
LITIGATING FOR WILDLIFE UNDER CURRENT STATE LAWS

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LITIGATION IN WASHINGTON STATE COURTS

■ Wolves

- State Administrative Procedure Act (APA)
- State Environmental Policy Act (SEPA)
- State Public Records Act (PRA)

■ Bears

- State Administrative Procedure Act
- Violations of state statute
- Unlawful Rulemaking

■ Industrial Aquaculture

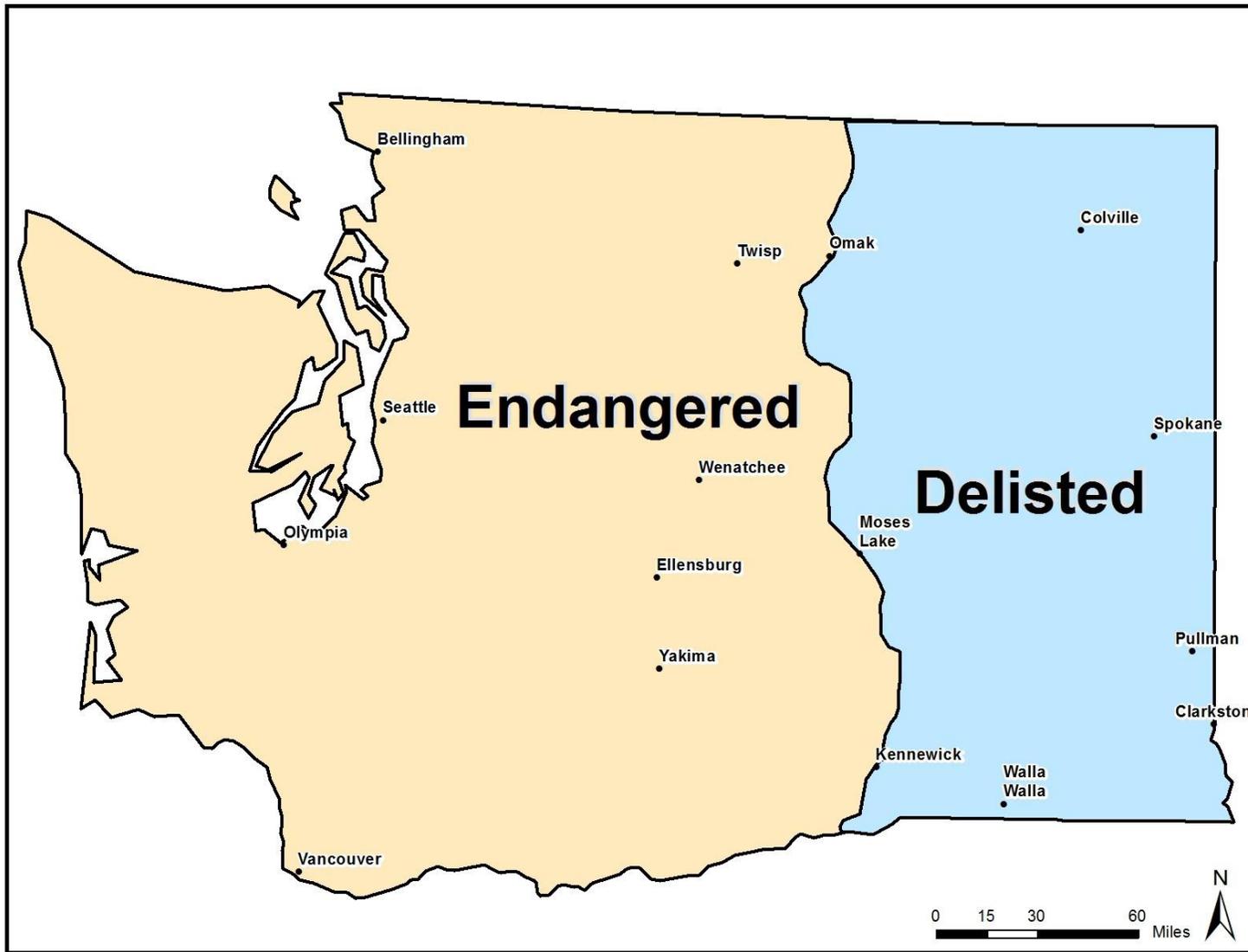
- Violations of state statute requiring Hydraulic Project Approval Permits for nearshore development
- Unlawful Rulemaking

WOLVES IN WASHINGTON



Washington Department of Fish and Wildlife

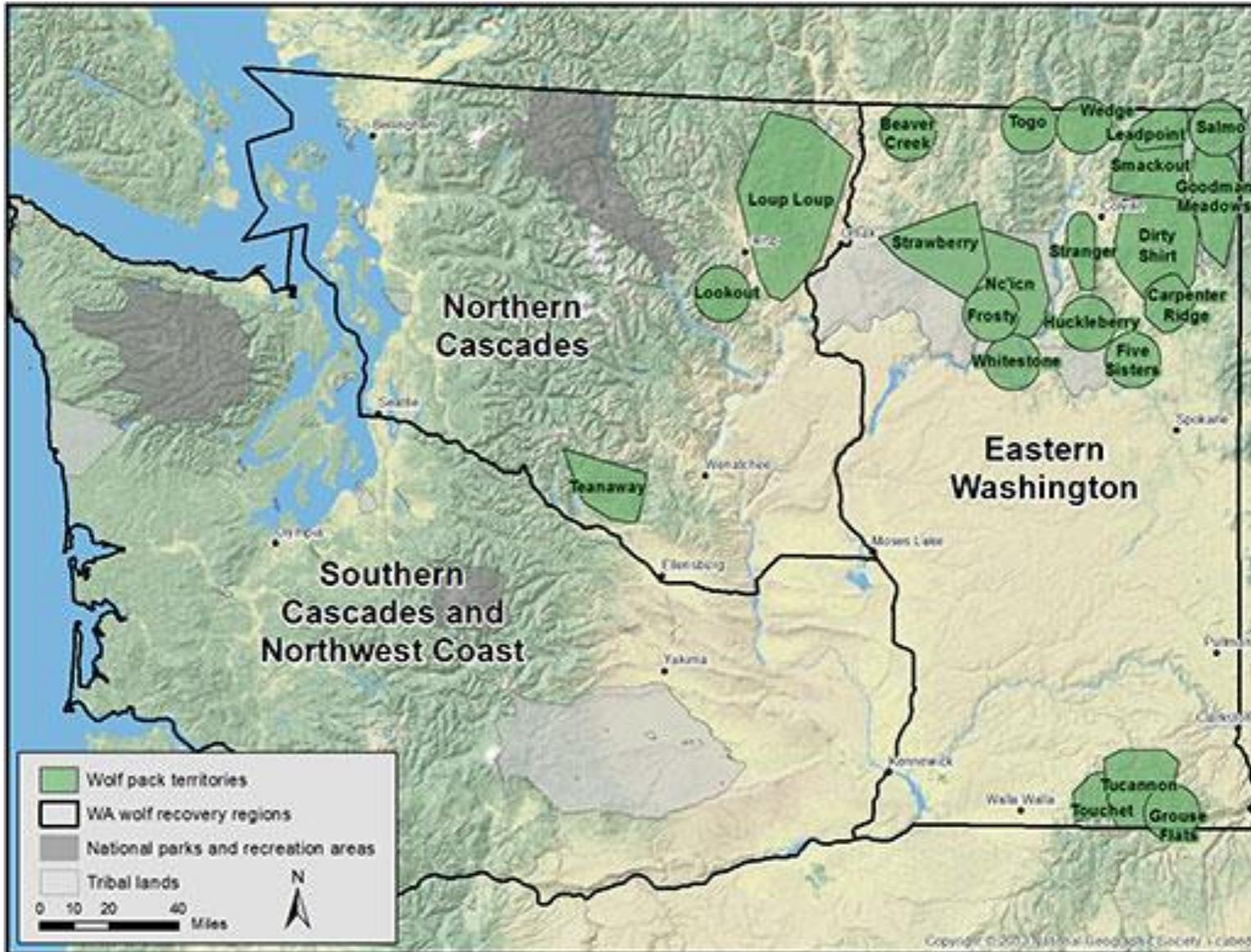
- Washington once had roughly 5,000 wolves
- Completely eliminated by 1900 through trapping, poisoning, hunting, bounties, and government-sponsored killing
- Zero wolves in 2007
- Natural dispersal from Idaho and British Columbia
- Estimated 22 wolves at the end of 2017, in 22 identified packs



- Wolves in western Washington still a federal endangered species
- Wolves in eastern Washington have been federally delisted
- Listed as state endangered species since 1980

WOLF CONSERVATION AND MANAGEMENT PLAN

- State Endangered Species Act requires development of species recovery plan with target population objectives, an implementation plan, and criteria for delisting.
- Wolf Conservation and Development Plan finished in 2011
- Wolves can be removed from list once there are:
 - 15 successful breeding pairs present for three years, with four in each of the three recovery regions and three anywhere in the state, or
 - 18 successful breeding pairs, with four successful breeding pairs in each of the three recovery regions and six successful breeding pairs anywhere in the state



- 122 wolves in count at end of 2017
- 22 packs
- 14 breeding pairs
 - 13 in eastern Washington
 - 1 in North Cascades
 - None in South Cascades

WASHINGTON WOLF MANAGEMENT POLICY

- 2011 Plan allows state to kill “problem wolves” in limited circumstances, as necessary to address livestock conflicts and maintain public support
Emphasis on nonlethal management during recovery phase
- Washington Department of Fish and Wildlife has altered Plan through a series of lethal removal protocols, developed informally by WDFW in conjunction with the citizen Wolf Advisory Group
- Through these protocols, state has killed 18 wolves in past five years; destroyed three packs
- Protocols cannot be directly challenged; need to wait until state takes action by issuing an order to kill wolves

*CENTER FOR BIOLOGICAL DIVERSITY AND CASCADIA WILDLANDS V.
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, ET AL.,*

- Filed in THURSTON COUNTY SUPERIOR COURT NO. 17-2-05206-34 in September 2017
- Challenged WDFW order to destroy the Sherman Pack. Kill order came after the pack had killed 4 cattle over a 10-month period belonging to state's largest rancher.
- Rancher consistently refused to use nonlethal measures to deter conflict; had been responsible for 15 of the 18 wolves killed by the state since the 2011 Plan
- At hearing in March 2018, judge dismissed action as moot. Only two wolves remained in the Sherman Pack. WDFW killed one, thus eliminating the "pack."
- Judge expressed sympathy with claims and acknowledged it was an issue of great public importance that merited full judicial review.
- Required WDFW to promise it would give at least 8 court hours notice before executing next Kill Order, to give time for TRO and allow full judicial review

POTENTIAL TOGO PACK KILL ORDER

- WDFW announced Friday that Togo Pack had passed kill threshold under the 2017 Protocol, with 5 predations on cattle over last 10 months
- Togo Pack not recognized until February 2018. Now 2-3 adult wolves with unknown number of pups
- 2 of predations counted against pack were from November 2017 before pack existed
- Had prepared for Kill Order and TRO action Monday, but late yesterday, WDFW announced that its new director wanted more information about the pack before taking further action
- First time WDFW has passed the lethal control threshold for a pack and not issued a Kill Order

STATE ADMINISTRATIVE PROCEDURE ACT ALLEGATIONS

- Agency receives discretion, but cannot take action that is “arbitrary and capricious”
 - Willful and unreasoning and taken without regard to the attending facts and circumstances
- Kill orders, and protocol on which they are based, are arbitrary and capricious
 - Reach protocol through a challenge to a discrete action
 - Failure to consider science
 - Contrary to goals articulated in 2011 Wolf Plan
 - WDFW abandoned discretion to Wolf Advisory Group for political cover
 - Failed to consider relevant facts when issuing kill order
 - Failed to follow requirements of protocol
 - Findings in kill order were unreasonable and ignored relevant facts

STATE ENVIRONMENTAL POLICY ACT ALLEGATIONS

- SEPA requires state agencies to prepare an environmental impact statement (EIS) when proposing “major actions having a probable significant, adverse environmental impact.”
 - Designed to require full disclosure of environmental information, allow for public comment, and ensure that officials are making a reasoned choice among alternatives
 - 2011 Wolf Plan went through SEPA and WDFW developed an EIS to support it
 - WDFW has not developed an EIS, or even made the threshold determination necessary, for any of its protocols
- New SEPA Process required for protocols
 - Protocols have a significant, adverse environmental impact on an endangered species
 - 2011 Plan done under “phased review,” contemplating subsequent supplemental review for specific actions
 - EIS for Wolf Plan did not consider alternatives to lethal control, or effects of different types of lethal control programs

STATE ENVIRONMENTAL POLICY ACT ALLEGATIONS

- Protocols depart from lethal control contemplated by 2011 Wolf Plan
 - Lethal control contemplated by Plan was limited, case-by-case, and emphasized use of non-lethal alternatives. Allowed only when necessary to control “problem wolves” to help “build public tolerance” –i.e. need to kill wolves to save them
 - WDFW has since abandoned this rationale: Acknowledged it cannot target “problem wolves,” and recognized state killing of wolves does not build public support for wolf recovery
 - Now, blatantly kills wolves to pacify livestock owners, which is not a valid rationale under the Plan
- EIS required because significant new information has emerged since 2011 Plan
 - Large and continually growing body of science showing that non-lethal controls are more effective and cost efficient than lethal control

OPPORTUNITIES UNDER CURRENT STATE LAW

- Ability to require state officials to go through a rational process
- Brings increased scrutiny to their actions
- Increased public and legislative awareness
- Require documentation of actions
 - Documentation available through public disclosure process
- Require acknowledgement of science
- Disclosure of environmental impacts
- Opportunity for public involvement through SEPA and rulemaking

LIMITATIONS OF CURRENT STATE LAW

- At best, can only require agencies to go through a better process
- Courts will give state agencies extreme deference under APA
- SEPA only requires consideration of environmental impacts and alternatives, and does not mandate the action taken as a result
- Under the APA, its difficult to challenge bad decisions if they emerge from a reasonable process
- Discovery limited (but documents available through public records)

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