becomes a “candidate” for listing.<sup>68</sup> A finding

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<sup>60</sup> See *id.* (stating the Secretary “shall make a finding” regarding the petition to add a species to the list).

<sup>61</sup> LISTING A SPECIES, *supra* note 50.

<sup>62</sup> See generally 16 U.S.C. § 1533(b)(3)(B) (2015) (stating the agency must decide whether the listing is warranted, not warranted, or warranted but precluded).

<sup>63</sup> See 16 U.S.C. § 1533(b)(5)(A)(i) (2015) (stating any decision to list a species or its critical habitat under 16 U.S.C. § 1533(a)(1) or 16 U.S.C. § 1533(a)(3) requires the Secretary to publish a notice in the Federal Register); see generally 16 U.S.C. § 1533(b)(6)(A) (2015) (stating the secretary must publish, within one year after the original notice under 16 U.S.C. § 1533(b)(5)(A)(i) is published, a final regulation to implement the decision, a final regulation determining the decision need not be implemented, notice that the period of one year needs to be extended, or notice that the proposed regulation is withdrawn).

<sup>64</sup> LISTING A SPECIES, *supra* note 50.

<sup>65</sup> *Candidate Species*, U.S. FISH & WILDLIFE SERV. (2014) [hereinafter CANDIDATE SPECIES], available at [http://www.fws.gov/endangered/esa-library/pdf/candidate\\_species.pdf](http://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf). The FWS states that an example of “taxonomic uniqueness” is that “full species” have higher priority than “subspecies.” *Id.*

<sup>66</sup> See Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098, 43098–14 (Sept. 21, 1983) [hereinafter Listing Guidelines] (stating the task priority system aids the Department in allocating funds and resources equitably for all species); Smith, *supra* note 53, at 127 (suggesting Congress initiated the ranking system recognizing the “warranted but precluded” system required prioritizing species); CANDIDATE SPECIES, *supra* note 65. A “task priority system” is used to narrow species even further. Listing Guidelines, *supra*, at 43014.

<sup>67</sup> CANDIDATE SPECIES, *supra* note 65.

<sup>68</sup> See Ortiz, *supra* note 55, at 454 (indicating a warranted but precluded designation means the species is now a candidate); Smith, *supra* note 53, at 125 (stating a designation of warranted but precluded means the species will join a list of other candidates); LISTING A SPECIES, *supra* note 50.

of “warranted but precluded” requires the FWS or NMFS to initiate subsequent annual findings on the anniversary date of the petition until it determines the species is either warranted or not warranted.<sup>69</sup> If, after a subsequent analysis, a species is not classified as warranted, the agency conducting the finding must publish a report explaining in detail why the agency has precluded the animal from listing.<sup>70</sup> Those animals that are found to be warranted are listed under the Act and receive statutory protection.<sup>71</sup> The complicated nature of the listing process ultimately results in either protecting the animal or providing inadequate safeguards via other means such as state conservation agreements.<sup>72</sup>

### B. Protection under the ESA

The ESA provides every listed species protection, which includes restrictions against “taking” the animal.<sup>73</sup> Taking an animal under the ESA is considered anything from pursuing to killing the animal.<sup>74</sup> In 1981, Congress issued a federal regulation further defining the word harm.<sup>75</sup> Harm, which is included in the

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<sup>69</sup> See 16 U.S.C. § 1533(b)(3)(C)(i) (2012) (stating a finding that a species is warranted but precluded requires the Secretary of the Interior to treat the species as if a petition were resubmitted the following year and contained substantial information that listing the species may be warranted); Smith, *supra* note 53, at 125 (stating the FWS must re-evaluate the condition of a warranted but precluded species each year); LISTING A SPECIES, *supra* note 50.

<sup>70</sup> See 16 U.S.C. § 1533(b)(3)(C)(i) (2012) (indicating a species found to be warranted but precluded must be re-analyzed every year as if a new petition was made, which means if the species is later found not to be warranted, the Secretary must “promptly publish” a notice regarding the agency’s findings pursuant to 16 U.S.C. § 1533 (b)(3)(B)(ii)).

<sup>71</sup> See generally 16 U.S.C. § 1538(a)(1) (2012) (itemizing protections given to any animal listed pursuant to 16 U.S.C. § 1533).

<sup>72</sup> See Smith, *supra* note 53, at 123 (describing the ESA listing process as complicated and lengthy). A species must be listed before it receives statutory protection. Smith, *supra* note 53, at 122.

<sup>73</sup> 16 U.S.C. § 1538(a)(1)(B)–(C) (2012); Wild Fish Conservancy v. Salazar, 628 F.3d 513, 518 (2010). However, there are instances where “incidental takings” are permitted. *Id.* at 519. If the FWS or another consulting agency determines a specific action by a business or agency may result in “incidental takings,” the consulting agency must issue an “incidental takings report” which exempts a specific number of “takings” prohibited by section 4 of the ESA. *Id.*

<sup>74</sup> See 16 U.S.C. § 1532(19) (2012) (defining “take” as a means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”). *Contra* Lynda Graham Cook, *Lucas and Endangered Species Protection*, 27 U.C. DAVIS L. REV. 185, 195 (1993) (suggesting a taking requires the harming or killing of an animal).

<sup>75</sup> 50 C.F.R. § 17.3 (2006). See generally *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 699–700 (1995) (declaring the Secretary’s definition of harm as reasonable). The regulation further states that such an act may include habitat

statute as a means of taking an animal, is defined as “an act which actually kills or injures wildlife.”<sup>76</sup> Congress was well aware of the possibility that the destruction of a species’ habitat may result in the taking or harming of a listed animal.<sup>77</sup> Thus, the ESA requires the Secretary of the Interior to list a species’ critical habitat concurrently with the endangered species and afford said habitat statutory protection.<sup>78</sup>

While listed species receive a multitude of statutory protections, species designated as “warranted but precluded” do not receive *any* protections under the ESA.<sup>79</sup> The failure to provide candidate species with statutory protection has led to a litany of litigation.<sup>80</sup> In February 2010, the United States District Court of Idaho described the FWS’s “warranted but precluded” designation of the

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modification or degradation. 50 C.F.R. § 17.3 (2006).

<sup>76</sup> See *Babbitt*, 515 U.S. at 691. The Supreme Court upheld the FWS’s definition of harm to include habitat degradation and modification, because if the Court held the respondent’s position was correct, “[w]hen an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listing species by destroying its habitat,” it would not constitute “harming” the species. *Id.* at 699-700. Therefore, the Court decided, degradation of a habitat occupied by a listed species would constitute “harm” if the result was injury or death to an animal. *Id.* at 708.

<sup>77</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978) (indicating Congress was informed that the greatest threat to species preservation was the destruction of natural habitats).

<sup>78</sup> See generally 16 U.S.C. § 1532(5)(A)–(C) (2012) (explaining the requirements that need to be met to designate a habitat as a “critical habitat”); 16 U.S.C. § 1532(5)(C) (2012) (asserting that a critical habitat does not include an area which it is merely possible for the species to occupy). A species’ critical habitat is confined to those areas occupied by the species at the time it is listed. The habitat must be essential to the species’ continued existence. § 1532(5)(A)(i); § 1533(a)(3)(A) (2012) (stating the Secretary of the Interior “shall,” concurrently with the listing of a species, designate any habitat which is considered that species’ critical habitat).

<sup>79</sup> See LISTING A SPECIES, *supra* note 50. Compare *Smith*, *supra* note 53, at 125 (suggesting species which are listed as “warranted but precluded” receive more protection than mere “candidates” receive), with *Ortiz*, *supra* note 55, at 454 (indicating that “candidate status” means a species is afforded “none of the protections afforded by the ESA,” drawing no distinction between those species which are mere candidates and those species which are warranted but precluded). A species listed as warranted but precluded immediately becomes a candidate species, which receive no protection under the ESA. LISTING A SPECIES, *supra* note 50.

<sup>80</sup> See, e.g., *Ctr. for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1099 (9th Cir. 2006) (challenging the FWS’s designation of the Sierra-Nevada Mountain Yellow-Legged Frog as “warranted but precluded”); *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 834 (9th Cir. 2001) (suing the Secretary of the Interior for failing to act regarding the Chiricahua Leopard Frog and the Gila Chub for seven and sixteen years, respectively); *Ctr. for Biological Diversity v. Salazar*, No. 10-1501, 2010 U.S. Dist. LEXIS 113757, at \*1 (D. Cal. Oct. 15, 2010) (challenging designation of the fisher as “warranted but precluded”).

sage grouse as “toothless.”<sup>81</sup> Listing delays and inaction caused 107 species to go extinct between 1973 and 1994.<sup>82</sup>

#### IV. HOW ECONOMICS AND POLITICS HAVE AFFECTED SPECIES

##### A. *The Polar Bear’s Critical Habitat*

Perhaps the quintessential symbol of endangered species and climate change, the Polar Bear is widely recognized and revered as one of nature’s unique and fascinating species.<sup>83</sup> Jon Mooallem, in his book, *Wild Ones: A Sometimes Dismaying, Weirdly Reassuring Story about Looking at People Looking at Animals in America*,<sup>84</sup> describes the Polar Bear’s ascent into the general public’s hearts. Mooallem discussed the warranted but precluded designation and called it “basically a loophole.”<sup>85</sup> The CBD, according to Mooallem, needed to put pressure on the Bush administration to convince them to address climate change.<sup>86</sup> The CBD knew that the administration could not just avoid the Polar Bear—with all of the public attention that comes with it—by designating it as warranted but precluded from protection.<sup>87</sup> If the FWS had used the warranted but precluded designation, they wouldn’t “have [had] to rule on [the] climate science or make any really difficult decisions.”<sup>88</sup>

The Polar Bear was the first species to be listed under the ESA

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<sup>81</sup> *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, No. 4:10-CV-229-BLW, 2012 U.S. Dist. LEXIS 13771, at \*3 (D. Idaho 2012). The court described the designation as a declaration that the sage grouse needs statutory protection yet “doing nothing about it.” *Id.* at \*3.

<sup>82</sup> Compare Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, Apr. 20, 2011, at A1 (explaining that forty-two species went extinct while waiting to be listed), with Kieran Suckling, Rhiwena Slack & Brian Nowicki, *Extinction and the Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY, 1, 2 (2004), <http://www.biologicaldiversity.org/publications/papers/ExtinctAndESA.pdf> (suggesting eighty-three species became extinct due to delays: twenty-nine before an initiated process began, forty-two due to a delay in the process, and eleven merely one day after being listed).

<sup>83</sup> See Geoff Manaugh & Nicola Twilley, *How the Polar Bear Lost Its Power, and Other Animal Tales*, ATLANTIC BLOG (Aug. 1, 2013, 5:35 P.M.), <http://www.theatlantic.com/technology/archive/2013/08/how-the-polar-bear-lost-its-power-and-other-animal-tales/278281/> (describing the polar as the “mega-celebrity of the animal kingdom”).

<sup>84</sup> JOHN MOOALLEM, *WILD ONES: A SOMETIMES DISMAYING, WEIRDLY REASSURING STORY ABOUT LOOKING AT PEOPLE LOOKING AT ANIMALS IN AMERICA* (2013).

<sup>85</sup> Manaugh & Twilley, *supra* note 83.

<sup>86</sup> Manaugh & Twilley, *supra* note 83.

<sup>87</sup> Manaugh & Twilley, *supra* note 83 (suggesting the choice of the polar bear was a legal strategy). Mooallem called the warranted but precluded designation an “infinite waiting room.” Manaugh & Twilley, *supra* note 83.

<sup>88</sup> Manaugh & Twilley, *supra* note 83.

solely due to the effects of global warming.<sup>89</sup> The bear is “completely dependent on Arctic sea ice habitat for survival.”<sup>90</sup> It uses the ice to migrate and to hunt seals and other prey.<sup>91</sup> Studies have shown that the sea ice is melting and severely damaging the Polar Bear’s ability to hunt, mate, and ultimately, survive.<sup>92</sup> Because of this, the FWS listed the Polar Bear as a threatened species in 2008, determining that the Polar Bear was “likely to become an endangered species [in the near] future.”<sup>93</sup> In October of 2009, the FWS proposed listing the Polar Bear’s habitat, totaling over two-hundred thousand square miles, as a critical one.<sup>94</sup> A coalition of plaintiffs who work in the Polar Bear’s designated critical habitat challenged the final rule, mainly because the ruling would have “significant adverse ramifications for . . . Alaska’s oil and gas industry . . . .”<sup>95</sup> The court explained the importance of judicial deference to agency decisions, noting that it must leave all informed agency decisions that are in accordance with the law untouched, and may overturn a ruling only if the agency’s conclusions are “arbitrary, capricious, [or] an abuse of discretion . . . .”<sup>96</sup>

Yet the court overturned the FWS’s designation of critical habitat, finding, *inter alia*, that the designation was insufficiently supported by the biological evidence presented.<sup>97</sup> Apparently, the FWS did not provide enough evidence to show that one of the areas listed as critical for the Polar Bear was necessary for the conservation of the species.<sup>98</sup> Unit 2 of the bear’s designated habitat, according to the court, was sufficiently supported by evidence as a critical

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<sup>89</sup> Kassie R. Siegel & Brendan R. Cummings, *Polar Bears, a Melting Arctic, and the United States Endangered Species Act: The Role of Domestic Wildlife Law in Polar Biodiversity Protection*, 1 Y.B. POLAR L. 121, 123 (2009).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Endangered and Threatened Wildlife and Plants: Determination of Threatened Status for the Polar Bear (*Ursus Maritimus*) Throughout its Range, 73 Fed. Reg. 28,212, 28,212 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17).

<sup>94</sup> U.S. FISH & WILDLIFE SERV., POLAR BEAR CRITICAL HABITAT: FREQUENTLY ASKED QUESTIONS (2010) [hereinafter POLAR BEAR CRITICAL HABITAT], [http://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/critical\\_habitat\\_factsheet\\_11\\_2010.pdf](http://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/critical_habitat_factsheet_11_2010.pdf).

<sup>95</sup> *Alaska Oil & Gas Ass’n v. Salazar*, 916 F. Supp. 2d 974, 983 (D. Alaska 2013).

<sup>96</sup> *Id.* at 985. Although a court is highly deferential to the agency, it must consider whether there was a “reasonable basis for its decision” and no “clear error in judgment.” *Id.* at 986. A court must consider whether the agency weighed the relevant factors, but is not to “substitute its judgment for that of the agency.” *Id.*

<sup>97</sup> *Id.* at 1001; *see* 16 U.S.C. § 1533(b)(5)(A)(i) (2012).

<sup>98</sup> *Alaska Oil & Gas Ass’n*, 916 F. Supp. 2d at 999–1001.

habitat in only one percent of the territory listed.<sup>99</sup> The bears' dens were located some ten miles from the coast, and as one critic of the holding suggested: "[P]olar bears are marine animals, and they had to get to their den somehow."<sup>100</sup>

The ESA states that "critical habitat" means:

[T]he specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations for protection . . .<sup>101</sup>

The court, however, determined that the FWS failed to provide competent evidence suggesting that ninety-nine percent of the area in Unit 2 was essential to the conservation of the species, and that the science it used was "premature" at best.<sup>102</sup> The economic impact of listing the Polar Bear's critical habitat may have affected the court's decision in a similar way to the warranted but precluded designation.<sup>103</sup> Governor Sean Parnell called the FWS's proposed critical habitat a "concerted effort to kill jobs and economic development in Alaska."<sup>104</sup> Until these species' habitats are sufficiently protected, any ESA protections will be simply inadequate.

### B. *The Pacific Walrus*

Conservationists emphasize the importance of preserving the natural habitats of certain species.<sup>105</sup> However, in the case of the recently warranted but precluded Pacific Walrus, there is little any organization can do to prevent habitat destruction.<sup>106</sup> Immediately

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<sup>99</sup> *The Polar Bear Critical Habitat Decision*, EVNLT. LAW PROF BLOG (Jan. 17, 2013), [http://lawprofessors.typepad.com/environmental\\_law/2013/01/the-polar-bear-critical-habitat-decision.html](http://lawprofessors.typepad.com/environmental_law/2013/01/the-polar-bear-critical-habitat-decision.html); *Alaska Oil & Gas Ass'n*, 916 F. Supp. 2d at 1000–01.

<sup>100</sup> *The Polar Bear Critical Habitat Decision*, *supra* note 99.

<sup>101</sup> 16 U.S.C. § 1532(5)(A)(i) (2012).

<sup>102</sup> *Alaska Oil & Gas Ass'n*, 916 F. Supp. 2d at 1001.

<sup>103</sup> *See infra* Part.IV.C–F.

<sup>104</sup> Press Release, State of Alaska Dep't of Law, District Court Rejects Polar Bear Critical Habitat Designation (Jan. 11, 2013), *available at* <http://www.law.state.ak.us/press/releases/2013/011113-PolarBear.html>. Much of the proposed habitat is in the heart of Alaska's oil production. *Id.*

<sup>105</sup> *See generally Habitat Conservation 101*, DEFENDERS OF WILDLIFE, <http://www.defenders.org/habitat-conservation/habitat-conservation-101> (last visited Oct. 24, 2015) (suggesting animals are threatened when the habitats they occupy are jeopardized).

<sup>106</sup> *See* Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened, 76 Fed. Reg. 7633, 7634 (Feb. 10, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Petition to List the Pacific Walrus] (listing the Pacific Walrus as a candidate species). There are three known types of walruses; the Atlantic Walrus, the Pacific Walrus, and the Laptev

following the Center for Biological Diversity's ("CBD") petition to list the Pacific Walrus, the FWS listed the Polar Bear as a "threatened" species in May 2008.<sup>107</sup> However, the FWS found the Pacific Walrus to be numerous in comparison to the Polar Bear, possessing greater adaptability.<sup>108</sup> Yet adaptability and population size were misconstrued as factors negating the pressing need to protect the Pacific Walrus.<sup>109</sup>

In the breeding months, Pacific Walrus mothers rely on sea ice for raising calves, as the ice shields the pair while they drift at sea.<sup>110</sup> The decrease in sea ice exposes the mother and calf to the dangers

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Walrus. *Id.* at 7635. Pacific Walruses migrate seasonally between the Bering Sea, located south of the Bering Strait, west of Alaska, and Chukchi Sea, located north of the Bering Strait, west of Alaska, relying on broken ice to access offshore areas for breeding and feeding. *Id.* at 7635-36. The walrus is distinguished from other aquatic arctic mammals by its long tusks, which have been observed being used to propel the animal out of water. *Id.* at 7635. Walruses have also been observed using their tusks to attach themselves to ice while resting in water during treacherous weather. *Id.* The Pacific Walrus has maternal instincts, as it is rare for a mother to be separated from her calf during the first two years of the baby's life. *Id.* See Andrew C. Revkin, *Walruses Suffer Substantial Losses as Sea Ice Erodes*, N.Y. TIMES, Oct. 3, 2009, at A15 (positing global warming as the cause for eroding sea ice leading to substantial losses to the walrus population); John Collins Rudolph, *Take a Number, Mr. Walrus*, N.Y. TIMES ENVTL. BLOG, (Feb. 9, 2011, 3:22 PM), <http://green.blogs.nytimes.com/2011/02/09/take-a-number-mr-walrus/?ref=walruses> (citing the FWS's designation of the Pacific Walrus as a candidate species of low priority despite threats to its natural habitat).

<sup>107</sup> See generally Press Release, Center for Biological Diversity, Pacific Walrus Advances Toward Endangered Species Protection: Arctic Marine Mammal Threatened by Global Warming, Oil Dev. (Sept. 8, 2009) (on file with author) (stating a petition was filed in February 2008 with the FWS to enlist the Pacific Walrus under the ESA); U.S. FISH & WILDLIFE SERV., POLAR BEAR (2009), [http://www.fws.gov/endangered/esalibrary/pdf/polar\\_bear.pdf](http://www.fws.gov/endangered/esalibrary/pdf/polar_bear.pdf).

<sup>108</sup> See Petition to List the Pacific Walrus, *supra* note 106, at 7637 (discussing how walruses move to land to rest when sea ice is unavailable); Rudolph, *supra* note 106 (stating the reason for the walrus's designation as a candidate species is because there are nearly 130,000 walruses, compared to about 25,000 polar bears, and walruses have a heightened ability to survive on land); Siegel & Cummings, *supra* note 89, at 123 (stating the polar bear is "solely dependent" on sea ice).

<sup>109</sup> Compare Petition to List the Pacific Walrus, *supra* note 106, at 7639 (discussing the decrease in walrus population since 1990 and threats posed to walruses when forced onto land) with Rudolph, *supra* note 106 (paraphrasing the director of the FWS claiming the walrus was listed as warranted but precluded because of adaptability and population size). The walrus population was estimated to be as high as 290,000 between 1975 and 1990. Petition to List the Pacific Walrus, *supra* note 106, at 7639. Currently, the estimate is 130,000. Rudolph, *supra* note 106. The walrus has the ability to survive on land, but requires sea ice for protection in its tender years. Petition to the List the Pacific Walrus, *supra* note 107, at 7648.

<sup>110</sup> See Petition to the List the Pacific Walrus, *supra* note 107, at 7648 (alleging the protection afforded to walrus mothers and their babies will diminish as sea ice is lost because they use it as protection while drifting at sea).

of predation.<sup>111</sup> While the Pacific Walrus possesses the ability to survive on land and the use of packed sea ice is not *absolutely* required for its survival, a greater number of calves and their nursing mothers will be put at risk while on coastal land.<sup>112</sup> Yet the FWS, after reading this, decided saving the Pacific Walrus was a low priority.<sup>113</sup>

Coincidentally, at the same time the FWS designated the Pacific Walrus warranted but precluded, the United States Government considered allowing drilling for oil in the Chukchi Sea, the heart of the Pacific Walrus's habitat.<sup>114</sup> Listing the Pacific Walrus would render gaining approval for such drilling extremely difficult, as the Chukchi Sea would have necessarily been included as part of the animal's critical habitat.<sup>115</sup> In this case, it seems clear that an interest in oil production triumphed over the interests of animals.<sup>116</sup> Once

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<sup>111</sup> See Petition to the List the Pacific Walrus, *supra* note 107, at 7649 (estimating polar bear and walrus interaction will increase due to the lack of sea ice). The polar bear and walrus will both need to rely on terrestrial environments rather than sea ice, and this will expose the walrus to extreme danger, and possibly force them to leave common feeding areas. Petition to the List the Pacific Walrus, *supra* note 107, at 7649.

<sup>112</sup> See Petition to the List the Pacific Walrus, *supra* note 107, at 7648 (discussing the need for sea to protect calves will be lost during periods where sea ice is lost).

<sup>113</sup> See Dan Joling, *U.S. Fish and Wildlife Service Delays Protection of Pacific Walrus*, L.A. TIMES BLOG (Feb. 9, 2011, 3:09 PM), <http://latimesblogs.latimes.com/unleashed/2011/02/us-fish-and-wildlife-service-delays-protections-for-pacific-walrus.html> (paraphrasing FWS spokesman Bruce Woods as stating the walrus is of lower priority and has been deemed a nine by the agency).

<sup>114</sup> See Press Release, Center for Biological Diversity, *Pacific Walrus Found Imperiled by Global Warming But Left Without Protections* (Feb. 8, 2011), [http://www.biologicaldiversity.org/news/press\\_releases/2011/pacific-walrus-02-08-2011.html](http://www.biologicaldiversity.org/news/press_releases/2011/pacific-walrus-02-08-2011.html) [hereinafter *Pacific Walrus Imperiled*] (claiming the Obama administration was deciding whether to permit drilling for oil in the Chukchi Sea shortly after the warranted but precluded designation of the walrus); Press Release, Center for Biological Diversity, *Obama Ignores Huge Dangers in Approving Arctic Drilling Permit for Shell* (Aug. 30, 2012), [http://www.biologicaldiversity.org/news/press\\_releases/2012/arctic-drilling-08-30-2012.html](http://www.biologicaldiversity.org/news/press_releases/2012/arctic-drilling-08-30-2012.html) [hereinafter *Approving Arctic Drilling Permit*] (describing the approval of Shell Oil's plan to drill for oil in the Chukchi Sea). Alaska director at the Center for Biological Diversity, Rebecca Noblin, said the United States government made a serious mistake by allowing Shell to move forward with their plan. *Id.* Noblin continued: "The harsh and frozen conditions of the Arctic make drilling risky, and an oil spill would be impossible to clean up...Once we've ruined the Arctic for wildlife, we'll never get it back." *Id.*

<sup>115</sup> See *Pacific Walrus Imperiled*, *supra* note 114 (suggesting gaining approval for drilling in the Chukchi Sea if the Pacific Walrus was listed under the ESA would be difficult due to critical habitat concerns).

<sup>116</sup> See John R. Platt, *Oil Spill Threatens Endangered Species at a Critical Time*, SCI. AM. (May 3, 2010), <http://blogs.scientificamerican.com/extinction-countdown/oil-spill-threatens-endangered-species-at-a-critical-time> (describing animals threatened by the Deepwater Horizon oil spill); Domenick Yoney, *Shell chooses oil over whales, threatening Western Pacific Gray*, AUTOBLOG GREEN (Jan. 26, 2011, 7:59 PM), <http://green.autoblog>.

again, political motivations played a subtle yet considerable role in endangered species protection.<sup>117</sup> The warranted but precluded designation allowed walrus to be endangered under the guise of the animal's ability to adapt and its quantity.<sup>118</sup>

### C. *The Spotted Owl*

A beautiful yet rare species, the Northern Spotted Owl dwells in the Sierra Forests of Washington and Oregon as well as the old growth forests of Northern California.<sup>119</sup> The Northern Spotted Owl requires 200-year-old trees for survival, and the United States Forest Service ("USFS") manages the Pacific Northwest forests where the owl lives for logging purposes.<sup>120</sup> Studies showed that if the USFS continued its "sustained yield practice," the owls' habitat would continue to decrease.<sup>121</sup> Listing the Northern Spotted Owl would have required the FWS to place harsher restrictions on logging in the owls' habitat, which would have undercut "existing government timber company contracts."<sup>122</sup>

Greenworld, and several other organizations, petitioned the Northern Spotted Owl for listing in 1987, but the FWS denied these petitions.<sup>123</sup> Later, in 1988, environmental organizations sued the FWS to force them to list the Northern Spotted Owl, claiming that the FWS considered factors other than scientific data, including economic factors.<sup>124</sup> The FWS provided no scientific basis for failing to list the Northern Spotted Owl, even ignoring the opinion of its own expert.<sup>125</sup> The court found that the FWS's failure to provide an

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com/2011/01/26/shell-chooses-oil-over-whales-western-pacific-gray (discussing how Shell wanted to build an oil platform in the habitat of the Pacific Gray Whale). Animals threatened by the Deepwater Horizon oil spill included the Brown Pelican, removed from the ESA merely a year before the spill, and Kemp's Ridley Sea Turtle, one of the world's most endangered turtles. Platt, *supra*. The Pacific Gray Whale's population at the time was only 130. Yoney, *supra*. Approximately thirty were females. Yoney, *supra*.

<sup>117</sup> See *supra* Part I.

<sup>118</sup> Compare Rudolph, *supra* note 106 (indicating the reasons for the walrus's warranted but precluded designation were based on population and adaptability) with Approving Arctic Drilling Permit, *supra* note 114 (suggesting the ability to drill oil in the Chukchi Sea was an important factor).

<sup>119</sup> Fact Sheet: Northern Spotted Owl, DEFENDERS OF WILDLIFE, <http://www.defenders.org/northern-spotted-owl/basic-facts> (last visited Mar. 5, 2014).

<sup>120</sup> Ivan J. Lieben, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1337 (1997).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1338.

<sup>124</sup> Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

<sup>125</sup> *Id.* at 481. Dr. Mark Shaffer, an FWS biologist, stated: "[T]he most reasonable

analysis of its decision not to list the Northern Spotted Owl was “arbitrary and capricious and contrary to law,” and remanded the case to the FWS to provide such analysis.<sup>126</sup> The Northern Spotted Owl was subsequently listed as threatened and remains so today.<sup>127</sup>

Although, ultimately, the Northern Spotted Owl was listed under the ESA, obvious economic considerations affected the FWS’s initial decision against listing the species.<sup>128</sup> One study estimated a loss of \$1.96 billion in the states of Oregon and Washington, at the time of the controversy, if the old-growth forests were closed down.<sup>129</sup>

While the Northern Spotted Owl was listed in 1990, the California Spotted Owl continues to be unlisted.<sup>130</sup> The California Spotted Owl was found to be warranted but precluded in 2000 and in 2004,<sup>131</sup> despite the logging industry depleting the old-growth forests in its territory by up to ninety percent.<sup>132</sup> Logging continues to be a problem in these forests, with the FWS recently approving a plan to harvest 150,000 acres of land in the Sierra Forest, including part of the Northern Spotted Owls’ and California Spotted Owls’ habitat.<sup>133</sup> Again, economic factors have played far too significant a role in the FWS’s listing decisions and its interactions with industry operating in species’ habitats.

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interpretation of current data and knowledge indicate continued old growth harvesting is likely to lead to the extinction of the subspecies [of spotted owl] in the foreseeable future, which argues strongly for listing the subspecies as threatened or endangered at this time.” *Id.*

<sup>126</sup> *Id.* at 483.

<sup>127</sup> Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990) (to be codified at 50 C.F.R. pt. 17).

<sup>128</sup> Lieben, *supra* note 120.

<sup>129</sup> Lieben, *supra* note 120.

<sup>130</sup> *California Spotted Owl*, SIERRA FOREST LEGACY (Sept. 18, 2015) [http://www.sierraforestlegacy.org/FC\\_SierraNevadaWildlifeRisk/CaliforniaSpottedOwl.php](http://www.sierraforestlegacy.org/FC_SierraNevadaWildlifeRisk/CaliforniaSpottedOwl.php).

<sup>131</sup> *Id.*

<sup>132</sup> *California Spotted Owl: Endangered Species Act Profile*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/species/birds/California\\_spotted\\_owl/endangered\\_species\\_act\\_profile.html](http://www.biologicaldiversity.org/species/birds/California_spotted_owl/endangered_species_act_profile.html) (last visited Dec. 30, 2015).

<sup>133</sup> *Lawsuit Challenges Plan to Log 150,000 Acres of California Old Growth Forests*, K.S. WILD (Aug. 15, 2013), <http://kswild.org/news/regional-press-clips/lawsuit-challenges-logging-in-spotted-owl-habitat>.

*D. The Grizzly Bear*

Habitat destruction has been perhaps the most significant threat to animals.<sup>134</sup> The Grizzly Bear<sup>135</sup> (“Grizzly”) has experienced both direct peril from humans<sup>136</sup> and the unfortunate results of habitat destruction.<sup>137</sup> From 1800 to 1975, the Grizzly population diminished from over 50,000 bears to merely 1,000.<sup>138</sup> In 1975, the FWS listed the Grizzly as a threatened species under the ESA.<sup>139</sup> In 1993, Dr. Christopher Servheen, the Grizzly Bear Recovery Coordinator for the FWS, executed a recovery plan for the conservation of Grizzlies.<sup>140</sup> In his study, Dr. Servheen estimated there were about fifteen Grizzlies in the Cabinet-Yaak ecosystem located in Northwestern Montana and Northeastern Idaho.<sup>141</sup> In 1999, the Fund for Animals and the Biodiversity Legal Foundation petitioned the FWS to change the status of the Grizzly from

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<sup>134</sup> See CZECH & KRAUSMAN, *supra* note 2, at 13 (asserting habitat destruction as an increasing threat to plants and animals).

<sup>135</sup> See Philip Kline, *Grizzly Bear Blues: A Case Study of the Endangered Species Act’s Delisting Process and Recovery Plan Requirements*, 31 ENVTL. L. 371, 396 (2001) (suspecting the brown bear first entered North America over the Bering Strait around 50,000 years ago). Grizzly bears are known for being aggressive but rarely attack humans in their natural environment. *Id.* at 397. A ubiquitous misconception regarding Grizzlies is that they are strictly carnivores; in fact, they are omnivores, and some have even been found to be herbivores. *Id.* at 398.

<sup>136</sup> See CZECH & KRAUSMAN, *supra* note 2, at 9 (asserting U.S. settlers, as they moved westward, actively confronted and destroyed grizzly bears, viewing them as competitors).

<sup>137</sup> CHRISTOPHER SERVHEEN, GRIZZLY BEAR RECOVERY PLAN 17 (1982), [http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Grizzly\\_bear\\_recovery\\_plan.pdf](http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Grizzly_bear_recovery_plan.pdf) (stating the Grizzly Bear population now occupies less than two percent of its historical range in the United States).

<sup>138</sup> See Wayne L. Wakkinen & Wayne F. Kasworm, *Demographics and Population Trends of Grizzly Bears in the Cabinet-Yaak and Selkirk Ecosystems of British Columbia, Idaho, Montana, and Washington*, 15(1) URSUS 65, 69 (2004) (finding in the Cabinet-Yaak ecosystem, twenty-seven bears died from 1983–2002); SERVHEEN, *supra* note 137, at 9 (stating the grizzly bear population receded from over 50,000 to 1,000 between 1800 and 1975). Some of the causes of the reduction in the Grizzly population were mining, trapping, ranching, and farming. SERVHEEN, *supra* note 137, at 9. Fifteen of the twenty-seven bears died due to human intervention. Wakkinen & Kasworm, *supra*, at 69. Twelve bears died of natural causes, three by humans in defense, three by mistaken identity, three unknown but human caused, and two by poaching, and one by management removal, research, train collision, and unknown causes. Wakkinen & Kasworm, *supra*, at 69.

<sup>139</sup> See SERVHEEN, *supra* note 137, at 15 (identifying the goals of the act in removing the Grizzly from threatened status after it was listed in 1975).

<sup>140</sup> See SERVHEEN, *supra* note 137, at 1 (stating recovery plans are required to recover and protect species).

<sup>141</sup> See SERVHEEN, *supra* note 137, at 12 (stating the population in the Cabinet mountains is fifteen bears, but in the Yaak portion the amount of bears is unknown).

threatened to endangered in the Cabinet-Yaak recovery zone.<sup>142</sup> The FWS determined the Cabinet-Yaak Grizzlies were warranted but precluded from a change in status because the ESA already listed the Grizzly as threatened, affording it protection, and there were more serious threats facing other animals.<sup>143</sup>

Perhaps the greatest threat to Grizzlies is human interaction.<sup>144</sup> Economic influences, such as the timber and logging business, create the need for more roads through Grizzly habitats, which leads to increases in human interaction.<sup>145</sup> When the Grizzly was listed as

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<sup>142</sup> See *U.S. Makes Grizzly Choice*, THE SPOKESMAN-REVIEW, Apr. 24, 1999, at B8 [hereinafter *Grizzly Choice*] (stating the Fund for Animals and the Biodiversity Legal Foundation petitioned the FWS, and also sought the Grizzly's status changed in the Yellowstone region).

<sup>143</sup> See Endangered and Threatened Wildlife and Plants: Finding on Petitions To Change the Status of the Grizzly Bear Populations in the North Cascades Area of Washington and the Cabinet-Yaak Area of Montana and Idaho from Threatened to Endangered, 63 Fed. Reg. 30453, 30454 (June 4, 1988) (to be codified at 50 C.F.R. pt. 17) [hereinafter *Petitions to Change Status of Grizzly*] (reaffirming the high magnitude of threats facing the Grizzly in the Cabinet-Yaak region but precluding it from a status change); *Grizzly Choice*, *supra* note 142, at B8 (alleging an FWS representative stated the FWS needs to focus on other species such as the Canada Lynx and the Mountain Plover which at the time, unlike the Grizzly, received no protection under the ESA). The FWS found listing the Grizzly as endangered to warrant a priority of six on their scale. *Petitions to Change Status of Grizzly*, *supra*, at 30454. Despite finding the Grizzly to warrant a status change, the FWS determined the change was precluded by species of a higher priority. *Petitions to Change Status of Grizzly*, *supra*, at 30454.

<sup>144</sup> See CZECH & KRAUSMAN, *supra* note 2, at 9 (suggesting Grizzlies posed threats to early western travelers); SERVHEEN, *supra* note 137, at 5 (classifying human-caused mortality into six categories). Human-caused deaths of Grizzlies result from:

- (1) human/confrontations (hikers, backpackers, photographers, hunters, etc.);
- (2) attraction of grizzly bears to improperly stored food and garbage associated with towns, subdivisions, farms, hunter camps, campers, loggers, fisherman, backpackers, and other sources;
- (3) careless livestock husbandry, including the failure to dispose of dead livestock in a manner that minimizes grizzly interactions;
- (4) protection of livestock;
- (5) the eroding of grizzly bear habitat for economic values; and
- (6) hunting (lawful and illegal).

SERVHEEN, *supra* note 137, at 5-6. Bears were "actively destroyed" by early frontier men, both hunters and farmers, because they were competitors. CZECH & KRAUSMAN, *supra* note 2, at 9. Bears are attracted to human food and learn that human populated areas contain food, which leads to bears being labeled as "nuisance bears." This situation leads to the shooting of such bears, or their removal from the area, confining them to smaller and smaller habitats where they cannot sustain their typical natural livelihood.

<sup>145</sup> See Kline, *supra* note 135, at 404 (claiming forest management practices lead to an increase in roads which directly leads to an increase in human-related Grizzly mortality). Specifically, logging roads encroaching into "roadless wilderness" are not conducive to Grizzly recovery. Kline, *supra* note 135, at 404. The 1993 Grizzly Bear Recovery Plan mentions the management of roads as "the most powerful tool available" in protecting bears from the activities of humans, yet offers neither criteria for the establishment of roads nor any meaningful discussion on how to manage roads in any habitats. Kline, *supra* note 135, at 404.

a threatened species under the ESA, the Secretary of the Interior was not obligated to list a species' critical habitat concurrently with the species.<sup>146</sup> Invoking his discretion, the Secretary chose not to list the Grizzly's habitat, thus clearing the way for timber companies to continue to work while avoiding punishment unless a Grizzly was taken.<sup>147</sup> The Grizzly Bear never had a critical habitat designated.<sup>148</sup> Upgrading the Grizzly from threatened to endangered would require the FWS to make such a designation.<sup>149</sup> Listing the Grizzly's critical habitat in the Cabinet-Yaak range would force timber companies and other interested parties to comply with ESA guidelines and allow the bear's territory to remain undisturbed.<sup>150</sup>

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<sup>146</sup> See Kline, *supra* note 135, at 400 (claiming the Grizzly was listed as threatened on July 28, 1975); *Past Secretaries of the Department of the Interior*, U.S. DEP'T OF THE INTERIOR, [http://www.doi.gov/whoweare/past\\_secretaries.cfm#hathaway](http://www.doi.gov/whoweare/past_secretaries.cfm#hathaway) (last visited Oct. 17, 2012) (displaying the former Secretaries of the Interior). According to the Department of the Interior, the Secretary of the Interior on this date was Stanley K. Hathaway. *Id.* See also Susan Lambard Sellers, *The Grizzly State of the Endangered Species Act: An Analysis of the ESA's Effectiveness in Conserving the Yellowstone Grizzly Bear Population*, 29 LAND & WATER L. REV. 467, 475 (1994) (describing the original act's requirement of listing a critical habitat as discretionary). In fact, the amendment to the ESA which requires a designation of critical habitat does not require the Secretary to designate a critical habitat for species listed prior to the enactment of the amendment. *Id.*

<sup>147</sup> See Kline, *supra* note 135, at 400 (suggesting that the Secretary was able to avoid designating a critical habitat for the Grizzly when strong opposition arose). The ESA currently provides a means for the Secretary to make a retroactive provision designating a critical habitat, but the Grizzly remains without that protection. *Id.*

<sup>148</sup> See Proposed Determination of Critical Habitat for the Grizzly Bear, 41 Fed. Reg. 48757, 48757 (Nov. 4, 1976) (to be codified at 50 C.F.R. pt. 17) (proposing to list several habitats for the Grizzly as critical).

<sup>149</sup> See 16 U.S.C. § 1533(a)(3)(A)(i) (2012) (declaring the Secretary must designate that habitat which is considered critical when listing a species); *id.* § 1533(a)(3)(A)(ii) (allowing the Secretary to revisit previous designations of habitat as critical and amend as appropriate).

<sup>150</sup> See also Sellers, *supra* note 146, at 475, n. 58 (describing other political motivations for not listing the Grizzly's habitat); *cf.* *Christy v. Hodel*, 857 F.2d 1324, 1327 (9th Cir. 1988) (discussing how a rancher was fined \$3,000 for killing a Grizzly Bear that entered his property pursuant to the ESA). The nature of the Grizzly would require a critical habitat designation of almost 20,000 miles, and the FWS held numerous public hearings regarding whether to list the Grizzly's critical habitat. Sellers, *supra* note 146, at 475, n. 58. The interests of ranchers and hunters were considered in listing the Grizzly's critical habitat when it was originally listed as threatened. In 1982, Richard Christy, a rancher in Montana, shot and killed a Grizzly Bear that came onto his land to attack his herd of sheep. *Christy*, 857 F.2d at 1327. Grizzlies had killed 84 sheep before Christy shot the bear. Christy claimed the ESA's regulations deprived him of Due Process in violation of the Fifth Amendment. The Ninth Circuit Court of Appeals noted the intent of Congress in enacting the ESA was "to halt and reverse the trend towards species extinction, whatever the cost." *Id.* at 1330. The regulations consider the rights of landowners, and offer a means for eliminating animals by authorizing government officials to kill "nuisance bears" when

The FWS was well-aware of the effect on the timber business if the Grizzly was upgraded to endangered, and so it declared that a known population of fifteen bears had not been diminished enough to re-list the Cabinet-Yaak Grizzlies as endangered.<sup>151</sup>

*E. The Guam Broadbill*

In the case of the Guam Broadbill, inaction contributed to the bird's extinction.<sup>152</sup> By the time Congress enacted the ESA in 1973, habitat destruction had decimated the Broadbill's population so significantly that only one-third of the birds remained.<sup>153</sup> The Guam Governor petitioned the FWS to list the Broadbill in 1979.<sup>154</sup> In 1982, the FWS declared the Broadbill warranted but precluded by other priorities.<sup>155</sup> The Broadbill was not afforded statutory

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efforts to capture the animal fail. *Id.* at 1331. Thus, since the ESA did not deprive Christy of his property, the Court upheld the ESA under the Fifth Amendment. *Id.* Christy also claimed the ESA constituted a taking of his land, but the Court quickly disposed of this argument, noting that takings typically force plaintiffs to bear a burden, while the losses suffered by Christy were "incidental . . . result[s] of [a] reasonable regulation [enacted] in the public interest." *Id.* at 1334–35.

<sup>151</sup> See 16 U.S.C. § 1533(b)(2) (allowing the Secretary to consider factors other than biological factors); Endangered and Threatened Wildlife and Plants: 12-month Finding on Petitions to Change the Status of Grizzly Bear Populations in the Selkirk Area in Idaho and Washington and the Cabinet-Yaak Area of Montana and Idaho from Threatened to Endangered, 64 Fed. Reg. 26725, 26733 (May 17, 1999) (to be codified at 50 C.F.R. pt. 17) [hereinafter Findings on Grizzly] (stating the Grizzly is precluded from a change in status because the FWS must devote funds to address high priority candidate species). *Contra* Wakkinen & Kasworm, *supra* note 138, at 68 (stating from 1983 until 2002, over a span of 5,884 nights, researchers successfully captured and radio-collared thirty-two Grizzlies). It is peculiar that the Grizzly was not upgraded to endangered, as the Secretary is given broad discretion in designating an animal's habitat. 16 U.S.C. § 1533(b)(2). Under the ESA, the Secretary may consider economic and political factors and has the ability to "[e]xclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . ." *Id.* The FWS inconsistently claimed the threats to Grizzlies in the Cabinet-Yaak region were "nonimminent" yet of "a high magnitude." Findings on Grizzly, *supra*, at 26733.

<sup>152</sup> See Endangered and Threatened Wildlife and Plants; Removing the Mariana Mallard and the Guam Broadbill from the Federal List of Endangered and Threatened Wildlife, 69 Fed. Reg. 8116, 8117 (Feb. 23, 2004) (to be codified at 50 C.F.R. pt. 17) (describing the Guam Broadbill). The Broadbill weighed merely 0.4 ounces, with a white throat and a "cinnamon breast." *Id.*; Suckling, Slack, & Nowicki, *supra* note 82 (examining Case Study One following page 11) (suggesting a significant population of the Guam Broadbill could have been saved had the FWS acted quickly).

<sup>153</sup> Suckling, Slack, & Nowicki, *supra* note 82 (declaring predation by brown tree snakes as another cause of the Broadbill's demise).

<sup>154</sup> Suckling, Slack, & Nowicki, *supra* note 82.

<sup>155</sup> Suckling, Slack, & Nowicki, *supra* note 82 (explaining the FWS declared the listing precluded by higher priorities).

protection and was placed on the candidate list.<sup>156</sup> In 1983, when the FWS finally proposed the listing of the Broadbill, merely one-hundred birds remained.<sup>157</sup> A male was captured for emergency breeding purposes, but died alone in captivity when no female could be captured.<sup>158</sup> The last Broadbill ever seen was in August 1984.<sup>159</sup> In tragically ironic fashion, days after that sighting, the FWS listed the Broadbill as an endangered species.<sup>160</sup> It is believed by the time the Broadbill was listed, it was already extinct.<sup>161</sup>

The reasons for not listing the Broadbill are unknown, but from 1979 until 1981, the Guam Governor petitioned for seven total animals to be listed, and only three gained that protection.<sup>162</sup> These animals were already extinct at the time of their listing.<sup>163</sup> All seven species were deemed extinct by 1986.<sup>164</sup> Oddly enough, the Broadbill was ruled warranted but precluded by higher listing

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<sup>156</sup> Suckling, Slack, & Nowicki, *supra* note 82.

<sup>157</sup> Suckling, Slack, & Nowicki, *supra* note 82. (declaring the one-hundred birds that remained occupied only 150 acres of forest).

<sup>158</sup> See Suckling, Slack, & Nowicki, *supra* note 82 (examining Case Study One following page 11) (stating the male Broadbill died alone in captivity in February 1984).

<sup>159</sup> See Suckling, Slack, & Nowicki, *supra* note 82 (explaining the last Guam Broadbill was seen in August 1984 near a Navy golf course).

<sup>160</sup> *Id.*

<sup>161</sup> See James L. Noles, Jr., *Is "Recovered" Really Recovered? "Recovered" Species Under the Endangered Species Act*, 39 CUMB. L. REV. 387, 395 (2009) (stating that by 2009, the Broadbill was one of nine species delisted due to extinction); Suckling, Slack, & Nowicki, *supra* note 82 (examining Case Study One following page 11) (asserting the listing of the Broadbill came eleven years after the enactment of the ESA, six years after it was petitioned for listing, two years after it was given candidacy status, and days after it was extinct).

<sup>162</sup> See Suckling, Slack, & Nowicki, *supra* note 82 (examining Case Study One following page 11) (explaining that seven species went extinct after the Governor of Guam petitioned them for listing and listing the three animals which went extinct after the Governor of Guam petitioned for their listing under the ESA). The seven animals, including the Guam Broadbill are the Guam Bridled White-Eye, Little Mariana Fruit Bat, Guam Rufous Fantail, Guam Cardinal Honey-Eater, Guam White-Throated Ground Dove, and the Guam Mariana Fruit Bat. The three animals which went extinct after the Governor of Guam petitioned to list them were the Guam Broadbill, the Guam Bridled White-Eye, and the Little Mariana Fruit Bat. Suckling, Slack, & Nowicki, *supra* note 82.

<sup>163</sup> See Suckling, Slack, & Nowicki, *supra* note 82 (discussing how all three animals were listed in 1984). The Guam Broadbill, extinct in 1984, was listed days after its extinction. Suckling, Slack, & Nowicki, *supra* note 82. The Guam Bridled White-Eye went extinct in 1983 and was listed in 1984. Suckling, Slack, & Nowicki, *supra* note 82. The Little Mariana fruit bat went extinct in 1979 and somehow was not listed under the ESA until five years later in 1984. Suckling, Slack, & Nowicki, *supra* note 82.

<sup>164</sup> See Suckling, Slack, & Nowicki, *supra* note 82 (listing when each species went extinct). The last of the seven to go extinct was the Guam White-Throated Ground Dove in 1986. Suckling, Slack, & Nowicki, *supra* note 82.

priorities, yet no species was listed under the ESA between February 1981 and January 1982.<sup>165</sup> In fact, only seventeen species were listed under the ESA between 1979 and 1982, none of which were nearly as endangered as the Broadbill.<sup>166</sup> Perhaps the fact that Guam is a U.S. territory and not officially a state played a determinative role in whether the Department of the Interior wanted to allocate funds for species' protection there.<sup>167</sup>

#### F. *The Dunes Sagebrush Lizard*

The intent of Congress in enacting the ESA was obviously to protect species from extinction.<sup>168</sup> Congress recognized a need to preserve species that were at serious risk.<sup>169</sup> Congress never intended for the warranted but precluded designation to act as a detriment to that intent, but that is exactly what has occurred.<sup>170</sup>

The Dunes Sagebrush Lizard ("DSL") is located exclusively in the shinnery oak dunes of the Permian Basin in southeastern New Mexico and western Texas.<sup>171</sup> Currently, the rare lizard occupies 749,000 acres there.<sup>172</sup> In 1982, the DSL was listed as a category two

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<sup>165</sup> Suckling, Slack, & Nowicki, *supra* note 82.

<sup>166</sup> Suckling, Slack, & Nowicki, *supra* note 82.

<sup>167</sup> See *Territorial Acquisitions of the United States*, NAT'L ATLAS, <http://www.nationalatlas.gov/mld/usacqp.html> (last modified July 23, 2012) (discussing how Guam became an unincorporated territory of the United States in 1950 and is administered by the Department of the Interior).

<sup>168</sup> See 16 U.S.C. § 1531(b) (2012) (stating the purpose of the act is to provide a means whereby endangered and threatened species may be conserved); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (stating the plain intent of Congress was to prevent species' extinction). The Court in *Hill* reasoned that in almost every section of the statute, limitations on government and people alike are in place to put endangered species above the missions of other federal agencies. *Id.* at 185.

<sup>169</sup> See *id.* at 184 (suggesting Congress in 1973 stated that government agencies must take note of animals which are endangered, Grizzly Bears in particular, and it is their duty to preserve them under the law).

<sup>170</sup> See Smith, *supra* note 53, at 125 (explaining the purpose of the warranted but precluded designation was to allow listing agencies flexibility and not to allow purposeful delay by those agencies).

<sup>171</sup> See Kalin Harvard, *Railroading the Dunes Sagebrush Lizard: Why it is Important to the Oil and Gas Industry that Texas Agencies Handle Conservation Measures*, 13 TEX. TECH. ADMIN. L.J. 349, 352 (2012) (explaining the Dunes Sagebrush Lizard has adapted to survive only within shinnery oak dunes and that the shinnery oak dunes ecosystem is located solely in southeastern New Mexico and western Texas); *Permian Basin*, BUREAU OF ECON. GEOLOGY, <http://www.beg.utexas.edu/resprog/permianbasin/index.htm> (last visited Sept. 27, 2012) (describing the location of the Permian Basin as southeastern New Mexico and western Texas).

<sup>172</sup> See Harvard, *supra* note 171, at 352 (stating studies show the DSL covers 749,000 acres). At the time, a category two species meant the FWS had information to indicate a proposed ruling may be necessary, but there was not enough information to validate

candidate species.<sup>173</sup> After a few re-classifications based on a fluctuating population and inconsistent threats, the FWS finally proposed listing the DSL in 2010.<sup>174</sup> Disregarding several immediate threats to the lizard, the FWS found the DSL was not warranted for listing.<sup>175</sup>

Oil and gas development is a significant threat to the prosperity of the DSL.<sup>176</sup> Critics of the decision not to list the DSL argue that political lobbying by oil and gas organizations played a controlling role.<sup>177</sup> The government has been heavily criticized for favoring oil and gas industries over endangered species.<sup>178</sup> The practice of

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the species' biological vulnerability and threats. Harvard, *supra* note 171, at 352.

<sup>173</sup> See Harvard, *supra* note 171, at 352 (explaining the DSL was first listed in 1982 as a category two candidate species).

<sup>174</sup> See Harvard, *supra* note 171, at 352 (stating the DSL was re-classified as a category 3C species because the lizard was more abundant and not subject to existing threats); Travis Sanford, *Oil Drilling Endangers Lizard*, COURTHOUSE NEWS SERV., (Dec. 16, 2010, 6:16 AM), <http://www.courthousenews.com/2010/12/16/32676.htm>. The DSL was re-classified again as a category two species in 1994. Harvard, *supra* note 171, at 352. In 1996, the DSL was removed from the list of candidate species that were warranted but precluded. Sanford, *supra*. It appeared on the candidate species list again in 2001. Harvard, *supra* note 171, at 352. For nine years, the DSL lingered as a higher priority candidate species without protection. Harvard, *supra* note 171, at 352.

<sup>175</sup> See Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. 36871, 36899 (June 19, 2012) (to be codified at 50 C.F.R. pt. 17) (concluding the DSL is not warranted for listing); Sanford, *supra* note 174 (discussing the history of the DSL and the ESA). In 2004, the DSL was found to be warranted but precluded.

<sup>176</sup> See Jay Lininger, *Endangered Status for the Dunes Sagebrush Lizard*, CTR. FOR BIOLOGICAL DIVERSITY 1, 7 (2012), [http://www.biologicaldiversity.org/species/reptiles/dunes\\_sagebrush\\_lizard/pdfs/CBD\\_cmt\\_DSL\\_list\\_031212.pdf](http://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/CBD_cmt_DSL_list_031212.pdf) (declaring oil and gas development as the primary threat to the DSL).

<sup>177</sup> See Press Release, Ctr. for Biological Diversity, *Dunes Sagebrush Lizard Denied Endangered Species Act Prot.*, Obama Admin. Caves to Oil and Gas Indus. Pressure (June 14, 2012), [http://www.biologicaldiversity.org/news/press\\_releases/2012/dunes-sagebrush-lizard-06-13-2012.html](http://www.biologicaldiversity.org/news/press_releases/2012/dunes-sagebrush-lizard-06-13-2012.html) [hereinafter *Lizard Denied Protection*] (stating the ruling came after heavy lobbying by the oil and gas industry); Gina-Marie Cheeseman, *Obama Puts the Oil Industry Above Endangered Species*, BEHIND CURRENT EVENTS, (Aug. 12, 2012), <http://www.behindcurrentevents.com/archives/178> (claiming the ruling came subsequent to oil and gas industry lobbying of the federal government). See generally Ivan J. Lieben, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1365 (1997) (suggesting the FWS's consideration of the political effects of a listing decision is a fairly common occurrence). As of 1997, the FWS has not acknowledged political influence as a factor in its listing process. *Id.* at 1365. It has been suggested that the FWS acts as a "trustee for our biological wealth" and should base its decision-making on what is best for the "voiceless myriad of imperiled organisms," not politics. *Id.*

<sup>178</sup> See *Lizard Denied Protection*, *supra* note 177 (claiming the U.S. government ignored the ESA in its ruling on the DSL); Cheeseman, *supra* note 177 (implying conservationists are disappointed with Obama because his administration puts oil and gas interests ahead of protecting endangered species). President Obama received

favoring oil, gas, and timber companies over endangered species is not an new concept.<sup>179</sup> The presence of oil in the Permian Basin creates a roadblock to listing the DSL.<sup>180</sup> The Basin's economic impact is significant, as it accounts for seventeen percent of the crude oil in the United States.<sup>181</sup> Those who opposed the listing of the DSL claimed if the lizard was listed, it would eliminate jobs and negatively affect the economy.<sup>182</sup> However, the CBD claimed this was an unfounded hypothesis.<sup>183</sup> The Texas General Land Office ("TGLO") even claimed the DSL's listing would adversely affect Texas schoolchildren.<sup>184</sup>

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\$884,000 during his presidential campaign from the oil and gas industries. Cheeseman, *supra* note 177.

<sup>179</sup> See Editorial, *An Endangered Act*, N.Y. TIMES (Jul. 5, 2005), <http://www.nytimes.com/2005/07/05/opinion/an-endangered-act.html> (suggesting the Bush administration rigged the science by ignoring their own scientists, negotiated settlements favorable to industry, and did not obey court orders); Tom Kenworthy, *Natural Resources also Campaign Resources*, USA TODAY (July 25, 2005, 10:29 PM), [http://www.usatoday.com/news/washington/2005-07-24-resources-campaigns\\_x.htm](http://www.usatoday.com/news/washington/2005-07-24-resources-campaigns_x.htm) (stating a plan was implemented giving governors a determinative say in how to use "roadless" forests); Victor Zapanta, *Bush's Department of Interior: Sex, Drugs, and Oil?*, THINK PROGRESS (Mar. 19, 2010, 9:48 PM), <http://www.thinkprogress.org/report/interior-scandals-under-bush> (stating Dirk Kempthorne was selected by Bush to replace Gale Norton for his willingness to promote increased drilling of oil and gas). In 2002, Idaho's Republican Governor Dirk Kempthorne received \$86,266 of the \$1.1 million he raised for re-election from mining, timber, and energy industries, while receiving nothing from environmentalist groups and individuals. Kenworthy, *supra*. Kempthorne later became the Secretary of the Department of the Interior. Zapanta, *supra*.

<sup>180</sup> See generally Gabriella Lopez, *Dunes Sagebrush Lizard Saga Could Come Again even if not Listed*, ODESSA AM. (June 17, 2012, 12:00 AM), [http://www.oaoa.com/news/government/article\\_47043e1e-e2c2-520e-b9bb-37ece2371b50.html](http://www.oaoa.com/news/government/article_47043e1e-e2c2-520e-b9bb-37ece2371b50.html) (stating oil and gas industry members worried listing the lizard would impact production and local economies because the lizard is located on land owned by oil and gas corporations).

<sup>181</sup> PR Newswire, *Estimated \$2 Trillion Oil Production From Permian Basin*, (Mar. 12, 2012), <http://www.prnewswire.com/news-releases/estimated-2-trillion-oil-production-from-permian-basin-143303756.html> (asserting the Permian Basin accounts for 17% of America's crude oil reserves). Only Alaska has more oil reserves, with 5.2 billion barrels compared to the Permian Basin's 4.5 billion barrels. *Id.*

<sup>182</sup> See Harvard, *supra* note 171, at 352 (claiming the majority of people assessing the situation surrounding the DSL believes listing the lizard will adversely affect business and create job loss); Lizard Denied Protection, *supra* note 177 (suggesting the Republicans ran a misinformation campaign relating to job losses in the Permian Basin area).

<sup>183</sup> See Lizard Denied Protection, *supra* note 177 (claiming the DSL's habitat encompasses merely two percent of the Permian Basin's oil and gas lands). Once the penalties imposed by the ESA have been removed, there is no guarantee the members of the conservation agreements will follow through with the agreement. Lizard Denied Protection, *supra* note 177.

<sup>184</sup> See *Dunes Sagebrush Lizard*, TEX. GEN. LAND OFF., [http://www.glo.texas.gov/glo\\_news/hot\\_topics/articles/dunes-sagebrush-lizard.html](http://www.glo.texas.gov/glo_news/hot_topics/articles/dunes-sagebrush-lizard.html) (last visited Sep. 20, 2012)

The decision not to list the DSL was based on the formation of voluntary conservation agreements in Texas and New Mexico.<sup>185</sup> Private land owners and corporations, hoping the FWS would take notice and not list the DSL, implemented the agreements.<sup>186</sup> They are completely voluntary and discretionary.<sup>187</sup> No landowner or company is forced to abide by the agreement.<sup>188</sup> Furthermore, the agreements do not address every threat to the DSL or habitat concerns.<sup>189</sup> The CBD provided evidence that the agreements will not protect the DSL and may even be a sham to avoid its listing.<sup>190</sup>

Advocates of the decision claim there was no scientific evidence favoring the DSL's listing.<sup>191</sup> Yet the CBD stands firm that the lizard

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[hereinafter TEX. GEN. LAND OFF.] (implying that the Permanent School Fund, which contributes money to public schools in Texas and owns land in the Permian Basin, will lose money if the DSL is listed under the ESA).

<sup>185</sup> See Lizard Denied Protection, *supra* note 177 (claiming the decision not to list the DSL relied heavily on the fact that there were voluntary agreements to conserve the DSL's habitat).

<sup>186</sup> See Harvard, *supra* note 171, at 362 (stating six private landowners and four oil companies entered into conservation agreements for the DSL). See generally Lopez, *supra* note 180 (claiming ranchers are happy the DSL was not listed but unhappy about the conservation agreements' potential effectiveness).

<sup>187</sup> See Harvard, *supra* note 171, at 365 (asserting the conservation plan states measures participants *should* take, but measures need to be determined on a case by case basis).

<sup>188</sup> Lininger, *supra* note 176, at 2. In fact, the direct language of the agreement states, "[a]ny participation under the candidate conservation agreement with assurances component of the Plan is purely voluntary and no Potential Participant, landowner or property will be forced or required to participate." Lininger, *supra* note 176, at 2.

<sup>189</sup> See Lininger, *supra* note 176, at 10 (citing another threat ignored by the Bureau of Land Management ("BLM") in New Mexico is off road vehicles, which crush lizards hibernating in the sand and destroy its habitat).

<sup>190</sup> See Lininger, *supra* note 176, at 1-12 (stating the conservation agreements are non-regulatory with no certainty and remove the need to list the species). The Texas Conservation Plan ("TCP") contains no specific standards of performance, no incentive for participation, and no penalty for failing to participate. Lininger, *supra* note 176, at 2. The CBD suggests that Texas oil and gas developers need an incentive to avoid liability for taking the DSL under the ESA before they will implement effective conservation measures. Lininger, *supra* note 176, at 4. Moreover, in New Mexico, half of the DSL's habitat is on land managed by the BLM, an office within the Department of the Interior. Lininger, *supra* note 176, at 6. The BLM has not implemented measures to protect the lizard's habitat. Lininger, *supra* note 176, at 6. Over sixty percent of land occupied by the DSL within BLM managed lands is under lease for oil and gas exploration. Lininger, *supra* note 176, at 7. Almost the entire New Mexico agreement is discretionary. Lininger, *supra* note 176, at 8. The CBD concludes these agreements do not provide a basis to not list the DSL. Lininger, *supra* note 176, at 12.

<sup>191</sup> See Harvard, *supra* note 171, at 352 (quoting Republican John Cornyn saying there is "insufficient scientific information to support a listing [of the DSL]"); TEX. GEN. LAND OFF., *supra* note 184 (asserting the FWS has little evidence and may even be unsure exactly where the DSL's current habitat in Texas is located). The Texas General Land Office claimed the FWS had inconsistent evidence and did not consider natural causes

warrants endangered species protection.<sup>192</sup> An interview with Chi Energy, Inc. owner Bill Bergman revealed Bergman believes the “smallest of our needs is greater than the greatest of [the DSL’s] needs.”<sup>193</sup> As previously stated, when the concerns of the oil industry are weighed against those of animals, the oil industry is simply going to win.<sup>194</sup>

#### V. CBD-FWS SETTLEMENT

On July 12, 2011, the CBD and FWS reached a settlement agreement (“the settlement”) to decide the fates of 757 species.<sup>195</sup> The settlement requires the FWS to make an initial finding or final rule on whether to list candidate species by 2018.<sup>196</sup> The CBD called the settlement a “historic victory,” but one thing remains certain: these species are not guaranteed protection. As part of the settlement, the CBD agreed to “limit” petitions during the seven year period.<sup>197</sup> However, a year after the settlement was struck, the CBD petitioned the FWS to list fifty-three reptiles and amphibians.<sup>198</sup> In other words, the CBD’s petition *added* to the backlog of species that require a decision by the FWS.<sup>199</sup> While the settlement may lead some to believe the warranted but precluded crisis is over, the 2012 petition to list fifty-three species clearly shows otherwise. As long as petitions continue to be filed, this issue will remain relevant.

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affecting the species. TEX. GEN. LAND OFF., *supra* note 184.

<sup>192</sup> See Lininger, *supra* note 176, at 1 (claiming the best scientific information supports listing the DSL as endangered).

<sup>193</sup> Harvard, *supra* note 171, at 359. Cf. Harrington, *supra* note 43 (explaining that people feared the economic effects of the 1978 amendments to the ESA). In 1978, Utah Senator Jake Garn expressed a sentiment similar to Bergman’s statement, claiming “[N]othing . . . will happen . . . if no endangered species is ever to be disturbed in its corner of the environment.” Harrington, *supra* note 43.

<sup>194</sup> See *supra* note 117 and accompanying text.

<sup>195</sup> *Historic Victory: 757 Species Closer to Protection*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/programs/biodiversity/species\\_agreement/](http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/) (last visited Mar. 30, 2014) (discussing the settlement between the CBD and FWS).

<sup>196</sup> *Id.*

<sup>197</sup> Crystal Feldman, *Center for Biological Diversity Disregards 2011 Settlement Agreement, Files Major Endangered Species Act Petition*, HOUSE COMM. NAT. RESOURCES (Aug. 8, 2012), <http://naturalresources.house.gov/blog/?postid=306049>.

<sup>198</sup> See generally Ctr. for Biological Diversity, PETITION TO LIST 53 AMPHIBIANS AND REPTILES IN THE UNITED STATES AS THREATENED OR ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT 1 (2012), [http://www.biologicaldiversity.org/campaigns/amphibian\\_conservation/pdfs/Mega\\_herp\\_petition\\_7-9-2012.pdf](http://www.biologicaldiversity.org/campaigns/amphibian_conservation/pdfs/Mega_herp_petition_7-9-2012.pdf).

<sup>199</sup> See Feldman, *supra* note 197.

## VI. CURRENT STATE OF POLITICS

The political landscape is constantly changing. However, species are still found to be warranted but precluded when listing will negatively affect an area's economy.<sup>200</sup> The latest practice has seen States scrambling to make an effort to work with local communities, governments, and corporations to save species, to show the FWS that the species is trending in a direction where its listing should be a low priority.<sup>201</sup> Preventing listing means there will be no critical habitat designation, and no punishment for takings, which protects local property owners and businesses.<sup>202</sup> If a species is listed, the FWS can, under certain circumstances, restrict land use on private property, and landowners may become subject to lawsuits regarding the species.<sup>203</sup>

Representatives in Congress have spoken harshly about the ESA.<sup>204</sup> Congressman Randy Neugebauer introduced a bill to reform the ESA, calling for greater State involvement in the listing process.<sup>205</sup> Prior to listing a species, the FWS would be required to

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<sup>200</sup> See, e.g., Jeff DeLong, *Nevada's Mark Amodei: Feds Must Step to Plate on Grouse*, RENO-GAZETTE J. BLOG (Apr. 8, 2014, 8:22 PM), <http://www.rgj.com/story/tech/environment/2014/04/08/nevadas-mark-amodei-feds-must-step-plate-grouse/7490441/>. The FWS found the Sage Grouse warranted but precluded in 2010, but by court order must make a decision on whether to list the species by late 2015. *Id.* Listing the grouse could have a devastating economic impact. *Id.*

<sup>201</sup> See, e.g., Amy J. O'Donoghue, *Report Highlights 11 States' Efforts to Protect Sage Grouse*, DESERT NEWS (Mar. 24, 2014, 1:35 PM), <http://www.deseretnews.com/article/865599354/Report-highlights-11-states-efforts-to-protect-sage-grouse.html?pg=all>. Utah has spent over \$9 million in efforts to keep the Sage Grouse off the Endangered Species Act, and "has set aside more than 240,000 acres to protect the bird." *Id.* The Utah Department of Natural Resources Executive Director Mike Styler "believe[s] . . . other states are interested in what [Utah is] doing." *Id.*

<sup>202</sup> See George Will, *Neugebauer: Prairie Chicken Decision wasn't Necessary*, LUBBOCK-AVALANCHE J. BLOG (Mar. 29, 2014, 9:18 PM), <http://lubbockonline.com/editorial-columnists/2014-03-29/neugebauer-prairie-chicken-decision-wasnt-necessary#.U09HtqLgwUM>. Texas Representative Randy Neugebauer claims that now that the Lesser Prairie-Chicken is listed, 62,000 square miles of land, mostly owned by "farmers, ranchers, energy producers, businesses, and homeowners," will be subject to restrictions by the federal government. *Id.*

<sup>203</sup> *Id.* If the landowner is "enrolled in a conservation program authorized in the listing," the FWS cannot restrict use of the land. *Id.*

<sup>204</sup> See, e.g., *GOP to Propose Changing Endangered Species Act*, C.B.S. NEWS (Feb. 4, 2014, 7:21 PM), <http://www.cbsnews.com/news/gop-to-propose-changing-endangered-species-act/>. Representative Norman Hastings of Washington State, the chairman of the House Natural Resources Committee, was frank in stating that the ESA is not working, and that there is more effort put forth to list species than there is to delist recovered ones. *Id.*

<sup>205</sup> See *Neugebauer Introduces Bill to Reform Endangered Species Act*, SEMINOLE SENTINEL (Mar. 25, 2014, 8:09 AM), <http://www.seminolesentinel.com/Content/Default/The-Latest/Article/Neugebauer-Introduces-Bill-to-Reform-Endangered-Species-Act/>

notify the States affected by a listing of the species' importance, and provide a report of criteria explaining how the States can prevent a listing.<sup>206</sup> The States would then have the option to develop a plan that the FWS would have 45 days to approve or deny.<sup>207</sup> If their plan is denied, the States would then have another chance to submit a "more appropriate plan."<sup>208</sup>

It is clear that, currently, Congress wants to reform the ESA. The FWS may be trying to list species when proper, but several deserving species remain precluded from listing due to economic and political factors. It seems that no matter what decision the FWS makes, they will face harsh criticism from extremists on both sides. Recently, the Obama Administration announced plans to delist the gray wolf, and the CBD stated it would "prematurely strip" the species of protection.<sup>209</sup> When the FWS decided to list the Lesser Prairie-Chicken as threatened, Republicans in the House called it unwarranted.<sup>210</sup> The FWS needs to ignore such criticism, and do what is best for each species. That, however, requires them to base listing a species on purely scientific data, ignoring the political and economic effects of every decision. This was the intent of Congress when enacting the ESA: to do what is best for each species.

## VII. RECOMMENDATIONS

### A. Ask for Proper Funding

The warranted but precluded designation has been repeatedly implemented to avoid listing animals that implicate important political or economic issues.<sup>211</sup> Dating back to the 1800's, humans have viewed endangered species in light of political and economic

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3/16/4287.

<sup>206</sup> H.R. 4284, 113th Cong. (2014) (as introduced on Mar. 24, 2014).

<sup>207</sup> *Id.*; see Neugebauer Introduces Bill to Reform Endangered Species Act, *supra* note 205.

<sup>208</sup> Neugebauer Introduces Bill to Reform Endangered Species Act, *supra* note 205.

<sup>209</sup> *Restoring the Gray Wolf*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/campaigns/gray\\_wolves/](http://www.biologicaldiversity.org/campaigns/gray_wolves/) (last visited Apr. 16, 2014).

<sup>210</sup> *Critics Cry Foul as Feds Place Lesser Prairie Chicken on Threatened Species List*, FOX NEWS (Mar. 28, 2014), <http://www.foxnews.com/politics/2014/03/28/critics-cry-foul-as-feds-place-lesser-prairie-chicken-on-threatened-species/>. Republicans called it an "overreach." *Id.*

<sup>211</sup> See Ortiz, *supra* note 55, at 450–451 (explaining that considering political and economic factors when listing species is not statutorily permissible). Administrative delays frequently occur when controversial species are listed, bringing a political or economic influence into the listing process. Ortiz, *supra* note 55, at 450–451. These influences are "often cloaked by the [FWS's] discretion in listing priorities." Ortiz, *supra* note 55, at 450–451.

factors.<sup>212</sup> The best response is to eliminate the warranted but precluded designation.<sup>213</sup> Frankly, it creates a loophole for the FWS to bypass the intent of Congress.<sup>214</sup> Congress was clear in enacting the ESA, stating that its goal was to “[p]revent species extinction, whatever the cost.”<sup>215</sup> The oxymoronic dichotomy of finding the listing of an animal to be warranted but precluding it from protection does not comply with the intent of Congress and allows for uninformed rulings which are often found to be arbitrary and irrational by courts.<sup>216</sup>

The main argument against eliminating the warranted but precluded designation is that the Department of the Interior is under-funded and cannot list every animal that warrants listing.<sup>217</sup> Realistically, this argument holds little merit, as a warranted but precluded designation requires the FWS to conduct subsequent yearly reviews on the animal and often leads to costly litigation from conservation groups such as the CBD.<sup>218</sup> If under-funding is a deterrent to listing more species, the FWS should ask for more money. For example, in 2003, the FWS determined it needed \$153 million to handle the backlog of species requiring review.<sup>219</sup> The Bush Administration requested only \$9 million for endangered species.<sup>220</sup> Congress recognized this seemed to be low, and invited the Administration to ask for more money.<sup>221</sup> The Secretary of the Interior, Gale Norton, refused the invitation, asking for only enough

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<sup>212</sup> See *supra* note 3 and accompanying text.

<sup>213</sup> *Contra* Smith, *supra* note 53, at 152 (suggesting the solution is not to abolish the warranted but precluded designation).

<sup>214</sup> See *supra* note 169 and accompanying text.

<sup>215</sup> See *supra* note 169 and accompanying text.

<sup>216</sup> See, e.g., *supra* note 25 and accompanying text.

<sup>217</sup> See Endangered and Threatened Wildlife and Plants; Review of Native Species that are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Decisions, 74 Fed. Reg. 57804, 57814 (Nov. 9, 2009) (to be codified at 50 C.F.R. pt. 17) [hereinafter Annual Description of Progress] (“[C]ongress has placed a statutory cap on funds which may be expended for the Listing Program . . . .”); Smith, *supra* note 53, at 133 (explaining that the FWS claims preclusion of species is necessary because the FWS is under-funded). The FWS asserts they “cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act.” Annual Description of Progress, *supra*.

<sup>218</sup> See *supra* note 70 and accompanying text.; see, e.g., *supra* note 81.

<sup>219</sup> Brian Nowicki, *Is There Really No Money for the Endangered Species Act?*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/campaigns/candidate\\_project/pdfs/esa-budget-crisis-nowicki.pdf](http://www.biologicaldiversity.org/campaigns/candidate_project/pdfs/esa-budget-crisis-nowicki.pdf) (last visited Oct. 15, 2012).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

money to handle court ordered activities.<sup>222</sup> Congress has shown it is willing to apportion more money for endangered species protection if asked.<sup>223</sup> Simply put, if the warranted but precluded designation cannot be eliminated, and there are valid reasons why it should not be eliminated, then the Department of the Interior needs to ask Congress for sufficient funds. It is important to note that while the elimination of the warranted but precluded designation may not be feasible, it would provide one important step in preventing corrupted decision-making.

*B. Eliminate Discretionary Critical Habitat Designations*

While the FWS cannot consider economic factors in determining whether a species is warranted for listing, the ESA provides broad discretion in determining a species' critical habitat.<sup>224</sup> As seen with the Grizzly Bear, broad discretion leads to inactivity.<sup>225</sup> The FWS should have to make critical habitat rulings based only on the best scientific determinations available.<sup>226</sup> Considering that destruction of habitats is one of the primary causes endangering animals, basing listing decisions on economic activity does not comply with the intent and purpose of the ESA.<sup>227</sup>

Congress caps how much money the FWS can spend on preserving habitats.<sup>228</sup> Yet this cap does not preclude the FWS from identifying critical habitats and working with affected parties to protect a reasonable range of a species' habitat. It is no excuse to claim that under-funding deters the designation of critical habitat when species' ranges are not protected in the heart of oil and timber lands.<sup>229</sup> Eventually, economic factors will push these animals out of the wild and entirely into captivity, before they leave the Earth forever.

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Compare 16 U.S.C. § 1533(b)(1)(A) (2012) (requiring the Secretary to use the best scientific data in determining whether to list a species), with § 1533(b)(2) (allowing the Secretary to consider economic factors when listing a species' critical habitat).

<sup>225</sup> See *supra* Part IV.D.

<sup>226</sup> Cf. 16 U.S.C. § 1533(b)(1)(A) (requiring the Secretary to make listing determinations based solely on the best scientific and commercial data available).

<sup>227</sup> *Id.*

<sup>228</sup> See Annual Description of Progress, *supra* note 217, at 57814 (claiming Congress put a cap on funds which can be used for critical habitat designations to ensure some funds will be apportioned to other work in the listing process).

<sup>229</sup> See *supra* Part IV.A-F.

C. *Allow for Protection When a State Official Files a Petition*

Another issue raised is that too many animals are petitioned and review of each one in a timely fashion is not possible.<sup>230</sup> The argument is that the warranted but precluded designation, at least, recognizes that the species needs to be considered and observed, but allows the FWS to move on to analyzing other species in peril.<sup>231</sup> By placing the species on the candidate species list, it ensures the FWS will continue to analyze the species' situation.<sup>232</sup>

However, many species linger on the candidate species list and continue to be precluded from listing despite being found warranted for protection.<sup>233</sup> This problem is exacerbated when more and more species are petitioned for listing, and it exists partly due to the inaction of the FWS, as seen with the Guam Broadbill.<sup>234</sup> Again, there is no good reason to fail to list an animal that warrants listing.

While a possible solution might be to involve the States on a more serious level, Congressman Neugebauer's proposed reform will be inadequate. The Congressman's idea to involve States in the listing process is not itself detrimental to species. But the development of State plans to protect species, the review of those plans, and the ability to develop new plans and resubmit them for review if denied will contribute to listing delays. Additionally, if a state plan is approved under the bill, the FWS is only required to conduct a review of the plan's effectiveness every five years.<sup>235</sup> Many of these State plans, such as the DSL's plan, are inadequate. The States, while vital to the conservation of their local species, should not be controlling the resolution of national concerns.

One solution would be to allow immediate protection for any animal petitioned by a state official. The FWS would then determine if the species is warranted or not warranted based on the same procedures under which it currently operates. If the species is not warranted, its ESA protections would be removed. If a species is warranted, it will remain protected and be added to the list. Of

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<sup>230</sup> See Smith, *supra* note 53, at 134 (claiming court ordered listing has backed up the FWS and created a litany of petitions).

<sup>231</sup> See Smith, *supra* note 53, at 171 ("[T]he purpose of the [warranted but precluded] designation was to allow the listing agencies some flexibility in complying with the timelines and in addressing backlogs.").

<sup>232</sup> See *supra* note 47 and accompanying text.

<sup>233</sup> See Suckling, Slack & Nowicki, *supra* note 82, at 6 (calling the candidate species list a "waiting room for imperiled species . . .").

<sup>234</sup> See *supra* note 231 and accompanying text; see *supra* Part IV.E.

<sup>235</sup> H.R. 4284, 113th Cong. (2014) (as introduced on Mar. 24, 2014).

course, there would need to be limits placed on the number of animals a State may petition each year to avoid widespread unwarranted protections. Currently, the FWS and government agencies work with the States in developing conservation agreements between businesses and land owners in areas of concern, but do not afford these candidate species federal protection.<sup>236</sup>

Affording immediate ESA protection to animals petitioned by a State official could potentially provide remedies for several related issues. First, it would likely result in the FWS reviewing petitioned species at a heightened pace.<sup>237</sup> If animals were immediately offered protection, it would behoove the FWS to determine each animal's status as quickly as possible due to alleged budget constraints.<sup>238</sup> Second, it would likely lessen the high number of petitions received by the FWS.<sup>239</sup> Conservation groups like the CBD would have an incentive to petition State officials, rather than the FWS, because the species State officials believe deserving of petitioning will be afforded immediate protection. Third, it would deflect some of the litigation costs away from the FWS.<sup>240</sup> The CBD and other conservation groups would instead sue the relevant State authority for irrational determinations when the official decides he or she will not petition the FWS. Finally, States would also benefit from such a process, as they would be able to immediately protect their prized species.

## VII. CONCLUSION

Mahatma Gandhi once said, “[E]arth provides enough to satisfy every man’s need, but not every man’s greed.”<sup>241</sup> The Earth has become overpopulated by humans who are economically dependent on natural resources, which has led to the confinement of animals in specific areas. As civilization has expanded, natural predators and their prey have been restrained, killed, and forced into

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<sup>236</sup> See, e.g., Part IV.D.

<sup>237</sup> See Annual Description of Progress, *supra* note 217, at 57815 (discussing how a listing of warranted but precluded requires the FWS to demonstrate “expeditious progress” is being made to add the species).

<sup>238</sup> See *supra* note 217 and accompanying text.

<sup>239</sup> See *supra* note 231 and accompanying text.

<sup>240</sup> See, e.g., *supra* note 25 and accompanying text.

<sup>241</sup> PYARELAL NAIR, MAHATMA GANDHI—THE LAST PHASE 552 (1958); see also Thomas Weber, *Gandhi’s Moral Economics: The sins of wealth without work and commerce without morality*, in THE CAMBRIDGE COMPANION TO GANDHI 135, 141 (Judith M. Brown & Anthony Parel ed., 2011) (internal citation omitted).

territories that historically have not been their home. Nonetheless, it is now their home, and we must protect them, or risk losing our animal friends for good.<sup>242</sup>

Congress's intent in enacting the ESA was clear to the Supreme Court and should not be interpreted differently.<sup>243</sup> Political and economic concerns were not to be considered in placing an animal on the endangered species list, and the protection of endangered species was to be valued above other governmental endeavors.<sup>244</sup> Still, political considerations have been entertained since the beginning of species conservation.<sup>245</sup> The warranted but precluded designation creates a safety valve for the FWS to consider political and economic issues in listing a species and its critical habitat, thus avoiding the intent of ESA.<sup>246</sup> In addition, requiring the FWS to list the critical habitat of animals, without considering economic factors, will force the agency to prioritize habitats over economic development. Furthermore, creating a cooperative system, limited in scope, for providing temporary protection to petitioned species will compel the FWS to review petitions at a faster rate, leading to a final ruling on more species. The preservation of species depends on our efforts. If our government agencies determine that a species needs our protection, failing to protect it undermines the severity of the environmental crisis we have placed these species in and renders the ESA a mere adhesive bandage over a gaping wound. After all, human intervention has placed many of these animals in the precarious predicaments they endure today.<sup>247</sup> As a fellow species and inhabitant of this Earth, we owe these animals the respect and protection they desperately need and deserve.

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<sup>242</sup> See, e.g., *The Extinction Crisis*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/programs/biodiversity/elements\\_of\\_biodiversity/extinction\\_crisis/index.html](http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/index.html) (last visited Oct. 14, 2012) (claiming that species are going extinct at a rate of roughly twelve per day).

<sup>243</sup> See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 166 (1978) (finding the clear intent of the legislature was to prevent species' extinction).

<sup>244</sup> See 16 U.S.C. § 1531(c)(1) (2012) (declaring the policy of all Federal departments is to conserve species and that they should use their power and authority to further such policies); 16 U.S.C. § 1536(a)(2) (2012) (requiring Federal agencies to insure that the policies and projects they authorize do not infringe upon the rights of endangered species pursuant to the ESA).

<sup>245</sup> Petersen, *supra* note 6.

<sup>246</sup> See *supra* Part IV.

<sup>247</sup> See, e.g., CZECH & KRAUSMAN, *supra* note 2, at 8 (indicating hunting as the main cause of the deterioration of the bison population); *supra* Part IV.