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ARTICLE

UNBEARABLE? BITTERROOT GRIZZLY BEAR REINTRODUCTION & THE GEORGE W. BUSH ADMINISTRATION

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In the early 1990s, a unique coalition of environmentalists, labor unions, timber industry executives and wildlife biologists put aside their philosophical differences to craft a plan to reintroduce the grizzly bear to the remote wilderness mountains of the Bitterroot Ecosystem along the Idaho/Montana border. They drafted a plan that called for the creation of a Citizen Management Committee, a locally-controlled, citizen driven management authority to oversee the day-to-day management of the reintroduced bears. The Citizen Management Committee was heralded as a success across the country and could have ushered in a new era of environmental politics, but for the 2000 Presidential election. This article discusses the collaborative approach used to formulate the grizzly bear plan, explores why it failed to win the support of the state of Idaho and the Bush Administration, and seeks answers to the future of species reintroduction under the Bush Doctrine.

I. INTRODUCTION

With America focused on the Bush Administration's war on terrorism and Middle East policy, many of us have forgotten about the issues that captured our minds and imaginations in the pre-September 11th world. While domestic policy has seemingly taken a backseat to America's foreign relations and the diversion of funds away from traditional domestic programs and towards homeland defense, the Bush Administration's Department of the Interior ("Interior Department") has consistently and aggressively implemented a policy placing local controls and local

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decision-making over the interests of sensitive habitat and species protection.

The Bush Administration's push for more local control of species and natural resource policy-making has been defended on states' rights grounds and the need to move away from the "federally" initiated policies of the Clinton Administration.¹ However, there existed one Clinton-era policy that seemed to capture the ideals of the Bush Administration's environmental policy. The plan had it all — citizen control; local decision-making by a broad coalition of environmentalists, governmental agencies, a tribal government, timber and other industry representatives; and widespread national support — except for the support of the Governor of Idaho and Bush's Secretary of the Interior Gale Norton.² After years of heated debate and numerous public hearings across the intermountain West and on Capitol Hill, and a little known lawsuit filed by the State of Idaho in January 2001, the Bush Administration and Secretary Norton made their first major wildlife decision since taking office by taking aim at this seemingly Bush-friendly plan. Secretary Norton ignored the conclusions U.S. Fish and Wildlife Service scientists and abandoned her predecessor's decision to reintroduce a small experimental population of grizzly bears in the Selway-Bitterroot Ecosystem in central Idaho and western Montana in favor of an official position on "no action."³ As a result, a proposal that reflected a radical departure from the kind of heavy-handed federally driven approaches that had subjected the Endangered Species Act to strong criticism had succumbed to a new form of heavy-handed Washington, D.C. pressure.

In the year and half since the Secretary's decision to shelve the grizzly bear recovery plan, the Bush Administration has faced growing criticism for rolling back numerous environmental protections.⁴ However, almost a year and a half later, the future of the grizzly bear in the United States remains in limbo.⁵

This article begins by providing a brief overview of the history of the grizzly bear reintroduction efforts and the Clinton Administration's

¹ See 2000 Republic Party Platform, available at :www.rnc.org/GOPInfo/Platform/2000/platform6.html (last visited Feb. 10, 2003).

² See *infra* Sec. III.C.

³ Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana; Removal of Regulations, 66 Fed. Reg. 33620-22 (June 22, 2001) (to be codified at 50 C.F.R. pt. 17). See *infra* notes 22-23 and accompanying text.

⁴ Natural Resources Defense Center, *Rewriting the Rules, Year End Report 2002*, available at www.nrdc.org/legislation/rollbacks/execsum.asp (last used Feb 10, 2003).

⁵ See *Bush Administration Pushing to Life Grizzly bear Protections* (Jan. 5, 2003), available at www.nrdc.org/bushrecord/2003-01.asp#1224 (last visited Feb. 10, 2003) (noting that the Bush Administration may seek to remove the grizzly bears from the endangered species list later this year).

decision to move forward with plans to secure an experimental population of the threatened species in the remote wilderness of Idaho and Montana. Section III focuses on local reaction to the decision to reintroduce the grizzly bear, and in particular, the strong rhetoric of the Idaho congressional delegation opposing the reintroduction. Section IV brings new light on the subsequent legal challenge brought by Governor Dirk Kempthorne and the Republican legislative leadership of the State of Idaho to bar the grizzly bear reintroduction. Section V discusses Secretary Norton's decision to adopt the "no action" alternative and substitute "best politics" for the "best available science." This section also reviews the public's overwhelmingly negative response to the Secretary's decision, paying particular attention to the comments of the framers of the citizen-driven reintroduction alternative and the Nez Perce Tribe ("Nez Perce" or "Tribe"). Section VI looks towards the future of grizzly bear recovery and other species reintroduction programs under the Endangered Species Act and the potential for litigation to force the Administration to take action on the grizzly bear plan. Finally, this article concludes that the Secretary Norton's decision to acquiesce to the will of a state Governor in the face of conclusive scientific evidence to the contrary signals an uncertain future for species reintroduction and the Endangered Species Act under the Bush Administration.

II. THE PURPOSE AND NEED FOR GRIZZLY REINTRODUCTION

Prior to European colonization, more than 50,000 grizzly bears (*Ursus arctos horribilis*) roamed the western United States.⁶ However, due in large part to diminished habitat and excessive human-caused mortality, approximately only 800-1,000 bears remain scattered among different isolated populations in Montana, Idaho, Wyoming, and Washington.⁷ This represents less than two percent of the bear's original range.⁸

⁶ Endangered and Threatened Wildlife and Plants: Proposed Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35763 (July 2, 1997) (to be codified at 50 C.F.R. pt. 17). See also H. Josef Hebert, Associated Press, *Unbearable?*, Nov. 17, 2000, available at www.abcnews.go.com/sections/us/Daily_News/grizzly001117.html (based on U.S. Fish and Wildlife 1993 estimates) (last visited Dec. 29, 2002).

⁷ U.S. Dep't of the Interior, Summary of the Final Environmental Impact Statement, Grizzly Bear Recovery in the Bitterroot Ecosystem at 2 (March 2000) (hereinafter FEIS Summary).

⁸ G. Sidney Silliman, *Norton Should Endorse Bitterroot Grizzly Bear Reintroduction*, available at www.csupomona.edu/~gssilliman/publications.html (last visited Dec. 29, 2002).

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A. REINTRODUCTION IN THE SELWAY-BITTERROOT ECOSYSTEM

Not surprisingly, the natural history of the grizzly bear and their ecological role was poorly understood during Western settlement, and the bear was eradicated along with other large predators because they were seen as a threat to humans, and later to livestock.⁹ Ironically, although the grizzly is an omnivore, the bear's diet consists of about ninety percent vegetation and insect matter.¹⁰ Nevertheless, fear of the unknown drove the extirpation of the grizzly.¹¹ The last verified death of a grizzly in the Bitterroot Mountains occurred in 1932, and the last tracks were observed in 1946.¹² No verified signs or tracking of grizzlies have occurred in the Bitterroot Ecosystem in more than fifty years.¹³ Based on the rapid decline of grizzly bear populations across the West, the U.S. Fish and Wildlife Service ("FWS") listed the bear as a threatened species under the federal Endangered Species Act ("ESA") in the lower forty-eight states in 1975.¹⁴

With this action, the FWS took responsibility for protecting the grizzly bear,¹⁵ and in 1982 the FWS finalized the Grizzly Bear Recovery Plan that called for the evaluation of 5,785 square mile¹⁶ Selway-

⁹ The bears were also killed for sport and for their fur. Conservative estimates indicate that trappers killed twenty-five to forty grizzly bears annually in the Bitterroot Mountains alone. U.S. Dep't of the Interior, Record of Decision and Statement of Findings for the Environmental Impact Statement on Grizzly Bear Recovery in the Bitterroot Ecosystem and Final Rule on Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana at Final Rule —3 (Nov. 2000) (hereinafter ROD and Final Rule). A ROD is a necessary document in the agency's decision making process under the National Environmental Policy Act which identifies all alternatives considered by the agency in reaching its decision, all issues and factors considering in reaching its decision, and states whether all practicable means have been used to avoid and minimize environmental harm from the selected alternative. See 40 C.F.R. § 1505.2 (2002).

¹⁰ U.S. Fish and Wildlife Service, *Grizzly Bear Recovery*, March 9, 2000, available at www.r6.fws.gov/endspp/grizzly/bitterq&a.html (last visited Dec. 29, 2002) (hereinafter Grizzly Bear Recovery).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734 (1975). A threatened species is defined as "any species . . . likely to become . . . endangered . . . within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (2002).

¹⁵ The ESA mandates that the agency take proactive steps to conserve the species and ecosystems upon which they depend. See generally 16 U.S.C. 1531 *et seq.* The ESA defines "conservation" as the "use of all methods and procedures . . . necessary to bring any endangered or threatened species to the point at which measures provided" under the ESA are no longer needed. *Id.* § 1532(3). The U.S. Supreme Court has found that the ESA "indicates beyond a doubt, that Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

¹⁶ The Selway-Bitterroot is all federally owned land. See FEIS Summary, *supra* note 3 at 10. In addition, to the 4 million acre Selway-Bitterroot Wilderness, adjacent to the Bitterroot Ecosystem is the 4 million acre Frank Church River of No Return Wilderness. *Id.* An addition 13 million acres

Bitterroot Ecosystem as a potential recovery area for the species.¹⁷ The Selway-Bitterroot Ecosystem was chosen as a potential recovery area for a number of reasons. Historically, the choice for this particular ecosystem is clear. The grizzly bear was a widespread inhabitant of the Bitterroot Mountains in central Idaho and western Montana, and were common in Idaho until the early 1900s.¹⁸ The Bitterroots are also a remote, vast wilderness, where the potential for human—bear interaction would be minimal, and an ample food supply exists for the bears.¹⁹ But more important than simply historical range, biologists determined that the Bitterroot Ecosystem could play a pivotal role in the eventual recovery of the bear throughout the West. In addition to having a carrying capacity of more than three hundred grizzly bears, thereby increasing the current number of grizzlies in the contiguous United States by twenty-five to thirty percent, the establishment of a third population group in the Bitterroots would bridge the gap between the two existing populations of bears (one to the East in Yellowstone National Park and the other to the north in the Northern Continental Divide Ecosystems).²⁰ This would allow the three populations to eventually interact, contributing significantly to the long-term recovery of the grizzly bear by creating a viable grizzly population which spans the Idaho-Montana border.²¹

Finally, eleven years after the Recovery Plan was formulated, the Interagency Grizzly Bear Committee²² (“IGBC”) endorsed the decision to use the Bitterroot Ecosystem as a potential recovery area, initiating federal planning for recovery and freeing appropriation dollars for the

of national forest land surround the wilderness area. National Wildlife Federation, *Reintroducing Grizzly Bears to the Bitterroot Ecosystem*, available at www.nwf.org/grizzly/bitterro.html (last visited Dec. 29, 2002). See FEIS Summary, *supra* note 3 at 10.

¹⁷ ROD and Final Rule, *supra* note 4. The Recovery Area was significantly smaller than the eventually chosen “experimental population area” which compromised 16.1 million acres. Only bears in the Recovery area were to be managed by the Proposed Rule. A special rule was to be crafted for the experimental area. See Final Rule and ROD Questions and Answers — Nov. 2000 at 3.

¹⁸ Grizzly Bear Recovery, *supra* note 6.

¹⁹ *Id.* The Bitterroot ecosystem is one of the largest contiguous blocks of federal land remaining in the lower 48 states. *Id.* The core of the ecosystem is comprised of a wilderness area which makes up the largest block of wilderness habitat in the Rocky Mountains south of Canada. *Id.* Six different studies were conducted, and each confirmed that the bear could thrive in the habitat as a wide variety of seasonal foods, including berries, forbs and grasses, and high levels of ungulates and carrion exists in the Bitterroot Ecosystem. *Id.*

²⁰ *Id.*

²¹ *Id.* Bear populations are most vulnerable when confined to small geographic areas that are genetically and geographically isolated from each other. FEIS Summary, *supra* note 3 at 2. Biologists believe that if no new genes are introduced to the Yellowstone grizzly population within three to four generations, the bears could suffer from inbreeding. Associated Press, *Biologist says Yellowstone Grizzlies Will Suffer Without Reintroduction Plans*, Lewiston Morning Tribune, July, 16, 2001.

²² The Fish and Wildlife Service have described the IGBC as a “group of high level administrators that represent the federal and state agencies and coordinate agency efforts in implementing” grizzly bear recovery plans. FEIS Summary, *supra* note 3 at 2.

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necessary scientific and environmental studies.²³ A technical working group comprised of scientists and a local citizen group was formed, and in December 1993, the Interagency Grizzly Bear Committee convened a hearing in Denver, Colorado to bring all interested parties to the table to discuss the possibility of reintroducing grizzly bears to the public lands of central Idaho and formulating an Environmental Impact Statement (“EIS”) to make the idea a reality.²⁴ Although many at the meeting expressed opposition to bringing the bears back to Idaho, one timber industry representative expressed a sentiment which opened the door for a unique collaborative process to begin, stating that if the bears were going to be introduced, the industry wanted a voice in how it was going to be done.²⁵

B. UNIQUE-COLLABORATIVE PROCESS FOR REINTRODUCTION IS BORN

In 1995, the FWS formed an interagency team to prepare the EIS. This team consisted of a number of diverse stakeholders from across Idaho and Montana including representatives from the FWS, U.S. Forest Service, Idaho Department of Fish and Game, the Montana Department of Fish, Wildlife and Game, and the Nez Perce whose 1855 treaty territory includes a significant portion the Bitterroot Ecosystem.²⁶ Public participation in identifying issues with grizzly bear recovery and seeking alternatives was ensured when the FWS published a Notice of Intent to recover the grizzly bear in the Bitterroot Ecosystem.²⁷ The coalition of agencies and governmental entities began drafting an EIS and despite national elections and threats of reduced funding, the participants reaffirmed their commitment to the collaborative process.

Also involved was a broad coalition of concerned stakeholders, including national environmental organizations and industry representatives who began crafting an alternative for the EIS — usually a task rele-

²³ *Id.* See FEIS Summary, *supra* note 3 at 10 (describing the proposed recovery area as designated by State highways).

²⁴ *Id.* at Final Rule 3-4; National Wildlife Federation, *Reintroducing Grizzly Bears to the Bitterroot Ecosystem*, available at www.backstage.nwf.org/grizzly/bitterro.html (last visited Dec. 29, 2002). An EIS is a required document under the wholly procedural environmental statute entitled the National Environmental Policy Act (“NEPA”) for any “major Federal actions significantly affecting the quality of the human environment. See 42 U.S.C. § 4332(C) (1998); 40 C.F.R. pt. 1502 (discussing the purpose of and implementation procedures for an EIS). The purpose of an EIS is to apprise decision makers of the disruptive effects that may flow from their decisions. See *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983).

²⁵ National Wildlife Federation, *Reintroducing Grizzly Bears to the Bitterroot Ecosystem*, available at www.backstage.nwf.org/grizzly/bitterro.html (last visited Dec. 29, 2002).

²⁶ ROD and Final Rule, *supra* note 5 at Final Rule 4; Treaty with the Nez Perce 12 Stats. 957 (June 11, 1855).

²⁷ Notice: Reintroduction of Grizzly Bears in the Bitterroot Ecosystem of East-Central Idaho and Western Montana, 60 Fed. Reg. 2399 (Jan. 9, 1995).

gated to low-level bureaucrats within Federal agencies.²⁸ Bill Mulligan, representing the Resource Organization on Timber Supply, an unlikely advocate for species reintroduction stated

We're sticking with this process because it's the right thing to do. Yes, we could block grizzly restoration now, but at some point in the future the pendulum will swing the other way. If we can find a solution today that meets the needs of local people and the bear, we're all better off. This approach takes the politics and polarization out of the issue.²⁹

The fact that this was not business as usual was also recognized by Phil Church, President of Paperworkers Local 712 in Lewiston, Idaho, who stated, "We bridged the gaps and created a situation where industry, organized labor and environmentalists could work on an issue for the benefit of everybody."³⁰

A lengthy process of public meetings and scoping sessions ensued at locations throughout Idaho, Montana and Utah, and more than 3,300 written comments were received from individuals, organizations and governmental agencies over the span of two years.³¹ In 1996, the coalition submitted a proposal to the FWS that called for continued citizen management as the foundation of the recovery plan.³² The process resulted in a Draft EIS and a proposed rule being issued to the public for further review and comment on the first week of July 1997 that included the coalition's proposal.³³ By early July 1997, the FWS released a Draft EIS and proposed rule for public review and comment that included the coalition's proposal.

The proposed rule, entitled "Proposed Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana,"³⁴ established the intent of the FWS to move for-

²⁸ NEPA requires an EIS contain a range of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1988); *see also* 40 C.F.R. 1502.14 (2002).

²⁹ Hank Fischer, *Bears and the Bitterroot 1996/97*, available at www.defenders.org/hfisch02.html (last visited Dec. 29, 2002).

³⁰ *Id.*

³¹ ROD and Final Rule, *supra* note 5 at Final Rule 5. Approximately eighty percent of written responses were from residents of counties in Idaho and Montana that were directly affected by the proposal. *See also* FEIS Summary, *supra* note 2 at 6-8 (providing detailed discussion of issues and impacts raised).

³² *Supra* note 21.

³³ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35762 (July 2, 1997).

³⁴ A "nonessential" population means an experimental population whose loss would not likely reduce the survival of the entire species. FEIS Summary, *supra* note 3 at 10. The nonessential status also allowed the Service to bring in bears from other populations, so long as the removal would not jeopardize the survival of the other population. ROD and Final Rule, *supra* note 5 at Final Rule 2. The proposed rule only addressed bears within the recovery area. Any reintroduced bears who may wander outside of the recovery area would be addressed by a special final rule meant

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ward with grizzly bear recovery by means of the experimental population provision of Section 10(j) of the ESA.³⁵ This infrequently used provision provided the Secretary of the Interior with extensive powers to reintroduce species under circumstances that, in the judgment of the Secretary, are in the best interests of the species.³⁶ More important than the flexible nature of the decision to reintroduce the species was how the Secretary crafted the future management of the grizzly bear population. With the authority vested in him by the ESA to develop special programs to address the particular needs of reintroduced populations, Secretary Bruce Babbitt chose to reintroduce twenty-five grizzly bears over a period of five years with a goal of 280 bears within fifty to one hundred-ten years, with the assistance of a fifteen member Citizen Management Committee (“CMC”) appointed by the Governors of Idaho and Montana, affected Indian tribes, and the Secretaries of Agriculture and Interior.³⁷ These appointments to the CMC would reflect a broad segment of concern, bringing local citizens, environmentalists, industry representatives, tribal members and scientists³⁸ to the table free from political motivations to execute a plan to save the species. Thanks to the collaborative approach used to craft the reintroduction plan and the forward-looking locally based approach used to implement it, reintroduction with a CMC was the Preferred Alternative and Proposed Action selected by the FWS.³⁹

to “accommodate” the needs of the communities and the bears. FEIS Summary, *supra* note 3 at 12. Moreover, an experimental population may be reintroduced regardless of whether the experimental population is “essential to the continued existence” of the species. 16 U.S.C. § 1539(j)(2)(B) (2002). This provision directly responds to arguments made against the grizzly reintroduction that the species does not need further reintroductions. Quite frankly, under Section 10(j), it does not matter.

³⁵ 16 U.S.C. § 1539(j) (2002).

³⁶ Congress amended the ESA in 1982 to include Section 10(j) which provides for experimental populations which means any population authorized for release which is located in a completely separate geographical area from any non-experimental population, that is, it must be outside the current range of the non-experimental population. 16 U.S.C. § 1539(j)(1)-(2). The ESA allows the Secretary to authorize the release of an experimental population of a threatened species, so long as the release is based on the “best information available”. *Id.* § 1539(j)(2)(B). As a threatened species, there is no requirement that the federal agencies consult under Section 7 of the ESA, and no requirement of critical habitat designation under Section 4. *See id.* § 1536(a)(2). This makes an experimental population an extremely flexible and “a more efficient conservation tool” than other measures. H.R. Rep. No. 567, 97th Cong., 2d Sess., at 8 (1982), reprinted in 1982 U.S.C.C.A.N. 2808. After all, the Secretary is vested with the authority “to issue such regulations as he deems necessary and advisable for the conservation” of listed species, including “all methods and procedures” necessary to conserve both threatened and endangered species and nonessential experimental populations. *Id.* § 1533(d).

³⁷ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35770 (2002). *See* 16 U.S.C. §§ 1531-1539 (2002); H.R. Rep. No. 567, at 8.

³⁸ The scientists were non-voting members of the CMC. FEIS Summary, *supra* note 2 at 13. However, a Scientific Review Panel was also created to make recommendations to the CMC and determine compliance with the rule. FEIS Summary, *supra* note 3 at 15.

³⁹ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg.

C. THE CITIZEN MANAGEMENT COMMITTEE

Under the proposed rule, once appointed, the CMC would have the authority to develop management plans, oversee the activities of the state agencies working on the reintroduction program, and exercise other powers and authority on behalf of the Interior Secretary to manage the day-to-day grizzly reintroduction effort.⁴⁰ CMC members would serve six-year terms and would meet biannually.⁴¹ The proposed rule did place parameters on the decision-making authority of the CMC, expressly limiting the scope of the decisions made by mandating that all actions lead towards the recovery of the grizzly, be in accordance with the ESA and be based on the best scientific and commercial data available, and seek to minimize any social or economic impacts on local communities from the reintroduction plan.⁴² The CMC would also be asked to create a two-year work plan outlining the Committee's policy for achieving reintro-

35763. In all, there were six alternatives as follows: (1) the Proposed Action and Preferred Alternative restoring the bear as a nonessential experimental population with citizen management; (1A) restoration of the grizzly bear as a nonessential experimental population with U.S. Fish and Wildlife Service Management; (2) No action; (3) No Grizzly bear; (4) Restoration of grizzly bears as a threatened population with full ESA protection and habitat restoration; and (4A) Restoration of grizzly bears as a threatened population with full ESA protection and U.S. Fish and Wildlife Service Management. See FEIS Summary, *supra* note 2 at 9 (for list and explanation). Pursuant to NEPA, the Federal agency responsible for the project is required to publish an EIS or an Environmental Assessment for any major Federal action that will have a significant effect on the environment. See 42 U.S.C. 4332 (2002). When a full EIS is required based on the parameters of the project at issue, the agency must provide a range of alternatives for the proposal. See 40 C.F.R. §§ 1502.2, 1502.14 (2002) (discussing alternatives). These alternatives must include a "no action" alternative. *Id.* § 1502.14(d). From the range of alternatives, the agency chooses a "preferred alternative" which will be used to follow through on the project because it has been designated as the most prudent choice for the project. The "proposed action" is the means by which the "preferred alternative" will be implemented. *Id.* § 1502.14.

⁴⁰ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35770. This note assumes that the Secretary is granted the necessary authority by the ESA to delegate his authority to a CMC to oversee a species reintroduction program under the "such regulations as he deems necessary and advisable to provide for the conservation of such species" language in Section 4(d) of the ESA. See 16 U.S.C. 1533(d) (2002). Subdelegation is often used by the Interior Department and other federal agencies to implement Federal programs. For a detailed discussion that concludes that such a delegation is lawful please see, Bredna L. Hall, *Subdelegation of Authority Under the Endangered Species Act: Secretarial Authority to Subdelegate his Duties to a Citizen Management Committee as Proposed for the Selway-Bitterroot Wilderness Grizzly Bear Reintroduction*, 20 PUB. LAND & RESOURCES L. REV. 81 (1999). Because the Secretary was vested with the authority under the ESA to use local officials and citizen controls to implement programs of this kind, the potential illegality of the subdelegation likely had no bearing on Secretary Norton's decision to abandon the reintroduction plan. In fact, neither the Secretary nor the Interior Department has mentioned this issue as a catalyst for proposing to withdraw the reintroduction plan.

⁴¹ FEIS Summary, *supra* note 3 at 13-14.

⁴² *Id.* at 14; Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35770.

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duction.⁴³ Such a plan includes the ability of the CMC to recommend changes to land use practices and wildlife management strategies, subject to approval by the appropriate agency, should such changes be necessary to successfully effectuate the recovery plan.⁴⁴ The Interior Secretary retained oversight authority over the CMC by reviewing the two-year policy plan and retaining the authority to disband the CMC and resume management authority if the Secretary determined that the CMC's decisions were not leading to the recovery of the grizzly.⁴⁵ Absent such intervention, the diverse fifteen-member team had broad authority to execute the grizzly bear recovery plan in their own image — sensitive to both the concerns of environmentalists and local industry executives and residents. This collaborative process between the Interior Secretary and the CMC was also reflected through the provisions to terminate the program. Ten years after reintroduction, the CMC would decide whether the reintroduction was successful.⁴⁶ After consultation with the CMC, should the Secretary agree that the reintroduction has failed to “produce a self-sustaining population” no more bears would be reintroduced; however, any remaining bears would retain their experimental status.⁴⁷

The flexibility in the CMC carried over into flexibility in protections for the bears. By avoiding selecting an alternative with full ESA protection and habitat restoration, the FWS was able to avoid costly critical habitat restoration activities and could instead endorse a plan to reintroduce the bears that provided them with the opportunity to restore themselves within the existing habitat conditions. The designation also allows ground-disturbing resource extraction activities to continue within the recovery area.⁴⁸ However, all the “take” prohibitions of Section 9 of the ESA did apply to the population.⁴⁹ Thus, under the Preferred Alternative, citizens were allowed to continue to kill grizzly bears in self-defense or in defense of others, and after receiving a permit from the FWS, could harass or deter bears from aggravating livestock and shoot to kill bears that wander onto private lands.⁵⁰ The outright hunting of grizzly bears, or harassment without a permit, was prohibited.⁵¹

⁴³ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35772.

⁴⁴ FEIS Summary, *supra* note 3 at 12.

⁴⁵ *Supra* note 36.

⁴⁶ FEIS Summary, *supra* note 3 at 17

⁴⁷ *Id.*

⁴⁸ *Id.* at 16.

⁴⁹ *Id.*

⁵⁰ *Id.* at 12.

⁵¹ *Id.*

The Interior Secretary and the FWS crafted their proposed rule to provide the most flexible reintroduction strategy ever created under the ESA. Designating the population as nonessential experimental, the FWS could tailor the needs of the population to “specific areas and local conditions, including meeting concerns of those opposed to reintroduction” by reducing “excessive governmental regulation on private lands, uncontrolled livestock depredation, excessive big game predation” and meeting the concerns of those who see species reintroduction as cutting out the “State government and local citizen involvement” from the process.⁵² Such a unique reintroduction strategy looked to forge new ground in the politics of species reintroduction, decentralizing control over the species from offices in Washington, D.C. and empowering local citizens living with the bears in their backyard. Moreover, the idea had strong political legs, as the Preferred Alternative was adopted in the November 2000 Final Rule and received broad support from some unlikely bed-fellows, with one noticeable dissent — the political powers that be of the state of Idaho.

III. REACTION TO THE GRIZZLY REINTRODUCTION PLAN

Returning the grizzly to the Bitterroot Ecosystem polarized western politics and exemplified

the classic dilemma faced by conservation biologists — a species in danger, scientific uncertainty regarding its biological needs, and a complex backdrop of real or perceived social and economic concerns. Our challenge is to meet the pressing environmental goal of expanding the grizzly’s range and numbers while maintaining the support of people who live near the bears.⁵³

But, widespread public support was surprisingly not hard to find. Due to the remote wilderness chosen for the reintroduction area, the reintroduction plan did not actually affect large populations of citizens.⁵⁴ Only a handful of bears were being reintroduced during the first phase of the recovery.⁵⁵ A century later, biologists expected only 280 bears expected to roam the vast, roadless and unpopulated 5,785 square mile area reintroduction.⁵⁶ Despite these favorable conditions for limited opposition to the reintroduction, the grizzly bears quickly became the target of scare tactics and political positioning.

⁵² *Id.* at 10.

⁵³ *Supra* note 23 (quoting Mike Roy a biologist for the National Wildlife Federation).

⁵⁴ *See supra* note 14.

⁵⁵ *See supra* note 30.

⁵⁶ *Id.*

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A. PUBLIC REACTION TO THE REINTRODUCTION PLAN

In the year after the publication of the Proposed Action, the FWS held seven public meetings in which 1,400 people attended and 293 individuals testified.⁵⁷ In addition, over 24,000 individuals, organizations, and governmental entities submitted written comments, a majority of which supported reintroduction under the Preferred Alternative, indicating the strong feelings people had about the benefits of the potential grizzly bear reintroduction.⁵⁸ A survey taken soon after the release of the proposed rule found that sixty percent of Idaho and Montana residents who originally opposed the reintroduction in whole, favored the reintroduction plan as written with the citizen management alternative.⁵⁹ In all, seventy-six percent of public comment received by the FWS prior to publishing the Final Rule in November 2000 supported the reintroduction plan.⁶⁰

The local and national media also documented these strong feelings. For example, the *Washington Post* published a feature on the “nontraditional coalition” and ABC Nightly News made the CMC a topic of a special Earth Day report.⁶¹ Nearly every daily Idaho and Montana newspaper published an editorial praising the collaborative process used to create the Draft EIS.⁶² The conservative *Idaho Post Falls Register* called the proposal “exciting” and opined that the plan “could set a trend for the next couple of decades in working out environmental problems.”⁶³ The *Bozeman Chronicle* called the proposal “one of the most forward-thinking developments on the threatened species front.”⁶⁴ The *Spokesman-Review* in Spokane, Washington called it “a model for 1990s environmentalism.”⁶⁵

B. POLITICAL REACTION TO THE REINTRODUCTION PLAN

The Preferred Alternative and the process by which it was created also received broad bi-partisan political support. Senator Michael Crapo (R-Idaho) had originally complained about the reintroduction idea, stating: “No one in Idaho wants these bears back. This is a plan . . . that is

⁵⁷ ROD and Final Rule, *supra* note 5 at Final Rule 6.

⁵⁸ *Id.*

⁵⁹ National Wildlife Federation, *supra* note 11.

⁶⁰ U.S. Dep’t of the Interior, Summary of Public Comments at Intro 7, 9 (March 2000).

⁶¹ *Supra* note 23.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

being shoved down our throats.”⁶⁶ The Senator added that the only acceptable plan would be one completely run by local authorities.⁶⁷ True to his word, the then Representative, having seen the *Washington Post* story, sent a copy of the article to all the members of the House Republican Task Force on the Environment and added, “One of the key challenges we face as Republicans is to develop a proper framework within which we can address environmental issues; [i]t takes creativity consensus-building and a willingness to work together.”⁶⁸ Recognizing the CMC and the proposed rule as an example of this workable approach, the Idaho Congressman praised the collaborative approach, but stopped short of endorsing the grizzly reintroduction plan.

Montana’s Republican Governor Marc Racicot who publicly endorsed the proposal, calling it “superb”, supported reintroduction under the CMC.⁶⁹ He added, “Without the detailed and intensive involvement of Montana and Idaho citizens their proposal envisions, the chances for success in that reintroduction would be greatly diminished.”⁷⁰ On the other side of Montana’s political spectrum, Senator Max Baucus, the ranking Democrat on the Senate committee that oversees the ESA, also endorsed the proposal, stating that “The [ESA’s] future hinges to a great degree upon the extent to which it is demonstrated to be efficient, flexible and responsive to local concerns.”⁷¹

C. DISSENTING VOICES

Just when it seemed that regulators, environmentalists and industry leaders had succeeded in creating a universally acceptable species reintroduction plan, other political voices began to be heard which were far less than supportive. Despite the support the plan had garnered from their constituents, Representative Helen Chenoweth (R-ID), Senators Larry Craig (R-ID) and Dirk Kempthorne (R-Idaho), Idaho Governor Phil Batt (R), and Idaho state and local government officials expressed both opposition to the reintroduction plan and concerns as to whether the Secretary had the authority to create a CMC in the first place.⁷²

On June 12, 1997, during an oversight hearing held before the House Subcommittee on Forests and Forest Health chaired by Represen-

⁶⁶ H. Josef Hebert, *supra* note 1.

⁶⁷ *Id.*

⁶⁸ *Supra* note 23.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Fredreka Schouten, *Idaho Officials Tell Congress: No Grizzlies!*, Idaho Statesman, June 13, 1997, at A1.

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tative Chenoweth on the reintroduction plan, these concerns became well known. Wielding a Joint Memorial passed by the Idaho state legislature earlier that year opposing the reintroduction of the grizzly bear in Idaho, Representative Chenoweth stated: "With the Governor saying no, the State legislature saying no, the entire Idaho congressional delegation saying no, and the people of Idaho saying no, what part of no doesn't the Department of the Interior understand?"⁷³ She continued, "I question the wisdom of an effort to place a lethal weapon into the public domain forests; [i]t is my belief that the issue of reintroduction of the grizzly bear is an issue of local control as well as one of state's rights."⁷⁴ Later she added that the plan was akin to "introducing sharks at the beach."⁷⁵

Senator Kempthorne submitted his concerns by way of a prepared statement submitted to the Subcommittee, in which he stated, "[a]s an Idahoan, I worry about what these dangerous predators will do to the people of Idaho . . . because of the very great danger that Idahoans would face if we allow the introduction of grizzly bears into the State, I cannot support any plan unless it is supported by the people of the State . . . Idahoans should have the right to make that decision."⁷⁶ Idaho Fish and Game Commissioner John Burns was slightly less diplomatic when he objected to the plan at a public hearing in Salmon, Idaho, stating: "[d]on't just say 'No!' to grizzlies. Tell them, 'Hell no!'. When you make a deal with the devil, the devil is going to win in the long run."⁷⁷

Not to be out done, things were not all copasetic from the environmentalists' perspective either. The head of Friends of the Wild Swan in Montana, Steve Kelly, declared that the plan was the "biggest sham that's even been perpetuated in the northern Rockies; [t]he timber industry only wants to do what they've always wanted to do, which is cut down trees."⁷⁸ As far as the environmental groups that were involved in the plan, Mr. Kelly said of them, "[w]hen you crawl into bed with the enemy, you become the enemy."⁷⁹

⁷³ Statement of Rep. Helen Chenoweth, Testimony at Oversight Hearing on the Reintroduction of the Grizzly Bear in the Public Domain, before the House of Representatives Subcommittee on Forests and Forest Health, June 12, 1997 at 9.

⁷⁴ *Id.* at 11-12.

⁷⁵ *Supra* note 23.

⁷⁶ Statement of Rep. Helen Chenoweth, *supra* note 73 at 17-18 (reading into the record the statement of Senator Kempthorne).

⁷⁷ *Supra* note 23.

⁷⁸ *Id.* (quoting a High County News interview).

⁷⁹ *Id.* (referring to Defenders of Wildlife and National Wildlife Federation).

D. PRACTICAL AND POLITICAL REALITIES

Although these comments made for good press, both sides overlooked the very fact that their concerns with the reintroduction and the way the CMC were formed were actually addressed within the plan they so vigorously attacked. Rather than champion a plan supported by a majority of the people of Idaho, Idaho's political leaders cavalierly dismissed the wishes of the electorate and set out on a media and legal campaign to quash the reintroduction.⁸⁰

Both Senator Kempthorne and Representative Chenoweth expressed concern that the federal government was imposing its will on the people of Idaho by introducing a lethal species.⁸¹ However, nothing could be further from the truth on both accounts. The state's rights and the rights of Idahoans, however, were being protected to a previously unheard of degree in the context of species reintroduction.⁸² While the pioneering conservationist Aldo Leopold first conceived of the idea of cooperative management of species between citizens and the government in 1936,⁸³ the idea had never been put into practice until the grizzly bear plan was developed.⁸⁴ This realization was lost on Idaho's political leadership. Also overlooked was the fact that a majority of Idaho citizens and leading Idaho industry groups were involved in crafting the CMC concept and were going to have a major role in shaping the day-to-day management of the reintroduced species.⁸⁵

These facts belie the state's opposition, indicating their objection may have been more ideological than it was in direct response to the real or perceived concerns of the state's citizens. This combined "anti-environmental", "anti-regulatory", and "anti-federal" ideology commonly associated with the state obfuscated the real details of the plan and the real benefits it provided over other reintroduction strategies.⁸⁶ Thus, rather than incurring the ire of those who supported the reintroduction plan, the anti-species message played well with the conservative populous and powerful in-state ranching interests that had been fighting other federal species reintroduction plans for years.⁸⁷ By portraying any species reintroduction within Idaho as a threat to life and livelihood, the environmentalists and timber representatives who crafted the reintroduc-

⁸⁰ See *supra* note 72.

⁸¹ See *supra* notes 73 and 76.

⁸² See *supra* notes 28-30 and accompanying text (discussing innovative nature of the CMC).

⁸³ *Supra* note 23 (discussing Aldo Leopold's 1936 essay "Threatened Species").

⁸⁴ See *supra* note 29.

⁸⁵ See *supra* Section II.B.

⁸⁶ See *supra* notes 73-77 and accompanying text.

⁸⁷ See *infra* Section V.B. (discussing wolf reintroduction).

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tion plan were effectively placed on the fringe and categorized as “out-of-touch” with the real needs of the state, thereby marginalizing what would otherwise have been a formidable combined political voice.

As with any cutting-edge policy initiative, especially a high-profile plan that attempted to find middle ground in the high stakes road of environmental politics, there were bound to be dissenters. Even though the grizzly bear is a reclusive species, unlikely to stray from the recovery area, some residents were understandably fearful of the bears.⁸⁸ Others distrusted the union between industry and environmentalists.⁸⁹ Still, the facts surrounding the potential benefits of the reintroduction and the time in which it took to craft the plan underscore the unprecedented nature of the project. In just four years, a coalition of diverse interests had formed to write a Draft EIS that had received overwhelmingly positive public support⁹⁰ for the cost of a Federal appropriation of \$250,000.⁹¹ It had taken over fifteen years of contentious debate and eight years of planning at the cost of six million for the Federal government to craft, and subsequently impose, a reintroduction plan for the gray wolf in Yellowstone.⁹² And, in that case, the agriculture industry was never consulted, leading to on-the-ground tensions that remain heated today, whether they occur leaning across a fence post or are played out in the courts. In stark contrast, the timber industry was involved from the beginning of the grizzly reintroduction process.⁹³ As a direct result, usual foes became partners and a cost-effective, mutually agreeable reintroduction plan was created to recovery the grizzly.

Unfortunately for the grizzly bear and the groups that had fought together to create a workable compromise reintroduction strategy that seemingly balanced the needs of the species and people who depend on the land for their livelihoods, the best available politics against reintroduction eventually superceded the best available science that supported a return of the grizzlies as the only means to ensure the eventual recovery of the species. By the time the Final Rule adopting the Preferred Alternative of a nonessential experimental population with citizen management was published in the Federal Register on November 17, 2000,⁹⁴ Senator Kempthorne was Governor Kempthorne, a new regime was

⁸⁸ National Wildlife Federation, *supra* note 11.

⁸⁹ *Id.*

⁹⁰ *See supra* Section II.B.

⁹¹ *Supra* note 23.

⁹² *Id.*

⁹³ *See supra* note 29 and accompanying text.

⁹⁴ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 65 Fed. Reg. 26924 (2002). The Rule became effective on December 18, 2000. *Id.* at 26924.

about to come to power in the Nation's capitol, and accordingly, the state of Idaho's delegation wasted no time enlisting the Bush Administration's help to scuttle the reintroduction plan.

IV. A LEGAL BATTLE AGAINST REINTRODUCTION ENSUES

A month after the publication of the Final Rule authorizing the reintroduction of twenty-five grizzlies to Idaho and Montana, Idaho Governor Dirk Kempthorne and members of the self-proclaimed "Idaho Constitutional Defense Council" which was comprised of the Governor, Attorney General, Idaho Senate President Pro Tem and Idaho Speaker of the House, held a press conference indicating their intent to "pursue both legislative and legal action" to stop the grizzly reintroduction plan.⁹⁵ Using money appropriated by the state legislature for such purposes, the Governor announced that the state was going "to go to federal court" to stop the "poorly thought-out federal decision" to reintroduce the grizzly bears.⁹⁶ He added, "Many of us had made it clear that we oppose the introduction of the flesh-eating, anti-social animal into Idaho. This is probably the first federal policy that knowingly can, and will, lead to the injury and death of citizens."⁹⁷

A. STATE OF IDAHO V. DEPARTMENT OF THE INTERIOR

On January 19, 2001, the state followed through on its threat and brought suit in the District Court for the District of Columbia against then-Secretary Bruce Babbitt to enjoin the DOI from implementing the grizzly bear reintroduction program in Idaho.⁹⁸ The complaint also sought a declaration that the reintroduction plan violated the Tenth Amendment to the United States Constitution⁹⁹ by unlawfully commanding state officials to carry out a Federal policy and the plan violated

⁹⁵ Press Release from Governor Dirk Kempthorne's Office, *State to Seek Legal Council to Fight Federal Grizzly Bear Plan*, Dec. 12, 2002, available at www2.state.id.us/gov/pr/2000/Dec/PR1212.html (last visited Dec. 29, 2002).

⁹⁶ *Id.*

⁹⁷ *Id.* It bears mentioning that grizzlies are not "flesh-eating", and are primarily vegetarians. Grizzly Bear Recovery, *supra* note 5. In fact, the potential loss of ungulates (such as elk) was estimated by the Service to be equivalent to the loss of elk due to current cougar predation. *Id.* Live-stock losses would range, based on 280 bears, from 4-8 cattle and 5-44 sheep per year. *Id.* Moreover, bear-caused human mortality is extremely rare, with only 17 injuries (including 3 mortalities) in 156 years in the Yellowstone Ecosystem outside of the national park. *Id.*

⁹⁸ *State of Idaho v. United States. Dep't of the Interior et al.*, CA-01-0106 (D. D.C. Jan. 19, 2001) (hereinafter Complaint).

⁹⁹ The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend.

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National Environmental Policy Act by arbitrarily and capriciously failing to consider risks to human health and safety, and the economic and potential land use restrictions resulting from the proposed grizzly bear reintroduction.¹⁰⁰

The state's arguments were quite simple. The rhetoric-filled complaint asserted that the Final Rule "unconstitutionally impose[d] obligation's on the state's executive branch of government, usurpe[d] the State of Idaho's sovereign and traditional right to regulate land use and fish and wildlife within its borders, interfere[d] with the State of Idaho's duty to protect its citizens from physical harm, and compromises the [ESA] protections currently afforded existing bears."¹⁰¹ Detailing the state's opposition to the reintroduction plan since the Draft EIS was issued in June 1997, the more interesting and legally defensible of the state's two claims for relief alleged that formation of the CMC violated the Tenth Amendment by forcing the Governor of Idaho to nominate citizens to serve on the Committee and directing the Idaho Department of Fish and Game to exercise day-to-day authority to impose, permit and enforce the decisions of the CMC.¹⁰²

Couched as a classic state's rights claim, the state was seeking to overturn the Final Rule because the Secretary was impermissibly seeking to force the state to administer and enforce a Federal program.¹⁰³ Yet, the claim that allowing state officials to implement a federal program impermissibly violates the state's sovereignty actually turns the notion of state's rights on its head. By arguing that federal delegation of ESA authority to states (or to a CMC) violates the Tenth Amendment to the Constitution, Idaho suggested, oddly, that had the Interior Department retained federal implementation of the program it would not have violated the state's sovereignty and would have been legally permissible.¹⁰⁴

¹⁰⁰ Complaint ¶¶ 43-53, 57.

¹⁰¹ *Id.* ¶ 1.

¹⁰² *Id.* ¶¶ 33, 37. This article does not discuss the NEPA based claim as the author does not believe that the argument was made in good faith. Each of the documents supporting the decision to reintroduce the grizzly allowed for substantial public comment and provided a full range of alternatives to the reintroduction. Idaho's objections based n failing to fully analyze health and economic impacts would not have passed a facial test based on the FEIS and ROD relied upon by the Service in adopting the Final Rule. All that is required under NEPA is that the EIS "set forth sufficient information for the general public to make an informed evaluation and for the decision maker to 'consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm' . . . the court may not rule an EIS inadequate if the agency has made an adequate compilation of relevant information, has analyzed it reasonably, has not ignored pertinent data, and has made disclosures to the public." *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2nd Cir. 1983).

¹⁰³ These suits have traditionally arisen regarding Federal control laws that impose duties on state law enforcement to carry out the enforcement provisions.

¹⁰⁴ *Id.* This argument highlights the paradox of species reintroduction. On the one hand, states generally resist federal reintroduction programs because they lack local control. Yet, when a

Thus, Idaho was actually fighting against the very state's rights they were purporting to defend — that state citizens and regulators should be able to decide how federal programs are to be implemented within the state's borders. Ironically, had the CMC alternative never existed, there would have been no federal directive to the state to act and Idaho would have lacked much of the legal basis they used to challenge the reintroduction and grizzly bears may now be on their way to the Bitterroot Ecosystem.¹⁰⁵ Nevertheless, this little known case was never briefed or argued past the complaint stage.

B. ENVIRONMENTAL GROUPS' ATTEMPTED INTERVENTION

On March 13, 2001 Washington, D.C.-based environmental organizations Defenders of Wildlife and the National Wildlife Federation attempted to intervene in the suit on behalf of the Federal defendants.¹⁰⁶ Before the court could rule on the intervention motion, however, attorneys for the Justice Department and the state of Idaho entered into a Joint Stipulation on March 21, 2001 staying the case until settlement negotiations could occur.¹⁰⁷ The basis for the environmental groups intervention was clear. The two groups were part of the coalition who took part in the creation of the Draft EIS that formulated the CMC and therefore represented interests different from those of the Justice Department or the Interior Department.¹⁰⁸ Moreover, when the sole issue in the case was the legality of the reintroduction decision, the only potential settlement would result in an abdication of the proposed reintroduction.¹⁰⁹ In addition, facing a new Republican Administration, the groups were concerned that the Interior Department would not adequately represent their interests.¹¹⁰ These concerns were not unfounded.

The Clinton-era reintroduction plan was adopted into a Final Rule two weeks after the November 2000 presidential election by a lame duck President and Interior Secretary that were generally supportive of endangered species issues.¹¹¹ By the time of the lawsuit, however, Mr. Bush

federal reintroduction plan is created which guarantees local control by delegating authority to state Governors to appoint state representatives to the Citizen Management Committee, Idaho still resists the proposal because it interferes with the state's right to, presumably, choose to take no action whatsoever.

¹⁰⁵ See *supra* note 37 and accompanying text.

¹⁰⁶ Motion and Memorandum in Support of Intervention filed by Defenders of Wildlife and National Wildlife Federation (filed Mar. 13, 2001).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* note 28 and accompanying text.

¹¹⁰ *Id.* at 14.

¹¹¹ See Final Rule *supra* note 9.

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had been adjudicated to be the winner of the presidential election, a new Republican Secretary of the Interior was set to be nominated, and new Department of Justice attorneys were set to defend the actions of the prior Democratic Administration. While no endangered species-related polices had emerged from the fledging regime, the environmental groups were fearful that a policy change, likely predisposed against the reintroduction plan, was underway. In part, these fears were based on a statement made by then Colorado Attorney General Gale Norton in 1996 asserting her thoughts that the Tenth Amendment had “not been given the power one would think that it should be entitled to” and that “the courts have not been strong defenders of the amendment.”¹¹² On May 1, 2001, the environmental groups sought to clarify their motion to become parties to the mediation in order to review and comment on any substantive result of the settlement discussions.¹¹³

The court, however, never heard their intervention motion. On June 22, 2001, the Interior Department conceded the case in its entirety, deciding to abandon its decision to reintroduce the grizzly bear into the Bitterroot Ecosystem publishing a notice of intent to select the “no action” alternative.¹¹⁴ The shrewd politically motivated litigation of the state of Idaho, filed after the Bush Administration came into office, had resulted in closed-doors negotiations that derailed the CMC and resulted in an unprecedented de-facto gubernatorial veto of a Federal decision to reintroduce a threatened species. And, for the first time in the history of the FWS and the ESA, a proposal was made to withdraw an existing Record of Decision.¹¹⁵ The only question remained: would the Administration get away with it?

V. SECRETARY NORTON’S DECISION TO SHELVE THE GRIZZLY BEAR REINTRODUCTION PLAN

In early June 2001, Secretary Norton proclaimed that she was “fully committed to the recovery of the grizzly bear in the lower 48 states.”¹¹⁶

¹¹² *Id.* (quoting speech by Gale Norton in Vail Colorado, Aug. 24, 1996, the entire text of which may be viewed at www.i2i.org/SUPTDOCS/stevenson/vail96.htm#norton) (last visited Dec. 29, 2002).

¹¹³ Motion to Clarify or Amend Order filed by Defenders of Wildlife and National Wildlife Federation (filed May 1, 2001).

¹¹⁴ Endangered and Threatened Wildlife and Plants; Proposed Establishment of Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 66 Fed. Reg. 33620-22 (July 2, 1997).

¹¹⁵ National Wildlife Federation, *Scientists Call on Interior Secretary Norton to Reinstate Grizzly Bear Recovery Program*, Aug. 16, 2001, available at www.nwf.org/grizzly/scientistsreinstatement.html (last visited Oct. 15, 2002).

¹¹⁶ Silliman, *supra* note 4.

Just weeks later, however, the Secretary reneged on this commitment. In her first major wildlife decision since taking office, Secretary Norton confirmed most environmentalists' and many Democrats' worst fear when she dealt a major blow to grizzly bear recovery efforts by cowing to political pressure and abandoning the decision of her predecessor in favor of an official position of "no action."¹¹⁷ This decision not only acquiesced to the demands of the state of Idaho, but expressly contradicted her promise to fully implement the ESA made during her Senate confirmation hearing, which charges her to take all appropriate and scientifically-based measures necessary to recover imperiled species such as the grizzly.¹¹⁸ The action also contradicted statements made by the Secretary since she took office earlier in the year attacking the previous Administration for business-as-usual Washington politics and indicating her desire to pay more attention to local controls and the concerns of local citizens.¹¹⁹ Most troubling was the fact that the plan she so vehemently attacked could not have been more locally-based and locally controlled, leading many in the environmental community to speculate that her decision on the bear "send a chilling message for other wildlife recovery efforts across the country."¹²⁰ Of additional concern were the specious contents of the Federal Register notice, which was entirely devoid of scientific explanation for the change in the government's decision.¹²¹ The notice simply stated that the FWS "has determined that it is not prudent" to recover grizzly bears in the Bitterroot Ecosystem.¹²² This lack of scientific support did not go unnoticed, however.

¹¹⁷ The selection of the "no action" alternative does not necessarily mean that the Service was precluding the reintroduction of the population of grizzly bears in the Bitterroot Ecosystem. Rather, if selected after the public comment period, the Service will simply remove the pertinent regulations adopted by the Final Rule implementing the CMC and the reintroduction plan. However, seeing how it took over five years to develop the CMC plan, the practical result of doing nothing is the death knell for reintroduction in the Bitterroot Ecosystem.

¹¹⁸ See Defenders of Wildlife, *Statement of Rodger Schlickeisen, President of Defenders of Wildlife, on Secretary of the Interior's Rejection of Selway-Bitterroot Grizzly Plan*, June 21, 2001, available at www.defenders.org/releases/pr2001/pr062101.html (last visited Dec. 29, 2002).

¹¹⁹ *Id.*

¹²⁰ National Wildlife Federation, *Interior Secretary Norton Shelves Grizzly Bear Recovery in Northern Rockies in Favor of "No Action" Decision Send "Chilling Message"*, June 20, 2001 (quoting Jaime Rappaport Clark, Senior Vice President for National Wildlife Federation), available at www.nwf.org/grizzly/nortongrizzly.html.

¹²¹ See Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana; Removal of Regulations, 66 Fed. Reg. 33620-22 (June 22, 2001) (to be codified at 50 C.F.R. pt. 17).

¹²² *Id.*

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A. PUBLIC RESPONSE TO THE NO ACTION DECISION

Immediately after the Secretary's decision, the title of an editorial in the *Missoulian* concisely summarized the concerns many in the West, and across the county, were feeling, "By Ignoring Science and Yielding to Politics, the Secretary of the Interior Endangers Collaborative Approaches to Species Protection."¹²³ The editorial proceeded to blast Secretary Norton's decision, accusing her of making decisions based on "irrational fears and political expediency" and concluding that "[m]ost endangered by this decision, however, is the spirit of cooperation and innovation reflected by the reintroduction plan. . . . Although her boss has given great lip FWS to cooperative approaches to such matters, Norton is abandoning a wonderful opportunity to demonstrate the merits of environmental pragmatism."¹²⁴ Other news stories followed, including a press release from a group of scientists, including the American Society of Mammalogists, the International Association for Bear Research and Management, the International Union for the Conservation of Nature Bear Specialists Group, and Idaho and Montana Chapters of the Wildlife Society, who urged the Secretary to implement the Record of Decision and the Final Rule "as scientific studies overwhelmingly suggest this action is essential to recovery of this native carnivore in the lower 48 states."¹²⁵

At the close of the mandatory sixty-day comment period following the Secretary's decision to abandon the reintroduction, the FWS issued a summary of the public comment received on October 22, 2001.¹²⁶ The results were astounding. The Secretary's proposal drew 28,222 comments from individuals, organizations, and agencies in fifty states and nineteen countries, over ninety-seven percent of which disagreed with the Secretary's decision to abandon the reintroduction plan.¹²⁷ In the area most directly affected by the reintroduction plan, out of 2,745 letters from Montana, ninety-three percent disagreed with the Secretary, and out of 3,055 letters received from Idaho, ninety-eight percent disagreed with the decision to shelve the reintroduction plan.¹²⁸ Although the FWS made sure to mention that eighty-eight percent of the letters were pre-typed form letters, even of those letters that were personally written as

¹²³ Editorial, *The Missoulian*, June 25, 2001.

¹²⁴ *Id.*

¹²⁵ National Wildlife Federation, *supra* note 90.

¹²⁶ See U.S. Fish and Wildlife Service, *Summary of Public Comments, Re-Eval of ROD/ Removal of Regulations for Reintroduction of Grizzly Bears in Bitterroot Area of Idaho and Montana*, October 2001.

¹²⁷ *Id.* at Intro-14.

¹²⁸ *Id.* at Intro-13.

“original comments”, Norton’s decision was disagreed with by eighty-two percent of those responding.¹²⁹

In response to the overwhelming public support urging the Secretary to reinstate the reintroduction plan, Interior Department spokesman Mark Pfeifle dismissed the numbers, saying that public opinion will not be the determining factor in the plan’s future. “Public opinion will be a portion of the decision-making process. But, it won’t be the only thing . . . [The Plan] was never a public opinion contest.”¹³⁰

B. CMC STAKEHOLDER RESPONSE — THE NEZ PERCE TRIBE

One of the sovereign governments involved in the development of the citizen management alternative was the Nez Perce.¹³¹ The reason for the Tribe’s involvement was two-fold. First, the Tribe aboriginally occupied almost thirteen million acres encompassing most of modern day north central Idaho, western Montana, northeastern Oregon and southeastern Washington.¹³² This territory was later ceded to the Federal government as part of the Tribe’s Treaty of 1855, but in return the Tribe reserved certain treaty rights in the area designated as the grizzly recovery area for hunting, fishing and gathering, and ceremonial uses.¹³³ Second, by the time the CMC was being developed, the Tribe was already intimately familiar with endangered species reintroduction, as it had been in charge of the day-to-day recovery efforts of the gray wolf in Idaho since the state refused to be involved in the program in the early 1990s.¹³⁴ In fact, the only difference between the story of the reintroduction of the wolf and the bear was that the Tribe and other stakeholders had learned from their mistakes with the wolf reintroduction. Cognizant of the intense political disagreement and local conflicts that occurred when the plan to reintroduce the wolf was forced upon Western states by the Department of the Interior,¹³⁵ the Tribe and the other members of the

¹²⁹ *Id.* at Intro-14.

¹³⁰ Associated Press, ‘Public Opinion’ Agrees with Grizzly Reintro, October 25, 2001.

¹³¹ See *supra* note 26 and accompanying text.

¹³² Indian Court of Claims, Docket No. 175 at 18 111 (1967).

¹³³ See 12 Stats. 957, arts. I, III.

¹³⁴ The Tribe has received both awards and nationwide recognition for its leadership in gray wolf recovery in Idaho. In addition to recognition from leading environmental groups and newspapers, the Tribe was a 1999 recipient of the prestigious “High Honors in Tribal Governance” award from the Harvard Kennedy School of Government’s Honoring Nations program. See Ford Foundation: *Nation’s Top 10 Innovative Government Programs Named: Federal, State, Local and Tribal Programs Each Awarded \$100,000*, Oct. 14, 1999, available at www.fordfound.org/news/view_news_detail.cfm?news_index=19 (last visited Dec. 29, 2002).

¹³⁵ Idaho Wolf Recovery Program, *Restoration and Management of Gray Wolves in Central Idaho Progress Report 1999-2001* at 6-7 (Jan. 2002), available at www.nezperce.org/Programs/wildlife_program.htm (last visited Dec. 29, 2002). There is a great deal of similarity between

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coalition decided instead to seek a collaborative approach to grizzly reintroduction.¹³⁶

From the outset, the Tribe was committed to grizzly reintroduction in the Bitterroot and welcomed its opportunity to have a role in the day-to-day management authority over the grizzly within its aboriginal territory in Idaho. In a press release issued shortly after the Final Rule was published, Samuel N. Penney, Chairman of the Nez Perce Tribal Executive Committee stated

[t]he Tribe is pursuing an active role in the recovery of the grizzly for both the ecological benefits of returning the bear to its rightful place and for the cultural benefits recovery would provide to the Nez Perce people. . . . We look forward to working with our neighbors, the [CMC], and appropriate agencies to ensure the success of the grizzly reintroduction program.¹³⁷

Not surprisingly, after being poised to appoint a representative to the CMC, the Tribe responded with harsh criticism of the Secretary's decision to set aside the Final Rule, asserting that the Secretary's actions

the wolf reintroduction program and that of the grizzly. Gray wolves (*Canis lupus*) were distributed throughout North America prior to the arrival of European settlers. As civilization moved westward, wolves were systematically eliminated because they were seen as destructive predators of big game and livestock. *Id.* By the 1930s only Minnesota retained a viable wolf population. *Id.* Wolves gained endangered status in 1974 with their listing under the ESA. *Id.* In 1987 the U. S. Fish and Wildlife Service completed the revised Northern Rocky Mountain Wolf Recovery Plan. *Id.* Four years later Congress instigated the Environmental Impact Statement process for wolf reintroductions into Yellowstone National Park and central Idaho. *Id.* Extensive public input showed overwhelming support for wolf recovery, and the Secretary of Interior approved the Final EIS, making reintroductions a reality. *Id.* In 1995 and 1996, 66 wolves were captured in Alberta and British Columbia, Canada; 35 were released in central Idaho, and 31 were reintroduced into Yellowstone National Park. *Id.* The ultimate goal of the northern Rocky Mountain wolf restoration effort is to establish self-sustaining populations on gray wolves and remove the gray wolf from the Endangered Species List. *Id.* The recovery goal for the Northern Rocky Mountain Restoration Region is to maintain 30 breeding pairs equitably distributed across the 3 restoration areas of northwest Montana, greater Yellowstone, and central Idaho for 3 years. *Id.* The Final EIS designated nonessential experimental population areas for the greater Yellowstone and central Idaho restoration areas in which all wolves (released and naturally occurring) were classified as nonessential experimental animals. *Id.* The Service developed the Final Rule that governs how wolves are managed within the nonessential experimental population areas. *Id.* This Rule allowed for management flexibility to meet public concerns and minimize conflicts regarding the presence of wolves, including effects on wild ungulate populations and livestock. *Id.* The Service, the Tribe, and USDA Wildlife Services Wildlife Services comprise the Idaho Wolf Recovery Program Recovery Program sharing legal responsibility for recovering wolves in Idaho. *Id.* The Recovery Program has adopted a collaborative approach working closely with other government and private entities to balance the biological needs of wolves with the social concerns of Idahoans. *Id.* The state of Idaho has not been involved. *Id.*

¹³⁶ See *supra* Section II.B.

¹³⁷ Nez Perce Tribe, *Tribe Responds to Record of Decision Regarding Reintroducing Grizzly Bears into the Bitterroot Ecosystem*, Nov. 16, 2000 (on file with Nez Perce Tribe Office of Legal Counsel in Lapwai, Idaho).

not only threatened the continued existence of the grizzly but undermined the very foundation of the Tribe's sovereignty.¹³⁸

In a comment letter sent to Secretary Norton in August 2001, the Tribe noted the lack of rationale provided for the Secretary's decision and the failure of the Secretary to engage in government-to-government consultation with the Nez Perce Tribe prior to making the decision, despite the Final Rule's guarantee that grizzly bear recovery will be undertaken "in cooperation with . . . the Nez Perce Tribe" and the notice of intent's statement that the government was going to continue to work closely with "States and local governments" in developing a grizzly reintroduction strategy.¹³⁹ The Tribe also highlighted the contradictions between the June 2001 Notice of Intent to adopt the "no action" alternative and the November Record of Decision (ROD) supporting the Final Rule, and the numerous scientific and common sense reasons for the Secretary to stay with the CMC approach as follows:

The No Action alternative will not allow for similar local control [of wildlife management decisions] and will sacrifice the efforts of numerous concerned citizens . . . from all walks of life — ranchers, loggers, environmentalists, and others — [who] worked in the spirit of cooperation and collaboration to develop a plan that would protect the grizzly and local interests.¹⁴⁰

Based on these concerns, and the long-standing cultural and spiritual connection between the Tribe and grizzly bear, the Tribal government and the Tribe's Wildlife Department have been seeking out different options to ensure the return of the grizzly to the Bitterroot Ecosystem. While those sovereign decisions are made, the Tribe remains committed to broad citizen involvement in the plan and the accountability such diverse stakeholders bring to the reintroduction effort. As the Tribe's Chairman, Samuel N. Penney explained, "As with wolves, returning grizzly bears to their native ecosystem will be a lesson in learning to live with these creatures once again."¹⁴¹

¹³⁸ See Nez Perce Tribe's Comments in Opposition to Proposal to Select No Action Alternative for Grizzly Bear Recovery, Aug. 20, 2001 (on file with Nez Perce Tribe Office of Legal Counsel in Lapwai, Idaho).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Nez Perce Tribe, *supra* note 104 (quoting Chairman Samuel N. Penney).

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VI. THE FUTURE FOR GRIZZLY REINTRODUCTION IN THE BITTERROOT ECOSYSTEM

The citizen management concept took a plunge into uncharted waters. Previously, endangered species management in the United States was based largely on a federally driven, top-down system of regulations and enforcement mechanisms. In contrast, the grizzly bear reintroduction plan was unique, embracing the spirit and intent of the ESA, but relying on local communities and citizens working in collaboration with agencies to develop and implement the most effective and least costly plan possible or recovering the grizzly bear. Even though this grassroots effort won the support of a great majority of the public and bi-partisan support from certain state leaders, this locally driven plan surprisingly failed to win the support of the Bush Administration despite the President's election promise to return federal decision-making to the hands of local leaders.¹⁴² Why then did the grizzly bear plan fail? What does it mean for the future of the grizzly bear, other wildlife reintroductions, and the ESA itself? And, is there anything that can be done to force the Bush Administration's hand to take action on the grizzly bear CMC alternative?

A. THE POLITICS BEHIND THE SCUTTLING OF THE GRIZZLY REINTRODUCTION PLAN

Despite the lip-service paid to the need to increase local control, the Bush Administration has rapidly become the most centralized government in recent American history with a great deal of power concentrated in the President and his cabinet level officials. When viewed under the guise of this political power structure, the rejection of the Clinton Administration CMC policy likely had more to do with entrenched notions of federalism and power sharing than it had anything to do with a rejection of the grizzly proposal on its merits. While the President is overwhelmingly perceived as a "state's rights" advocate, a more careful review of his Administration's treatment of the grizzly bear plan indicates that actions over the past two years indicate that placing power in the hands of local decision makers is only supported by the Administration in limited circumstances.

The rejection of the CMC grizzly reintroduction plan may have had more to do with the fact that the proposal did not initiate with the Bush Administration, than it did with a greater paradigm shift in the Administration's policy towards endangered species. While the Administra-

¹⁴² See *supra* note 1.

tion's acquiescence to the demands of Idaho's Governor raises serious questions as to the independence of Federal agencies, the decision was simply an example of Washington party politics as usual supporting the wholesale abandonment of the previous Administration's policies as a matter of course rather than out of respect for the state's position or indicating an abandonment of the ESA. Otherwise, a locally created and locally managed species reintroduction plan would seem to fit squarely into the Administration's *modus operandi*.

The reactions of Idaho's political leaders are a little more difficult to understand. In a state that is home to many anti-Federal government factions, it would seem as though a plan developed by local citizens for local citizens would win overwhelming support — especially when the burden of the conservation fell squarely within federal land.¹⁴³ And such a plan did — among the local citizens. Although it may seem politically counter-intuitive that Idaho's elected leaders did not support the plan as well, the voices that supported reintroduction within the state do not curry political favor and lack the ability to mobilize against the predominately anti-species Idaho regime, as is aptly demonstrated by Idaho's continued resistance to the presence of gray wolves in the state.¹⁴⁴ The CMC had everything the wolf recovery plan, also rejected by the state, did not, including broad local citizen control and clear accountability. After years of fighting wolf recovery, however, the state of Idaho is now actively pursuing management of gray wolf after it is removed from the endangered species list in the next few years. The reason behind the sudden change of heart in the wolf context applies equally to the grizzly. Had the state of Idaho been the guiding force crafting the grizzly reintroduction plan and had more than a minority role to play on the CMC, the state may have supported the plan. Moreover, the CMC did not include the powerful special interests in the state, including the Idaho Cattleman's Association and ranching and hunting organizations, even though the Governor could have used his CMC appointments to effectuate this result. Thus, while the CMC had local control, it may have been the wrong local control to appease state decision-makers.

B. IMPLICATIONS FOR FUTURE OF SPECIES REINTRODUCTIONS UNDER THE ESA

Perhaps the biggest loser in the battle over grizzly bear reintroduction is the availability of future species reintroductions under the ESA, rather than the grizzly bear itself.

¹⁴³ See *supra* note 16.

¹⁴⁴ See *supra* note 134.

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The nonessential experimental population provisions of the ESA were written broadly by Congress granting significant discretion to the Secretary to “authorize the release . . . of any population . . . if the Secretary determines that such release will further the conservation of the species.”¹⁴⁵ This determination is to be based on the “best available information.”¹⁴⁶ By not using the term “best available science”, which is found in other sections of the ESA, Congress likely intended to provide the Secretary with the ability to use all the information available to him, whether stemming from scientific data, commercial data, or other identifiable and reliable sources to meet the conservation needs of the species.¹⁴⁷ Like the listing requirements under the ESA, however, the Secretary is still bound to view the experimental population designations as an impartial and objective inquiry, free of economic or other extraneous considerations.¹⁴⁸ The problem is simple: the terms “best available information” and “best available scientific data” are at best subjective. At worst, they highlight the fundamental weakness of the ESA, one that has long been exploited by environmental groups challenging the Secretary’s failure to list species as threatened or endangered. From all the circumstances surrounding the decision to abandon the grizzly bear plan, it appears as though Secretary Norton has adopted the approach long used against her agency as a means of justifying her “no action” decision — scientific uncertainty.

The “best available politics does not equate to the best available science.”¹⁴⁹ Yet, in the grizzly bear context, it was politics and not science that prevailed at the end of the day. This exact problem has been recognized by Idaho Senator Michael Crapo who, when discussing pacific salmon recovery, stated:

We must not fear good accurate science. Some worry where good accurate science may lead us and as a result, many seek to manipulate scientific processes and mis-characterize scientific hypothesis and conclusions. Such activity is a disservice and can only bring further gridlock and severe penalties to the Pacific Northwest. I urge people from

¹⁴⁵ 16 U.S.C. § 1539(j)(2)(A). (2002)

¹⁴⁶ *Id.* §1539(j)(2)(B).

¹⁴⁷ The term “best scientific data” is the standard for listing determinations under Section 4 of the ESA. *Id.* § 1532(b)(1)(A).

¹⁴⁸ See H.R. Rept. No. 97-567 Pt. 1, 97th Cong. 2d Sess. At 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820.

¹⁴⁹ *Midwater Trawlers Co-Operative v. Dep’t of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002) (discussing the Magnuson-Stevens Act, which like the ESA, requires NMFS to use the “best scientific information available” when making species protection decisions).

all perspectives to insist on good science and be willing to recognize it when we find it.¹⁵⁰

Until this occurs, the ESA and the programs and species that rely on its strength will remain at the mercy of the politically powerful and risk adverse.

The problem is not with the language of the ESA. Far too often, stories emerge from Federal agencies where low-level scientists make a decision, based purely on the data before them, which is subsequently rejected by appointed bureaucrats within the agency because of the implications of that scientific decision on land management and land use practices within the proposed reintroduction area. Unfortunately, insulating science from politics and encouraging respect for the scientifically based agency decisions cannot be legislated by an act of Congress. Land use interests are already given leverage within Section 10 of the ESA that grants take permits and other hardship exemptions based on “substantial economic loss resulting from” ESA listings and species reintroductions.¹⁵¹ Those potentially adversely affected by ESA actions must be encouraged to use existing ESA procedures to seek relief rather than using political means to influence the decision making process. One means to accomplish this end should include greater education and outreach from agency representatives about the realities of the ESA and species reintroduction plans. The opportunities for public hearings and comment periods secured under the Administrative Procedures Act can only go so far in dispelling the myths of the ESA.¹⁵² Only through targeted educational and outreach efforts in areas affected by species reintroduction can Federal agencies begin the long process of gaining broad acceptance for the ESA and the species it seeks to protect.

However, species reintroduction under the ESA is not dead. In fact, a plan has resurfaced to reintroduce the grizzly bear, this time in the North Cascades of north central Washington State.¹⁵³ The North Cascades is one of six grizzly bear recovery zones established after the bear was listed under the ESA in 1975, and is the last to undertake the necessary environmental study required for grizzly recovery efforts to begin.¹⁵⁴ Nevertheless, the reason for the decision to move forward with the plan is not based on the needs of the species, but rather on pragmatic

¹⁵⁰ Statement of Senator Michael Crapo, U.S. Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Wildlife and Water, Sept. 14, 2000.

¹⁵¹ 16 U.S.C. § 1539(a)-(b) (2002).

¹⁵² See generally 5 U.S.C. §§ 552, 706.

¹⁵³ Associated Press, *Grizzly Reintroduction is Back on the Agenda*, Lewiston Morning Tribune, Sept. 30, 2002, at 6A (on file with Nez Perce Tribe Office of Legal Counsel in Lapwai, Idaho).

¹⁵⁴ *Id.*

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concerns over management authority caused by the possibility that Canadian grizzlies may wander into Washington if the Canadian government proceeds with a plan to move grizzlies into southern British Columbia.¹⁵⁵ A consultant group has been hired by the Department of the Interior to raise awareness of the plan and build grassroots support for the project.¹⁵⁶ So far though, “area farmers, business owners, recreation groups and political leaders” have rejected the idea of reintroducing the grizzly.¹⁵⁷ In the early 1990s, the Washington Department of Fish and Wildlife and the state Senate publicly opposed the idea.¹⁵⁸

The North Cascades plan serves to highlight one major problem with the citizen management approach to species reintroduction — what happens if the public disagrees with the science that demands species reintroduction? While it is increasingly important to have local support for environmental decisions, science must not yield to public opinion in the same way it has yielded to political pressure. Environmentalists, industry representatives, and government leaders must seek consensus building. Should that process fail, however, the Federal government must not be afraid to carry out the mandate that Congress charged it with under the ESA.¹⁵⁹ If we are only willing to use the ESA to save the charismatic species that we will never have to come into contact with, biodiversity and all of us in the country are the losers.

C. THE ROAD AHEAD FOR THE GRIZZLY BEAR AND THE BITTERROOT REINTRODUCTION PLAN

Fortunately, despite the rejection of the proposed Bitterroot reintroduction plan, two populations of grizzly bears remain in the continental United States.¹⁶⁰ The bad news is that the two genetically and geographically isolated populations become more imperiled by their separation each day.¹⁶¹ The Interior Secretary’s decision to ignore the conclusions of her own agency that the long-term survival of the grizzly requires their recovery over a broader geographical area than they currently populate and to disregard the government’s own twenty-seven year-old plan for

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Congress declared it to be the policy of the United States and one of the purposes of the ESA to “encourage[] the States and other interested parties . . . to develop and maintain conservation programs which meet national and international standards [as] key to meeting the Nation’s international commitments and to better safeguard[], for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and plants.” 16 U.S.C. § 1531(a)(5).

¹⁶⁰ See *supra* note 20 and accompanying text.

¹⁶¹ *Id.*; see *supra* note 21.

recovering the species, however, may not signal the death knell for the species or the reintroduction plan.

The Final Rule proposing the reintroduction of grizzlies into the Bitterroot Ecosystem remains in a state of political and legal limbo. As of the writing of this article, almost a year and a half after the scuttling of the reintroduction plan, Secretary Norton has still not acted on the public comment received in response to her notice of intent to select the “no action” alternative. This may prove to be a blessing in disguise.

The potential for a lawsuit exists under the Administrative Procedures Act (APA),¹⁶² with additional claims under the ESA to force the Interior Secretary to take action on the grizzly bear plan and reinstate the proposed action to reintroduce the bears under the management of the CMC.¹⁶³ In particular, a lawsuit brought by a local citizen in the recovery area or one of the stakeholders in the CMC plan,¹⁶⁴ could seek to compel agency action unlawfully withheld or unreasonably delayed.¹⁶⁵ While the successful resolution of such a suit can only result in a court order compelling the FWS to make a final decision on whether to adopt the Final Rule or the “no action” alternative, the addition of a claim seeking declaratory relief under the ESA could push the Court to find that the Interior Secretary violated the mandate of the ESA when she rejected the proposed reintroduction without any scientific evidence to do so.¹⁶⁶ Should the Secretary be adjudicated to have acted arbitrarily and capri-

¹⁶² 5 U.S.C. § 701 *et seq.* (2002).

¹⁶³ Considering the hostile response such a lawsuit may receive in the press and in Congress, and the political realities of the courts today, it is not surprising that a lawsuit has not yet been filed to force the Secretary's hand.

¹⁶⁴ The class of potential plaintiffs is so limited due to the requirements of constitutional and prudential standing. In addition to the Article III constitutional elements of standing (injury in fact, causation and redressability), the APA limits standing to “[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by a [final] agency action within the meaning of a relevant statute is entitled to judicial review thereof.” *Id.* § 702.

¹⁶⁵ Such an action would be based on Section 706 of the APA. That section reads, in relevant part, “To the extent necessary to decision and when presented, the reviewing court shall . . . (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (a) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” *Id.* § 706(1)-(2).

¹⁶⁶ The ESA claim could be based on Section 4(d) which requires the Secretary to “issue such regulations as he deems necessary” to provide for the conservation of threatened species. 16 U.S.C. § 1533(d). Section 7(a)(1) further requires the Secretary to use his authority to carry out programs for the “conservation” of listed species. *Id.* § 1536(a)(1). In light of these mandates, the scientific evidence contained in the EIS and ROD, and the “plain language of the Act, buttressed by its legislative history [that] shows clearly that Congress viewed the value of endangered species as *incalculable*”, such an action should succeed. *TVA, 437 U.S. at 176*. Generally, courts “reject conclusory analysis” like that contained in the Secretary's notice of intent “where the agency spurns un rebutted expert opinions without itself offering a credible alternative explanation.” *American Tunaboat Ass'n v. Baldrige, 738 F.2d 1013, 1016 (9th Cir. 1984)*.

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ciously and without accordance of law,¹⁶⁷ the notice of intent to pursue the “no action” alternative would have to be withdrawn and a new action proposed in its place.¹⁶⁸ Together, a successful action on both claims for relief could open the door to eventual adoption of the CMC Bitterroot grizzly reintroduction plan.

VII. CONCLUSION

Although the plan to reintroduce a small number of grizzly bears into the Bitterroot Ecosystem was dealt a major set back in 2001, the reintroduction plan may very well be resurrected with the next change of tenancy at the White House. The bears, however, may not wait that long. With grizzly bear populations slowly expanding to the north and east of the Bitterroot Ecosystem, it is just a matter of time until one of these majestic creatures makes its way into Idaho on its own. When the grizzly does return to its historic habitat it may not be under conditions nearly as favorable to or controllable by local governments as those that were offered under the CMC plan.

Much like the eventual spread of the grizzly bear across the West, the desire of people to conserve threatened and endangered species cannot be stilted forever, and neither can the desire of people to work together to craft creative, grassroots solutions to the Federal bureaucratic delays that too often come at the expense of the species sought to be protected. While the CMC approach was a first of a kind method for dealing with species reintroduction, it will not be the last.

The future of the ESA and species recovery must be built on mutual trust and cooperation between local citizens, organizations, governments and federal agencies. The flexibility inherent in a system designed and managed by those most closely connected to the species and on-the-ground concerns make the CMC concept worthy of emulation throughout the United States. Now, it is up to our leaders in Washington, D.C. to get the message. Regardless of the outcome of this particular effort at grizzly bear reintroduction, the most important aspect of the collaborative grizzly bear recovery process will not be the tone it sets for future species reintroductions under the ESA. Rather, the lasting benefit will be

¹⁶⁷ The arbitrary and capricious standard is highly deferential to the agency, requiring the court to uphold a decision “so long as the agency gave at least minimal consideration to the relevant facts contained in the record.” *American Petroleum Inst. v. Environmental Protection Agency*, 661 F.2d 340 (5th Cir. 1981). However, as noted above, the Secretary’s decision to abandon the reintroduction plan was devoid of supporting evidence and clearly ignored the ROD issued with the Final Rule. Even under this highly deferential standard, a court would likely find that the Secretary’s actions were not based on the record and were conducted without observance of the requirements of the ESA.

¹⁶⁸ 5 U.S.C. § 706.

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the more open and hospitable social environment these bears will step into when they finally cross into the wilds of Idaho.