Hamstringing the Endangered Species Act: How the Department of Justice is Driving Criminal Prosecutions off the Rails

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HAMSTRINGING THE ENdangered SPECIES ACT:
HOW THE DEPARTMENT OF JUSTICE IS DRIVING CRIMINAL
PROSECUTIONS OFF THE RAILS

By
Joel Plainfield

Abstract

The Department of Justice’s directive requiring proof of actual knowledge (willfulness) in ESA prosecutions ignores the unequivocal intent of Congress that violations of the Endangered Species Act (ESA) amount to general intent crimes, the fact that Congress purposely amended the language in the ESA’s criminal provisions to make that fact clear, and the interpretations of several district courts and circuit courts of appeal. As a result, criminal investigations and prosecutions of ESA violations are artificially hampered in ways lawmakers, the courts, and the American public never envisioned.
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INTRODUCTION

Following the 1978 amendment to the Endangered Species Act of 1973 (ESA), criminal prosecutions were intended to be a general intent offense. Section 11 of the ESA provides for criminal liability for “any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title.”

To convict a defendant of an illegal taking of an animal protected under the ESA, the government only needed to establish that a defendant had intentionally “taken” an animal and that the animal was in fact protected. It was not required for the government to prove that the defendant knew what kind of animal they were “taking” or that the animal was endangered or threatened. Up until 1998 any examination of the legislative history, case law, and jury instructions dealing with criminal prosecutions under the ESA and its “knowingly” requirement comported with this general intent construction. Then, out of nowhere the Department of Justice unilaterally instituted a new policy to prosecutors requiring that the government prove that criminal defendants under the ESA had actual knowledge of the species of animal they had taken (at the item of such conduct) and that it was in fact protected. This new policy has effectively hamstrung criminal prosecutions under the ESA.

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2 For a discussion of the meaning of the terms “take,” “taking,” and “taken” under the ESA refer to note 92 infra.
3 Id.
BRINGING WOLVES BACK

The time is the middle of the twentieth century. The gray wolf is arguably one of the most comprehensively researched animals in the world; likely having more books written about it than any other wildlife species.\(^4\) The association between the gray wolf and the humans predates written history and it has been contentious; the wolves have been despised and hunted in agricultural communities due to their attacks on livestock, while being respected by other communities such as Native American tribes.\(^5\) Hunting and trapping by humans has reduced the gray wolf’s range to about one third of its original size\(^6\) and had all but eliminated their population from the Yellowstone National Park by the Twentieth Century.\(^7\) Thus in 1987 the U.S. Fish and Wildlife Service (USFWS), together with the National Park Service (NPS), embarked on controversial ecological experiment to reintroduce the Gray Wolf to Yellowstone beginning with their *Northern Rocky Mountain Wolf Recovery Plan*.\(^8\) In 1987 the USFWS presented their Northern Rocky Mountain Wolf Recovery Plan; needless to say, their plan was nothing if not controversial.\(^9\) In 1991 Congress tasked the USFWS, together with the NPS and the U.S. Forest Service, to prepare an Environmental Impact Statement (EIS) on reintroducing


\(^7\) U.S. FISH & WILDLIFE SERV. & N. ROCKY MOUNTAIN WOLF RECOVERY TEAM, NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN 1-3 (1987), [hereinafter RECOVERY PLAN].

\(^8\) Id. at pp. v.

\(^9\) Id. The Plan was approved by the USFWS and the Northern Rocky Mountain Wolf Recovery Team comprised of representatives from the National Park Service, the USFWS, the Bureau of Land Management, the Idaho Department of Fish and Game, the U.S. Forest Service, the National Audubon Society, and the University of Montana. The Plan’s main objective “is to remove the Northern Rocky Mountain wolf from the endangered and threatened species list by securing and maintaining a minimum of ten breeding pairs of wolves in each of the three recovery areas for a minimum of three successive years.” Id. at v.
wolves to Yellowstone and central Idaho. The stated purpose of the proposed action by the EIS was the “recovery and conservation of endangered gray wolves … in Yellowstone and central Idaho areas.” Because wolf populations [did] not … exist in these areas” at the time the EIS was made the necessary course of conduct to accomplish its stated purpose would be to reintroduce the species. And by 1994, following unprecedented levels of public commentary, the plan was finished and took effect in November of that year.

“Gray wolves once dominated the western landscape, but widespread killing virtually wiped them out by the 1940s.” The human-induced population decline of these animals was a result of “(1) intensive human settlement, (2) direct conflict with domestic livestock, (3) a lack of understanding of the animal’s ecology and habits, (4) fears and superstitions concerning wolves, and (5) the extreme control programs designed to eradicate it.” More specifically, the USFWS lists “land development, loss of habitat, poisoning, trapping, and hunting as reasons for decline of the Northern rocky Mountain Wolf.” On the one side of the controversial plan, scientists, environmentalists, and biologists expressed a growing concern with the unbalanced predator-prey ratios resulting in “overabundant” ungulate populations, and the subsequent effect it was having on the Yellowstone ecosystem – namely “range deterioration.” They argued that the

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11 ENVIRONMENTAL IMPACT STATEMENT, supra note 10, at 1–1.
12 Id.
13 Wolf Restoration, supra note 10; ENVIRONMENTAL IMPACT STATEMENT.
15 Id.
16 Id.
reintroduction of wolves to the area could help control the population of lesser predators and also maintain healthier overall ungulate population (by preying on the weak and injured) while simultaneously reducing stresses on the environment by limiting populations that over-consume natural resources if unchecked.\(^{18}\) Furthermore, as the ecosystem recovers from over-consumption and natural resources are less scarce, smaller mammal and bird populations are able to return and/or recover as well.\(^{19}\) This delicate balance between predators, prey, the environment, and concomitant species requires the participation of all the parties to achieve the synergistic interrelatedness that is central to a healthy ecosystem. And it is the result of that synergy, an awe inspiring array of wildlife and vegetation, which compels people to visit areas like Yellowstone.

Despite the reasons just discussed and the fact that the “restoration of wolves … has become a widely accepted conservation and management practice throughout North America and Europe … the ecosystem effects of returning top carnivores remain both scientific and societal controversies.”\(^{20}\) And opposite those in favor of such efforts in Yellowstone stood hunters, ranchers, and residents.\(^{21}\) Ranchers were concerned with the impact of recovered wolf populations on domestic livestock, feeling that they would systematically devour domestic cattle and sheep populations.\(^{22}\) Hunters voiced their outrage with the Recovery Plan and the

\(^{18}\) ENVIRONMENTAL IMPACT STATEMENT, supra note 10, at 1–8, ch. IV; Smith, Yellowstone after Wolves, supra note 17, at 331-32; Jesse H. Alderman, Crying Wolf: The Unlawful Delisting of Northern Rocky Mountain Gray Wolves from Endangered Species Act Protections, 50 B.C. L. REV. 1195, 1198-99 (2009).

\(^{19}\) Alderman, supra note 18, at 1198-99.


\(^{22}\) ENVIRONMENTAL IMPACT STATEMENT, supra note 10, at 5–48. In response to these concerns the FWS explained that “[s]ome wolves will kill livestock and occasionally other domestic animals and pets. However, the proposed wolf control program is similar to the one that has been operational in Montana since 1987. The Montana program has resolved livestock losses caused by wolves and allowed for continued wolf population growth. Wolf recovery and control of the occasional wolf that attacks livestock can occur simultaneously. The proposed wolf control
expectation that the reintroduction of “wolves would significantly diminish the number of ungulates available to the sport hunter.”

Opponents of the Recovery Plan also contested that it would be a “waste of taxpayers’ money and could be used for other programs.” Apart from the overstatement of the negative effects, and ignorance of the benefits, of wolf reintroduction these concerns were taken seriously. Reimbursement programs were introduced to compensate ranchers for losses and regulations were set that provide for the legal removal (lethally) of wolves that were preying on stock. Additionally, the USFWS also prepared special regulations that took effect in November of 1994 “outlining how wolves would be managed as a nonessential experimental population under section 10(j) of the Endangered Species Act.”

After several years of public commentary on the 1987 Recovery Plan, the Secretary of Interior “signed the Record of Decision on the Final Environmental Impact Statement … for reintroduction of gray wolves” to Yellowstone and central Idaho. Outside of national parks and wildlife refuges, states and Native American Tribes were tasked with implementing and

program should effectively resolve most conflicts between wolves and domestic animals, including pets.” Id. The FWS also made clear that various programs for compensation for livestock depredations were also being explored. Id.

23 ENVIRONMENTAL IMPACT STATEMENT, supra note 10, at 5–53. While the EIS noted that wolf populations “can compete with human hunters for some of the harvestable surplus in ungulate populations under some circumstances,” they stressed that wolves tend to prey on “the less fit” members of the populations. Id. (emphasis added). Additionally, the EIS also indicated that the states would still be empowered to “manipulate wolf density” and presaged their expectations that the populations of wolves and ungulates could be effectively managed. Id.

24 ENVIRONMENTAL IMPACT STATEMENT, supra note 10, at 5–51. Although the chosen wolf reintroduction program would be funded through general taxpayer revenue, it was designed to be supplemented with private contributions. Id. Additionally, in 1994 dollars, the plan was expected to cost only slightly more than $6 million, while the alternative plans would either cost far more or take far longer. Id. Furthermore, the EIS provides a compelling analysis for the position that the reintroduction of wolves will be a major attraction for tourism which is a far more significant factor to the Yellowstone area economy than is big game hunting. Id. at 50-54. See also James Brooke, Yellowstone Wolves Get an Ally in Tourist Trade, N.Y. TIMES (Feb. 11, 1996), http://www.nytimes.com/1996/02/11/us/yellowstone-wolves-get-an-ally-in-tourist-trade.html.


26 Wolf Restoration, supra note 10.

27 Id.
leading wolf management within federal guidelines. In the autumn of 1995 the stage was set for the culmination of the EIS and the recovery plan and the reintroduction of the gray wolves began with multiple releases in the Yellowstone and Idaho areas through 1996.

The newly released wolves were listed as “threatened” under the ESA in order to protect them from countermeasures of opponents of the Recovery Plan. This made it illegal to “take” any of the protected wolves regardless of whether the individually protected wolf was physically within Yellowstone National Park.

THE ENDANGERED SPECIES ACT: BACKGROUND

In Tenn. Valley Auth. v. Hill, the Supreme Court of the United States described the Endangered Species Act (ESA) as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation…. The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”

The stated purpose of the ESA is “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, and to take steps as many be

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28 Id.
29 Sime et al., supra note 21; Wolf Restoration, supra note 10.
30 Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1996). Some of the wolves in the area outside of Yellowstone were listed as “experimental.” 50 C.F.R. § 17.84(i)(7)(ii) (1996). There are distinct protections afforded for both threatened and experimental populations but some taking is permitted of experimental populations where certain specified conditions are met. 50 C.F.R. § 17.84(i)(3).
31 16 U.S.C. § 1532. “The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Id. at para. (19). The Supreme Court has defined “harm” in the context of § 1532 to include “indirect as well as direct injuries.” Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 697-98 (1995). The ESA prohibits the violation of regulations pertaining to threatened fish and wildlife species. 16 U.S.C. § 1538(a)(1)(G). Federal Regulations prohibited the “taking” of gray wolves in areas where they were listed as “threatened.” 50 C.F.R. §§ 17.21, 17.31 (1996).
appropriated to achieve the purposes of the treaties and conventions set forth…”35 The ESA “further declared to be the policy of Congress that all Federal Departments and agencies shall seek to conserve endangered species and threatened species and shall use their authorities in furtherance of this Act.”36 The ESA also stated “The Secretary shall develop and implement plans (hereinafter in this subsection referred to as “recovery plans”) for the conservation and survival of endangered species and threatened species….”37

The ESA places primary authority for the execution of its purpose in the Secretary of the Interior, who in turn has delegated administration of the ESA to the U.S. Fish & Wildlife Service (USFWS).38 The ESA amounts to much more than a passive prophylactic congressional effort – “it contains both a shield for conservation of imperiled animals, and a sword that requires affirmative planning for the recovery of any listed species.”39 Specifically, the ESA protects “endangered” species at risk of becoming extinct, and “threatened” species at risk of becoming endangered.40 This protection is accomplished by prohibiting and/or regulating the “taking” of such species and the prescription of criminal liability for anyone who “knowingly” violates the ESA and/or the regulations promulgated thereunder.41 Anyone convicted of “knowingly taking” an endangered species (without qualifying for any exclusion) can be fined up to $50,000.00

40 16 U.S.C. §§ 1532(6), (19), (20) (defining the terms “endangered species,” “take,” and “threatened species” respectfully).
41 16 U.S.C. § 1540(b) (“Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title”).
and/or imprisoned for up to a year.\textsuperscript{42} Any person who “knowingly takes” a threatened species can be fined up to $25,000.00 and/or imprisoned for up to six months.\textsuperscript{43}

The USFWS’s responsibility for investigating violations of the ESA is carried out by the USFWS’s special agents.\textsuperscript{44} The USFWS special agents are “plainclothes criminal investigators who enforce Federal wildlife laws throughout the United States. They target crimes – such as wildlife trafficking and habitat destruction – that undermine U.S. efforts to conserve wildlife resources.”\textsuperscript{45} Despite the lofty mission of these agents, only some 250 special agents work for the USFWS.\textsuperscript{46}

\begin{center}
\textbf{THE KILLING OF WOLF NUMBER TEN}
\end{center}

The story of Wolf Number Ten begins with his capture in Hinton, Alberta, Canada in January of 1995 where he became part of USFWS’s Wolf Recovery Plan.\textsuperscript{47} Wolf Number Ten was one of the first wolves to arrive in the United States as part of the controversial Recovery Plan. His large size and bold demeanor quickly established Number Ten as an alpha male in “acclimation pen” in Yellowstone “where he took up the role of progenitor with relish.”\textsuperscript{48} On

\begin{footnotesize}
\begin{enumerate}
\item Id.  
\item Id.  
\item 16 U.S.C. § 1540(e); 50 C.F.R. § 402.01(b) (2009); Fish, Game, and Wildlife Conservation, 35 Am. Jur. 2d § 64 (2010).  
\item Id.  
\item McNamee, \textit{supra} note 47. Number Ten weighed in at over 120 pounds, much larger than his 35 pound cousin the Coyote and at the high end of the average 80-120 pound range for an adult gray wolf. Id.  
\end{enumerate}
\end{footnotesize}
April 26, 1995, Number Ten found himself exploring the area around Red Lodge, Montana, just beyond the Northeast Corner of Yellowstone National Park.49

On that same day in April, Chad McKittrick and his friend Dusty Steinmasel are trespassing on private property where McKittrick wants to hunt bears.50 Steinmasel “works as a laborer for a concrete company… [he] works hard, … keeps out of trouble … [and] is a sportsman.”51 McKittrick, on the other hand, is “a renegade from a strict Mormon family” who “drifts in and out of trouble, [and] in and out of jobs.”52 It is on this fateful day that Steinmasel spots Wolf Number Ten high up on a snowy ridge above the pair and draws McKittrick’s attention to Number Ten’s silhouette.53 McKittrick has with him a Ruger hunting rifle equipped with a “five-to-nine-power zoom scope” and identifies the moving silhouette as a wolf.54 McKittrick’s Ruger is loaded with powerful seven millimeter magnum rounds and the sights are trained on Number Ten.55 McKittrick has already determined that he is going to shoot Number Ten despite Steinmasel’s protestations, and for no reason other than his own gratification.56 McKittrick takes a deep breath, settles the scope of his Ruger, and squeezes the trigger as Steinmasel looks on with binoculars.57

At the time of his encounter with McKittrick and his companion, Wolf Number Ten was something of a celebrity to wolf biologists being one of the first wolves to be part of the effectuated Recovery Plan.58 From the time of his capture in Canada, Number Ten wore a thick

49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Phillips, supra note 47.
leather radio collar “so [his] movements could be monitored” by biologists. To the biologists following Number Ten’s movements with his mate, he was an integral part of the future of wild gray wolves in Yellowstone and the overall health of the Yellowstone ecosystem. But on that late April day in 1995 when Number Ten strayed outside Yellowstone’s northeast boundary, the resounding crack of McKittrick’s Ruger would mark the untimely end of this ecological celebrity’s life, and would engender some puzzling questions for the law.

When McKittrick saw Number Ten he knew it was a wolf. There is no mistaking the distinction between a 120 gray wolf, a 35 pound Coyote, and a dog. Before Number Ten had any idea he was in any danger McKittrick determined to end his life. McKittrick’s shot struck Number Ten in the upper chest cavity and ripped through his body, leaving a shredded liver and hemorrhaged lung in its wake. McKittrick laid down his rifle and started toward Number Ten with a .44 Magnum pistol to finish the job but by the time McKittrick and Steinmasel reach Number Ten, any life had already bled out of him. Number Ten’s collar was clearly marked with the words “National Park Service” and “Hinton, Alberta” and his red plastic ear tags were marked “FWS” on one side and “10” on the other. There was no questioning what had just happened and the pair argue over what to do next.

“This is a big fucking deal, Chad,” Steinmasel says. He is scared and revolted. ‘We need to go to town and find somebody from Fish and Game and report this.’ ‘No,’ McKittrick replies, ‘I'll go to jail. I can't do time.’


59 Id.
60 See generally McNamee, supra note 47; Phillips, supra note 47.
61 At trial, McKittrick claimed that he thought he was shooting at a dog, but Steinmasel’s testimony contradicted McKittrick’s excuse. U.S. v. McKittrick, 142 F.3d 1170, 1178 (9th Cir. 1998).
62 See note 48, supra.
63 McNamee, supra note 47.
64 Id.
65 Id.
66 Id.
McKittrick convinces Steinmasel to leave him out of any report that he makes and hides the body of Number Ten, but only after skinning him and taking his hide as a trophy. Steinmasel had taken the collar to destroy it but instead wipes it down and ditches it in a roadside culvert. Little did McKittrick and Steinmasel realize that the collar had begun transmitting a “mortality mode” signal due to its unnatural periods of stillness. Yellowstone wolf biologist Doug Smith picks up on Number Ten’s collar’s mortality mode transmission later in the day on the 26th and reports it to the USFWS, Yellowstone National Park headquarters, and the Montana Department of Fish, Wildlife, and Parks. It was not long before the horror of McKittrick’s actions would be revealed to all.

Special Agent Tim Eicher of the U.S. Fish and Wildlife Service, “the very image of the western lawman,” was assigned to investigate the murder of Wolf Number Ten. His tenacious investigations quickly uncovers the details of how Number Ten’s life was snuffed out and Chad McKittrick was promptly apprehended and charged with illegally taking Number Ten – an animal listed as threatened under the ESA. Specifically, the government charged McKittrick with three counts: one, taking the wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(3); two, possessing the wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(5); and three, transporting the wolf in violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(1), 3373(d)(2). McKittrick denied all of the charges.

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67 Id.
68 Id.
69 Id.
70 Id.
71 Id.; See also Ted Williams, Defense of the Realm: The Thin Green Line Protecting Endangered Species, 81 SIERRA 34, 39 (1996).
72 Id.
73 McKittrick, 142 F.3d at 1172-73.
74 McNamee, supra note 47; Williams, supra note 71, at 39.
JUSTICE FOR NUMBER TEN

Chad McKittrick requested a jury trial, and the U.S. District Court for the District of Montana approved the reading of a jury instruction that required the federal government to only prove that McKittrick “knew he was shooting an animal, and that the animal turned out to be a protected gray wolf.”\(^\text{75}\) According to the District Court’s jury instruction, it only mattered that McKittrick intentionally shot Number Ten and that Number Ten was in fact protected by the ESA as he was listed as a “threatened” animal – which he was. Nonetheless, evidence was even presented at McKittrick’s trial that established that he knew or believed that he was shooting a wolf when he fired his Ruger at Number Ten.\(^\text{76}\) After a federal jury convicted McKittrick on all counts he was sentenced by a Magistrate Judge to six months imprisonment.\(^\text{77}\) The conviction and sentence was subsequently affirmed by District Judge Jack D. Shanstrom.

McKittrick contested his conviction and appealed the District Court’s decision to the United States Court of Appeals for the Ninth Circuit.\(^\text{78}\) On appeal McKittrick made a number of arguments: he argued that “his separate counts for taking and for possessing the wolf were multiplicitious, that his taking of the wolf was not “knowing” because he did not realize what he was shooting, … that the court erred in instructing the jury about the ‘incidental take exception,’” and that the sentencing magistrate judge should have reduced his offense level for his acceptance of responsibility.\(^\text{79}\) In a decision by Judge Otto Richard Skopil, Jr., the Ninth Circuit Court of Appeals rejected all of McKittrick’s challenges and affirmed his conviction, except with respect to the reduction in his offense level.\(^\text{80}\) On this remaining issue, Judge Skopil

\footnotesize{
\textit{75} McKittrick, 142 F.3d at 1177.
\textit{76} Id. at 1177-78.
\textit{77} Id. at 1173.
\textit{78} Id. at 1173.
\textit{79} Id.
\textit{80} Id.
}
held that “[b]ecause the magistrate judge may have disallowed the reduction on impermissible grounds, we remand for a redetermination of whether McKittrick accepted responsibility under U.S.S.G. § 3E1.1.” 81

McKittrick’s argument with respect to the degree of intent required for his conviction has precipitated lasting and paradoxical changes in the enforcement of the ESA and is the focus of the remainder of this discussion. Specifically, McKittrick argued that a violation of “ESA section 11 requires the government to prove that he knew he was shooting a wolf, and that the jury instructions misled the jury about the requisite intent.” 82 Judge Skopil found McKittrick’s contentions to be less than convincing, and citing to the Congressional Record and other Appellate Court decisions, he held the jury instructions to be accurate:

McKittrick need not have known he was shooting a wolf to “knowingly violate [] the regulations protecting the experimental population. 16 U.S.C. § 1540(b)(1). In 1978, Congress changed the wording of section 11 to “reduce [] the standard for criminal violations from ‘willfully’ to ‘knowingly.’ ” H.R.Rep. No. 95-1625, at 26 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9476. It did this to “make [] criminal violations of the act a general rather than a specific intent crime.” Id. As the magistrate judge recognized, the District of Montana had already decided the intent issue in the government's favor, holding on similar facts that “[t]he critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting.” United States v. St. Onge, 676 F.Supp. 1044, 1045 (D.Mont.1988); see also Billie, 667 F.Supp. at 1493 (“[T]he Government need prove only that the defendant acted with general intent when he shot the animal in question.”). The Fifth Circuit has reached the same conclusion in related situations. See United States v. Nguyen, 916 F.2d 1016, 1017-18 (5th Cir.1990) (sustaining possession conviction did not require that defendant know animal's ESA-protected status); United States v. Ivey, 949 F.2d 759, 766 (5th Cir.1991) (citing St. Onge and Billie in holding that, like § 1540(b)(1), § 1538(c) is a general intent statute). The Eleventh Circuit has expressed its agreement with the reasoning of these cases in holding that an analogous provision of the African Elephant Conservation Act requires only general intent. See United States v. Grigsby, 111 F.3d 806, 817 (11th Cir.1997). As these cases and the legislative history indicate, section 11 requires only that McKittrick

81 Id.
82 Id. at 1176.
knew he was shooting an animal, and that the animal turned out to be a protected gray wolf.\textsuperscript{83}

**DEFINING THE DEGREE OF INTENT REQUIRED BY SECTION 11**

Knowing violations of the ESA are punishable criminally.\textsuperscript{84} The jury instructions in McKittrick’s trial became such a contentious issue because they were used to define key elements of the charges against McKittrick to the jurors. As a procedural matter jury instructions are a matter of law that are set out by the court.\textsuperscript{85} When possible, courts are able to design jury instructions based on definitions sourced directly from the relevant statute itself. Unfortunately, however, the ESA does not define “knowingly,” so the trial court was unable to rely on a statutorily provided definition for the knowing taking of a protected wolf under the ESA.\textsuperscript{86} As Judge Skopil’s decision indicates, McKittrick’s case was far from the first to wrestle with and parse out the meaning of “knowingly” in the context of criminal violations of Section 11 of the ESA. Additionally, the legislative history of the ESA itself provides substantial discussion of the term “knowingly.”\textsuperscript{87}

Prior to the 1978 Amendments to the ESA, the statute distinguished between “knowing” and “willful” violations of its provisions.\textsuperscript{88} Specifically, the penalties for “knowing” and

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  \item \textsuperscript{83} Id. at 1177. As a general matter, “[s]pecific and general intent have been notoriously difficult terms to define and apply.” People v. Hood, 1 Cal. 3d 444, 82 Cal. Rptr. 618, 462 P.2d 370 (1969). Chief Justice Traynor of the California Supreme Court made the following distinction:
  
  When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.
  
  Id.
  
  
  \textsuperscript{85} See generally Staples v. U.S., 511 U.S. 600, 612 n. 6 (1994).
  
  \textsuperscript{86} See 16 U.S.C. § 1532 (providing the definitions for chapter 35 of the Code but not defining the term knowingly).
  
  \textsuperscript{87} See H. R. Conf. Rpt. No. 95-1804 at 26 (1978) (discussing the addition of “knowingly” in place of “willfully” to make “criminal violations of the act a general rather than specific intent crime” as part of the 1978 Amendments to the ESA.).
  
“willful” violations of the ESA differed such that a person who knowingly violated the ESA could only be fined while one who willfully violated the ESA could be fined and/or imprisoned. The 1978 Act to amend the Endangered Species Act of 1973 was designed in part to “alleviate certain ambiguities of the Act” and “make it clear that the Act’s civil and criminal sanction apply to violations involving commission of a prohibited act.” This was accomplished in part by reducing the standard for criminal violations from “willfully” to “knowingly.” The legislative history of the amendment makes clear that Congress specifically did “not intend to make knowledge of the law an element of either civil penalty or criminal violations of the act.”

Therefore, the unequivocal intent of Congress in the 1978 amendment to the ESA was to effect a specific and substantial change to the degree of intent required to establish a violation of section 11 of the ESA. The amendment essentially reduced the previous criminal intent standard to one that requires only a conscious taking of a protected animal.

This analysis was mirrored by the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. The principal issue in *Babbitt* was whether the Secretary of the Interior “exceeded his authority under the [ESA] by promulgating” “a regulation that defines the [ESA’s] prohibition on takings to include ‘significant habitat modification or...

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81 Id. See also United States v. Nguyen, 916 F.2d 1016, 1018 (5th Cir. 1990) (describing the 1978 amendment to the ESA).
83 “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532 (19).
degradation where it actually kills or injures wildlife.”

The Court held that the regulation was appropriate, relying on the legislative history of the ESA to substantiate its conclusion. As part of the Court’s analysis, Justice Steven’s majority opinion explains that:

in order to be subject to the Act’s criminal penalties or the more severe of its civil penalties, one must “knowingly violat[e]” the Act or its implementing regulations. 16 U.S.C. §§ 1540(a)(1), (b)(1). Congress added “knowingly” in place of “willfully” in 1978 to make “criminal violations of the act a general rather than a specific intent crime.” H.R.Conf.Rep. No. 95–1804, p. 26 (1978). The Act does authorize up to a $500 civil fine for “[a]ny person who otherwise violates” the Act or its implementing regulations. 16 U.S.C. § 1540(a)(1). That provision is potentially sweeping, but it would be so with or without the Secretary’s “harm” regulation, making it unhelpful in assessing the reasonableness of the regulation. We have imputed scienter requirements to criminal statutes that impose sanctions without expressly requiring scienter, see, e.g., Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), but the proper case in which we might consider whether to do so in the § 9 provision for a $500 civil penalty would be a challenge to enforcement of that provision itself, not a challenge to a regulation that merely defines a statutory term. We do not agree with the dissent that the regulation covers results that are not “even foreseeable ... no matter how long the chain of causality between modification and injury.” Post, at 2421. Respondents have suggested no reason why either the “knowingly violates” or the “otherwise violates” provision of the statute—or the “harm” regulation itself—should not be read to incorporate ordinary requirements of proximate causation and foreseeability. In any event, neither respondents nor their amici have suggested that the Secretary employs the “otherwise violates” provision with any frequency.

The discussion in Babbitt supports Judge Skopil’s conclusion – and jury instructions – in McKittrick that criminal liability under the ESA falls under a general intent standard and that defendants such as McKittrick are not required to know that the animal they are taking is in fact protected or even what kind of animal it is.

**THE COURTS GET TO KNOW “KNOWINGLY”**

As discussed, the legislative history of the ESA and the reasoning of the Supreme Court have addressed the issue of the desired interpretation of the “knowing” requirement as a general

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95 Id. at 690.
96 Id. at 696, 708-9.
97 Id. at 697 n. 9.
intent standard under Section 11 of the ESA. In keeping with this interpretation, federal court decisions under the ESA interpret the mens rea requirement as one of general intent as well and they do not ascribe to the position that criminal liability under Section 11 requires knowledge of a taken animal’s species or status under the ESA.

In 1987, the United States District Court for the Southern District of Florida handled one of the first cases to grapple with the meaning and application of the knowledge requirement in the ESA following the 1978 amendment. In that case, U.S. v. Billie, the defendant James Billie had been charged with the taking of a protected Florida panther in violation of the ESA. Billie sought to dismiss the two count information against him on several grounds, the relevant one for the purposes of the current discussion is his contention that the “in order to convict, the Government must prove beyond a reasonable doubt his knowledge that (1) the animal he shot was a Florida panther, and (2) it was a crime to do so on the Seminole Indian Reservations.”

In discussing whether the ESA requires actual knowledge of the subspecies taken to establish criminal liability, the Billie court recognized that the “legislative history of the Act indicates that Congress did ‘not intend to make knowledge of the law an element’ of a criminal violation” of the ESA. The court found Billie’s argument to be “without support in law or reason” and went further to say that “knowingly” simply means that an “act was done voluntarily and intentionally and not because of mistake or accident.” Ultimately the Billie court held that the

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99 Id. at 1487. “The felis concolor coryi or Florida panther is a particular subspecies of panther listed as “endangered” pursuant to the Act.” Id.
100 Id. at 1492.
102 Id. According to the court, such a definition is in keeping with the general rule that criminal penalties attached to regulatory statutes “intended to protect public health, safety, or welfare should be construed to effectuate their regulatory purpose.” Id. (citing United States v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir.1984), cert. denied, 469 U.S. 1208 (1985)).
“[g]overnment need only prove that [Billie] acted with general intent when he shot the animal in question” and that since specific intent is not required “the Government need not prove that Billie knew the Act applied to his … hunting in order to convict him.”

Following Billie in 1988, the court in U.S. v. St. Onge conducted a similar analysis to the one in Billie in response to the defendant’s efforts to present evidence “that he believed he was shooting an elk at the time he allegedly shot the [protected] bear in question.” The District Court of Montana agreed with the government that the defendant’s contention does not constitute a defense to the crime charged. The court cited to the congressional record of the ESA in finding that the “construction of the ‘knowingly’ requirement [that] would best give effect to the regulatory and protective nature of the Act” is one where the criminal violations are “general rather than … specific intent crimes.” defense to criminal liability under the ESA. The court explained that “[t]he critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting … [and that t]he scienter element applies to the act of taking; thus, defendant could only claim accident or mistake if he did not intend to discharge his firearm … or similar circumstances occurred.” Following this line of reasoning, the court also revealed its intended jury instructions which required that the government prove only that (1) the defendant knowingly took an animal in the U.S.; (2) the animal was a protected grizzly bear; and (3) the defendant did not have permission to take the bear.

In 1990, following Billie and Onge, the U.S. Court of Appeals for the Fifth Circuit addressed another case involving the taking of a protected animal in which the defendant argued

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103 Billie, 667 F. Supp. at 1492-93.
105 Id.
107 Id.
108 Id.
that knowledge of the species and/or the protected status of the taken animal is necessary to
convict him under the ESA.\textsuperscript{109} In that case, \textit{U.S. v. Nguyen}, the defendant, Oanh Vu Nguyen had
been convicted by a jury of violating the ESA by illegally possessing and importing a threatened
species of sea turtle.\textsuperscript{110} On appeal, Nguyen argued that “trial judge committed reversible error
by failing to impose a \textit{mens rea} requirement.”\textsuperscript{111} The Fifth Circuit, however, held that “because
the legislative history shows that Congress intended to make violations of this provision of the
Endangered Species Act a general intent crime, we AFFIRM his conviction.”\textsuperscript{112}

On May 4, 1989 defendant Nguyen had been a crewmember onboard the fishing vessel 
\textit{Diana} in the Gulf of Mexico (off the coast of Galveston, Texas) when it was stopped and
boarded by two Coast Guard Officials because the \textit{Diana}’s home port was not visible on the
tern.\textsuperscript{113} Upon a sweep of the vessel, the Coast Guard Officials discovered the flippers of a
Loggerhead sea turtle – a threatened species.\textsuperscript{114} Nguyen explained to the Officials that the turtle
had been caught in the boat’s nets and had already been dead when they pulled it onboard the
\textit{Diana}.\textsuperscript{115} Despite his advice to the crew of the \textit{Diana} that it was illegal to keep the turtle, “they
persuaded him to let them salvage the edible portions.”\textsuperscript{116} After discovering these remains, the
Coast Guard escorted the \textit{Diana} to the Galveston Coast Guard Base and charged Nguyen with
two violation of the ESA.\textsuperscript{117} In the first count, Nguyen was charged with “knowingly possessing
a threatened species of sea turtle” and in the second count he was charged with “knowingly

\textsuperscript{109} \textit{Nguyen}, 916 F.2d 1016.
\textsuperscript{110} \textit{Id.} at 1017.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
importing or attempting to import a sea turtle into the United States.”\textsuperscript{118} At Nguyen’s trial the District Court’s jury charges clearly did not require that Nguyen knew that the animal taken was a Loggerhead sea turtle or that it was protected under the ESA as a threatened species.\textsuperscript{119} After his conviction, Nguyen appealed arguing that “it is ‘aberrational in our jurisprudence’ to allow him to be convicted without requiring some sort of mental fault on his part.”\textsuperscript{120}

As did the courts in \textit{Billie} and \textit{Onge}, the Fifth Circuit analyzed the legislative history of the ESA in arriving at their conclusion that Congress intended to make violations of the ESA general intent crimes.\textsuperscript{121} Previewing the McKittrick court’s reasoning, the Fifth Circuit in \textit{Nguyen} paid particular attention to the 1978 amendment of the ESA and the substitution of “knowingly” for the previous requirement that the government prove that a defendant had “‘willfully commit[ted] an act which’ violated promulgated regulations.”\textsuperscript{122} As the McKittrick court would as well, the Fifth Circuit also noted that Congress specifically “did ‘not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act.’”\textsuperscript{123}

\begin{footnotesize}

\textsuperscript{118} \textit{Id.} For additional statutory background see 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1); 50 C.F.R. § 227.71(a) (1989).

\textsuperscript{119} \textit{Nguyen}, 916 F.2d 1017. As to the first charge, the District court’s jury instructions stated: “Nguyen could be found guilty of that charge if the government proved beyond a reasonable doubt that (1) ‘the defendant knowingly possessed a sea turtle or its parts’; (2) ‘the sea turtle was an animal listed as a threatened species of wildlife by the United States’; and (3) ‘the animal had been taken either upon the high seas or in the territorial sea of the United States.’” \textit{Id.} As to the second charge the jury instructions stated: “Nguyen could be found guilty on this count if the government proved beyond a reasonable doubt that (1) ‘the defendant did an act’; (2) ‘the act was a knowing attempt to import something’; (3) ‘the thing was a threatened species’; and (4) ‘the attempted importation was into the United States.’” \textit{Id.}

\textsuperscript{120} \textit{Id.} at 1019.

\textsuperscript{121} \textit{Id.} “‘The plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.’ Section eleven is no different. The legislative history of that section shows that Congress intended to make violations of its provisions a general intent crime.” \textit{Nguyen}, 916 F.2d at 1018 (citing \textit{Tennessee Valley Auth. v. Hill}, 437 U.S. 153, 184 (1978)).

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.} at 1018-19.

\end{footnotesize}
Of note is Nguyen’s argument that *U.S. v. Anderson* supported his position that criminal liability under the ESA requires the government to prove that he had some sort of mental fault – to the effect of knowing that the animal in question was protected and/or what species the animal was.\(^{124}\) In *Anderson*, the defendant was convicted of possessing pistols in violation of the National Firearms Act (NFA), 26 U.S.C. § 5861 (1989) due to their illegal modification (despite initial legal purchase).\(^{125}\) The jury instruction at trial in *Anderson* required that the government prove only that the defendant knew that the pistols were “firearms” in a general sense; the government was not required to prove that Anderson knew that the pistols were in fact the type of weapons proscribed by the NFA.\(^{126}\) The Fifth Circuit held that the trial court had erred in their instruction and allowing conviction without meeting a *mens rea* requirement.\(^{127}\)

In *Nguyen* the Fifth Circuit made two important distinctions between the underlying statutes at issue in *Anderson* and *Nguyen*. First and foremost, the Fifth Circuit noted that the “legislative history of the NFA was silent as to the state of mind necessary to support a conviction”\(^{128}\) The Fifth Circuit found that although the spelling out of “elements of a criminal offense is entrusted to the legislature”, where there is no clear intent to make a violation of a statute anything but a specific intent crime, then a *mens rea* requirement should be imposed.\(^{129}\) The court reasoned that “Congress ‘plainly’ did not intend ‘to subject to ten years’ imprisonment one who possessed what appears to be, and what he innocently believes to be, a wholly ordinary and legal pistol merely because it has been, unknown to him, been modified to be fully automatic.”\(^{130}\) This distinguished *Anderson* because the statute in question in *Nguyen*, the ESA,

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\(^{124}\) *U.S. v. Anderson*, 885 F.2d 1248 (5th Cir.1989) (en banc).

\(^{125}\) Id. at 1249.

\(^{126}\) Id.

\(^{127}\) Id. at 1255.

\(^{128}\) *Nguyen*, 916 F.2d at 1019.

\(^{129}\) Id. (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

\(^{130}\) Id. (quoting *Anderson*, 885 F.2d at 1254).

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was specifically and “clearly intended to proscribe certain acts regardless of the actor’s mental state.”\textsuperscript{131} The Fifth Circuit also felt that different treatment of the \textit{mens rea} requirement between the NFA and the ESA is warranted because a violation of the ESA is a misdemeanor while a violation of the NFA is a felony.\textsuperscript{132} The court explained that “[o]ther things being equal, the greater the possible punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault.”\textsuperscript{133} Returning to \textit{U.S. v. McKittrick}, one of the arguments that McKittrick made, and the one central to our discussion, is that his taking of Wolf Number Ten was not “knowing” because at that time he did not know that he was firing on a protected animal under the ESA.\textsuperscript{134} This was principally the same argument as in \textit{Billie, Onge, and Nguyen}, and not surprisingly, it failed.\textsuperscript{135} The Ninth Circuit upheld the District Court’s ruling and jury instruction in \textit{McKittrick}, holding that Chad McKittrick only had to know that “he was shooting an animal, and that the animal turned out to be a protected gray wolf.”\textsuperscript{136} McKittrick attempted to bring his argument to the U.S. Supreme Court in 1999 but his petition for writ of certiorari was denied.\textsuperscript{137}

The cases of \textit{Billie, Onge, Nguyen, and McKittrick} past Supreme Court precedents, and the legislative history of the ESA itself all point to the immutable conclusion that in cases involving criminal liability under the ESA, the government is not required to prove that

\begin{footnotesize}
\begin{enumerate}
\item Id. The court is referencing to their prior discussion of the legislative history of the ESA and the 1978 amendment regarding the substation of “knowingly” for “willfully.” See generally notes 97, 117 \textit{supra.}
\item \textit{Nguyen}, 916 F.2d at 1019.
\item Id. (citations omitted).
\item \textit{McKittrick}, 142 F.3d at 1173.
\item Id. at 1177.
\item Id. at 1177-78. At trial, McKittrick offered conflicting testimony to Dusty Steinmasel assertion that McKittrick knew he was shooting at a wolf. Because the court did not require the government to prove that McKittrick knew that he was shooting at a wolf or that it was protected, the jury did not have to decide whether to believe McKittrick or Steinmasel.
\end{enumerate}
\end{footnotesize}
defendants knew the specific species of the animals they have harmed or that they were protected under the ESA. All that is required is that a defendant intended to “take” the animal and that the animal was in fact protected. Despite this clear precedent and reasoning, precisely what the law does not require, is exactly what the Department of Justice is requiring that its attorney’s prove in criminal prosecutions under the ESA. The enforcement of the ESA began to go off the rails with the filing of a brief by the U.S. Solicitor General in opposition to McKittrick’s petition.

**GOING OFF THE RAILS**

Prior to the fateful filing of the brief by the U.S. Solicitor General it appeared clear that knowing violations of the ESA were punishable criminally and that this entailed establishing a general intent on the part of a defendant to secure a conviction. This meant that it was not necessary for the government to establish that a defendant had known the legal status of a taken animal (as in whether or not it is protected under the ESA) or to have had any intention of violating the law. Nevertheless, after the brief filed with the Supreme Court in *McKittrick v U.S.*, it is now the government’s position that “the defendant must know the biological identity of the animal at issue.”

Following McKittrick’s certiorari petition briefs were filed by the U.S. Solicitor General’s Office and McKittrick. Buried in the Solicitor General’s brief was a completely

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138 See note 28 supra.
140 Id.
141 See, e.g., *United States v. Ivey*, 949 F.2d 759, 766 (5th Cir. 1991) (holding that the government does not have to prove that defendant knew the taken animal’s biological identity); *Nguyen*, 916 F.2d at 1018-19 (same); *United States v. Doyle*, 786 F.2d 1440, 1444 (9th Cir. 1986) (same); *St. Onge*, 676 F. Supp. at 1045 (same); *Billie*, 667 F. Supp. at 1497 (same).
142 Silverberg, *supra* note 139, at 49.
unexpected accession that the jury instructions upheld by the Ninth Circuit did not warrant the
Supreme Court’s review and that the “Department of Justice does not intend in the future to
request the use of this instruction, because it does not adequately explicate the meaning of the
term ‘knowingly.’ In [Title 16] Section 1540(b)(1)”\textsuperscript{143} Apparently as explained by Lois Schiffer,
then an assistant attorney general for environment and natural resources, the Solicitor General’s
“decision brought the Endangered Species Act into line with many other federal laws.”\textsuperscript{144}

Strangely, there is little to no explanation of the reasoning for this departure anywhere in
the Brief apart from the assertion that it is based on recent Supreme Court case law construing
“similar” “knowing” violations in other statutes.\textsuperscript{145} Nowhere in the brief is any analysis
provided that assesses how the expansive analysis, discussed above, of the knowing requirement
in the ESA leads to the conclusion that the jury instructions relied on in \textit{McKittrick} “do not
explicate the term knowingly,” \textit{especially} with respect to \textit{that} statute – the ESA. Nevertheless,
as a result of the Solicitor General’s brief, it has become the position of the Department of
Justice (DOJ) to require prosecutors “not to request and to object to the use of the knowledge
instruction at issue in \textit{McKittrick}.”\textsuperscript{146} Instead, it is now “the position of the government … that
the defendant must know the biological identity of the animal at issue.”\textsuperscript{147} Neill Hartman, acting
agent-in-charge for eight Western states for the USFWS explained that now “we have to show

\textsuperscript{143} Brief for U.S. in Opposition, McKittrick v. U.S. (No. 98-5406, 525 US 1072 (1999)) at 15-16; \textit{See also}
Silverberg, \textit{supra} note 139, at 49.
\textsuperscript{144} Deborah Schoch, \textit{Policy Limits Endangered Species Act Prosecutions}, L.A. TIMES (June 22, 2003),
\textsuperscript{145} Brief for U.S. in Opposition, \textit{supra} note 143, at 15-16; \textit{See, e.g.}, \textit{U.S. v. X-citement Video, Inc.}, 513 U.S. 64, 72
(1994) (holding that “knowingly” as used in the Protection of Children Against Sexual Exploitation Act applied to
elements of crime concerning minority of performers and sexually explicit nature of material, despite natural
grammatical reading of Act under which scienter element would apply only to transport element; Congress could not
have intended Act to apply to actors who had no idea of sexually explicit nature of material they transported,
shipped, received, distributed, or reproduced.).
\textsuperscript{146} Silverberg, \textit{supra} note 139, at 49.
\textsuperscript{147} \textit{Id.}
mental state, which for federal agents is very difficult. It’s hard for anyone to read someone’s mind.”

The DOJ’s changed policy has effectively hamstrung prosecutors in bringing criminal charges against criminals for the taking of protected animals in violation of the ESA. It has made convictions harder to achieve for crimes that need to be punished. What’s worse is that the policy is a self-imposed handicap with elusive substantive rationalization.

STILL OFF THE TRACKS – WHERE WE ARE NOW

For obvious reasons, the DOJ’s policy that prosecutors cannot rely on the jury charges favored by the legislative history of the ESA, as well as established case law, makes prosecutions under the ESA far more difficult. Essentially, what was once a strict liability offense is now one of specific intent. And the ramifications have been quick to manifest.

On February 13, 2003 AC-8, “one of the last California condors taken into captivity in the 1980s and a matriarch of the captive breeding program … was found dead.” AC-8 was a member of an endangered species protected by the ESA (or that should have been protected) and was determined to have been killed by a gunshot from a poacher. The USFWS mounted an extensive investigation in order to track down the killer(s) of AC-8, raising upwards of $45,000.00 of reward money for information leading to the arrest and conviction of the shooter(s).

148 Schoch, supra note 144.
150 Id.
Cole Lewis. While Lewis’ conduct was just as egregious as McKittrick’s, and clearly violated the ESA, he got away with pleading guilty in U.S. District Court to “violating a federal law protecting migratory birds.” It was a result that Lewis’ attorney regarded as “one of the best possible outcomes in the case.” The “why” behind this “best possible outcome” is even more unnerving than the fact that a criminal has been afforded such leniency.

As a defense, Lewis argued that he didn’t “knowingly” kill a protected animal under the ESA because he thought AC-8 was a buzzard; and because of the DOJ’s new self-imposed heightened standard of proof to secure criminal convictions under the ESA, “prosecutors said they could not use the law and instead charged him under a law protecting migratory birds” – which carried far more lenient penalties. So Britton Lewis caught a break, one given to him by the DOJ, the very organization responsible for prosecuting criminals in his position. If only the story ended there.

Many federal wildlife officials feel that the DOJ’s “policy has given those who kill endangered animals an easy way to escape prosecution, at least under the Endangered Species Act.” They note that “[o]ther federal and state laws can sometimes be used, as in the condor case, but those laws generally carry lesser penalties.” In fact, the policy has “effectively halted federal criminal prosecutions in shooting of grizzlies and wolves” in Montana and Wyoming (where most grizzlies in the lower 48 states live), according to Neill Hartman. Even before the changed mens rea requirement, prosecutions for the murder of grizzlies in violation of

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153 Id.  
154 Id.  
155 Schoch, supra note 144.  
156 Id.  
157 Id.  
158 Id. Neil Hartman was the acting agent-in-charge for eight Western states for the USFWS in 2003. Id.
the ESA were difficult because defendants would often claim self defense.\textsuperscript{159} But now, “the McKittrick policy has blocked Endangered Species Act prosecutions even in cases that did not involve self-defense.”\textsuperscript{160} In Wyoming, the policy has hamstrung the prosecution of the killing of five protected grizzly bears and two wolves.\textsuperscript{161} In Colorado, “prosecutors could not charge a man who shot a lynx; he said he thought he was aiming at a bobcat.”\textsuperscript{162}

Ultimately, the DOJ’s directive requiring proof of actual knowledge (willfulness) in ESA prosecutions ignores the unequivocal intent of Congress that violations of the Endangered Species Act (ESA) amount to general intent crimes, the fact that Congress purposely amended the language in the ESA’s criminal provisions to make that fact clear, and the interpretations of several district courts and circuit courts of appeal. As a result, criminal investigations and prosecutions of ESA violations are artificially hampered in ways lawmakers, the courts, and the American public never envisioned.

\textbf{GETTING BACK ON TRACK – WHAT CAN BE DONE?}

At this point, if you are thinking to yourself “something needs to be done about the DOJ’s McKittrick policy,” you are not alone. Federal wildlife officials tried to persuade the Bush administration to change the policy, emphasizing that it has blocked them from bringing charges under the ESA “in dozens of cases around the country.”\textsuperscript{163} Bush’s administration did nothing. Around the same time “[f]ormer Fish and Wildlife Director Jamie Rappaport Clark

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
appealed … to then-Interior Department Solicitor John Leshy in hopes of changing the policy.”¹⁶⁴ That plea failed as well.

If nothing changes the purpose of the criminal prohibitions of the ESA will not be effectuated as Congress intended; an increasing number of criminal acts will continue to go unpunished; the ability of government agencies to protect and promote the recovery of endangered and threatened species will remain hamstrung; and most importantly innocent animals will continue to meet the fates of Wolf Number Ten and AC-8.

The reasoning in Babbitt, Billie, Onge, Nguyen, and McKittrick clearly indicate that the courts support a general intent knowledge requirement for criminal prosecutions under the ESA. However, it would seem that the court’s position on the issue is of little consequence as they do not have the authority to direct the DOJ’s internal policies. What is left is, and the purpose behind this discussion, is a call for the change of the DOJ’s McKittrick policy or for direct legislative action. The U.S. Attorney General, or anyone with greater authority in the executive branch could unilaterally rescind the directive. Additionally, Congress does have the power to ensure that the DOJ was interpreting the ESA as it intended. Finally, it may simply fall to public calls for legislative action to override the DOJ’s policy in order to give “real and substantial effect”¹⁶⁵ to the criminal prosecutions under the ESA. What is clear about these options is that they first require a public awareness of the problem with the McKittrick policy. It is to that end to which this discussion is directed.

¹⁶⁴ Id.
¹⁶⁵ Babbitt, 515 U.S. at 701.