Grizzlies, Wolves, and Law in the Greater Yellowstone Ecosystem: Wildlife Management Amidst Jusidictional Complexity and Tension

Robert Keiter
S.J. Quinney College of Law, University of Utah
Grizzlies, Wolves, and Law in the Greater Yellowstone Ecosystem: Wildlife Management Amidst Jusidictional Complexity and Tension

Acknowledgements
Copyright © 2022 by the Wyoming Law Review unless otherwise noted. Except as otherwise provided, copies of any article may be made for classroom use, provided that: (1) Copies are distributed at or below cost; (2) The author and journal are identified; (3) Proper notice of copyright is affixed to each copy; and (4) The Wyoming Law Review is notified of the use.
GRIZZLIES, WOLVES, AND LAW IN THE GREATER YELLOWSTONE ECOSYSTEM: WILDLIFE MANAGEMENT AMIDST JURISDICTIONAL COMPLEXITY AND TENSION

Robert B. Keiter*

I. Introduction ................................................................. 304
II. Wildlife Law, Management, and Conservation .......................... 305
   A. An Evolving Federal Legal Framework ................................ 306
      1. Federal Lands and Wildlife Conservation ......................... 306
      2. Federal Species Conservation Laws ................................ 309
      3. Federal Law and Predators ........................................ 312
   B. State Wildlife Law and Policy ........................................ 313
   C. Wildlife Conservation in the GYE .................................. 318
III. Yellowstone Grizzly Bear Management and Recovery ............. 320
   A. Historical Background ............................................... 320
   B. Delisting and the Courts .......................................... 323
   C. Delisting and State Management Revisited ....................... 328
IV. Wolf Recovery and State Management .................................. 332
   A. Early History ......................................................... 332
   B. Yellowstone Wolf Reintroduction ................................ 333
   C. The Delisting Struggle ............................................ 335
   D. State Wolf Management ............................................ 338
   E. The 2021 State Wolf Hunting Bills ................................ 340
V. Toward Landscape Conservation and Enhanced Coordination .... 344
   A. The Need for Meaningful Coordination at the Landscape Scale .... 345

* Wallace Stegner Professor of Law, University Distinguished Professor, and Director, Wallace Stegner Center for Land, Resources and the Environment, University of Utah S.J. Quinney College of Law. I am deeply indebted to Ben Cilwick, my Behle Research Fellow, for his excellent and unflagging research assistance on this article.
I. Introduction

Grizzly bears and wolves—both apex predators—are popular attractions in Yellowstone National Park but are frequently regarded as unwelcome intruders outside the park. Awe, raw emotion, and controversy surround both animals. The opportunity to view a grizzly bear or wolf is often the highlight of a Yellowstone visit, while scientists extoll the critical role these animals play in the ecosystem. But ranchers sighting a grizzly or wolf lurking near their livestock react quite differently, fearing the loss of valuable cattle or sheep. When unable, under federal law, to shoot these animals to protect their property, they often blame the federal government as well as wildlife advocates for the problem. Hunters too have bemoaned the presence of wolves, blaming them for a decline in big game numbers. The simple biological truth is that neither animal can, nor will remain inside the park; they both roam broadly throughout the region, now widely known as the Greater Yellowstone Ecosystem (GYE). The legal truth is that their presence both inside and outside the national park renders them subject to federal as well as state jurisdictional authority, creating legal tensions and managerial challenges.

In the Yellowstone region, the grizzly bear and the wolf have enjoyed the protection of the powerful Endangered Species Act (ESA), which has placed them under federal rather than state management. A species “listed” under the ESA receives broad legal protection that prohibits anyone from harming the animal and constrains federal agency actions that might jeopardize the species. These federal protections have safeguarded the GYE grizzly bear and its habitat for nearly 50 years despite two efforts to “delist” the bear and return it to state management, both of which were rebuffed by the courts. Long absent from the GYE, wolves were reintroduced to Yellowstone National Park in 1995 under a special ESA provision that granted them a reduced level of federal protection. The park’s wolf population proliferated rapidly, prompting its “delisting” throughout the region in

---


2 16 U.S.C. §§ 1531–1541. See infra notes 41–60 and accompanying text, for more detailed discussion of the ESA.


4 See Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015 (9th Cir. 2011); Crow Indian Tribe v. United States of America, 965 F.3d 662 (9th Cir. 2020). For detailed discussion of these decisions, see infra notes 150–167 and accompanying text.

5 16 U.S.C. § 1539(j). For detailed discussion of the Yellowstone wolf reintroduction, see infra Part IV.B.
2017 when it was fully returned to state management, but only after contentious litigation and congressional intervention. Under state law, GYE wolves are now subject to extensive hunting and trapping, which provokes further controversy and raises serious concerns about the fate of the GYE grizzly bears if they are also returned to state management.

Given the vital, high profile role grizzly bears and wolves play in the GYE, this article reviews their legal status with a critical eye on federal and state relations in regional wildlife management. Part II provides an overview of the relevant laws governing wildlife management, including an introduction to related ecosystem management and landscape conservation policies in the GYE. Part III describes the Yellowstone grizzly bear recovery effort under the ESA, highlighting the management arrangements that have helped restore the bear population and prompted efforts to remove it from federal protection. Next, Part IV describes the Yellowstone wolf reintroduction and subsequent delisting decision as well as the litigation and political maneuvering that continues to dog the wolf recovery effort. Part V concludes by arguing for a landscape conservation approach to grizzly bear and wolf management based upon meaningful inter-jurisdictional coordination between the responsible federal agencies and the states as well as between the GYE states. Because neither grizzlies nor wolves can survive over the long term solely within the confines of Yellowstone and Grand Teton National Parks, the article envisions an ecologically intact GYE that affords space for these charismatic animals while responding to legitimate federal and local concerns—an accomplishment that would solidify Yellowstone’s role as a worldwide model for wildlife conservation.

II. Wildlife Law, Management, and Conservation

Both federal and state law govern wildlife management in the GYE and elsewhere. While state law initially covered wildlife throughout the United States, federal law has gradually secured an important foothold in the field, reflecting the need for a national policy respecting certain species and public lands, such as national parks. Over time, science has assumed a more central role in wildlife management policy, though political concerns remain an omnipresent force, particularly at the state level. Big game species have long occupied a central role

---


7 See infra Part IV.D, for a description of the state laws governing wolf management in the three GYE states.

in state wildlife management, while grizzly bears, wolves, and other predatory species have often been treated with disdain. That has changed, however, with the advent of the ecological sciences and evolving social values, as manifested in federal endangered species legislation and other laws and policies. These changes are also reflected in the evolving movement toward ecosystem management and related landscape conservation policies, both of which are evident in the GYE and beyond.

A. An Evolving Federal Legal Framework

In the United States, wildlife law is best understood as an amalgam of federal and state law. In the beginning, states were responsible for wildlife found within their borders, regarded as trustees for this common resource owned by all state citizens. Gradually, the federal government assumed a notable role in wildlife management, predicated upon a combination of its constitutional powers found in the commerce, treaty, and property clauses. When Congress established Yellowstone National Park in 1872, it vested exclusive jurisdiction with the responsible federal officials, eliminating any state role in managing park wildlife. Beginning in the early 20th century, Congress transferred specific wildlife species—namely migratory birds and bald eagles—from state to federal control, based upon the national interest in protecting these birds. In 1973, confronted with a worsening extinction problem, Congress adopted the Endangered Species Act, bringing the federal government squarely into wildlife management to avert a looming crisis. This gradual extension of federal authority over designated wildlife species has heightened tension between federal and state officials, particularly when controversial animals like the grizzly bear and wolf are involved.

1. Federal Lands and Wildlife Conservation

Wildlife management authority is complicated on federal public lands, dependent on the lands at issue, as well as individual enabling acts for specific federal tracts. For the most part, national parks like Yellowstone are vested with exclusive jurisdiction over their lands, which gives them sole authority for wildlife within the park. The 1872 Yellowstone Park Act vested the Secretary of Interior with “exclusive control” over the new park and authorized him to promulgate regulations for managing the park, which included “provid[ing] against the wanton destruction of the fish and game found within the park.” In 1894, responding to a notorious

---

13 § 2, 17 Stat. at 32–33.
bison poaching incident, Congress adopted the Lacey Act and expressly outlawed hunting or killing animals inside the park. In 1916, Congress passed the National Parks Organic Act to establish the national park system in order “to conserve the scenery, natural and historic objects, and wild life [in the parks] and to provide for the enjoyment of the [parks] in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” In 1978, Congress reaffirmed the fundamental conservation purpose of the national parks while acknowledging that the parks existed within the larger, surrounding landscape. In addition, National Park Service (NPS) regulations have long prohibited hunting and trapping within the national parks unless Congress has specifically authorized it in an individual park enabling act.

National wildlife refuges, which are administered by the U.S. Fish and Wildlife Service (FWS), are set aside for wildlife conservation purposes. From early on, hunters and anglers played a significant role in securing lands for refuges and influencing management policies. Originally administered under a welter of statutes, Congress eventually linked hunting with the refuges through legislation that established funding sources tied to the sale of hunting and fishing equipment.


19 See Martin Nie, State Wildlife Policy and Management: The Scope and Bias of Political Conflict, 64 PUB. ADMIN. REV. 221, 223 (2004) (describing state wildlife management as a client-manager model, where angler, hunters, and trappers are the clients).


After adopting the 1966 National Wildlife Refuge System Administration Act to consolidate the refuges into a coherent system,\(^22\) Congress passed the National Wildlife Refuge System Improvement Act in 1997,\(^23\) which clarified that wildlife conservation was the dominant mission for the refuges and prioritized wildlife-dependent recreation.\(^24\) The 1997 legislation specified hunting a “priority general public use” when compatible with an individual refuge’s primary purposes and the system’s general conservation mission.\(^25\) Hunting on the national wildlife refuges is administered either by federal or state authorities depending on the legislation or executive order governing the individual refuge.\(^26\)

On multiple use federal lands, the states retain considerable authority over wildlife while the federal land management agencies are responsible for habitat management. The Forest Service is governed by the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), which enumerates wildlife as a designated purpose of the national forest system, but disclaims any intent to affect state “jurisdiction or responsibilities . . . with respect to wildlife and fish on the national forests.”\(^27\) In 1976, Congress adopted the National Forest Management Act (NFMA), which instructs the Forest Service to “provide for diversity of plant and animal communities,”\(^28\) giving the agency responsibility for conserving an array of wildlife species within each forest.\(^29\) The related NFMA planning regulations, not only require that forest plans ensure ecosystem integrity and diversity in the plan area,\(^30\) but also that they address individual species by requiring plans to “include plan components, including standards or guidelines, to maintain or restore ecological conditions within the plan area to contribute to maintaining a viable population of the species within its range.”\(^31\) Nonetheless, the states generally retain and exercise


\(^{24}\) Id. § 4–5, 111 Stat. at 1254–55.

\(^{25}\) Id. § 4, 111 Stat. at 1254; see also 16 U.S.C. § 668dd(d)(1)(A).

\(^{26}\) The Secretary of the Interior is authorized to coordinate with the states to allow for state management of certain units in the national wildlife refuge system. 16 U.S.C. §§ 661, 664. Such areas are aptly dubbed “Coordination Area[s].” 16 U.S.C. § 668ee(5); see also Fischman, supra note 20, at 468.


\(^{29}\) See, e.g., Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754 (9th Cir. 1996).

\(^{30}\) 36 C.F.R. § 219.9(a) (2022).

\(^{31}\) Id. § 219.9(b)(2)(ii).
authority over wildlife within national forests, which includes establishing hunting and trapping rules. The same division of authority attaches on the Bureau of Land Management (BLM) public lands, which are governed by the Federal Land Policy and Management Act of 1976 (FLPMA) for similar multiple use purposes.

In FLPMA, however, Congress empowered the secretaries of Interior and Agriculture, following consultation with state officials, to prohibit hunting or fishing for specific time periods on designated national forest or BLM public lands “for reasons of public safety, administration, or compliance with provisions of applicable law.”

2. Federal Species Conservation Laws

Over time, Congress has supplanted the states’ traditional authority over wildlife by adopting specific wildlife conservation laws, citing the national interest in preserving certain animal and bird species. In 1918, Congress invoked its treaty power to pass the Migratory Bird Treaty Act, extending federal protection to waterfowl and other migratory birds during their annual transcontinental migrations irrespective of state boundaries. In 1940, Congress extended federal protection to the disappearing bald eagle with passage of the Bald Eagle Act, and later amended the statute to include golden eagles. In 1966, Congress adopted the first Endangered Species Act, extending modest federal protection to species verging on extinction. In 1971, concerned about the abysmal treatment of wild horses on the western range, Congress passed the Wild Free-Roaming Horses and Burros Act, seeking to protect these animals by prohibiting anyone from harming them.

---

32 See generally Martin Nie et al., Fish and Wildlife Management on Federal Lands: Debunking State Supremacy, 47 Env’t L. 797, 857–68 (2017); see also infra notes 72–81 and accompanying text.


34 43 U.S.C. § 1732(b).


By most measures, the Endangered Species Act (ESA) of 1973\textsuperscript{41} represents the most far-reaching, and controversial, wildlife management statute in federal law. The ESA is designed to safeguard animals and plants from extinction, a problem that has become more serious in the face of population growth and habitat destruction.\textsuperscript{42} Under the ESA, which is administered by the FWS in the case of terrestrial species,\textsuperscript{43} a species facing possible extinction due to habitat loss, overutilization, disease or predation, inadequate regulatory mechanisms, or other factors is eligible to be “listed” on the federal endangered species registry.\textsuperscript{44} A listing decision, according to Congress, is to be based “solely on the basis of the best scientific or commercial data available.”\textsuperscript{45} Once listed, the FWS is charged with preparing a recovery plan that outlines steps necessary to nurse the protected species back to health,\textsuperscript{46} and must ordinarily designate critical habitat for the animal.\textsuperscript{47} Federal agencies must consult with and secure approval from the FWS before taking any action that might jeopardize a federally protected species or adversely modify its habitat.\textsuperscript{48} Further, the ESA prohibits anyone from “taking” a protected animal,\textsuperscript{49} which extends to altering an animal’s habitat.\textsuperscript{50} Once recovery goals are met, species are subject to


\textsuperscript{42} 16 U.S.C. § 1531. In the ESA, Congress plainly states that the statutory purpose is “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.” Id. § 1531(b). See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Daniel J. Rohlf, The Endangered Species Act at Forty: The Good, the Bad, and the Ugly, 20 Animal L. 251 (2014) (assessing the successes and failures in achieving the goals of the ESA).

\textsuperscript{43} 16 U.S.C. § 1532(15). More specifically, the Secretary of the Interior, acting through the FWS, has jurisdiction over terrestrial species (including wildlife and inland fish), while the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), has jurisdiction over marine species.

\textsuperscript{44} Id. § 1533(a)(1)–(2).

\textsuperscript{45} Id. § 1533(b)(1)(A).

\textsuperscript{46} Id. § 1533(f). Recovery plans, however, are not judicially enforceable. See, e.g., Center for Biological Diversity v. Bernhardt, 509 F. Supp. 3d 1256, 1267–68 (D. Mont. 2020) (holding that ESA recovery plans are not rules within the scope of the Administrative Procedure Act, and so cannot be compelled by judicial action).

\textsuperscript{47} 16 U.S.C. § 1533(b)(2). The U.S. Fish and Wildlife Service is not required to designate critical habitat for every listed species. For example, no critical habitat designation is needed when such habitat is not determinable, though this exception has a one-year limit. See id. § 1533(a)(3)(A). Likewise, a critical habitat designation is unnecessary if such designation would be imprudent (e.g., if designating critical habitat and mapping would raise the risk of illegal takes), or if designation would not benefit the species (e.g., if the habitat is already protected by, say, wilderness designation). See id. § 1533(b)(2); Eric T. Freyfogle et al., Wildlife Law: A Primer, supra note 9, at 251–53.

\textsuperscript{48} 16 U.S.C. § 1536(a)(2); see also Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985).


\textsuperscript{50} 50 C.F.R. § 17.3 (2022) (directing that the definition of “take” may include “harm” that involves “significant habitat modification or degradation’); see also Babbitt v. Sweet Home Chapter, 515 U.S. 687 (1995).
being “delisted” from the ESA under the same criteria that governs listing, returning management responsibility to the states.51

Since its adoption, the powerful ESA has evoked considerable controversy, much of it related to the U.S. Supreme Court’s 1978 ruling that the statute’s purpose to prevent extinction takes priority over other matters.52 The statutory grant of federal regulatory authority to protect dwindling species has troubled state officials and others who object to such a federal presence in the state’s traditional realm of wildlife management, the elevation of science over economics, and the hurdles encountered in delisting species. Citing property rights, landowners lament the extension of federal authority over private lands, including habitat protection for listed species. Although congressional reform efforts have surfaced over the years, none have significantly altered the ESA, often referred to as the “pit bull” of environmental law.53

These federal wildlife laws, as well as related laws, reflect a strong commitment to utilizing scientific knowledge to conserve the nation’s natural heritage and to providing the public a voice in conservation matters. The National Environmental Policy Act of 1970 (NEPA)54 constitutes a paradigmatic example of this trend toward science-based management and public engagement. NEPA applies whenever a federal agency contemplates taking a major federal action that significantly impacts the human environment, requiring the agency to prepare an environmental analysis that takes account of the relevant science and gives the public an opportunity to comment on the matter.55 As noted, the 1973 ESA requires that listing and other decisions be based upon the best available science,56 and effectively gives the FWS veto power over federal and private land use decisions that ignore biological realities.57 The 1976 NFMA also incorporated science-based factors into the national forest planning and decision making processes, most notably the provision requiring the Forest Service to provide for the diversity of plant and animal species.58

51 On the ESA delisting process, see Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015 (9th Cir. 2011).
53 Principal criticisms of the ESA and related congressional reform efforts are summarized in Robert B. Keiter, Keeping Faith with Nature: Ecosystems, Democracy, and America’s Public Lands 161, 239–42 (2003); see also Jason F. Shogren, Benefits and Costs, The Endangered Species Act at Thirty: Conserving Biodiversity in Human-Dominated Landscapes 181–89 (Michael Scott et al. eds., 2006).
55 Id. § 4332(2)(C); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351–53 (1989).
57 Cf. Bennett v. Spear, 520 U.S. 154, 172 (1997) (holding that the FWS’s biological opinions have a “powerful coercive effect” on federal agency land use decisions).
58 See supra notes 28–32 and accompanying text. In addition, the NFMA planning regulations require that the forest planning process must utilize “the best available science.” 36 C.F.R. § 219.3 (2022).
The 1997 National Wildlife Refuge System Improvement Act went further and established a progressive “biological integrity, diversity, and environmental health” management standard for refuges.\(^59\) A year later, Congress expressly instructed the NPS to employ science in managing the national parks.\(^60\) What emerges is a patchwork of federal laws that have brought the federal government into wildlife management on public lands and beyond, with a clear direction to employ scientific information in fulfilling their responsibilities.

3. Federal Law and Predators

Predatory animals, however, have long been unwelcome under either federal or state law. During the early 20th century, Congress carved out a federal role for controlling wolves, bears, mountain lions, coyotes, and other “noxious animals” on federal, state, and private lands.\(^61\) At the urging of the states, when local bounty programs failed to eliminate livestock depredation problems, Congress initially made federal funding available to the states, soon followed by a predator control program with the mission of destroying animals that threatened private property.\(^62\)

In 1931, Congress adopted the Animal Damage Control Act,\(^63\) authorizing the Secretary of Agriculture “to conduct campaigns for the destruction or control” of “mountain lions, wolves, coyotes, bobcats . . . and other animals” that injured agriculture, livestock, other domestic animals, and wild game.\(^64\) These mounting federal predator control efforts were largely directed toward the West and its extensive public lands, which supported a politically powerful livestock industry as well as big game animals prized by hunters. By the mid-1930s, federal involvement in predator control, including the use of poisons, proved decisive in the campaign against wolves, nearly eradicating them from the continental United States.\(^65\)

Gradually, federal policy toward predatory animals began to change, reflecting evolving scientific and public views toward these animals. During the 1930s, the NPS reversed its stance on predators and adopted the policy that “every species shall


\(^{62}\) In 1915, Congress established the Branch of Predator and Rodent Control in the Biological Survey, which was situated in the Department of Agriculture. Coggins & Evans, supra note 61, at 835.


\(^{64}\) Id. Notably, the Act did not include bears, probably because bears were a prime attraction for national park visitors. See id.

\(^{65}\) A few remnant wolves remained in northern Minnesota and Michigan, but wolves no longer roamed the West. Coggins & Evans, supra note 61, at 863.
be left to carry on its struggle for existing unaided.” The agency further clarified that “no native predator shall be destroyed on account of its normal utilization of any other park animal.” By the 1960s, Aldo Leopold, Adolph Murie, and other well-known scientists began outspokenly questioning the wisdom and necessity of removing wolves and other predators from the landscape. Their concerns helped galvanize Secretary of Interior Stewart Udall to enlist A. Starker Leopold (Aldo Leopold’s son) and other scientists to review federal predator control policy. The ensuing 1964 report elaborated two basic principles: all wildlife has inherent value, and control efforts should be limited to individual problematic animals, only in proximity to where the damage occurred. The report also strongly criticized the economic underpinnings of the federal predator control program as well as the effectiveness of trapping and broadcast poisons. But subsequent reform initiatives merely generated modest changes in federal predator control efforts, which were increasingly focused on the coyote and its impact on sheep populations.

B. State Wildlife Law and Policy

For the most part, state law governs wildlife management unless preempted by federal law. Although the U.S. Supreme Court has ruled that Congress may exercise authority over wildlife pursuant to its constitutional commerce, treaty, or property powers, Congress has generally adhered to longstanding tradition and

---

"Peter Matthiessen, Wildlife in America 198 (1959). The Park Service policy does permit intervention if the target animal is in danger of extermination, but only if the predator “is not itself a vanishing form.” Id.; see also Coggins & Evans, supra note 61, at 839.

Matthiessen, supra note 66, at 198.


Another federal report, prepared in 1972 by Dr. Stanley Cain, reinforced the Leopold Predator Report conclusions, also arguing that control efforts should be focused on individual animals and that poisons should be deployed sparingly. Cain et al., Predator Control—1971, Report to the CEQ and the Department of the Interior by the Advisory Comm. on Predator Control (1972).

These subsequent efforts included a short-lived 1972 presidential order banning the use of poisons on federal lands, which was revoked ten years later. Other federal initiatives, including additional reports and a 1979 Animal Damage Control EIS, prompted few changes in the government’s predator control efforts. U.S. Fish & Wildlife Serv., U.S. Dep’t of the Interior, Final Environmental Impact Statement, Mammalian Predator Damage Management for Livestock Protection in the Western United States (1979); see also Coggins & Evans, supra note 61, at 859–63.

deferred to state oversight on hunting and trapping, even on most federal lands. Early on, the Supreme Court ruled that the states owned wildlife found within their borders, which they were responsible for managing “as a trust for the benefit of the people.”73 Eventually, the Supreme Court reversed itself on the state ownership doctrine, but left the state trust doctrine intact.74 Applying trust principles based on conserving wildlife for the greater public good, the states are responsible for establishing hunting rules, including license requirements, permit fees, seasonal dates, and harvest limitations.75

In most states, these wildlife management policies and rules are formulated by state game and fish commissions, which are usually composed of politically connected appointees, often ranchers and hunters in the western states.76 The policies—based largely upon the North American Model of Wildlife Conservation—are then implemented by state game and fish agencies that are staffed by biologists and other professionals.77 State wildlife management funding is primarily derived from hunting and fishing license fees as well as federal excise taxes on hunting and fishing equipment, effectively giving hunters and anglers a preferred position in determining state wildlife policies.78 Most states statutorily classify animals into various categories, which include big game animals, trophy animals, and predators. Predatory animals—like wolves, coyotes, and foxes—are generally subject to liberal take rules, and some states retain bounty systems in an effort to rid the landscape of these often-despised animals.79 Several states also have endangered species, biodiversity, and environmental policy laws, but these laws differ considerably from

75 See, e.g., Idaho Code § 36-103 (2021) (declaring “all wild animals, wild birds, and fish” within the state to be property of the state and mandating that capture and take occur only if it will “preserve, protect, and perpetuate such wildlife”); Mont. Code Ann. § 87-1-201 (2021) (delegating to the Department of Fish, Wildlife, and Parks the power and duty to “supervise all the wildlife, fish, game, game and nongame birds, waterfowl, and the game and fur-bearing animals of the state”); Mont. Code Ann. § 87-1-304 (granting to the Fish and Wildlife Commission the powers to regulate hunting, including the establishment of bag and possession limits, license and season restrictions, and declaring open and closed seasons).
76 Nie et al., supra note 32, at 808–09.
77 The historically-based North American Model emphasizes state management of wildlife under public trust principles with hunting playing an important role in wildlife management. Id. at 811–14.
78 Id. at 809; see also Nie, supra note 19, at 222–24.
79 See, e.g., Wyo. Stat. Ann. § 23-3-103(a) (2021) (allowing for “predatory animals and predacious birds” to be taken at any time without a license, with few exceptions); Mont. Code Ann. § 81-7-102 (directing the Department of Livestock to “conduct the destruction and control of predatory animals” that threaten livestock and to adopt predator control rules “necessary and proper for the systematic destruction of the predatory animals by hunting, trapping, and poisoning operations and payments of bounties”); Idaho Code § 25-2612A (establishing a state animal damage control board to prevent damage by predatory animals).
one state to another. Among the GYE states, only Montana has an endangered species law as well as a state environmental policy act.

Wyoming, Montana, and Idaho have each adopted wildlife management laws that apply to grizzly bears and wolves on the region's private and public lands outside the two GYE national parks. Both Wyoming's and Idaho's general wildlife management laws treat the grizzly bear as a trophy game animal, subject to hunting upon payment of an enhanced license fee due to its trophy status. In 2018, following a short-lived decision by the FWS to delist the grizzly bear, the Wyoming Fish and Game Commission authorized a controversial hunt permitting up to 22 grizzlies to be shot, but backed down when a court ruled that the bear remained under federal protection. Montana also allows grizzly bear hunting under its general game animal statute, but requires that hunters purchase a trophy license after killing a bear. In 2021, the Montana legislature adopted new laws governing grizzly bears, one of which provides that the state will “manage the grizzly bear as a species in need of management to avoid conflicts with humans and livestock.” Another allows individuals to kill any grizzly bear “threatening to kill a person or livestock,” but unhelpfully leaves the term “threatening” undefined. Moreover, the

---


82 The trophy game animal designations for wolves and grizzlies apply only where the states retain jurisdiction over wildlife management. Thus, for example, Wyoming's trophy designations do not extend to animals on the National Elk Refuge, those roaming Grand Teton and Yellowstone National Parks, nor to animals on the nearby Wind River Indian Reservation.

83 See IDAHO CODE § 36-202(h); WYO. STAT. ANN. § 23-1-101(a)(xii)(A).


85 MONT. CODE ANN. §§ 87-2-101(4), -701(g)(2); see also §§ 87-5-302 (authorizing the game and fish commission to further regulate hunting of grizzly bears, subject to maintaining a sustainable population of bears).

86 § 87-5-301(2)(a).

87 S.B. 98, 2021 Leg., 67th Sess. (Mont. 2021) (codified at MONT. CODE ANN. § 87-6-106(4) (2022)). Moreover, the 2021 Montana legislature limited the ability of state wildlife managers to deal with and relocate troublesome grizzly bears, which is an essential tool for addressing conflict situations involving grizzlies and humans. S.B. 337, 2021 Leg., 67th Sess. (Mont. 2021) (codified at MONT. CODE ANN. § 87-5-301(3)).
three GYE states have entered a Memorandum of Agreement (MOA) to cooperate with one another if the grizzly bear is delisted, and each agreed to a conservation strategy document that incorporates their individual state grizzly bear management plans. Of course, while the grizzly bear remains on the federal endangered species list, it is protected throughout the GYE.

The three GYE states are now largely treating the delisted wolf as a predatory animal for management purposes. In 2011, when the FWS delisted the wolf in Montana and Idaho, both states—pursuant to their respective wolf management plans—authorized wolf hunting under their existing wildlife statutes, while committing to maintaining at least 15 wolf packs. When wolves were delisted in Wyoming in 2017, the state’s wolf management plan classified them as a “trophy game animal” in the area surrounding the two GYE national parks, but labelled it a “predator” in the rest of the state, thereby allowing wolves to be shot on sight at any time in roughly 85% of the state. In 2021, following the FWS’s decision to delist wolves across the country, the Montana and Idaho legislatures promptly revised each state’s wolf management policies, seeking to dramatically reduce the population and depredation incidents. While Montana remains committed to


maintaining a population of 15 breeding wolf pairs, the revised laws authorize the Montana Fish and Wildlife Commission to enable individual hunters to kill a nearly unlimited number of wolves subject to area quota, extend the wolf hunting season, permit the use of snares, allow night hunting on private land, and reimburse hunters for their costs, which critics have labelled a bounty system.92 Under its revised law, Idaho allows the state and ranchers to hire private contractors to kill wolves, sanctions aerial and motorized hunting methods, and permits year-round wolf trapping on private lands,93 while still aiming to maintain 15 breeding pairs of wolves—an approach that reportedly puts 90% of the state’s wolf population at risk.94 Recent litigation not only seeks to enjoin these harsh wolf hunting state laws but also to reinstate ESA protections for the GYE wolves along with wolves found elsewhere.95

In this legal milieu, fundamental concerns continue to plague grizzly bear and wolf management in the GYE. While the three GYE states have eagerly sought management control over wolves and grizzlies, they have only succeeded in the case of the wolf outside of Yellowstone and Grand Teton National Parks, and their recent legislative actions call into question their commitment to maintaining viable wolf populations. Even if the FWS succeeds in delisting the Yellowstone grizzly bear, the states will not have full responsibility for local grizzlies, since the NPS will remain responsible for bears in the two GYE national parks and the tribes will remain responsible for bears on their lands.96 As we shall see, while the states may have agreed in the MOA to coordinate their grizzly bear management actions, current wolf management practices provide little indication of such coordination with Yellowstone National Park officials.97 Wyoming’s eagerness to implement a grizzly bear trophy hunt in 2017 similarly raises concerns about the bear’s long-term prospects under state management. Whether the states are committed to a meaningfully coordinated and ecologically sound approach to grizzly and wolf management in the GYE remains to be seen.


93 Idaho Code §§ 36-1107(c)–(d), -201(3) (2021).


96 Of course, the states do not manage wildlife found on Native American reservations in and around the GYE; the tribes, as sovereigns, are responsible for managing the delisted wolves populating their reservation lands and would likewise assume responsibility for grizzly bears if they are delisted.

97 See infra notes 181–196 and accompanying text.
C. Wildlife Conservation in the GYE

Home to both the grizzly bear and wolf, the GYE extends across roughly 20 million acres of mostly federal lands that span three states—Montana, Idaho, and Wyoming. The GYE encompasses two national parks—Yellowstone and Grand Teton—that form the core of the ecosystem. Five national forests covering more than 15 million acres encircle the two national parks; nearly half of these forest lands, over seven million acres, are designated as wilderness and wilderness study areas, much of which borders the two national parks. Three national wildlife refuges as well as Bureau of Land Management (BLM) lands make up the rest of the ecosystem’s federal acreage. About 25% of the GYE acreage is in private or tribal ownership. Various towns and communities dot the landscape, including Bozeman, Jackson, and Cody, as well as extensive lower elevation ranchlands that provide critical wildlife habitat during the region’s harsh winter months. All of the principal wildlife species found in the area when Euro-Americans first arrived are present today, constituting a major tourist attraction and recreational resource in this expansive and unique wildland setting.

Wildlife in the GYE pay no attention to the jurisdictional boundaries that legally define the region. Rather, their habitat is defined in ecological terms. This is certainly true for grizzly bears and wolves whose range has expanded well beyond national park boundaries as each population has recovered and grown in size. But as we have seen, the various federal, state, tribal, and private landowners in the region are governed by different laws and priorities that take distinctly different approaches to wildlife conservation and management. In this complex jurisdictional setting, effective wildlife management requires some degree of coordination among managers and landowners. Recognizing this fact, federal and state officials early on established the Interagency Grizzly Bear Committee, which manages each of the northern Rockies grizzly bear populations on a coordinated, ecosystem basis.

---

99 Id.
104 For more on interagency grizzly bear coordination efforts, see infra notes 133–138 and accompanying text.
The concept of ecosystem management has taken hold not only within the GYE for grizzly bears but more generally within the federal land management agencies. Drawing upon well-accepted conservation biology and related principles, ecosystem management promotes science-driven, coordinated, and adaptive resource management policies to conserve biodiversity and natural processes at an ecologically appropriate scale, while also supporting economically and socially sustainable communities. The ill-fated federal Greater Yellowstone Vision process represented an early formal effort to institutionalize the ecosystem management concept within the region’s NPS and Forest Service offices. Although the Vision initiative failed, the region’s responsible federal officials have since then, informally and through the Greater Yellowstone Coordinating Committee, pursued resource management policies predicated on conserving the region’s ecological resources and processes, mindful of the cross-boundary implications of wildlife-related management decisions.

In recent years, however, it has become evident that wildlife conservation and other resource management policies must look beyond the GYE to include the larger, surrounding landscape in order to preserve the region’s wildlife heritage and unique natural character. Accordingly, the concept of landscape conservation has assumed greater importance and garnered increased attention in the GYE and elsewhere. A response to climate change and biodiversity concerns in an increasingly developed world, landscape conservation broadens the geographic scope of conservation efforts and thus brings additional parties into the effort to safeguard wildlife corridors, climate-related dispersal routes, and the like to promote ecological integrity and resilience.

See James R. Skillen, Federal Ecosystem Management: Its Rise, Fall, and Afterlife (2015); Keiter, supra note 53, at 220.

For a compilation of “ecosystem management” definitions, see Keiter, supra note 53, at 71–78.

See infra notes 131–135 and accompanying text, for a description of the interagency Vision process.


See Nat’l Acads. of Sci., A Review of the Landscape Conservation Cooperative (2016) (defining a ‘landscape’ as “a large area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of intersecting management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are meaningful to the management objectives”); McKinney et al., supra note 109 (describing “large landscape conservation” as “focus[ing] on land and water problems at an appropriate geographic scale, regardless of political and jurisdictional boundaries . . . [reflecting] a growing consensus that such efforts are multijurisdictional, multipurpose, and multistakeholder, and they operate at various geographic scales using a variety of governance arrangements”); Robert F. Baldwin et al., The Future of Landscape Conservation, 68 BioScience 60, 60–63 (2018).
GYE grizzlies with their Northern Continental Divide cousins is one manifestation of landscape-level management; another example involves the budding effort to safeguard elk and other ungulate migration corridors; and yet another is the collaborative federal-state effort to protect the greater sage grouse and its habitat covering 165 million acres and stretching across 11 western states. The landscape conservation concept may also tolerate active human interference with natural processes, such as the translocation of endangered species as an adaptive climate change strategy. In the case of the Yellowstone grizzly bear and wolf, as we shall see, a collaborative, landscape-scale conservation approach is essential to secure the long-term recovery of both populations—a fact highlighted in the judicial opinions construing the ESA for both grizzly bears and wolves.

III. Yellowstone Grizzly Bear Management and Recovery

A. Historical Background

No predator in the GYE is as revered or feared as the grizzly bear. In 1804, when the Lewis and Clark Expedition first penetrated the interior West, more than 50,000 grizzly bears were believed to roam the countryside. The expedition's journals first introduced the new nation to the grizzly bear, describing it as a “verry large and a turrible looking animal [sic],” as well as “a most tremendious looking animal, and extreemly hard to kill [sic] . . . .” It was not long, however, before the early western settlers set about ridding the countryside of grizzlies and other predators perceived as a threat to themselves as well as their livestock. An aggressive eradication campaign that included government bounties, steel traps, and poison baits was launched with the goal of eliminating grizzlies. By the early 1900s, the grizzly bear was essentially gone from the Great Plains and elsewhere, having fled to a few mountain strongholds that included the Yellowstone country.
Established in 1872, Yellowstone National Park provided a secure redoubt for the grizzly bear since hunting was prohibited inside the park. Although Yellowstone’s early military caretakers and later the NPS did not hesitate to dispatch troublesome bears, they otherwise left the bears alone in order to please park visitors. Early on, the NPS actually encouraged bear feeding and even erected bleachers so visitors could observe bears feasting nightly at hotel garbage dumps. Gradually, park officials began to phase out the feeding practice, and then abruptly closed the garbage pits during the late 1960s. The final closure decision was predicated in large part on the seminal 1963 Leopold Report, which heralded the beginning of a new NPS resource management policy that emphasized preserving natural conditions within national parks. Despite warnings from grizzly bear researchers, the NPS insisted on closing the dumps, which ultimately resulted in a substantial number of grizzly bear deaths. Having been habituated to the dumps as a major food source, the bears were soon coming into conflict with visitors, prompting the NPS to remove troublesome bears for the safety of park visitors.

Following passage of the ESA, the FWS soon identified the grizzly bear as trending toward extinction and, in 1975, added it to the endangered species registry as a “threatened” species. At the time, the park’s grizzly population was estimated at 146–312 bears, leading scientists to fear that these isolated bears might not survive over the long-term. Although early litigation under the ESA seeking to protect important grizzly bear habitat nearby Yellowstone’s Fishing Bridge campground failed, Congress expressed alarm about the plight of Yellowstone’s dwindling grizzly population and problematic federal land management practices in the Yellowstone region.

In 1984, two House of Representatives committees convened a joint hearing on resource conditions in the recently denominated Greater Yellowstone Ecosystem. The ensuring report identified the grizzly as “the most important indicator of the

---


122 Id. at 95, 107.


125 50 C.F.R. § 17.11 (2022).


Ecosystem’s health,” but concluded that “the Federal grizzly bear management program is flawed.”\textsuperscript{129} Highlighting a troubling decline in bear numbers, the report explained that logging, energy development, new road construction, and livestock grazing in the region’s national forests, endangered the bear population. It also noted the prevalence of “black holes,” areas where bear mortality levels were alarmingly high.\textsuperscript{130}

Regarding the report as a call to action, the NPS and Forest Service joined in an unprecedented interagency initiative—denominated the Vision process—intended to better coordinate federal resource management policy across the GYE. However, after producing a draft document that emphasized protecting the region’s natural attributes,\textsuperscript{131} the Vision process faltered in the face of intense state and local political opposition that emerged during a public comment period on the draft proposals. The final report merely reaffirmed the two agencies’ distinct missions while supporting a reduction in road densities.\textsuperscript{132}

Nonetheless, the 1986 congressional report prompted notable changes in grizzly bear management policy. The Interagency Grizzly Bear Committee (IGBC), established in 1983 to oversee the joint federal-state grizzly recovery effort,\textsuperscript{133} adopted new grizzly bear management guidelines that included a revised zoning scheme designed to better safeguard bear habitat across the GYE and

\textsuperscript{129} CRS Ecosystem Report, supra note 128, at 15.  
\textsuperscript{130} Id. at 22.  
\textsuperscript{132} On the GYE Vision process, see Bruce Goldstein, Can Ecosystem Management Turn an Administrative Patchwork into a Greater Yellowstone Ecosystem?, 8 Nw. Env’t J. 285 (1992); Pamela Lichtman & Tim W. Clark, Rethinking the “Vision” Exercise in the Greater Yellowstone Ecosystem, 7 Soc. & Nat. Res. 459 (1994).  
\textsuperscript{133} The Interagency Grizzly Bear Committee (IGBC) originally consisted of upper-level managers from the U.S. Fish and Wildlife Service, Park Service, and Forest Service, as well as wildlife managers from Wyoming, Montana, and Idaho. Over time, the IGBC has expanded its membership, which now also includes members from the U.S. Geological Survey and Bureau of Land Management. Interagency Grizzly Bear Committee: About Us, IGBC, https://igbconline.org/about-us/#1634593061643-05f3daf-9bc [https://perma.cc/MHT5-7C27] (last visited May 13, 2022). A separate Interagency Grizzly Bear Study Team composed of scientists was established in 1974 with federal, state, and tribal membership with the charge to research and monitor grizzly bears; it is not directly involved in bear management decisions. The IGBC has also established a Yellowstone Ecosystem Subcommittee with equally diverse federal, state, tribal, and local membership that oversees implementation of the Grizzly Bear Recovery Plan in that ecosystem.
other remaining grizzly strongholds. In 1993, the FWS released its Grizzly Bear Recovery Plan outlining the steps necessary to recover the bear, which persisted in four different pockets across the northern Rockies, with the largest populations in the Yellowstone area and Northern Continental Divide region surrounding Glacier National Park. Notably, while the Recovery Plan set specific grizzly bear population targets, the FWS did not designate critical habitat for the bear, citing alternative habitat protections and a lack of social tolerance among local residents for the decision.

Conservation groups challenged the Recovery Plan in court and secured a ruling that the plan illegally ignored standards to measure effective grizzly bear habitat, but lost the argument that the FWS was obligated to designate critical habitat. To safeguard bear habitat, these same groups also brought regular, often-successful challenges to national forest plans and timber harvest decisions, arguing that new access roads and logging projects were further degrading grizzly habitat, thus threatening the recovery effort. In 2000, moreover, conservation groups sought to restore grizzly bears to Idaho’s Selway-Bitterroot country. Although the initiative would have helped to connect the isolated Yellowstone bear population with bears from the Northern Continental Divide population, Idaho politicians and local residents successfully resisted the effort.

B. Delisting and the Courts

As these new grizzly bear management practices took hold, bear numbers gradually increased, prompting an ultimately unsuccessful effort to remove the Yellowstone bears from federal oversight and return management responsibility to the states. According to the FWS, the recovery targets had been met, and the states were eager to resume management of the region’s grizzlies. Not only were the states convinced that they were fully capable of managing the bears (as they had before listing), but they asserted that hunting would help control the growing grizzly population that was expanding into areas inhabited by humans, which

---


138 Keiter, supra note 53, at 161.


140 Id. at 14936.
increased the likelihood of conflict between the bears, people, and livestock.\textsuperscript{141} State managed hunting would help condition bears to avoid people, while trophy hunting fees would provide the states with critical bear management funds.\textsuperscript{142} Moreover, because hunting is popular in the three GYE states, it would generate considerable economic activity for the states.\textsuperscript{143}

By the early 2000s, scientists estimated that the Yellowstone population exceeded the 500-bear recovery target for delisting and otherwise met the required occupied habitat and mortality thresholds.\textsuperscript{144} In 2007, the responsible agencies released a Conservation Strategy document that established a Primary Conservation Area where bears took priority, set bear population, habitat, and mortality guidelines, and delineated monitoring protocols.\textsuperscript{145} The document also observed that connecting the Yellowstone grizzly bears with the Northern Continental Divide grizzlies was “sound policy to ensure the survival of the Yellowstone bears.”\textsuperscript{146} In addition, the Forest Service revised forest plans to incorporate new bear management standards,\textsuperscript{147} and the three GYE states each adopted their own bear management plans.\textsuperscript{148} With an estimated 600 grizzlies in the GYE, the FWS proceeded to delist this grizzly bear population,\textsuperscript{149} confident that these regulatory and other changes would ensure a viable population into the foreseeable future.

Although the delisting decision pleased the states, it troubled several conservation groups who went to court in an effort to retain federal control over the grizzly bear. A Montana federal district court concluded that the FWS’s decision ignored the impact of climate change on the region’s white bark pine nuts, a

\textsuperscript{141} Id. at 14913, 14926.


\textsuperscript{144} 72 Fed. Reg. at 14871–72; 82 Fed. Reg. at 30514.


\textsuperscript{146} Id. at 37.


\textsuperscript{148} 2007 Grizzly Bear Conservation Strategy, supra note 145, at 79; see also Wyoming Management Plan, supra note 89.

critical grizzly food source, which would likely put the bears in closer and more dangerous contact with humans as they sought other food sources.\textsuperscript{150} Further, the court ruled that the revised forest plans and state conservation strategies failed to provide “adequate regulatory mechanisms” to protect the bear, as statutorily required.\textsuperscript{151} On appeal, the Ninth Circuit Court of Appeals agreed that the FWS must further assess climate change impacts on the bear’s food sources, but ruled that the revised plans and strategies met the “adequate regulatory mechanism” statutory threshold, explaining that the ESA did not require post-delisting protections as rigorous as those embodied in the ESA.\textsuperscript{152} The Ninth Circuit panel concluded by commending the federal and state agencies for their “comprehensive multi-jurisdictional cooperative effort” to recover the Yellowstone grizzly population, deeming it a “substantial wildlife conservation planning achievement.”\textsuperscript{153}

In 2017, the FWS again sought to delist the Yellowstone grizzly bear population. By then, the FWS was able to cite several biological studies concluding that the omnivorous grizzly was not deeply dependent on white bark pine nuts and would have no trouble finding alternate food sources without provoking conflict with people.\textsuperscript{154} Moreover, estimates put the Yellowstone bear population at 600–750 animals.\textsuperscript{155} Although the responsible federal agencies harbored misgivings about the delisting,\textsuperscript{156} the FWS nonetheless proceeded to delist the Yellowstone bears with near-unanimous assent among the agencies,\textsuperscript{157} believing it was the best

\textsuperscript{150} Greater Yellowstone Coal. v. Servheen, 672 F. Supp. 2d. 1105, 1115 (D. Mont. 2009).
\textsuperscript{151} Id. at 1120.
\textsuperscript{152} Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015, 1024–30 (9th Cir. 2011), rev’d in part, 672 F. Supp. 2d 1105 (D. Mont. 2009).
\textsuperscript{153} Greater Yellowstone Coal., 665 F.3d at 1032.
\textsuperscript{157} 82 Fed. Reg. 30502.
deal available with the states in the aftermath of the 2016 presidential election.158 The states thus assumed responsibility for managing grizzlies outside the two GYE national parks and nearby Native American reservations, with Wyoming announcing it would authorize a trophy hunt for 22 bears.159 Though the FWS was still obligated to monitor the bear population and a new interagency team—the Yellowstone Grizzly Bear Coordinating Committee—would help oversee future management, research, and financial matters,160 it was clear the states had the final word on bear management.

Another round of lawsuits ensued, challenging the delisting decision as scientifically and legally flawed. Again, a Montana district court agreed with the challengers, which consisted of several Native American tribes and various conservation groups, and upheld their three claims.161 On appeal, the Ninth Circuit again affirmed the lower court on each claim.162 First, the courts ruled that the FWS had illegally “balkanized” the Yellowstone grizzly bear population by ignoring the effect of delisting on other ESA-protected grizzly bear populations elsewhere in the northern Rockies region.163 Second, noting that the FWS was no longer committed to augmenting the Yellowstone grizzly population to ensure long term genetic diversity by translocating bears from elsewhere, the courts held that eliminating this commitment from the delisting rule violated the ESA’s “best available science” mandate and ignored the “adequate regulatory mechanism” requirement since there was no assurance the states would promote connectivity between the region’s bear populations.164 Finally, the courts faulted the FWS for dropping a recalibration

---

158 Keiter, Greater Yellowstone Ecosystem Revisited, supra note 1, at 55.
159 Matthew Brown, States Divvy Up Yellowstone Area Grizzly Hunt, BILLINGS GAZETTE (Jan. 4, 2016), https://billingsgazette.com/article_2a95a10e-dd25-566f-a9a-51ecaa25d755.html [https://perma.cc/Y5C8-C8W8]; Bruillard, Trophy Hunt, supra note 84. In dividing grizzly mortality (hunting) limits among themselves, the three GYE states agreed to maintain a population of five hundred bears within the Demographic Monitoring Area, to prohibit the hunting of females with cubs, and to monitor mortality levels throughout the year. WYO. GAME & FISH COMM’N ET AL., MEMORANDUM OF AGREEMENT REGARDING THE MANAGEMENT AND ALLOCATION OF DISCRETIONARY MORTALITY OF GRIZZLY BEARS IN THE GREATER YELLOWSTONE ECOSYSTEM 2 (2016), https://wgfd.wyo.gov/(X(1)A(cCbUax1ubwr4ubm1pKDiqUKHISMTzanVY1L84pOVAlR3iqjNTqR7cq9Q9-fhjy4hpqg4iw5j5OcchD0zqwkJDhdizqpkos0B2nCXynHAFLT-KO9FB74iWKZLJJnXS4mSinJibz2WMQXBYzLkqSUiiw2)/WGFD/media/content/PDF/Wildlife/Large%20Carnivore/GB_TristateMOA_Signed.pdf [https://perma.cc/F6XH-EJ8K].
162 Crow Indian Tribe v. United States of America, 965 F.3d 662 (9th Cir. 2020).
163 Crow Indian Tribe, 343 F. Supp. 3d at 1013–15; Crow Indian Tribe, 965 F.3d at 677–78. In concluding that the ESA prohibited the FWS from “balkanizing” the various grizzly populations, the courts relied upon the D.C. Circuit Court of Appeals decision in HUMANE SOCIETY v. ZINKE, 865 F.3d 585 (D.C. Cir. 2017). That court had overturned the FWS’s decision to delist a sub-population of wolves inhabiting nine states in the Western Great Lakes region because the agency did not address the impact that delisting one population would have on the other, remnant wolf populations. Id. at 600–03. When undertaking that impact review, however, the Ninth Circuit did not require the FWS to employ the same five-factor review process as required for listing a species. Crow Indian Tribe, 965 F.3d at 678.
164 Crow Indian Tribe, 343 F. Supp. 3d at 1018–21; Crow Indian Tribe, 965 F.3d at 678–80.
requirement from the final rule, finding that any change in the current conservative Chao2 population counting method risked overestimating the bear population.\textsuperscript{165} Hence, the agencies were obligated to recalibrate the counting method to ensure accuracy, as required by the ESA’s “best available science” mandate.\textsuperscript{166} Both courts expressed concern that the recalibration requirement was dropped due to political pressure by the states,\textsuperscript{167} which would have allowed them to increase the number of bears available for hunting.

The GYE states responded by objecting to the judicial decision, asserting that the region's grizzly bears were recovered, overflowing the ecosystem, and increasing the risk to citizens, local communities, and livestock. Plainly unhappy with the judicial ruling, the Wyoming legislature passed a new law authorizing grizzly bear hunting despite the bear’s ongoing federal protected status,\textsuperscript{168} while Montana adopted legislation redefining when a “threatening” grizzly bear can be shot.\textsuperscript{169} Wyoming’s congressional delegation also introduced a series of bills in Congress to overturn the court decision to facilitate delisting the Yellowstone bear population.\textsuperscript{170} Moreover, conflict has intensified between ranchers and bear advocates in Wyoming’s Upper Green River country after a number of livestock depredation incidents, which triggered a lawsuit by bear advocates challenging the Forest Service’s decision to reopen livestock grazing allotments previously closed to protect wildlife.\textsuperscript{171}

The two failed grizzly delisting efforts reveal the intertwined scientific, legal, and political dimensions of grizzly bear management in the GYE, including the persistent federal-state tensions that have long infused the matter. Biologists generally agree that the isolated Yellowstone bear population risks genetic damage absent connection with other bears, which explains the ongoing efforts to safeguard

\textsuperscript{165} Crow Indian Tribe, 965 F.3d at 674–75.
\textsuperscript{166} Id.; Crow Indian Tribe, 343 F. Supp. 3d at 1018.
\textsuperscript{167} Crow Indian Tribe, 343 F. Supp. 3d at 1018; Crow Indian Tribe, 965 F.3d at 680–81.
\textsuperscript{169} See supra note 86–87 and accompanying text.
a north-south corridor that would enable Yellowstone bears to link with Northern Continental Divide bears.\textsuperscript{172} Biologists also fear the impact that excessive hunting could have on the isolated Yellowstone population given existing mortality rates and the female grizzly’s slow reproductive cycle of one to two cubs every other year. The courts clearly interpreted the ESA to address these science-based concerns, requiring the FWS to assess the impact of delisting on other grizzly populations, to reconsider the translocation of other bears as well as connectivity opportunities, and to proceed cautiously before altering the current bear counting method.\textsuperscript{173} What emerges is the clear sense that grizzly bear recovery requires a landscape-scale perspective, truly collaborative interagency coordination, and meaningful regulatory protections at the state level. While perhaps not politically popular in the GYE states, particularly Wyoming, the courts have indicated that political pressure will not be allowed to overcome the ESA’s science-based legal mandates.\textsuperscript{174}

\textbf{C. Delisting and State Management Revisited}

Following the failed 2017 grizzly bear delisting effort, both the FWS and the states have revisited the legal status of the Yellowstone bears. For its part, the FWS concluded an ESA-required five-year status review of the grizzly bear,\textsuperscript{175} finding that it continues to merit federal protection as a threatened species.\textsuperscript{176} Conducted by a team of independent scientists, the FWS’s status review addressed the current condition of grizzly bears in the continental U.S., focusing on the four ecosystems where bear populations presently exist. Noting that grizzly populations have “expanded considerably” both in number and occupied habitat,\textsuperscript{177} the review found that the GYE bears mostly ranked “high” in terms of resiliency, representation, and redundancy criteria, but dropped to the “moderate” category due to the population


\textsuperscript{173} See supra notes 161–167 and accompanying text.

\textsuperscript{174} See supra note 161–173 and accompanying text.

\textsuperscript{175} 16 U.S.C. § 1534(g).


\textsuperscript{177} Id. at 4.
size and genetic connectivity concerns. Motorized activity in bear habitat and human-caused mortality also continued to be a concern. After reviewing potential future conservation scenarios, the FWS concluded that “there is enough future uncertainty associated with conservation efforts, such that the grizzly bear in the lower-48 States remains likely to become in danger of extinction within the foreseeable future throughout all of its range.” Despite notable growth in the GYE bear population and expanded habitat usage, the FWS did not recommend delisting these bears, much to the chagrin of the affected states.

Nonetheless, the three GYE states are proactively moving to delist the Yellowstone grizzly bear as a distinct population segment that has recovered and should be managed by the states outside of the two national parks and nearby Indian reservations. Montana, Idaho, and Wyoming have jointly signed a Memorandum of Agreement (MOA) committing to the established demographic recovery criteria in terms of the total Yellowstone bear population, occupied bear management units, and annual bear mortality levels. The MOA divides the acceptable grizzly mortality level among the states—primarily to establish annual hunting quotas—and allocates 58% of the annual harvest to Wyoming, 34% to Montana, and 8% to Idaho. The MOA, notably, prohibits the shooting of female grizzlies with cubs or young bears still accompanying their mother. The MOA also provides that the states will “confer with the National Park Service and United States Forest Service annually” and will invite them to the states’ annual quota-setting meeting. It makes no commitment, however, to address hunting immediately outside the park boundary line (a major concern of the NPS and conservation groups), nor does it appear to account for grizzly mortalities within the national parks. Though the MOA reflects a meaningful degree of state-to-state coordination, the same cannot be said about the prospects for meaningful federal-state coordination upon delisting, particularly given how wolf hunting has evolved in the GYE.

With the MOA in place, the state of Wyoming has petitioned the FWS to return the GYE grizzlies to state management, asserting that they constitute a fully recovered distinct population segment (DPS) for delisting purposes. The

---

178 Id. at 8.
179 Id. at 6, 17.
180 Id. at 21.
181 See Tri-State Memorandum of Agreement, supra note 88; Thuermer, Wyo Approves Hunting, supra note 88.
182 See Tri-State Memorandum of Agreement, supra note 88, at 5.
183 Id. at 6.
184 Id.
185 See infra notes 303–316 and accompanying text (describing disagreements between the Park Service and the states over wolf hunting proximate to the two GYE national parks).
186 State of Wyo., Off. of the Governor, Petition to Establish the Greater Yellowstone Ecosystem (GYE) Grizzly Bear (Ursus arctos horribilis) Distinct...
petition asserts that Yellowstone bear numbers now exceed 1,000 bears (substantially beyond the 500 bear recovery target), that females with cubs occupy the requisite number of bear management units, and that the bears’ range has expanded well beyond the original primary conservation area, such that further expansion poses an unacceptable risk of human-bear conflicts. The petition also seeks to address the shortcomings identified in the 2017 court decision by agreeing to recalibrate any change in the Chao2 bear counting method and to translocate bears from elsewhere to ensure long-term genetic diversity in the still-isolated Yellowstone bear population. Characterizing the GYE grizzly bear recovery as “a monumental ESA success story,” the petition observes that “the State of Wyoming [has] demonstrated unwavering commitment to advance the recovery of the GYE grizzly bear DPS,” highlighting the state’s significant investment of “time, effort, and money annually to protect and manage the grizzly bear population in Wyoming.” At the same time, Montana has petitioned the FWS to delist the Northern Continental Divide grizzly bear population.

Not unexpectedly, the delisting petitions have prompted concern from several quarters, reflecting the belief that the states still cannot be trusted to manage the grizzly bear. As a legal matter, delisting the Yellowstone grizzly population will remove the ESA as a formidable legal tool that overhangs federal land management decisions across the GYE and impacts how ranchers, hunters, and others interact with the bears. With delisting, the bears inhabiting Yellowstone and Grand Teton National Parks will likely be subject to state managed hunting regulations upon

---

188 Id. at 17–19. First, Wyoming proposes to amend the 2017 recovery plan by requiring a recalibration of “population metrics and mortality thresholds,” in the event that a new population estimation method is employed. Id. at 19. The Tri-State Memorandum has been amended to reflect this commitment to recalibration. Id. Second, Wyoming points to an amendment to the Tri-State Memorandum of Agreement in which the three GYE states commit to translocating “at least two grizzly bears from outside the GYE” by 2025, unless there is evidence of “migration from outside the GYE in the interim.” Id. at 18.
189 Id. at 2.
venturing beyond the park boundaries, which many bears—including Grand Teton’s famous Bear 399—regularly do in search of food or a mate. Critics of delisting fear an uptick in grizzly bear mortalities due to state managed hunting and relaxed legal protections for the bears. Indeed, a prominent group of experienced biologists, most of whom have been involved in the grizzly bear recovery effort and have previously supported delisting, including the FWS’s former grizzly bear recovery coordinator, are now adamantly opposed to state management. In a widely circulated opinion piece, they assert that recently revised state hunting laws put grizzlies at heightened risk, noting a provision that allows anyone to shoot a grizzly bear “threatening to kill a person or livestock.” They also cite Montana’s 2021 wolf hunting statutory revisions that approve the use of snares, bait, hounds, night lights, and bounty payments as particularly dangerous to grizzlies. Some people also find the prospect of a trophy grizzly bear hunt morally objectionable, believing that such a majestic, ecologically important animal should not be killed merely for sport and bragging rights.

The final outcome of this impending grizzly bear delisting controversy is uncertain. What is certain though, is that the science-based ESA legal criteria for delisting will again be at issue, not only before the FWS as it reviews Wyoming’s petition, but also in the courts once the agency has rendered its decision. This time the GYE states believe they have satisfactorily resolved the problems identified in the 2017 delisting effort, specifically in regard to long-term population viability and genetic diversity concerns. However, recent political developments, namely the revised Montana and Idaho wolf and bear hunting laws, put those commitments in question for the region’s grizzly bears. The absence of a firm commitment to meaningfully engage with the NPS to address its boundary-related hunting

---


192 Op-Ed, Prominent Scientists Push Back Against Delisting Grizzly Bears, Mountain J. (Jan. 13, 2022), https://mountainjournal.org/prominent-scientists-say-removing-grizzly-bears-from-federal-protection-in-west-is-bad-idea [https://perma.cc/5EN8-6X5A]. Significantly, the editorial is signed first by Dr. Chris Servheen, PhD, who spent 35 years overseeing the FWS’s grizzly bear recovery program, where he supported delisting the bears in accordance with sound science and public input, which the editorial contends are lacking in Montana’s revised anti-predator laws that are driven solely by political concerns. The editorial describes the signatories in these terms: “We are 35 state, federal, and tribal wildlife professionals who have worked together for more than 40 years to help recover and manage grizzly bears, wolves, and other wildlife in Montana.” Id.

193 Id. (citing S.B. 98, 2021 Leg., 67th Sess. (Mont. 2021) (codified at Mont. Code Ann. § 87-6-106(4) (2022))). The problem, according to the scientists, is that the law does not define the term “threatening,” leaving unclear exactly what constitutes such behavior by a grizzly bear, whose mere presence can be perceived as “threatening.” Id.

194 Id.; see also infra notes 264–269 and accompanying text (describing Montana’s new wolf management laws in more detail).
concerns is also problematic, given that the states have refused to consider any such buffer protection in the case of park wolves.\footnote{195} It is thus difficult not to link the fate of Yellowstone’s bears with that of the region’s wolves, and their experience under state management. Moreover, the absence of regulatory commitments to assure connectivity between the GYE grizzlies and their cousins in the Northern Continental Divide Ecosystem not only hinders genetic interchange but also belies the ESA’s ecosystem conservation purpose and related prior commitments.\footnote{196} For Yellowstone’s grizzly bears, it remains to be seen whether the states’ efforts are yet sufficient to meet the ESA’s population, habitat, and regulatory mechanism delisting requirements.

IV. Wolf Recovery and State Management

A. Early History

Although western travelers regularly encountered wolves during the 19th century, the animal was mostly gone from the landscape by the early 20th century. The Lewis and Clark Expedition reported the presence of wolves as the group made its way westward,\footnote{197} an observation repeated by later travelers.\footnote{198} As with the grizzly bear, once settlers arrived, efforts began to eliminate wolves, which were viewed as a major predatory threat to livestock and prized wildlife.\footnote{199} Teddy Roosevelt did not help the wolf’s image when he labeled it “the beast of waste and destruction.”\footnote{200} After the federal government joined state and local extermination efforts, the wolf was doomed. Even the NPS participated in the eradication campaign, convinced that wolves would decimate park elk, deer, bison, and other “good” animals.\footnote{201} By the late 1920s, the last wolves were eliminated from Yellowstone, and were soon eradicated across the surrounding states as well.

As time passed, however, scientists began to reevaluate the wolf and its ecological role, eventually restoring wolves to a semblance of scientific respectability. First, the NPS reversed its stance on predators and began protecting them.\footnote{202} Then,

\footnote{195}{See infra notes 303–307 and accompanying text.}
\footnote{196}{16 U.S.C. § 1531(b); see also infra notes 293–294 and accompanying text (describing the need for linkage between the two grizzly populations).}
\footnote{197}{See Journals of Lewis and Clark, supra note 117, at 103, 121.}
\footnote{198}{See, e.g., George Catlin, Letters and Notes on the Manners, Customs and Condition of the North American Indians 254 (1842).}
\footnote{199}{See Bruce Hampton, The Great American Wolf 6–8 (1997); Barry Lopez, Of Wolves and Men 171–184 (1978). See generally War Against the Wolf: America’s Campaign to Exterminate the Wolf 53–132 (Rick McIntyre ed., 1995) [hereinafter War Against the Wolf] (documenting the efforts of frontier-era “wolfers” hired to exterminate wolves, typically with poison, and describing the early bounty programs in the West).}
\footnote{200}{Theodore Roosevelt, Wolves and Wolf-Hounds, in War Against the Wolf, supra note 199, at 108, 108.}
\footnote{201}{Sellars, supra note 123, at 24, 73.}
\footnote{202}{See Matthiessen, supra note 66, at 198.}
renowned biologist Aldo Leopold proposed reintroducing the absent wolf to Yellowstone. Nonetheless, the wolf remained an unwelcome predator, subject to being shot on sight under most state legal regimes.

B. Yellowstone Wolf Reintroduction

Following passage of the ESA in 1973, the FWS soon added wolves to the federal endangered species list, assuming management responsibility for the few wolves remaining in the upper Midwest as well as a legal obligation to restore absent wolves elsewhere. Unsurprisingly, the FWS’s statutorily mandated Wolf Recovery Plan met immediate opposition from several states along with ranchers, hunters, and various industrial users of the public lands. A 1982 amendment to the ESA known as “section 10(j),” opened the door for restoring wolves as an “experimental population” in some western locations, including Yellowstone National Park. Conceived as a means to facilitate controversial species restorations, section 10(j) empowered the FWS to reintroduce extirpated species as a “nonessential experimental population,” which reduced the level of legal protection the animals would receive under the ESA. The stage was set for reintroducing wolves to Yellowstone and other remote wilderness locations in the northern Rockies.

What ensued was a political and legal donnybrook with scientific and economic overtones. Invoking section 10(j), the FWS joined by the NPS, proposed reintroducing wolves to Yellowstone and elsewhere in Montana and Idaho. Wolf proponents extolled the proposal, citing the ecological benefits wolves would bring

204 These scientists included Adolph Murie, Sigurd Olson, and Paul Errington, whose wolf studies help restore the wolf to some level of biological respectability. See Sigurd F. Olson, A Study of Predator Relationships with Particular Reference to the Wolf, in War Against the Wolf, supra note 199, at 312, 312–18; Adolph Murie, The Wolves of Mount McKinley, in War Against the Wolf, supra note 199, at 318, 318–21; Hampton, supra note 199, at 152, 155–57.
207 16 U.S.C. § 1539(j). An experimental population can be reintroduced into “unoccupied habitat,” and it must be “wholly separate geographically” from non-experimental populations of the species. See Eric T. Freyfogle et al., Wildlife Law: A Primer, supra note 9, at 281–82. The experimental population is afforded fewer protections “as a way of softening local opposition to the reintroduction effort.” Id. at 81.
208 16 U.S.C. § 1539(j)(2)(B), (C). Upon determining that a species poised for reintroduction is not “essential to the continued existence of an endangered or threatened species,” the Secretary is required to treat the species as one proposed to be listed, which eliminates the ESA’s section 7 consultation requirements.
and the unique wildlife viewing opportunities that park visitors would enjoy.\textsuperscript{210} Opponents argued that wolves would depredate mercilessly on domestic livestock and decimate big game herds, costing ranchers dearly, and denying hunters a valued recreational experience.\textsuperscript{211} They also lamented the federal regulatory limitations on land use that would follow,\textsuperscript{212} notwithstanding the reduced legal protections available under section 10(j). While the tristate GYE congressional delegations were able to delay the wolf reintroduction proposal,\textsuperscript{213} Congress eventually directed the Secretary of Interior to prepare an environmental impact statement (EIS) on the reintroduction of wolves to Yellowstone National Park and central Idaho.\textsuperscript{214} Meanwhile, wolves quietly returned from Canada to Glacier National Park, where they enjoyed the full protection of the ESA.\textsuperscript{215}

In 1994, the FWS released its final EIS, which proposed to reintroduce Canadian wolves under section 10(j) to Yellowstone and central Idaho by designating them a “nonessential experimental population.”\textsuperscript{216} This designation effectively eliminated the possibility of additional land use restrictions. The wolves would be considered recovered once three separate wolf populations with 10 breeding pairs inhabited the recovery area for three consecutive years, genetic interchange occurred between the three wolf subpopulations, and the three states had adopted federally acceptable wolf management plans. Once the plan was approved, the Wyoming Farm Bureau sued federal officials in an effort to block the reintroduction. The Bureau initially prevailed in Wyoming federal district court on the argument that the reintroduction violated section 10(j), which required that the reintroduced wolves be “outside the current range of such species,” because a few wolves were reportedly present in Yellowstone.\textsuperscript{217} However, the Tenth Circuit Court of Appeals soon reversed that decision, interpreting section 10(j) to prohibit reintroduction only when a population of wolves existed, not a few solitary ones.\textsuperscript{218}

\begin{itemize}
\item \textsuperscript{210} Schullery, Searching for Yellowstone, supra note 14, at 243–44; McNamee, supra note 209, at 31–46.
\item \textsuperscript{211} See Fischer, supra note 68, at 55–58; McNamee, supra note 209, at 41–43, 48–51.
\item \textsuperscript{212} Fischer, supra note 68, at 62; see also McNamee, supra note 209, at 41–42 (describing wolf-opponents’ September 1, 1993, rally in Cody, Wyoming, prior to a public hearing on the Draft EIS to reintroduce wolves to Yellowstone).
\item \textsuperscript{213} Fischer, supra note 68, at 118–30; McNamee, supra note 209, at 33–38.
\item \textsuperscript{215} Diane Boyd, The Return of the Wolf to Montana, in War Against the Wolf, supra note 199, at 357–66; Hampton, supra note 199, at 202–03.
\item \textsuperscript{216} U.S. Fish & Wildlife Serv., The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho Final Environmental Impact Statement (1994).
\item \textsuperscript{217} Wyoming Farm Bureau Fed. v. Babbitt, 987 F. Supp. 1349, 1369 (D. Wyo. 1997). Under the ESA, an experimental population reintroduction is only permitted if the reintroduced animals are “outside the current range of such species,” and the Farm Bureau argued that this was not the case in Yellowstone where a few wolves had been sighted over the years. See 16 U.S.C. § 1539(j)(2) (A).
\item \textsuperscript{218} Wyoming Farm Bureau Fed. v. Babbitt, 199 F.3d 1224, 1233–36 (10th Cir. 2000); see also United States v. McKittrick, 142 F.3d 1170, 1173–74 (9th Cir. 1998) (similarly interpreting the § 10(j) “outside of the current range” language).
\end{itemize}
Once on the ground, the park’s wolf population grew rapidly with attendant ecological impacts. By 2001, the original 30 wolves reintroduced into Yellowstone had swelled to more than 175 animals in 18 packs due to their rapid reproduction rate, with litters averaging 7 pups annually. Scientists began observing notable changes in the park’s ecology: predator-prey dynamics were on display; elk were no longer congregating in open riparian areas; and white willows, aspen, and other vegetation were reappearing along with beavers and songbirds.\textsuperscript{219} Livestock losses were not severe, nor were big game herds noticeably depleted.\textsuperscript{220} Park visitation also increased as did tourism-related revenues, consistent with earlier projections that wolf-based tourism would generate an additional $7–10 million annually for the local economy.\textsuperscript{221} By 2007, the overall northern Rockies wolf population was estimated to exceed 1500 animals in 106 breeding pairs.\textsuperscript{222} As a result, the GYE states joined by ranchers, outfitters, and hunters were soon pressing the FWS to delist the wolves, citing their expanded presence in terms of numbers and location.

\textit{C. The Delisting Struggle}

In 2008, the FWS proceeded to remove the wolves from federal protection, but not before revising the recovery criteria—all of which triggered a court challenge from conservation groups opposed to state management. Faced with pressure from the states, the FWS revisited its original wolf recovery criteria for the three distinct wolf populations now occupying northern Montana, central Idaho, and northwestern Wyoming. Where the FWS originally required evidence of genetic interchange between the three wolf subpopulations, it now suggested, without evidence, that such interchange was unnecessary or had likely already occurred.\textsuperscript{223} Concluding that the recovery criteria were satisfied, the FWS removed the wolves


\textsuperscript{220} See Nate Blakeslee, \textit{American Wolf: A True Story of Survival and Obsession in the West} 67, 185–86 (2017).


from the endangered species list,\textsuperscript{224} essentially ignoring the fact that Wyoming’s wolf management plan classified wolves as a predatory animal throughout much of the state.

Wolf proponents promptly sued the FWS, arguing that its delisting decision violated the ESA and ignored its own recovery criteria. In \textit{Defenders of Wildlife v. Hall}, a Montana district court agreed.\textsuperscript{225} Citing the ESA’s ecosystem conservation purpose and best available science requirement, the court was unconvinced that genetic interchange between the wolf populations was no longer scientifically justified and that genetic interchange had occurred between the three subpopulations.\textsuperscript{226} Moreover, the court ruled that Wyoming’s predator-oriented plan, which relied heavily on the NPS to meet the state’s wolf population requirement, failed to ensure it could meet its requisite wolf population goals.\textsuperscript{227} The court also faulted the FWS for reversing course on both the genetic interchange requirement and on Wyoming’s plan without providing an explanation in either case—a patent administrative law violation under longstanding Supreme Court precedent requiring agencies to provide a reasoned explanation when they reverse positions or otherwise change course.\textsuperscript{228}

Perceiving Wyoming’s wolf management plan as the real problem, the FWS responded by subdividing the northern Rockies wolf population and delisting the Idaho and Montana wolves as a distinct population segment.\textsuperscript{229} Hunting then commenced in Montana and Idaho, sparking a loud public outcry from wolf advocates when four Yellowstone wolves were shot just north of the park.\textsuperscript{230} In a second lawsuit, the same Montana federal district court remained unpersuaded that the wolves had recovered. In \textit{Defenders of Wildlife v. Salazar},\textsuperscript{231} the court ruled that the agency could not legally establish these distinct, state-based subpopulation segments after treating the regional wolves as a single population.\textsuperscript{232} Though

\footnotesize
\begin{itemize}
\item \textsuperscript{224} Endangered and Threatened Wildlife and Plants; Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing this Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10514 (Feb. 27, 2008).
\item \textsuperscript{225} 565 F. Supp. 2d at 1172.
\item \textsuperscript{226} Id. at 1168–72.
\item \textsuperscript{227} Id. at 1172–75.
\item \textsuperscript{228} Id. at 1170, 1174; see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).
\item \textsuperscript{229} Endangered and Threatened Wildlife and Plants; Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (Apr. 2, 2009).
\item \textsuperscript{230} Douglas W. Smith et al., \textit{Managing Wolves in the Yellowstone Area: Balancing Goals Across Jurisdictional Boundaries}, 40 WILDLIFE SOC. BULL. 436, 440 (2016).
\item \textsuperscript{231} 729 F. Supp. 2d 1207 (D. Mont. 2010).
\item \textsuperscript{232} In arriving at this conclusion, the court relied upon the ESA’s statutory language and congressional intent as reflected in the FWS’s longstanding interpretation of the term “distinct population segment” to not allow delisting on a state-by-state basis, even as the FWS argued that it
\end{itemize}
acknowledging the FWS’s decision represented a pragmatic response to its delisting problem, the judge concluded it was “at its heart a political solution that does not comply with the ESA.” Read together, the two delisting court decisions view the northern Rockies wolf recovery initiative as a landscape-level conservation effort that requires interstate coordination to meet the ESA’s legal requirements.

Faced with these adverse court rulings, the GYE states sought congressional assistance to remove the wolves from the ESA and federal oversight. When wolf proponents proved unable to agree on a potential settlement to the delisting dispute, Congress inserted a rider in the Defense Continuing Appropriations Act for 2011, instructing the FWS to reissue the delisting rule for Montana and Idaho while also insulating it from judicial review. Returning to court, wolf advocates challenged the rider as an unconstitutional intrusion by Congress into the judicial realm, but lost because Congress possesses the authority to amend the laws it creates. The presiding federal district court judge pointedly noted, however, that politics had now carried the day: “Section 1713 sacrifices the spirit of the ESA to appease a vocal political faction.”

Wyoming officials, in an effort to relieve the state from the ESA’s strictures, turned to the Wyoming federal court, arguing that its state wolf management plan passed legal muster. The court agreed that the FWS could not force Wyoming to treat the entire state as a trophy game area, thus putting its stamp of approval on Wyoming’s plan to designate wolves as predators in 85% of the state. When the FWS responded by accepting Wyoming’s plan and delisting the state’s wolf population, conservation groups sued again, this time in a Washington, D.C. federal court. Though they obtained a favorable ruling from the district court, was now changing its interpretation, though without adequate explanation. Hence, the court was unwilling to defer to the agency’s interpretation of the statutory term. On judicial deference to an agency’s statutory interpretation, see Chevron v. Nat. Res. Def. Council, 487 U.S. 837 (1984).

233  Defenders of Wildlife, 729 F. Supp. 2d at 1228.
234  See supra notes 223–233 and accompanying text.
237  All. for the Wild Rockies v. Salazar, 672 F.3d 1170, 1175 (9th Cir. 2012), aff’d, 800 F. Supp. 2d 1123 (D. Mont. 2011).
238  All. for the Wild Rockies, 800 F. Supp. 2d at 1126.
the D.C. Circuit Court of Appeals reversed and held that the Wyoming wolf management plan met the minimum recovery goal of 100 wolves in 10 packs statewide. In addition, the court ruled that the plan adequately provided for genetic connectivity between the various northern Rockies wolf populations. With this ruling, wolves were finally delisted across the three GYE states, which have since been responsible for managing them.

D. State Wolf Management

Unsurprisingly, controversy persists over the GYE wolves and state management practices, even after the states each agreed to maintain 150 wolves and fifteen breeding wolf pairs, representing 50% more pairs than required for delisting. As planned, the three states have managed the wolves under the North American Model of Wildlife Conservation, save for Wyoming with its joint trophy-predator zone management plan. Wolves are thus hunted immediately upon leaving the two GYE national parks, a practice that has irked the NPS, park visitors, and wolf advocates. Several radio-collared wolves have been killed just beyond park boundaries, not only disrupting ongoing scientific studies but also depriving park visitors of wolf observation opportunities. Although a 2013 Montana law expressly prohibits the establishment of no hunting zones outside national parks, the state initially responded favorably when Yellowstone park officials complained about this practice by reducing its hunting quotas near the park. The state has since retreated from that position, while neither Idaho nor Wyoming altered

243. Defenders of Wildlife, 849 F.3d at 1091.


245. See supra notes 76–81 and accompanying text, for a description of the North American Model.


248. Mont. Code § 87-1-304(7) (2021). This provision was added to this statutory section in 2013, soon after wolves were delisted and management responsibility returned to Montana and Idaho. H.B. 73, 63rd Leg., 2013 Mont. Laws ch. 13, § 1, at 17–18.


their hunting practices. None of the GYE states responded positively to a proposal by scientists to establish a no-hunting, wolf sanctuary zone adjacent to the park.\textsuperscript{251} Now in control of wolves outside the GYE national parks, the states have shown little interest in coordinating wolf management with the NPS, which views wolves as a primary visitor attraction rather than as a troublesome predator or mere quarry.

By any measure, wolves have dramatically multiplied across the GYE following their 1995 reintroduction, reclaiming their ecological and historical role as apex predators while becoming a primary visitor attraction in the two national parks. Though now subject to being hunted and trapped in the three GYE states, the GYE wolf population has increased or remained relatively stable under state management. In 2020, Yellowstone officials counted 123 wolves in 9 packs within the park; four packs inhabited the park’s northern range while the other five packs roamed the park’s interior.\textsuperscript{252} The park’s wolf population, since peaking in 2003 at 174 wolves, has leveled off and typically fluctuates between 80–100 wolves.\textsuperscript{253} Outside the park, Wyoming estimated its 2020 wolf population at a minimum of 327 wolves in 44 packs; 147 wolves were in the state’s trophy game management area, 123 resided in Yellowstone, and 21 were on the Wind River Indian Reservation.\textsuperscript{254} Montana’s wolf population numbered roughly 1,177 animals statewide in 2020,\textsuperscript{255} while Idaho’s wolves were estimated at 1,556 animals statewide in 2020.\textsuperscript{256} Unlike Wyoming, where the wolves are mostly concentrated near the two GYE parks, wolves in Montana and Idaho are spread more broadly across both states.

Depredation incidents continue to stir concern among ranchers, while wolf mortality levels trouble its advocates. In 2019, depredation incidents in Montana totaled 62 cattle and 32 sheep,\textsuperscript{257} while Idaho recorded 60 cattle and 13 sheep in

\hspace{1cm} state-wildlife-commission-expands-wolf-hunting-trapping-regulations/ [https://perma.cc/BQ4V-CU47].
\textsuperscript{251} Smith et al., supra note 230, at 440–41.
\textsuperscript{253} Id. at 2, 4.
\textsuperscript{257} Montana 2020 Gray Wolf Report, supra note 255, at 6. The level of livestock depredation by wolves has remained constant for more than a decade. Id.
2016,258 and Wyoming reported 51 cattle and 12 sheep killed in 2020.259 Although compensation is available to cover livestock depredation losses,260 ranchers assert that it does not cover their actual costs.261 Members of the hunting community also continue to lament the impact wolves are having on big game numbers, leaving them with fewer elk and other animals to pursue. In 2019, Montana reported 298 wolf mortalities while Wyoming reported 119 wolf mortalities in 2020 through hunting, trapping, government removals, or other causes.262 Idaho Fish and Game also reported 583 wolves killed by human causes between August 2019 and August 2020 although the overall population remained substantially the same.263

E. The 2021 State Wolf Hunting Bills

In 2021, following the FWS’s decision to remove wolves nationally from the list of endangered species,264 the Montana and Idaho state legislatures unleashed a flurry of bills profoundly altering each state’s wolf hunting and management laws. Montana passed four such bills during its legislative session: one allows trappers to use snares on wolves;265 another extends the trapping season by four weeks;266 a third provides that hunters and trappers may be reimbursed for “costs incurred related to the hunting or trapping of wolves;”267 and the fourth authorizes the Fish and Wildlife Commission to allow individual hunters to kill an unlimited number of wolves subject to area quotas and to use spotlights for night hunting, a practice otherwise outlawed for big game hunting.268 However, the Fish and Wildlife


262 See Montana 2020 Gray Wolf Report, supra note 255, at 16 (reporting that 298 wolves were killed by hunters, while 72 wolves were removed for livestock depredations); Wyoming 2020 Wolf Report, supra note 254, at 5 (reporting that 87% of the state’s wolf mortalities were human-caused; 31 wolves were killed by hunters and another 27 were removed for conflict control).


Commission only authorized an initial harvest of 450 wolves in its 2021 hunting regulations, and it has also limited night hunting with spotlights to privately owned lands and similarly limited the use of snares to private lands.\(^\text{269}\)

The Idaho legislature, over objections from the Idaho Fish and Game Commission, likewise authorized the virtually unlimited killing of wolves, subject only to maintaining the required minimum of 150 wolves and 15 breeding pairs.\(^\text{270}\) The bill sets no limit on the number of wolves individual hunters can kill, approves year-round wolf trapping on private lands, empowers the state’s Wolf Depredation Control Board to hire private contractors to kill wolves, and approves the use of all-terrain vehicles, snowmobiles, and even private vehicles for wolf hunting.\(^\text{271}\) Wyoming notably did not alter its wolf-hunting policies, perhaps because the number of wolves in the state hovers near the state’s minimum population commitment in its delisting conservation agreement.\(^\text{272}\) With only a modest number of wolves in Wyoming, and with Montana and Idaho ramping up wolf hunting and trapping activity to reduce their wolf populations to the bare minimum number required under the delisting standards, the margin for error may narrow to the point that the FWS may be compelled to relist the wolves in the future.\(^\text{273}\)

Once more, wolf advocates have returned to the courts and petitioned the FWS in related efforts to safeguard the wolves and to relist them. Following the FWS’s 2020 decision to delist wolves nationwide,\(^\text{274}\) conservation groups filed separate lawsuits in a northern California federal court, arguing that the FWS was illegally ignoring its own distinct population segment rules as well as its own previous position by now asserting that none of the wolf populations spreading outside the northern Rockies and Upper Midwest constituted a distinct population segment entitled to federal protection.\(^\text{275}\) After consolidating the cases, the court agreed with

\(^{269}\) See Scott, supra note 250.


\(^{272}\) Mike Koshmrl, Numbers About Flat Within Wyoming’s Constrained Wolf Range, JACKSON HOLE NEWS & GUIDE (May 12, 2021), https://www.jhnewsandguide.com/news/environmental/numbers-about-flat-within-wyomings-constrained-wolf-range/article_b5a525e3-0db0-5467-a1eb-ae23d6c24643.html [https://perma.cc/2UAN-22YD].

\(^{273}\) See infra note 280 and accompanying text (explaining that the FWS is currently reviewing the status of wolves in the GYE states).

\(^{274}\) See Removing the Gray Wolf, 85 Fed. Reg. at 69778.

that argument, ruling that the FWS could not simply lump in the northern Rockies and Great Lakes core wolf populations with the other wolves without assessing the impacts of delisting on the remnant wolves.276 In response, the FWS has relisted wolves across the nation, except those in the GYE and Upper Midwest states.277

Separately, conservation groups requested the FWS to relist the northern Rockies distinct population segment of wolves or to recognize and relist a new western distinct population segment of wolves derived from the agency’s delisting rule.278 These groups support the relisting petitions by pointing to the new Montana and Idaho wolf laws, contending that the revised level and methods of permitted wolf hunting and management constitute overutilization of the species and reflects the absence of adequate regulatory mechanisms as set forth in the ESA listing criteria.279 Plainly troubled by the Montana and Idaho laws, the FWS has announced a new status review for the tristate wolves, which could lead to their relisting.280

Litigation is also pending against the new Idaho and Montana wolf hunting laws. A principal argument in this litigation entwines the GYE region’s wolves and grizzly bears. Wolf advocates, invoking the ESA provision outlawing the “take” of any listed species, argue that the Idaho statutory provision authorizing the use of snares to trap wolves will inevitably “take” some of the region’s grizzly bears by inadvertently catching them in the snares.281 This argument finds support in

---

276 Defenders of Wildlife v. U.S. Fish and Wildlife Service, Nos. 21-cv-00344, 21-cv-00349, 21-cv-00561, 2022 WL 499838, at *6–7 (N.D. Cal. 2022). In reaching its decision, the court relied heavily upon the D.C. Circuit’s decision in Humane Society v. Zinke, 865 F.3d 585 (D.C. Cir. 2017). Notably, the court did not consider whether the Wisconsin wolf management plans met the ESA’s adequate regulatory mechanisms requirement to sustain the FWS’s wolf delisting decision following Wisconsin’s high mortality February 2021 wolf hunt, because that information was not part of the administrative record. Defenders of Wildlife, 2022 WL 499838, at *12 n.12.


281 Ctr. for Biological Diversity v. Little, Complaint for Declaratory & Injunctive Relief, no. 2:21-cv-00479-DCN (D. Idaho, Dec. 6, 2021); Letter from Ben Scrimshaw, Assoc. Att’y, Earthjustice, to Greg Gianforte, Governor of Mont., Hank Worsech, Dir. of Mont. Fish Wildlife
a related case involving the federally-protected Canada lynx, where a Minnesota federal court found that the state's trapping rules violated section 9 of the ESA, because “a risk of taking exists [even] if trappers comply with all applicable laws and regulations in place.”

In addition, wolf advocates have urged the Department of the Interior to block the $18 million due to Idaho under the Pittman-Robertson Act, asserting that the state's efforts to radically reduce the wolf population violates the statute's wildlife conservation obligations.

Although state wolf population numbers substantially exceed the FWS's original recovery targets, state management continues to generate intense controversy. Wolf numbers in the three GYE states are overall running more than three times the agreed upon recovery levels, indicating that the states are maintaining a stable wolf population. Nonetheless, a notable point of contention involves the popular Yellowstone National Park wolves that are subject to being shot by hunters upon leaving the park. In fact, 23 Yellowstone wolves—nearly a quarter of the park's wolf population—were killed in Montana outside the park during the early months of the 2022 hunting season. Troubled by the mounting losses, Yellowstone's superintendent implored Montana's governor to curb hunting near the park border but was rebuffed. As public outrage grew, however, the state relented and closed the...
hunting units adjacent to the park.\(^{287}\) The event starkly demonstrates the heavy toll the new wolf hunting laws can exact on the park’s wolf population, even as wolf hunting opportunities are readily available elsewhere in the three states.

The GYE wolf restoration saga continues to vacillate between politics, science, and law. Political maneuvering initially stalled the science-driven wolf restoration effort, but the ESA and its section 10(j) experimental population provision eventually paved the way for the successful northern Rockies wolf recovery initiative. Once the wolves were on the ground, the science-based ESA and the courts insulated them from state efforts to prematurely return management from the FWS to the states. But as wolf numbers mounted along with depredation incidents, local political pressure proved irresistible. Congress intervened by overriding the federal court rulings in the case of Montana and Idaho, which then compelled the FWS to delist those wolves.\(^{288}\) Nonetheless, the judicial rulings interpreting the ESA to require the FWS to ensure connectivity between the three northern Rockies wolf populations stands as a powerful precedent endorsing a landscape-level approach to wolf management.\(^{289}\) Moreover, the need for coordination between the NPS and the states—both of whom are now responsible for maintaining the GYE wolf population at the risk of relisting—is more apparent than ever. However, the states have shown little willingness to mitigate wolf hunting on Yellowstone’s border, with Montana even adopting legislation that flatly rejects the park’s concerns.\(^{290}\) The recent anti-wolf legislation in Montana and Idaho suggests that politics has again taken center stage in the ongoing controversy over wolf management, though science and law may yet have the final word pending the outcome of the FWS’s status review and the related litigation.

V. Toward Landscape Conservation and Enhanced Coordination

The number of grizzly bears and wolves roaming the GYE represent one of the nation’s most prominent wildlife restoration achievements and is a defining symbol of the region’s wilderness character. As apex predators, grizzlies and wolves play a vital role in shaping the regional ecosystem while also serving as a principal attraction for park visitors. At the same time, these controversial animals present perhaps the region’s most difficult and politically fraught wildlife management challenge. Although both species have enjoyed federal protection under the ESA, only the grizzly bear remains subject solely to federal management. Having been delisted, the region’s wolves are now under state management outside the two GYE


\(^{288}\) See supra notes 236–238 and accompanying text.

\(^{289}\) See supra notes 109–115 and accompanying text (describing and defining landscape conservation).

\(^{290}\) See supra notes 247–251 and accompanying text.
parks, where they face growing hunting pressures. The three GYE states are actively seeking responsibility for the grizzly bear, a prospect that sets off alarm bells within much of the conservation community. Although grizzlies and wolves are—and will remain—protected inside Yellowstone and Grand Teton National Parks, the states assume responsibility for them once they are delisted (as the wolf is) and venture outside the boundary line. Given how the GYE states are approaching the wolf, there is mounting concern as to whether the wolf recovery will endure and whether the states can be trusted with the grizzly bear.

A. The Need for Meaningful Coordination at the Landscape Scale

Neither the parks nor the states can ignore the indisputable fact that grizzlies and wolves roam widely across the landscape without regard to the region’s legally imposed boundaries. Consequently, the GYE states and national parks are entwined, whether they like it or not. They each have an undeniable common interest in conserving both animals, having already invested heavily in the recovery efforts for them. The NPS is guided and bound by its statutory mission of preserving nature, including native wildlife, and providing visitors with an opportunity to view and enjoy wild animals. The states’ principal interests evolve around maintaining their traditional wildlife management role without federal interference, safeguarding their residents, and providing hunting opportunities. To secure these diverse interests, given the biological realities of grizzly bear and wolf behavior, as well as the intense controversy over hunting them, the GYE states and the NPS should focus their efforts on two interrelated aspects of wildlife conservation: 1) a landscape conservation approach to managing these wide-ranging species; and 2) meaningful coordination among themselves in that management effort. Anything less jeopardizes their respective interests and investments in the ongoing grizzly bear and wolf recovery efforts.

Today, both species are found on federal, state, tribal, and private lands in three different states, subjecting them to various jurisdictional authorities. Driven by the ESA and its express ecosystem conservation purpose, the recovery effort for both species has required an ecosystem-level approach that disregards conventional boundary lines and seeks to connect the discrete population segments for each species. In the case of the grizzly bear, this ongoing approach aims to link the Yellowstone and Northern Continental Divide grizzly bear populations in order to

---

291 54 U.S.C. § 100101(a) (stating the purpose of the NPS is “to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wildlife”).

292 See generally Wyo. Fish & Game Dep’t, FORGING THE FUTURE: STRATEGIC PLAN, https://wgfd.wyo.gov/WGFD/media/content/PDF/About%20Us/WGFD_StrategicPlan.pdf [https://perma.cc/3QC8-8TQJ] (last visited May 4, 2022) (stating Wyoming Game and Fish “is dedicated to conserving, enhancing and protecting Wyoming’s exceptional fish and wildlife resources and the habitats that support them... [and] will work with and for the public to provide a wide array of fish and wildlife experiences” and that wild animals “are woven into the fabric of the state...”).

293 16 U.S.C. § 1531(b) (stating the “purposes of this chapter [ESA] are to provide a means whereby the ecosystems which endangered and threatened species depend may be conserved...”).
ensure genetic diversity in the isolated Yellowstone bears—a landscape-scale goal acknowledged by the FWS as well as the federal courts.\footnote{Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 82 Fed. Reg. 30502, 30536 (June 30, 2017); Crow Indian Tribe v. United States, 343 F. Supp. 3d 999, 1018–21 (D. Mont. 2018); Crow Indian Tribe v. United States, 965 F.3d 662, 679 (9th Cir. 2020).} For wolves, the original recovery goal sought to connect the Yellowstone wolves with the reintroduced central Idaho wolves as well as the northern Montana wolves for genetic diversity purposes. According to the Montana district court, the ESA’s ecosystem conservation and best available science provisions required no less, as reflected in the recovery plan’s connectivity commitment.\footnote{Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1168–72 (D. Mont. 2008); see also supra notes 223–228 and accompanying text.} Although the ESA no longer applies to the GYE wolves, a state-driven landscape conservation approach seems essential to avoid the prospect of relisting the wolves, since slippage by one state will call into question the wolves’ status across the region.\footnote{See supra notes 244–245 and accompanying text.} And with the GYE grizzlies still protected by the ESA, nothing short of a landscape conservation approach is essential for their delisting and long term survival.\footnote{Crow Indian Tribe, 965 F.3d at 680; cf. Humane Society v. Zinke, 865 F.3d 585, 602–03 (D.C. Cir. 2017) (concluding that the 2011 rule delisting the Western Great Lakes population segment of gray wolves was arbitrary and capricious because it failed to consider the impacts on remnant wolf populations, even though these remnant populations were not geographically concentrated).} As an ecological and legal matter, it is simply not enough to retain a grizzly or wolf population only within Yellowstone and Grand Teton National Parks.

Sustaining a landscape scale approach to grizzly bear and wolf management will require an ongoing and enhanced level of coordination between the responsible federal and state agencies. Significantly, the ESA-driven grizzly bear recovery effort has engendered extensive interagency cooperation. As noted, the Interagency Grizzly Bear Committee brought together representatives from the various involved federal, state, and tribal agencies, who have developed and overseen the grizzly bear management strategy across the northern Rockies; a separate, equally representative Yellowstone Ecosystem Subcommittee has focused intensively on the GYE bear recovery effort.\footnote{See supra notes 175–180 and accompanying text.} The FWS’s 2017 grizzly bear delisting proposal contemplated a new Yellowstone Grizzly Bear Coordinating Committee with similar membership to oversee future bear management, research activities, and financial needs.\footnote{82 Fed. Reg. at 30502, 30508, 30596–30618.} Other instances of federal-state coordination are evident in the GYE, perhaps most notably in establishing the Path of the Pronghorn migration corridor in western Wyoming.\footnote{See Keiter, The Greater Yellowstone Ecosystem Revisited, supra note 1, at 95–96 (describing the Path of the Pronghorn interagency project designed to safeguard a 200-mile seasonal migration corridor).} However, the results are not encouraging in the...
case of the Interagency Bison Management Plan Group, given the ongoing level of conflict over Yellowstone’s seasonally migratory bison. The states have similarly not been consistently cooperative with federal officials over grizzly bear recovery and delisting.

State management of the region’s wolves following delisting raises serious doubts about their commitment to meaningful collaboration, which has implications for the GYE grizzly bears should they be delisted. At the outset of the federal wolf recovery effort, the states consistently resisted re-introduction, with Idaho even refusing to participate in wolf management once the animals arrived. Immediately upon delisting, the three GYE states established aggressive hunting policies for wolves and largely ignored requests from the NPS to limit hunting activity around the boundary. As a result, several radio-collared park wolves have been killed, not only impacting ongoing scientific studies with management implications, but also reducing wolf viewing opportunities for park visitors and prompting public backlash. Montana has gone so far as to statutorily prohibit its state wildlife commission from establishing no hunting zones for wolves adjacent to the state’s national parks. All three GYE states have been unreceptive to continued requests from the NPS and others to temper wolf hunting quotas on adjacent lands. Wyoming has persisted in asserting jurisdictional authority over inholdings within Grand Teton National Park, effectively opening these lands for state-sanctioned wolf hunting. Given the difference between Wyoming’s wolf management plan with its far-flung, shoot-on-sight predator zone designation and the more conventional Montana and Idaho wolf management plans, it is evident that the states did not coordinate among themselves in crafting their post-delisting wolf management policies. Simply put, the absence of meaningful federal-state coordination, or consistent coordination among the three states, undermines the notion of a coordinated, landscape conservation scale approach to wolf management in the days ahead.

What may await the GYE grizzly bears should they be delisted and returned from federal to state management as requested by the three GYE states? The signals regarding state management are problematic in the aftermath of Wyoming’s ill-

301 Id. at 74–78.
302 See supra Parts III.B, III.C and accompanying text.
304 See supra notes 244–251 and accompanying text.
305 See supra note 248 and accompanying text.
306 See supra notes 248–251 and accompanying text (noting that Montana initially responded favorably to Yellowstone’s request to limit wolf hunting on the park’s borderlands, but the state soon reversed course).
307 Defenders of Wildlife v. Everson, 984 F.3d 918, 923 (10th Cir. 2020); see also Keiter, The Greater Yellowstone Ecosystem Revisited, supra note 1, at 46–48.
advised attempt in 2017 to allow 22 bears to be shot by hunters.\textsuperscript{308} The fact that the Wyoming legislature, after the FWS’s 2017 delisting decision was enjoined, enacted a patently unconstitutional law authorizing grizzly hunting despite the bear’s federally protected status is troubling, given the legislature’s role in state wildlife management matters. Recent Montana legislation allowing anyone to kill a grizzly bear “threatening to kill a person or livestock” without further definition is likewise troubling, as is the new law limiting the relocation of captured bears.\textsuperscript{309} Further, the Forest Service’s decision to reopen livestock grazing allotments in Wyoming’s Upper Green River country despite a long history of grizzly-cattle depredation problems may be a harbinger of more such decisions and conflicts across the GYE once the bear is no longer federally protected, and that could portend trouble for grizzly bears.\textsuperscript{310}

Nonetheless, Wyoming’s delisting petition argues that the states have now addressed the legal shortcomings identified by the courts. Based upon the 2021 tristate MOA, the states continue to coordinate among themselves by agreeing to divide grizzly mortality quotas by state, to translocate bears if necessary to meet genetic diversity concerns, and to recalibration following any change in the bear counting method.\textsuperscript{311} But there is little evidence that the states are prepared to coordinate at the federal level. While the MOA expresses a willingness to “confer” with the NPS and Forest Service, and to invite them to annual quota-setting meetings, the states have not otherwise acknowledged federal interests, making no mention of grizzly hunting adjacent to the GYE national parks. Although Wyoming agreed to prohibit grizzly hunting outside Grand Teton National Park following the 2017 delisting, it made no such commitment regarding hunting outside Yellowstone, where considerably more bears are at risk.\textsuperscript{312} In addition, the MOA does not address connectivity between the Yellowstone and Northern Continental Divide grizzly populations, basically ignoring the need for landscape-level planning and management.

Moreover, the experience of the wolves post-delisting does not bode well for the GYE grizzly bears should they be delisted. As noted, Montana and Idaho have revised their wolf hunting laws to approve an array of ethically questionable hunting and trapping methods in order to rid themselves of as many wolves as

\textsuperscript{308} See supra notes 154–160 and accompanying text.


\textsuperscript{310} See supra note 171 and accompanying text.

\textsuperscript{311} Based upon Wyoming’s grizzly bear delisting petition, the states seem intent on recalibration, which would boost the size of the grizzly bear population, not only making more bears available to be hunted but also boosting trophy hunting license revenues. Wyoming Grizzly Delisting Petition, supra note 186, at 18–19.

\textsuperscript{312} Keiter, The Greater Yellowstone Ecosystem Revisited, supra note 1, at 57 n.217. As a practical matter, much of the land surrounding Yellowstone in Wyoming is managed by the Forest Service as wilderness; it is far from human settlements where most human-bear conflicts occur, thus reducing the need to eliminate bears. Id. at 9.
possible within their delisting commitments. The expanded use of snares to trap wolves presents an obvious danger to Montana’s grizzlies that seemingly violates the ESA’s prohibition on “taking” protected animals. These aggressive wolf hunting laws have prompted a group of experienced bear biologists to publicly voice their objection to grizzly bear delisting, fearing similar practices may be applied to the bears once the states assume management control. Notwithstanding the tristate MOA and its grizzly bear management commitments, nothing prevents the Montana or Idaho legislatures from overriding these commitments, either in whole or in part. The absence of any effort by the GYE states to undertake a coordinated, landscape-scale planning approach to wolf management calls into question their long-term commitment to any such approach with grizzly management. Although the FWS retains the legal authority to relist grizzly bears should state actions imperil the species, such a decision would be politically fraught given the torturous path that grizzly recovery (including previous unsuccessful delisting efforts) has followed. Of course, the courts may prove willing to intervene once again under the ESA on behalf of the grizzlies.

B. Related Policy and Political Considerations

In any event, political considerations are inherent in the ongoing controversy over grizzly bear and wolf management—a reality evident when Congress intervened in the wolf delisting controversy. Beyond science and law, economic considerations as well as social and ethical values have played a role in these issues and will continue doing so. Do the states and affected communities derive a greater economic return from the two GYE national parks and the presence of grizzlies and wolves for visitors to enjoy, or does state regulated hunting of these animals bring a greater economic return? Yellowstone and Grand Teton National Parks jointly generated more than $1.04 billion in visitor spending in 2020; Wyoming derived $850 million statewide from its various national park sites, while Montana derived $445 million statewide from its national park sites. In Montana, hunting expenditures by nonresidents, including guide and outfitter services, hotel, and other travel-related expenditures, appears to have generated roughly $200 million statewide in 2017. In Wyoming, a state Game and Fish Department report indicates that wildlife viewing generated $365 million for local economies across

---

313 See supra notes 281–284 and accompanying text.
314 See supra notes 192–194 and accompanying text.
315 See Greater Yellowstone Coal. v. Servheen, 665 F.3d 1015, 1029 (9th Cir. 2011).
316 See id. at 1029 (rejecting “the future possibility of relisting a species . . . as a reasonable justification for delisting”).
317 See supra notes 235–238 and accompanying text.
the state in 2016, while hunting accounted for $206 million. In short, the limited information available strongly suggests that the economic return from national park visitation and wildlife viewing notably outstrips guiding and hunting revenues. Which, in turn, suggests that limitations on hunting wolves and grizzlies near the parks should benefit national park visitor revenues without significantly impacting hunting-related revenues.

Because bears and wolves are expensive to manage, the states require adequate financial resources to do so responsibly. Both animals already generate significant economic returns in the form of park visitor expenditures, guide service revenues, and related expenditures. Perhaps some of these dollars might be captured to support state management expenses other than relying upon trophy license fees. An intriguing recent proposal suggests charging Yellowstone visitors a wildlife conservation fee in addition to the entrance fee, which would then be dispersed by the NPS to the adjoining states to help cover wildlife management costs attributed to elk and other migratory animals roaming beyond park boundaries and thus subject to state management. The proposal would be more attractive if it were revised to condition state receipt of these fee revenues on the states imposing hunting limitations on grizzly bears and wolves adjacent to national park lands. Or Congress could directly appropriate funds to support state grizzly and wolf management outside the parks, conditioning the funding on the states adopting boundary-based hunting restrictions and specified interagency coordination obligations at a landscape scale.

[https://perma.cc/FYK2-ZE3E]. The figures in the text are derived by multiplying the total economic impact of visitors hiring an outfitter ($791 million) by 24%, which represents the percent of total outfitter revenue ($230 million) derived from hunting clients ($55 million). Id. at 14, 19. Though this methodology provides only a rough estimate of visitor spending on hunting, it confirms that this amount is significantly less than national park visitor spending in Montana and Yellowstone. Of course, Montana residents also spend money on hunting, so the overall figure for hunting-related expenditures will go higher but will still fall considerably short of the national park visitor expenditure figures.


See infra notes 75–89 and accompanying text.

In the GYE, social values reflect the transitional changes occurring across the region due to rapid population growth and changing economic priorities. The issue of social values is therefore regularly framed in terms of national versus local values or “newcomers” versus “old timers,” which is often translated into “Old West” and “New West” terminology. However, framed, the underlying assumption is that longtime residents view the region’s lands and wildlife as a commodity to be put to human use while newcomers see them as amenities to be protected. In any event, it would blink reality not to acknowledge the overall importance of Yellowstone and Grand Teton National Parks. Yellowstone is not only the world’s first national park, but a recognized international leader in wildlife conservation and restoration, as manifest in the grizzly and wolf recovery initiatives. And the two GYE national parks are dominant regional economic engines, with their wildlife and scenery representing major visitor attractions. By any reasonable measure, Yellowstone’s worldwide reputation as a wildlife sanctuary outweighs the GYE states’ interest in wolf and grizzly bear hunting proximate to the parks for the benefit of a few individuals.

As an ethical matter, some object to hunting on principle, others find trophy hunting problematic, and yet others endorse only fair chase hunting practices, while many hunters view their sport in simply recreational or utilitarian terms. Though there may be no ready middle ground between these positions, mandating fair chase practices and limiting hunting proximate to the GYE national parks would address several of these concerns. At a minimum, economic, social, and ethical policy considerations support a more nuanced approach to hunting as well as a more meaningful degree of federal-state coordination at the landscape scale that gives appropriate weight to the interests at play.

As the debate festers over state management and hunting, alternative approaches to grizzly and wolf conservation may merit further consideration. One option would be for the FWS to address hunting and coordination in any future grizzly bear delisting rule, ensuring the Interior Secretary (or the NPS) an explicit role and defined authority alongside the states in setting hunting regulations. Another

---

324 See Keiter, The Greater Yellowstone Ecosystem Revisited, supra note 1, at 13–21.


326 Id.

327 Of course, problem bears will need to be addressed, including those predating on livestock, as is the case in Wyoming’s Upper Green River area. See supra notes 171, 310 and accompanying text. Hence, some grizzly hunting opportunities removed from the national parks may be advisable to promote social tolerance for the presence of bears among local residents.


329 The ESA provides that after a species has been delisted, the Secretary shall collaborate with “the states to monitor [the species] effectively for not less than five years,” and instructs the Secretary to “make prompt use” of her authority “to prevent a significant risk to the wellbeing of any such recovered species.” 16 U.S.C. § 1533(g)(1), (g)(2). The FWS interprets the term “collaboration”
administrative option, though one that could evoke a political reaction, would more directly involve the Forest Service on whose lands most hunting takes place in the GYE. Under FLPMA, the Secretary of Agriculture has the authority to designate places or periods of time when hunting is not permitted on national forest lands “for reasons of public safety, administration or compliance with provisions of applicable law,” a power that might be invoked to constrain grizzly and wolf hunting adjacent to the two GYE national parks.\(^\text{330}\) Given the high profile nature of the grizzly bear recovery effort, the time may come to seek congressional intervention in the form of a Grizzly Bear Protection Act. Drawing upon the Bald and Golden Eagle Act as a model,\(^\text{331}\) such an act might mandate landscape-level management, meaningful federal-state coordination, and regulate the taking of grizzly bears by giving the Secretary of Interior a defined permitting role that would limit takings only for specific reasons, such as protecting human safety or imperiled livestock. To be sure, it is hard to imagine Congress passing such legislation absent the (unlikely) assent of the GYE congressional delegations, but the introduction of such an act may prompt improvements in state-federal coordination over the GYE grizzly bears, and perhaps the region’s wolves as well.

**VI. Conclusion**

The controversy over grizzly bear and wolf management in the GYE shows little sign of abating any time soon. Federal-state tensions have been rife since grizzlies and wolves were listed under the ESA, and management responsibility transferred from the three GYE states to federal officials. While wolves are now back under state management outside the two parks, grizzly bears remain solely in federal hands, and recent efforts to return their management to the states have failed under existing law, further roiling relations within the region. The level of controversy over state management of these charismatic species is likely to only increase in the wake of recent state legislation not only accelerating wolf hunting

---

\(^{330}\) 43 U.S.C. § 1732(b). The statutory term “administration” appears to give the Forest Service considerable discretion in determining when to intervene in state hunting policies and should permit intervention in instances where the states insist on hunting adjacent to the region’s national parks contrary to the sister federal agency Park Service’s wildlife conservation mission. However, the Forest Service would be statutorily obligated to consult with the states before taking such action, id., which would likely prompt political pushback. Further, the courts have refused to compel the Secretary to take such action. Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1250 (D.C. Cir. 1980). See supra notes 33–34 and accompanying text, for further discussion of this statutory provision.

\(^{331}\) 16 U.S.C. §§ 668–668d.
across Montana and Idaho, but also authorizing questionable hunting practices. The fact that Yellowstone National Park has played the major role in the recovery of both species, that park visitors put a premium on viewing grizzlies and wolves, and that the parks account for a significant share of local economic activity makes clear that the interests of the GYE national parks cannot—and should not—be ignored in future management decisions.

Neither grizzlies nor wolves will stay within the parks, yet that biological fact alone should not immediately subject them to being shot upon crossing the boundary line, given the enormous federal-state effort that has gone into recovering both animals. While it may not be possible to meet everyone’s concerns over the GYE grizzlies and wolves, a joint commitment between the responsible sovereigns to meaningful coordination, at a landscape scale, with constraints on hunting these animals adjacent to the national parks, offers a viable path forward. It is an approach that comports with scientific realities and legal standards in the GYE’s jurisdictionary complex environment, and one that recognizes Yellowstone’s renowned leadership role in wildlife conservation as well as state, local, and visitor interests. Absent a meaningful collaborative relationship between the GYE sovereigns over grizzly and wolf management, federal jurisdictional authority will inevitably trump state authority to ensure the continued survival and recovery of both species.