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Finding Teeth for Russian Federation Tiger Protection Laws: Using United States Gray Wolf Populations as an Inspiration, and United States Endangered Species Legislation as a Model, for Russian Federation Endangered Species Legal Reform

I. Introduction

Imagine a world free of epilepsy and rheumatism. Imagine a world with fewer skin diseases, and with non-invasive methods for the treatment of paralysis. Imagine all of these medical breakthroughs contained in one source. Now imagine that source, and its magical chemical compounds being lost before these cures or treatments can be utilized. Traditional Asian medicine touts the ability to provide alleviation for these afflictions,¹ the demand for these cures in Asian countries, however may lead to the extinction of the source before its efficacy can be validated by modern science. The supposed source for all of these cures: the common tiger. The problem is that the tiger is not so common anymore. As a matter of fact, the tiger is in danger of becoming extinct.²

The largest feline on the planet, the Siberian or Amur Tiger, is a

1. Traditional Asian medicine practitioners believe tiger parts can cure or alleviate many common afflictions. Tiger eyeballs are used to treat epilepsy and tiger whiskers are used to treat toothaches. The brain of the tiger is believed to be effective against laziness and is used to make pimples disappear, the tail is used for the treatment of skin diseases, the penis and testicles are valued for virility preparations, and the bones are purported to build strength as well as being used to treat rheumatism and paralysis. Parts of a Tiger Used in Traditional Chinese Medicine, <http://www.5tigers.org/chinmed.htm> (1994).

2. Russian Federation Government decree No. 843 dated 8 July 1997, "On the Special Federal Program <<Conservation of the Amur Tiger>>," art. 1 [Executive Program Summary] [hereinafter On the Special Federal Program <<Conservation of the Amur Tiger>>] (translation received from Tatiana Sidorova, IRC Director, Public Affairs Section U.S. Consulate Vladivostok) (document on file with The Penn State Environmental Law Review).

native of the Russian Far East.³ The Amur Tiger has hovered near extinction for most of the twentieth century⁴ due to poaching,⁵ despite laws that have protected this sub-species of tiger from hunting since 1947. In addition, human impact on the tiger's habitat has led to a shortage of suitable land that can support a tiger population.⁶ Because the tiger is highly valued in traditional Asian medicine, the market for tiger parts in China, Japan, and Korea makes poaching a lucrative enterprise.⁷ A tiger skin in China can be sold for \$10,000 or more.⁸ The demand to feed this illegal market is compounded in the neighboring Russian Far East Asia where unemployment is prevalent.⁹

The genetic mystery of the tiger as a potential cure for some of mankind's ailments, is not the only reason this endangered species should be protected from extinction. The international community is

3. The Amur tiger can reach lengths exceeding ten feet long and can weigh as much as 660 pounds, Stigers, *Amur or Siberian Tiger: Panthera tigris altaica*, <http://www.5tigers.org/Directory/allabouttigers.htm> at [Five Tiger Subspecies] [Amur (Siberian) Tigers]. The Amur Tiger's range originally extended throughout the Russian Far East, northeast China and the Korean peninsula. Today, the only remaining viable population is in the Primorski and southern Khabarovski Krai in the Russian Far East. The Amur Tiger has its back against a wall—the Sea of Japan. RIDING THE TIGER 273 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

4. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2 at art.1 [Executive Program Summary].

5. In 1993, Russian and International wildlife experts believed the Amur Tiger faced imminent extinction. The number of Amur Tigers in the wild was estimated at 200-300 and on the average, 50-60 were being killed each year by poachers. Through the efforts of government and non-governmental organizations, the situation had changed dramatically by 1997. The latest census of Tigers in the Russian Far East estimated that in 1996 between 330-371 adult animals remained. Experts reported the rising population was correlated to the lower rate of loss of these cats to poachers. While this positive increase towards a healthy, sustainable population was achieved during a period of otherwise rampant organized criminal activity, this trend is not guaranteed without continued efforts. India's Project Tiger, after realizing initial success in the 1970's, saw a backslide in the numbers of the Amur's cousins (Indian Tiger) in that country just a decade later. Compounding the threat to the Amur Tiger is its proximity to the world's largest markets for tiger parts and products in China, Korea, and Japan. RIDING THE TIGER, 230, 273 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

6. RIDING THE TIGER 292, 296-97 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

7. See CITES Tiger Missions Technical Team, *Issues Relating to Species—Tiger—Technical Missions*, CITES Doc. SC.42.10.4, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions], 10-12, 76 (1999) [hereinafter *Tiger—Technical Missions*].

8. WildAid Director Goes Undercover To Help Bust Major Wildlife Mafia Ring In The Russian Far East, <http://www.wildaid.org/> (Apr. 12, 2000).

9. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3 at 75.

“[conscious] of the ever-growing value of wild [animals] from aesthetic, scientific, cultural, recreational and economic points of view”¹⁰ While poaching is not the only danger to the continued existence of the Amur Tiger, it is the most imminent threat,¹¹ and therefore is the primary focus of this comment.

It must initially be noted that stricter or more comprehensive endangered species laws will never be a panacea for the preservation of the Amur Tiger. The over-all conservation effort has a much broader scope than endangered species laws can encompass.¹² Not only must legal safeguards be present in order to eliminate the threats to the Amur tiger’s survival, but also local communities’ needs must be addressed. The primary threats to the Amur Tiger have been identified as poaching, decreased prey species, and loss of large, intact natural ecosystems.¹³ Illegal logging in the Russian Far East is quickly decreasing the habitat of the Amur Tiger¹⁴ despite such a decrease in the Amur Tiger’s habitat being contrary to Federation law.¹⁵ The unstable Russian Federation economy has led to subsistence poaching of ungulates; hooved plant-eating animals, which are the Amur tiger’s natural prey.¹⁶ The needs of the local communities in Amur tiger country include a community-backed plan for co-existence addressing issues such as livestock depredation by tigers and the land use rights of people.¹⁷ Other critical needs of local communities are affected by socio-economic factors, which are beyond the scope of this comment.¹⁸ These socio-economic

10. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1090, 993 U.N.T.S. 242.

11. RIDING THE TIGER 273 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

12. “The formula for the future of wild Amur tigers is straightforward: protect large blocks of habitat so that tiger populations are demographically and genetically viable; give local people a reason not to poach tigers; and give local people an incentive to support higher populations of key prey species.” RIDING THE TIGER 98 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

13. RIDING THE TIGER 290-93 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

14. Press Release: Illegal Logging, Rising Consumption Threaten Russian Forests, <http://www.pacenv.org/ttrpr.htm> (2000).

15. Russian Federation Forest Code, No. 22-FZ (1997) (mandating that “the use of the forest stock must be effected by methods which do not harm the environment, animal life, or human health”).

16. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 75.

17. RIDING THE TIGER 290-93 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

18. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee,

factors play a vital role in the conservation of the Amur tiger, but the long-term solution to these factors is beyond the reach of endangered-species legislation. It is unrealistic to expect that in the face of unemployment people would not gamble; taking the chance of poaching and selling a tiger worth \$15,000¹⁹ or getting caught poaching and paying a fine of \$35.²⁰ Tigers can co-exist with people, but unless local community needs are met, conservation of the tiger will not succeed.²¹

Recognizing that other factors will play a crucial role in the stabilization of the Amur Tiger population, this comment will address the role that stricter and more comprehensive Russian Federation endangered species laws could play in the over-all effort. First, current Russian Federation legislation will be examined in the context of its protection of the Amur Tiger. Second, United States legislation will be examined in the context of its success in effectively facilitating the Gray wolf's return from the brink of extinction.²² Conclusively, through analysis of the Endangered Species Act, a legal strategy will be recommended for increased protection of the world's largest cat.

II. Provisions for Protection of the Amur Tiger Under Russian Federation Law

The supreme source of legal protection for the environment in the Russian Federation is the Russian Federation Constitution.²³ The Constitution provides the Russian Federal government with the authority to set environmental policy and to establish federal environmental programs.²⁴ In addition the Federal government may regulate commerce as necessary to provide for the protection of the environment.²⁵ Joint jurisdiction over environmental protection between the Federal

42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 75.

19. WildAid Director Goes Undercover To Help Bust Major Wildlife Mafia Ring In The Russian Far East, <http://www.wildaid.org/> (Apr. 12, 2000).

20. WildAid Director Goes Undercover To Help Bust Major Wildlife Mafia Ring In The Russian Far East, <http://www.wildaid.org/> (Apr. 12, 2000).

21. World Wildlife Fund, *Tigers in the Wild*, http://www.panda.org/resources/publications/species/tiger99/local_level.html (last visited Feb. 2, 2001) (describing a lesson scientists learned during the tiger conservation efforts in India and Nepal).

22. The United States Fish and Wildlife Service has recently proposed reclassifying certain populations of the Gray wolf from endangered status to threatened status and the remaining Gray wolf populations would be delisted (classified as neither endangered nor threatened). Proposal to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 65 Fed. Reg. 43450 (2000) (to be codified as 50 C.F.R. pt.17) (proposed July 13, 2000) [hereinafter Proposal to Reclassify].

23. Konstitutsiia [KONST.] art. 15 §1 (1994).

24. KONST. art. 71 (1994).

25. KONST. art. 71 §2 (1994).

government and subjects of the Russian Federation is granted by the Constitution and is binding on the territories within which the Amur Tiger ranges.²⁶

The Russian Federation Constitution further provides that “the international treaties of the Russian Federation shall be a component part of its legal system.”²⁷ The Russian Federation is a signatory member to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (hereinafter CITES), having joined in 1976 under its predecessor form of government, the Soviet Union.²⁸ As a signatory member, the Russian Federation is bound to impose penalties for the unauthorized import and export of specimens of endangered species.²⁹ Tigers have been listed in the CITES Treaty as a protected species since the original treaty was signed in 1973.³⁰ Because tigers are listed in Appendix I of CITES, which mandates the highest degree of protection, trade in tigers or their parts³¹ must be strictly regulated.³² All signatories³³ to the treaty are bound to prohibit trade in the listed species and to impose penalties for trade of the species.³⁴ However, the burden

26. KONST. art. 72 §§1-2 (1994).

27. KONST. art. 15 §4 (1994).

28. The Russian Federation affirmed its commitment to the CITES Treaty after the country’s transition from a Socialist to a republican form of government. See Russian Federation Government decree No. 318 dated 7 April 1995, “On Exemptions Regarding the Species of Wild Animals Included in Appendixes I and II of the Convention on the International Trade in Species of Wild Fauna and Flora Under Threat of Disappearance of 3 March 1973,” *Ross. Gazeta*, 26 Apr. 1995, translated in Joint Publications Research Service. *Environmental Issues: CENTRAL EURASIA*, JPRS-TEN-95-007; 14 Nov. 1995.

29. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. VIII, 27 U.S.T. 1090, 1101, 993 U.N.T.S. 242, 250.

30. The Amur Tiger falls under the *Felidae Panthera tigris* classification under Appendix I. CITES, <http://www.cites.org/CITES/eng/index.shtml> at [Documents] [CITES Appendices]. Under the original CITES listing the Amur Tiger was listed separately from other tigers in Appendix II under the classification *Felidae Panthera tigris altaica*, Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. VIII, 27 U.S.T. 1090, 1135, 993 U.N.T.S. 242, 266.

31. CITES extends its protection to animal specimens. The definition of an animal specimen under CITES is “any recognizable part or derivative thereof.” Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. I(a)(ii), III, 27 U.S.T. 1090, 1090-91, 993 U.N.T.S. 242, 245.

32. The treaty provides “[a]ppendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to further endanger their survival. Trade must only be authorized in exceptional circumstances. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. I(a)(ii), 27 U.S.T. 1090, 1090-91, 993 U.N.T.S. 242, 245.

33. Interestingly, Japan has been a signatory member of CITES since 1973, and The People’s Republic of China since 1981. The Democratic People’s Republic of Korea is not a member of CITES. CITES, <http://www.cites.org/CITES/eng/index.shtml> at [About CITES] [List of Parties].

34. The Measures to be taken by the parties to CITES includes in part, “to penalize

for implementing regulations and providing penalties prohibiting the trade in endangered species and their parts, falls primarily on the country in which a species lives.³⁵

The Federation's obligations under CITES also require the establishment of penalties for possession of tiger parts.³⁶ Possession of tiger parts means two things: someone poached a tiger and somewhere there is a demand for the parts of that tiger. The nexus between the poaching of tigers and the illegal export of their body parts to Asian markets is no secret.³⁷ However, under current Russian Federation law³⁸, it appears as though possession of tiger skins or bones is not punishable. Without evidence of some other illegal act, only confiscation of the tiger specimen results.³⁹ While "animal life"⁴⁰ is protected under Federation

trade in, or possession of, such specimens, or both." Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. VIII §1(a), 27 U.S.T. 1090, 1101, 993 U.N.T.S. 242, 250. *See also* 16 U.S.C. 5301-06 (2000) (establishing that the purpose of the Rhinoceros and Tiger Conservation Act is "[t]o assist in the conservation of rhinoceros and tigers by supporting the conservation programs of other nations whose activities directly or indirectly affect rhinoceros and tiger populations, and the CITES Secretariat").

35. The preamble to the Text of the Convention on International Trade in Endangered Species of Wild Fauna and Flora states "that peoples and States are and should be the best protectors of their own wild fauna and flora." Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1090, 993 U.N.T.S. 242. *See also* E. N. Matyushkin et al., Numbers, Distribution and Habitat of the Amur Tiger in the Russian Far East, Tiger Census-96 at 2 (1996) (unpublished manuscript on file with The Penn State Environmental Law Review) (enunciating Russia as having the primary responsibility for conservation of the Amur tiger.).

36. The definition section of CITES defines a specimen as any readily recognizable part or derivative thereof, and article VIII mandates that parties shall penalize trade in, or possession of specimens. *See* Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. I, VIII, XIV, 27 U.S.T. 1090, 1101-03, 1108-09, 993 U.N.T.S. 242, 250, 253-54.

37. Technical teams were formed by CITES and dispatched to countries who have some connection with tiger conservation or illegal trade in tigers, tiger parts, or derivatives. The principle mission of the teams was to assist in developing strategies for combating the illicit trade in tiger specimens. Accomplishment of these missions required extensive inquiry into current conservation issues, legislation, practical controls, and education and awareness. The culmination of the inquiries was to recommend aspects for improvement. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 8,9,76-77. *See also* On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary].

38. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 73 (recognizing that the Russian Federation is drafting new legislation specifically to address CITES issues).

39. The Russian Federation criminal code provides penalties for illegal hunting

law, possession of animal parts does not appear to be a concern.⁴¹

The Russian Federation's environmental obligations under CITES were, until recently, executed by the Federation State Committee for Environmental Protection.⁴² The committee had the duty to implement state policy for the preservation of biological diversity⁴³ and its decisions were "binding on bodies of executive government, legal entities, and individuals."⁴⁴ More notably, in 1997, the committee had developed a special federal program to protect the Amur Tiger population from poachers.⁴⁵ However, in a recent governmental restructuring, Russian Federation President Vladimir Putin dissolved the State Committee for Environmental Protection and transferred its functions to the Ministry of Natural Resources.⁴⁶ The elimination of this environmental committee

while vaguely stating that the offense must cause "substantial damage to nature." 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezhko. Cf. Russian Federation Law No. 2060-1, adopted 19 Dec. 1991, "On Protection of the Environment," at §III, art. 21, *Ross. Gazeta*, 3 Mar. 1992, translated by the Joint Publications Research Service. *Environmental Issues: CENTRAL EURASIA*, JPRS-TEN-92-007; 15 Apr. 1992 [hereinafter *On Protection of the Environment*] (providing that environmental funds will in part come from the sale of fish and game illegally obtained, but does not specify sale from the parts or derivatives of the fish or game); *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 73 (reporting that it is not clear whether tiger parts or derivatives are covered by relevant laws).

40. The Law on Environmental Protection lists animal life as objects of protection. This law also states that rare or threatened animals and their habitats are subject to special protection. It does not mention, however, or allude to, protection for parts or derivatives of animals. *On Protection of the Environment*, *supra* note 39, at § 1 art. 4.

41. The CITES Tiger Missions Technical Team has reported that although the commercial use of tigers is prohibited, the laws implementing the CITES treaty are fragmented. Actual possession of a tiger pelt or part is not a criminal violation in the Russian Federation. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 73.

42. Russian Federation Government decree No. 643 dated 26 May 1997, "On Approving the Statute on the Russian Federation State Committee for Environmental Protection," at art. 6, § 9, *Ross. Gazeta*, 10 Jun. 1997, translated by the FBIS. *FBIS Translated Text: CENTRAL EURASIA*, FBIS-SOV-97-202; 22 Jul. 1997 [hereinafter *State Committee for Environmental Protection*].

43. State Committee for Environmental Protection, *supra* note 42, at §1.

44. State Committee for Environmental Protection, *supra* note 42, at §10.

45. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2.

46. While Putin proclaimed this restructuring to be a cost saving measure, the Russian and international environmental community perceived this measure to be the result of pressures exerted by multinational and Russian corporations. Environmental sources also believe that powerful political ministries responsible for enabling these corporations to exploit Russian natural resources also had a hand in the dissolution of the State Committee on Environmental Protection. According to Aleksandr Nikitin, a former

calls into question the fate of the special program the committee implemented in 1997.

A. *Special Federal Target Program <<Conservation of the Amur Tiger>>*

In 1995 the Russian Federation Government approved an Act⁴⁷ which enabled the State Committee on Environmental Protection to prepare a program, the goal of which was to guarantee conservation of the Amur Tiger in the wild.⁴⁸ In 1997 the proffered program was made law.⁴⁹ The program has three primary objectives: first, prevent the destruction of tiger habitat; second, stop tiger poaching and block channels of illegal trade of tigers, their parts, and products made from tigers; and third, restore and maintain the ungulate population, the prey base of tigers.⁵⁰

1. *Tiger Habitat Conservation*—The Special Federal Program recognizes that state nature reserves and national parks are the safest havens for the remaining Amur Tiger population.⁵¹ However, the square mileage of existing parks, reserves, and wildlife refuges is insufficient to support the current population of this tiger subspecies.⁵² Plans to create new reserves, refuges, and parks have been proposed,⁵³ and once designated, removal of the lands from the preserve system is forbidden.⁵⁴ The long established⁵⁵ preserve system and the plant and animal life within them are, by law, guaranteed special protections from

Federation naval officer turned environmental activist, “[t]he interests of the environmental committee were in conflict with the interests of those ministries so they chose the simplest way: just remove the committee.” *The Green Menace: Vladimir Putin Finds a New Class Enemy in Environmentalism*, SIERRA, Nov./Dec. 2000, at 20.

47. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at Core Information [Enabling Legislation].

48. See On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 2 [Primary Goals, Objectives and Program Implementation Phase].

49. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2.

50. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 2 [Primary Goals, Objectives and Program Implementation Phase].

51. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories].

52. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories]. See also RIDING THE TIGER 290 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

53. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories]. See also RIDING THE TIGER 283-85 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

54. On Protection of the Environment, *supra* note 39 at § IX, art. 60.

55. At least one of the preserves has been established since 1916 and several others since the 1930's. RIDING THE TIGER 284 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

environmentally harmful activities.⁵⁶ Vital ecological corridors connecting this system of preserves have also been proposed,⁵⁷ but this innovative approach to species management has no legislative precedent in Federation law.⁵⁸ These corridors may prove to be a weak link in the expansion of tiger habitat unless a legally defined management strategy is promulgated and enforced.⁵⁹ While the creation of new reserves and ecological corridors is a promising first step, tiger management in the way of habitat conservation cannot be strictly limited to the existing and proposed protected territories.⁶⁰ Other habitat that is suitable for tigers will need to be managed in such a manner consistent with the priority of tiger conservation.⁶¹

Management of tiger habitat in non-protected territories must address the tensions that co-existence of humans and tigers produces.⁶² These tensions include factors such as loss of human life to tigers,⁶³ livestock and domestic animal depredation, competition for ungulates,

56. On Protection of the Environment, *supra* note 39 at § IX, art. 61-63.

57. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories].

58. See RIDING THE TIGER 295 (John Seidensticker et al. eds., Cambridge Univ. Press 1999). See generally On Protection of the Environment, *supra* note 39, at § IX (no mention of ecological corridors).

59. The Special Federal Program on the Conservation of the Amur Tiger envisions restrictions on human impact in these corridors, but more definitive rules will need to be issued. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories]. See RIDING THE TIGER 295 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

60. RIDING THE TIGER 290-93 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

61. See On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories]; RIDING THE TIGER 290 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

62. "All tiger conservation efforts should take into account the interests of the local communities." "To a large extent tiger conservation depends heavily upon the attitude of the local population toward the tiger. The Program envisages the development of recommendations for how people should behave themselves in areas where there is a high likelihood of meeting a tiger." On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Program Activities] [Environmental Education and Awareness]. "The situation for many Russians today is difficult to say the least, but not as difficult as it is for our wildlife. Finding a balance between economic reform and wildlife recovery is a task few Russians want to take on." Tatiana Dmitrienko, *Siberian Tigers Receive Boost From New Female Activist*, WILDLIFE MATTERS, Oct. 2000, at 6.

63. Unprovoked attacks on people by Amur tigers are rare, despite the frequency with which humans encounter tigers. RIDING THE TIGER 290-93 (John Seidensticker et al. eds., Cambridge Univ. Press 1999). See also Y. Yarosh, *In the Man-eater's Stomach Were Found Grass and Dirt*, GOLDEN HORN, http://www.vladivostok.com/Golden_Horn/N16_96/AMB.HTML (1996), translated by Professor Alexander Merezhko (reporting an attack on a man and a woman during which the man was killed and after which it was found the tiger had only grass and dirt in its stomach).

poaching, timber harvest, and unnecessary road access.⁶⁴ There is a great deal of connectivity between all of these co-existence factors. Tiger attacks on humans, domestic animals, and livestock are mainly a result of a dearth of ungulates, the tigers' natural prey.⁶⁵ The dearth of ungulates is exacerbated by the ease with which ungulate and tiger poachers can access the animals' habitat due to the network of roads constructed for timber harvesting. Many poachers hunt ungulates so they can feed their families and the habitat-destructive timber harvests provide financial support for the weakened Federation economy.⁶⁶ Education efforts are currently being made to address attacks on humans and livestock and domestic animal depredation.⁶⁷ Also, road closure programs are being developed and limits on the hunting of ungulates have been recommended.⁶⁸ Poaching, however, the most immediate threat to the survival of the Amur tiger,⁶⁹ has yet to be seriously addressed at a judicial level.⁷⁰

2. *Tiger Poaching*—In 1994, the State Committee on Environmental Protection created a specialized enforcement unit to combat tiger poaching.⁷¹ The Committee's plan to equip this unit,⁷² called "Inspection Tiger," with technical support including vehicles and radio

64. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Program Activities]; Joint Decree By the Primorsky Krai Administration Committee On Natural Resources and the Primorsky Krai State Committee for Environmental Protection decree No. 147/1613 dated 26 Jul. 1999, "On Rules On How People Should Behave and Maintain Livestock in Areas of Tiger Habitat in Primorsky Krai," at [How to Avoid an Attack], *translated by* Karin Elliot, WildAid [hereinafter Rules On How People Should Behave and Maintain Livestock in Areas of Tiger Habitat] (document on file with The Penn State Environmental Law Review); RIDING THE TIGER 290-93 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

65. Rules On How People Should Behave and Maintain Livestock in Areas of Tiger Habitat, *supra* note 64, at [How to Avoid an Attack].

66. RIDING THE TIGER 231, 293 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

67. Rules On How People Should Behave and Maintain Livestock in Areas of Tiger Habitat, *supra* note 64.

68. RIDING THE TIGER 293 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

69. RIDING THE TIGER 194, 231 (John Seidensticker et al. eds., Cambridge Univ. Press 1999) (reviewing 1993 estimates that without a reduction in the estimated poaching of 60 tigers a year, the Amur Tiger would likely be extinct by the year 2000).

70. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary].

71. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 74.

72. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 2 [War Against Poaching, Illegal Trade and Export of Tigers, Tiger Parts, and Tiger Derivatives].

communications has been realized.⁷³ This well trained, and professional group of personnel, not only have been effective in catching poachers, but also have received international recognition⁷⁴ and a commendation for their efforts from CITES.⁷⁵

While recent efforts of Inspection Tiger, Russian Police, and other governmental agencies appear to be catching poachers of Amur tigers, Western organizations and Federation tiger specialists believe that penalties for poaching simply do not have any bite.⁷⁶ The State Committee on Environmental Protection has substantiated this belief.⁷⁷ Poaching is a criminal offense in the Russian Federation but no civil penalties are levied for this activity.⁷⁸ The Criminal Code of the Russian Federation imposes different fines⁷⁹ for poaching depending upon the status of the individual committing the act. An ordinary citizen poaching alone "shall" be fined between \$14.42 and \$3605.00.⁸⁰ A functionary

73. RIDING THE TIGER 240-41 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

74. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 74, 77.

75. Convention on International Trade in Species of Wild Fauna and Flora, <http://www.cites.org/CITES/eng/index.shtml> at [Cites Documents] [Resolutions] [11th meeting of the Conference of the Parties] [Conf. 11.5] (Apr. 2000).

76. WildAid, *WildAid Director Goes Undercover To Help Bust Major Wildlife Mafia Ring In The Russian Far East*, <http://www.wildaid.org/> (Apr. 12, 2000); Interview with Dr. Victor Yudin, Supervisor, zoological research station of Biology & Soil Research Institute, in Gaivoron, Russ. (Mar. 5, 2001); Interview with Vladimir Shetin, Deputy Head and Retired Commander, Krai Committee on the Protection of the Environment and Natural Resources and Inspection Tiger, in Vladivostok, Russ. (Mar. 8, 2001).

77. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary].

78. 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezhko.

79. The Russian Federation criminal code sets fines in terms of a range of the number of minimum wages, which will be paid by the offender. The figures provided for this comment have been calculated using the current minimum wage of 200 rubles a month. 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezhko; RUSSIA AND EURASIA DOCUMENTS ANNUAL, vol. 1, THE RUSSIAN FEDERATION 283 (Centre for Research on Canadian-Russian Relations ed., Academic International Press (1999)). The minimum wage was multiplied by the range determined by the code and divided by the exchange rate of rubles to U.S. dollars. At the time of writing, February 2, 2001 the exchange rate was 28.4002 rubles for 1 dollar, making the minimum wage per month, \$7.04 U.S. dollars. Rubicon International, *World Exchange Rates*, (2001) <http://www.rubicon.com/passport/currency/currency.html>.

80. The text of the Russian Federation criminal code provides that prohibited hunting that causes substantial damage to nature shall be punished by "a fine of 200-500 minimum wages or in the amount of wage or other profit of 2-5 months of the offenders salary, or by correction work for two months-two years at 5%-20% of the offenders

who uses the power of position, a conspirator, and a member of organized crime "shall" be fined between \$36.05 and \$5047.00 or may be imprisoned for up to two years.⁸¹ In addition, a functionary who receives a prison sentence will lose the right to hold certain positions for three years.⁸² However, these penalties extend only to individuals who cause "substantial damage to nature."⁸³ If no connection can be made between the killing of the tiger, and the individual apprehended with the tiger or tiger part, it appears as though no penalty can be imposed under existing Russian Federation criminal law.⁸⁴ A more substantial concern is found in the judicial system.

This concern was plainly stated by the State Committee on Environmental Protection in the Executive Summary to the Special Federal Program <<Conservation of the Amur Tiger>>. The Executive Summary reveals that "[t]he war against poaching is exceedingly ineffective, because law breakers are not held fully accountable for their actions; courts do not like to review such cases, and, as a rule, levy inadequate punitive measures and insufficient fines."⁸⁵ A recent report issued by the CITES Tiger Missions Technical Team reported that

salary." 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezko.

81. The text of the Russian Federation criminal code further provides:

The same action committed by a functionary with the use of the power of the position or by conspirators or by organized crime,—shall be punished by a fine of 500-700 minimum wages or in the amount of wage or other profit of 5-7 months of the offenders salary or by deprivation of freedom for up to two years with no right to hold certain positions or activities for three years.

26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezko.

82. 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezko.

83. 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezko.

84. CITES officials who visited the Russian Federation and discussed the legal ramifications of possession of tiger parts with Federation enforcement officers were left with the impression that the applicable laws are fragmented and unclear on the issue. The enforcement officers expressed the opinion that a lack of criminal penalties for possession of tiger parts and derivatives is a weakness in the Federation laws. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 73.

85. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary]. See also Y. Yarosh, *In the Man-eater's Stomach Were Found Grass and Dirt*, GOLDEN HORN, http://www.vladivostok.com/Golden_Horn/N16_96/AMB.HTML (1996), translated by Professor Alexander Merezko (quoting Vladimir Shetinin, Deputy Head of the Krai Committee on the Protection of the Environment and Natural Resources who reported, "[c]ourts are extremely unwilling to take these cases for trial and as a rule apply punishment measures which are not adequate in comparison to the damage").

although Inspection Tiger has seized forty tiger skins and carcasses, no prosecutions have followed tiger-related incidents.⁸⁶ Although the State Committee on Environmental Protection acknowledges that conservation of the Amur Tiger is a problem which requires coordinated action at the federal and regional levels, and the Russian Federation made that acknowledgment law, a disconnect is present between the Judiciary and the Executive.⁸⁷ This disconnect flies in the face of the edict of the Russian Federation State Committee for Environmental Protection's organic statute: "[d]ecisions of the [Committee] . . . shall be binding on . . . legal entities."⁸⁸ If poachers are not effectively punished, the citizenry and foreigners will maintain a misperception as to the Federation's commitment to Amur tiger conservation.⁸⁹

3. *Ungulate Prey Base*—Both Federal and Regional entities appreciate the need for a sufficient natural prey base for successful tiger conservation.⁹⁰ The State Committee on Environmental Protection has recommended ungulate hunting restrictions in the form of quotas, seasons, and areas.⁹¹ While these regulations are being introduced,⁹² the

86. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm-main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 74. *But see* RIDING THE TIGER 241 (John Seidensticker et al. eds., Cambridge Univ. Press 1999) (reporting that the "apathetic attitude of the Russian courts and law enforcement agencies towards wildlife issues in general [has] gradually changed, resulting in a rise in prosecutions of wildlife criminals").

87. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary].

88. State Committee for Environmental Protection, *supra* note 42, at art. 10.

89. Interview with Dr. Victor Yudin, Supervisor, zoological research station of Biology & Soil Research Institute, in Gaivoron, Russ. (Mar. 5, 2001); Interview with Vladimir Shetinin, Deputy Head and Retired Commander, Krai Committee on the Protection of the Environment and Natural Resources and Inspection Tiger, in Vladivostok, Russ. (Mar. 8, 2001). *See* Y. Yarosh, *In the Man-eater's Stomach Were Found Grass and Dirt*, GOLDEN HORN, http://www.vladivostok.com/Golden_Horn/N16_96/AMB.HTML (1996), *translated by* Professor Alexander Merezko (quoting Vladimir Shetinin, Deputy Head of the Krai Committee on the Protection of the Environment and Natural Resources who remonstrated that the courts' failure to adequately address poachers and penalize them appropriately forms a misperception in the minds of the population); Moscow News, *Beastly Gift*, MOSCOW NEWS, Mar. 12, 1998, <http://news.mosinfo.ru/news/mn/98/03/data/0312-1.html> (reporting a tiger pelt given as a gift from a Russian Federation Primorye Territory Governor to the Belarusian President caused an international environmental scandal). *See also* RIDING THE TIGER 292 (John Seidensticker et al. eds., Cambridge Univ. Press 1999) (suggesting that high conviction rates are necessary to impact the poaching problem).

90. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 2 [Supporting the Amur Tiger Prey Base]; Rules On How People Should Behave and Maintain Livestock in Areas of Tiger Habitat, *supra* note 64, at [How To Avoid An Attack].

91. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra*

socio-economic instability in the tiger habitat region leads to subsistence poaching of ungulates at an estimated three times the limit for some species.⁹³ Inspection Tiger has become involved in the apprehension of poachers of ungulate species,⁹⁴ but until the socio-economic instability and judicial concerns are addressed, efforts to conserve the tigers' prey base are likely to be unsuccessful.

III. United States Legislative Success With Gray Wolf Preservation

The members of the Gray wolf species, the largest wild member of the dog family⁹⁵, once roamed freely across the North American continent. Wolves were an integral part of their ecosystem, culling the weaker members from the ungulate populations⁹⁶ and leaving behind carcasses that served as readily available food for smaller predators such as fox, wolverines, ravens and vultures.⁹⁷ Also, the wolves predation of the larger wild ungulates such as deer and elk helped to maintain an ecosystem balance keeping these populations in check and thereby allowing smaller plant-eaters such as beaver and rodents to compete in the food chain.⁹⁸ Gradually, however, with the encroachment of civilization and the settling of the West, the habitat of the Gray wolf became more restricted.⁹⁹ Settlers competed with wolves for bison, deer, elk, and other ungulates. With their natural prey species depleted, wolves began to kill the sheep and cattle the settlers had brought along on their westward expansion.¹⁰⁰ The settlers prompted predator control programs throughout the United States and, as late as 1960, bounties

note 2, at art. 2 [Supporting the Amur Tiger Prey Base].

92. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 75; RIDING THE TIGER 291 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

93. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 75.

94. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 75.

95. Proposal to Reclassify, *supra* note 22.

96. U.S. Fish and Wildlife Service, *Wolves in North America*, <http://midwest.fws.gov/wolf/> [Learn More] (2000).

97. U.S. Fish and Wildlife Service, *Gray Wolf*, http://species.fws.gov/bio_gwol.html (June 1998).

98. *Id.*

99. *Id.*

100. *Id.*

were still offered for wolves.¹⁰¹ Eventually, by the middle of the twentieth century, the species was extirpated from the lower 48 states with the exception of a small population in Minnesota and in Michigan's Isle Royale.¹⁰²

In 1974¹⁰³ the Gray wolf was listed as an endangered¹⁰⁴ species in the lower 48 states¹⁰⁵ and in 1975¹⁰⁶ gained protection under the CITES.¹⁰⁷ Since being granted protection under the Endangered Species Act, the Gray wolf has made such a remarkable comeback that the U.S. Fish and Wildlife Service has recently proposed a reclassification of distinct geographical populations of the Gray wolf from endangered to threatened status.¹⁰⁸ The remainder of the Gray wolf populations in the lower 48 states would be delisted, or removed from both the endangered and threatened lists.¹⁰⁹ The successes with the Gray wolf have been attributed to conservation and management programs as mandated by law, scientific research, and public education efforts.¹¹⁰ The public

101. *Id.*

102. U.S. Fish and Wildlife Service, *Wolves in North America*, <http://midwest.fws.gov/wolf/> [Learn More] (2000).

103. 50 C.F.R. §17.11(h)(2000).

104. The ESA defines the term "endangered species" as:

any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

16 U.S.C. § 1532(6) (2000).

105. The Gray wolf population in Minnesota is currently listed under the ESA as threatened, 50 C.F.R. §17.11(h) (2000). The ESA defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (2000).

106. *See* 50 C.F.R. § 23.23 (2000).

107. *See* CITES, app.II, <http://www.cites.org> (July 19, 2000) [Documents] [CITES Appendices].

108. Proposal to Reclassify, *supra* note 22 at 43472. A species' status may be changed to threatened when the best available scientific and commercial data establish that the species is no longer in danger of extinction. This data will examine the same five factors which were examined when the species was originally listed as endangered:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence.

50 C.F.R. § 424.11 (2000).

109. Proposal to Reclassify, *supra* note 22 at 43474. Species may be delisted when the Secretary of the Interior determines that the species is not endangered or threatened due to extinction, recovery, or error in the original classification. 50 C.F.R. § 424.11(d) (2000).

110. U.S. Fish and Wildlife Service, *Gray Wolf Biologue*, <http://midwest.fws.gov/wolf/> [Learn More] (2000).

education efforts have led to positive public support for the recovery of this predatory species.¹¹¹

Conservation of biodiversity, and therefore, conservation of the Gray wolf is rooted in the Constitution of the United States. The Constitution empowers Congress to regulate interstate and foreign commerce¹¹² and to make laws that are necessary to execute this power.¹¹³ This empowerment allows Congress to regulate wildlife and to regulate nonfederal lands in the United States, when doing so is necessary to protect wildlife that has been listed as endangered.¹¹⁴

111. See Proposal to Reclassify, *supra* note 22 at 43472 (suggesting that public involvement in management plans has led to a positive public attitude to the recovery programs); The Wisconsin Wolf Advisory Committee of the Wisconsin Department of Natural Resources Madison, WI, *Wisconsin Wolf Management Plan*, <http://www.dnr.state.wi.us/org/land/er/publications/wolfplan/toc.htm>, II [History of Wolves in Wisconsin and Public Attitudes] (1999); Michigan Gray wolf Recovery Team, *Michigan Gray Wolf Recovery and Management Plan*, http://www.dnr.state.mi.us/pdfs/wildlife/wolf_mgmtplan.pdf, § 4, at 12 [Attitudes of Michigan Residents Toward Wolves] (1997); Ted Williams, *Living With Wolves*, AUDUBON, December 2000, at 56 (quoting Tim Dawson a member of Minnesota Audubon, “[w]e strongly support delisting wolves”). *But see* Wyoming Farm Bureau Fed’n v. Babbitt, 199 F.3d 1224 (10th Cir. 2000) (recognizing that many organizations dispute the legal validity of wolf reintroduction into Yellowstone National Park and that the organizations believe the reintroduction program is not in the best educational, economic, and social interests of their members); Proposal to Reclassify, *supra* note 22, at 43471 (describing the failure of the States of Montana, Idaho, and Wyoming to develop wolf management plans as a result of insufficient public and political support); Douglas H. Chadwick, *Return of the Gray Wolf*, NATIONAL GEOGRAPHIC, May 1998, at 82 (stating ranchers and hunters in particular were opposed to reintroduction).

112. U.S. CONST. Art. I, § 8, cl. 3.

113. U.S. CONST. Art. I, § 8, cl. 18.

114. *National Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C. Cir. 1997) (holding that even though the Delhi Sands Flower-Loving Fly inhabited only the state of California, because it was listed as an endangered species, destruction of the fly’s habitat would lead to a loss of biodiversity thereby invoking the commerce clause). The *National Association of Home Builders* court reasoned that such a loss of biodiversity has a substantial effect not only on the ecosystem, but also on interstate commerce. The court relied on the United States Supreme Court’s explanation in *U.S. v. Lopez*, 514 U.S. 549 (1995), that Congress could regulate three broad categories of activity under the commerce clause: (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate commerce,” and (3) “those activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558-59. The court in *National Association of Home Builders* specified that the ESA prohibition on “taking” falls within the first and third *Lopez* categories. *National Ass’n of Home Builders*, 130 F.3d at 1046. Under the first *Lopez* category, in order for the ESA’s prohibitions on selling and transporting endangered species in interstate commerce to be fully effective, the species habitat must be protected. *National Ass’n of Home Builders*, 130 F.3d at 1047. Moreover, the ESA’s prohibition on “taking” of endangered species impedes the ability of interstate actors from using the channels of interstate commerce to promote activities that have interstate repercussions. *National Ass’n of Home Builders*, 130 F.3d at 1048. The third *Lopez* category matches the intent of Congress in enacting

With the Constitutional power to regulate foreign commerce, Congress bound the United States to the CITES treaty¹¹⁵ and promulgated the Lacey Act, one of the implementing laws for the United States' obligations as a signatory member of CITES¹¹⁶. The Lacey Act prohibitions focus on the transportation and marketing of wildlife that is protected by United States and foreign law.¹¹⁷ Both civil and criminal penalties may be imposed upon a violator of the Lacey Act.¹¹⁸ Under the civil penalties provision, violators of the Act may be subject to fines up to \$10,000 if they should have known that the conduct they engaged in was in violation of the underlying law.¹¹⁹ The criminal penalties provision provides for fines of up to \$20,000, or imprisonment for not more than five years, or both.¹²⁰ Furthermore, the Lacey Act provides a citizens' incentive in the form of a reward to any person who furnishes information that leads to prosecution under the Act or regulations issued under the Act.¹²¹ The Lacey Act is but one form of protection afforded Gray wolves by the United States.

The canonical piece of legislation promulgated by Congress to provide protection for the Gray wolf, and other endangered species, is the Endangered Species Act of 1973.¹²² This law protects from harm¹²³

the ESA. National Ass'n of Home Builders, 130 F.3d at 1050-51. Protection of the genetic pool inherent in biodiversity may lead to the self-sustaining availability of this resource for controlled commercial use and for the benefaction of all mankind. National Ass'n of Home Builders, 130 F.3d at 1051.

115. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, art. III, 27 U.S.T. 1090, 1349, 993 U.N.T.S. 242, 318.

116. The ESA, another of the implementing laws for CITES, provides authority to the Secretary of the Interior to implement the obligations of the United States under CITES. 16 U.S.C. 1537a (2000).

117. The Lacey Act in pertinent part makes it unlawful for any person:

- (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
- (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—

- (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.

16 U.S.C. § 3372 (2000).

118. See 16 U.S.C. § 3373(a), (d) (2000).

119. See 16 U.S.C. § 3373(a) (2000).

120. See 16 U.S.C. § 3373(d) (2000).

121. See 16 U.S.C. § 3375(d) (2000).

122. 16 U.S.C. 1531-44 (2000).

123. The Act states that it shall be:

unlawful for any person subject to the jurisdiction of the United States to –

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

any species designated by regulation, as endangered.¹²⁴ The Endangered Species Act (hereinafter ESA) has both proactive provisions designed to foster proliferation of listed species and reactive provisions established to punish individuals who “take” members of the protected species. A taking under the ESA broadly encompasses harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct.¹²⁵ This definition includes indirect and unintentional harm caused to a species through habitat modification.¹²⁶

A. Reactive Provisions of the Endangered Species Act

The reactive provisions of the Endangered Species Act (ESA) provide both civil and criminal penalties.¹²⁷ The civil penalties allow fines of not more than \$25,000 for each violation and the criminal penalties include fines of not more than \$50,000 or one year imprisonment or both.¹²⁸ The penalties are imposed for violations of the ESA and regulations promulgated thereunder.¹²⁹ The mere existence of these substantial penalties has acted as a deterrent to otherwise would-be violators.¹³⁰

Similar to the reward provision in the Lacey Act, the ESA contains incentives to encourage citizens to help enforce its provisions. The first

- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
- (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- (F) sell or offer for sale in interstate or foreign commerce any such species; or
- (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to [§ 4] and promulgated by the Secretary pursuant to authority provided by this chapter.

16 U.S.C. 1538(a)(1) (2000).

124. The ESA provides that the Secretary of the Interior or the Secretary of Commerce shall promulgate regulations listing species which are endangered or threatened due to present or threatened loss of habitat, overutilization, disease or predation, inadequacy of existing law, or other natural or manmade factors. 16 U.S.C. 1533(a)(1) (2000).

125. 16 U.S.C. § 1532(19) (2000).

126. *Babbitt v. Sweet Home Chapter of Communities For A Greater Oregon*, 515 U.S. 687, 705, 707 (1995).

127. 16 U.S.C. § 1540(a), (b) (2000).

128. *Id.*

129. *See* 16 U.S.C. § 1540 (2000).

130. Proposal to Reclassify, *supra* note 22 at 43462 (stating “[t]he large fines and prison sentences provided for by the Act for criminal violations are believed to substantially discourage and minimize the illegal killing of wolves for commercial or recreational purposes”).

is a monetary reward for individuals who provide information that leads to the arrest, criminal conviction, civil penalty assessment, or forfeiture of property for any violation of the Act or any regulation promulgated thereunder.¹³¹ The second is a citizen suit provision that allows any individual to enjoin any other individual, including any U.S. governmental instrumentality or agency who may be in violation of the Act or associated regulation.¹³² This provision also allows a citizen to bring suit against the Secretary of the Interior for the Secretary's failure to perform certain non-discretionary actions or duties under the Act.¹³³ This citizen suit provision allows a concerned individual to act as a check on the Secretary to ensure that proper procedures for listing, delisting and reclassifying species are followed.¹³⁴ Additionally, a concerned citizen has legal recourse regarding the development and implementation of species recovery plans.¹³⁵ Reimbursement for the costs of litigation may be provided to citizens who bring suit under this provision.¹³⁶ What the ESA does, then, is to allow every United States citizen to champion the cause of endangered and threatened species, possibly either at no cost or with a monetary reward.

B. Proactive Provisions of the ESA

The Supreme Court of the United States described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."¹³⁷ The proactive provisions that have played a role in the broad scope of protection for the gray wolf include: mandatory preservation of the species' habitat,¹³⁸ mandatory development and implementation of recovery plans¹³⁹ with the opportunity for state and tribal government direct participation,¹⁴⁰ and a

131. See 16 U.S.C. § 1540(d) (2000).

132. See 16 U.S.C. 1540(g)(1) (2000). Environmental organizations also have standing under the "citizens' suit" provision of the Act since 16 USC § 1540(g) confers automatic standing on any person claiming violation thereof; in addition, such organizations can allege "injury in fact" to their members. Also, visitors and users of a species habitat will be considered to be within "zone of interest" intended to be protected by the statute. *National Wildlife Federation v Coleman*, 400 F Supp 705, (S.D. Miss. 1975), *rev'd on other grounds*, 529 F2d 359, (5th Cir. 1976), *reh'g denied*, 532 F2d 1375, (5th Cir. 1976), and *cert. denied*, 429 US 979, 50 L Ed 2d 587, 97 S Ct 489 (1976).

133. See 16 U.S.C. § 1540(g)(1)(C) (2000).

134. See 16 U.S.C. § 1533(a)-(c) (2000).

135. See 16 U.S.C. § 1533(f) (2000).

136. See 16 U.S.C. § 1540(g)(4) (2000).

137. *TVA v. Hill*, 437 U.S. 153, 180 (1978).

138. See 16 U.S.C. § 1533(b)(2) (2000).

139. See 16 U.S.C. § 1533(f) (2000).

140. See 16 U.S.C. § 1535 (2000). See also, *Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in*

special allowance for species reintroduction in order to hasten its recovery.¹⁴¹

1. *Habitat Preservation*—Because much of the original habitat of the Gray wolf cannot offer significant potential for the species repopulation, the Fish and Wildlife Service has focused its conservation efforts on four distinct population segments.¹⁴² The ESA includes in its definition of species, any distinct population segment (hereinafter DPS), thereby allowing the Fish and Wildlife Service to concentrate its efforts within discrete areas that offer significant potential for the species survival.¹⁴³ Concurrent with listing a species as endangered or threatened, the Secretary of the Interior must designate the critical habitat of the species.¹⁴⁴ Critical habitat is an area determined to be “essential to the conservation of the species and which may require special management considerations or protection.”¹⁴⁵ Any “significant habitat modification or degradation that actually kills or injures wildlife”¹⁴⁶ is considered to be a taking under the act.¹⁴⁷

Critical habitat has been designated for the Gray wolf in Isle Royale National Park, Michigan¹⁴⁸ and in three wolf management zones in Minnesota.¹⁴⁹ In addition, the state wolf management plans for Michigan and Wisconsin focus largely on habitat preservation.¹⁵⁰ These plans recognized the need to limit human access into wolf territory and addressed this need through restrictions on road densities through wolf territory and human activity around den and rendezvous sites.¹⁵¹ Also,

Central Idaho and Southwestern Montana, 59 Fed. Reg. 60252-60266 and 60266-60281 (November 22, 1994) (codified at 50 C.F.R. pt. 17) (describing the process by which the special regulations under the experimental population designation involved both state and tribal governments, interest groups, and thousands of citizens).

141. See 16 U.S.C. 1539(j) (2000).

142. Proposal to Reclassify, *supra* note 22, at 43474.

143. See 16 U.S.C. § 1532(16) (2000). See also Proposal to Reclassify, *supra* note 22, at 43452 (explaining that a distinct population segment must satisfy tests of discreteness and significance, as well as qualifying for the assigned status).

144. See 16 U.S.C. 1533(b)(2) (2000).

145. 16 U.S.C. 1532(5)(A)(i)(I),(II) (2000).

146. See 50 CFR § 17.3 (1994).

147. The Supreme Court of the United States upheld this extension of the definition of the statutory prohibition of “taking” any species listed under the Act. *Babbitt v. Sweet Home Chapter of Communities For A Greater Oregon*, 515 U.S. 687 (1995). While the vigorous protection species’ habitat receives under the ESA is only a relatively recent development in this law, the spirit of this scope of protection was originally provided for with the Act’s provision of land acquisition authority. 16 U.S.C. 1534 (2000).

148. See 50 C.F.R. 17.95(a) (2000).

149. See 50 C.F.R. 17.40(d)(1) (2000).

150. Proposal to Reclassify, *supra* note 22, at 43459-60.

151. The Wisconsin Wolf Advisory Committee of the Wisconsin Department of Natural Resources Madison, WI, *Wisconsin Wolf Management Plan*, pt. V(D)(2),(5), <http://www.dnr.state.wi.us/org/land/er/publications/wolfplan/toc.htm>, [Access

the need for forested corridors for wolf dispersement is recognized and addressed in these plans.¹⁵² It was precisely this type of dispersement that allowed wolves from Minnesota and Canada to re-inhabit Michigan and Wisconsin.¹⁵³ In essence, the state plans recognize the need for human populations to alter their land use behaviors in order for humans and wolves to be able to coexist.

The habitat preservation efforts for the Gray wolf in the western United States have been focused on three distinct recovery areas on tracts of public land in Idaho, Montana and Wyoming.¹⁵⁴ Although no critical habitat has been designated in the Rocky Mountains for the western population of Gray wolves,¹⁵⁵ the environmental stability provided by the policies inherent in the system of National Parks and Wilderness Areas in which the wolves live should be sufficient to ensure habitat preservation while sustaining viable Gray wolf populations.¹⁵⁶ The states of Idaho, Montana, and Wyoming have announced that they will not be directly involved in wolf management through formalized plans until the Gray wolves are delisted.¹⁵⁷ These states have, however, vouched to help with the Federal recovery efforts.¹⁵⁸

2. *Recovery Plans*—While the Lacey Act's prohibition on exploitation, and the ESA's prohibition on taking, have prevented persecution of the Gray Wolf and protected its habitat, the ESA's mandated recovery plans have provided the mechanism under which the

Management], [Management of Den and Rendezvous Sites] (1999); Michigan Gray Wolf Recovery Team, *Michigan Gray Wolf Recovery and Management Plan*, §§ 6.31-6.32 at 27-28, http://www.dnr.state.mi.us/pdfs/wildlife/wolf_mgmtplan.pdf (1997).

152. The Wisconsin Wolf Advisory Committee of the Wisconsin Department of Natural Resources Madison, WI, *Wisconsin Wolf Management Plan*, pt. V(D)(4), <http://www.dnr.state.wi.us/org/land/er/publications/wolfplan/toc.htm> [Habitat Linkage and Corridors] (1999); Michigan Gray Wolf Recovery Team, *Michigan Gray Wolf Recovery and Management Plan*, § 6.33 at 30, http://www.dnr.state.mi.us/pdfs/wildlife/wolf_mgmtplan.pdf. [Habitat Corridors/Linkage Zones] (1997).

153. Proposal to Reclassify, *supra* note 22, at 43455-56.

154. Proposal to Reclassify, *supra* note 22, at 43456.

155. See Proposal to Reclassify, *supra* note 22, at 43462 (providing that only land in Michigan and Minnesota has been designated as critical habitat).

156. The purpose of the National Park Service "is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1 (2000). The National Wilderness Preservation System secures for the American people areas "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain" and which retains "its primeval character and influence, without permanent improvements or human habitation" with "outstanding opportunities for solitude or a primitive and unconfined type of recreation." 16 U.S.C. 1131 (2000).

157. Proposal to Reclassify, *supra* note 22, at 43471.

158. Proposal to Reclassify, *supra* note 22, at 43471.

Gray wolf has been afforded the chance to repopulate.¹⁵⁹ For each of the Gray wolf distinct population segments determined to offer significant potential for the species survival, a recovery plan was developed and implemented.¹⁶⁰

The Eastern Plan, which covers the Western Great Lakes DPS, has two reclassification criteria.¹⁶¹ First, the survival of the wolf in Minnesota must be assured and second, at least one additional viable wolf population¹⁶² must be reestablished within the historical range of the eastern timber wolf outside Minnesota and Isle Royale, Michigan.¹⁶³

Minnesota has harbored the only continuous wolf population in the lower 48 states with estimates between 350-1000 individuals at varying times in the twenty years preceding protection under the ESA.¹⁶⁴ The Minnesota population was reclassified to threatened status in 1978, due to the continued presence of wolves in the more remote regions of northern Minnesota.¹⁶⁵ In both Wisconsin and Michigan, the wolf had been extirpated as reproducing populations by the 1960s.¹⁶⁶ Through dispersement from Canada and natural population growth, and with the protections afforded by law, the Western Great Lakes DPS has grown to the point where the Gray wolf populations in Wisconsin and Michigan are ready to be reclassified.¹⁶⁷ Included in this reclassification will be the listing of wolves as threatened in buffer zone states in order to protect the members of the species that temporarily disperse from the DPS.¹⁶⁸

Within twenty-six years the criteria for the eastern plan have been met.¹⁶⁹ The most notable achievement of the plan is the presence of

159. Similar state management plans will begin to play a vital role in the continued preservation of the species once it is delisted. Although Secretary of the Interior, Bruce Babbitt recommended delisting the Gray wolf in the Western Great Lakes region in 1998, a management plan for the state of Minnesota had not been approved by the state legislature. Without state plans in place, the Secretary concluded that continued preservation of the species could not be assured, and therefore, only reclassification was proposed. Reclassification to threatened status allows the Gray wolf to retain protection under the ESA. Proposal to Reclassify, *supra* note 22, at 43468. While four DPS have been designated for the Gray wolf recovery, only two will be analyzed for the purpose of this comment. Proposal to Reclassify, *supra* note 22, at 43450.

160. Proposal to Reclassify, *supra* note 22, at 43468.

161. Proposal to Reclassify, *supra* note 22, at 43454.

162. A viable population is defined here as 80 or more individual wolves for three consecutive years. Proposal to Reclassify, *supra* note 22, at 43454-55.

163. Proposal to Reclassify, *supra* note 22, at 43454-55.

164. Proposal to Reclassify, *supra* note 22, at 43455.

165. Proposal to Reclassify, *supra* note 22, at 43453.

166. Proposal to Reclassify, *supra* note 22, at 43455-56.

167. Proposal to Reclassify, *supra* note 22, at 43454-56.

168. Proposal to Reclassify, *supra* note 22, at 43455.

169. The estimated wolf population in the Western Great Lakes DPS (Minnesota, Wisconsin and Michigan) was 2816 in 1999. This is an increase from an estimated 1041 in 1979. The Minnesota wolf population has increased from an estimated 1750 in 1979

viable populations in both Wisconsin and Michigan, in part due to comprehensive, local wolf management plans.¹⁷⁰ Because of these local plans, it is the intention of the Fish and Wildlife Service to consider delisting the Gray wolf Western Great Lakes DPS as soon as Minnesota adopts an acceptable state wolf management plan.¹⁷¹

The Rocky Mountain Wolf Recovery Plan focused recovery within northwestern Montana, Central Idaho and the Yellowstone National Park area of Wyoming.¹⁷² Features of this plan included focus of recovery in large blocks of land with abundant native ungulates and minimal livestock,¹⁷³ reintroduction of the wolf into the Yellowstone National Park area and into central Idaho as non-essential experimental populations,¹⁷⁴ and special rules for the management of the species relating to its interaction with livestock.¹⁷⁵ The plan was originally completed in 1980 and revised in 1987.¹⁷⁶ Wolves naturally migrated into Glacier National Park in Montana in 1982.¹⁷⁷ In 1995 wolves were reintroduced into central Idaho's National Wilderness areas and in 1996 into Yellowstone National Park in Wyoming.¹⁷⁸ The estimated 105 individual wolves within the Rocky Mountain recovery area in 1995

to 2445 in 1999. Wisconsin's population has increased from an estimated 25 in 1979 to 197 in 1999. Michigan's wolf population (excluding Isle Royale, which is not considered to be able to contribute to the long-term survival of the species) has made a dramatic reappearance from 2 in 1991 to 174 in 1999. Proposal to Reclassify, *supra* note 22, at 43455-56.

170. Proposal to Reclassify, *supra* note 22, at 43455.

171. It does not appear as though delisting for the Western Great Lakes DPS will occur anytime soon. While the FWS appears to be confident that the Minnesota wolf population will be assured survival with an adequate state plan in place, political hurdles still remain. The Minnesota legislature did not approve a proposed state wolf management plan in 1999. Proposal to Reclassify, *supra* note 22, at 43468. In addition, environmental organizations are ready to wage a battle in the courts in order to stop a state management plan. These organizations believe that the Minnesota wolf population figures are based on less than the statutory requirements of "the best scientific and commercial data available." Ted Williams, *Living With Wolves*, AUDUBON, December 2000, at 55; 16 U.S.C. 1533(b)(1)(A) (2000).

172. Proposal to Reclassify, *supra* note 22, at 43454.

173. Proposal to Reclassify, *supra* note 22, at 43457.

174. See Proposal to Reclassify, *supra* note 22, at 43456-57.

175. See Proposal to Reclassify, *supra* note 22, at 43452, 43456.

176. In 1989 an interagency wolf working group involving Federal, State, and native American Tribal personnel was created to implement four primary recovery tasks. The tasks were to monitor wolf numbers and distribution; limit livestock loss through the relocation or elimination of degrading wolves; research the relationship between wolves, wild ungulates, livestock, and people; and educate the public about wolf management through reports and mass media. It was noted that the severe winter of 1997 in Montana reduced white-tailed deer populations, a natural prey for wolves, and correspondingly, wolf conflicts with livestock were noted. Proposal to Reclassify, *supra* note 22, at 43456-57.

177. Proposal to Reclassify, *supra* note 22, at 43457.

178. Proposal to Reclassify, *supra* note 22, at 43457.

grew to approximately 400 in 1999.¹⁷⁹ In only nineteen years, the FWS had achieved its plan's goal for reclassification of the area from endangered to threatened status.¹⁸⁰

3. *Wolf Reintroduction*—The greatest factor contributing to the plan's success in achieving the numbers of wolves necessary for reclassification was the reintroduction of the species into the two non-essential experimental areas.¹⁸¹ Although this reintroduction was controversial,¹⁸² the program dramatically hastened the recovery of the Gray wolf species in the Rocky Mountains.¹⁸³ These reintroduction areas were chosen because, as public lands they fall under Federal jurisdiction, they are comprised of high quality wolf habitat, and they consist of vast expanses of undisturbed forest.¹⁸⁴ The classification of the wolf populations in these areas as "experimental" has allowed for greater management flexibility,¹⁸⁵ which in turn addressed public concerns.¹⁸⁶

179. Proposal to Reclassify, *supra* note 22, at 43457.

180. The Northern Rocky Mountain Recovery Plan's criterion for reclassification, which covers the Western DPS, is based upon 3 recovery areas. If two of the recovery areas have at least 10 pairs of breeding wolves for 3 consecutive years then the population can be reclassified. This criterion was met in 1999. It is estimated that full recovery in the Rocky Mountains will be achieved by 2002 or 2003, at which time the Western DPS can be delisted. Proposal to Reclassify, *supra* note 22, at 43457.

181. See Proposal to Reclassify, *supra* note 22, at 43457.

182. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000) (recognizing that many organizations dispute the legal validity of wolf reintroduction into Yellowstone National Park and that the organizations believe the reintroduction program is not in the best educational, economic, and social interests of their members); Proposal to Reclassify, *supra* note 22, at 43471 (describing the failure of the States of Montana, Idaho, and Wyoming to develop wolf management plans as a result of insufficient public and political support); Douglas H. Chadwick, *Return of the Gray Wolf*, NATIONAL GEOGRAPHIC, May 1998, at 82 (stating ranchers and hunters in particular were opposed to reintroduction).

183. When the ESA was passed in 1974 no wolves inhabited any portion of the Rocky Mountains. The first permanent reappearance of wolves occurred in 1982 when a pack migrated from Canada and began occupying Glacier National Park in Montana. This pack first reproduced in the Park in 1986, however the wolf population in Montana has not increased beyond 65 to 90 wolves. In 1995 14 wolves were reintroduced into Yellowstone National Park and 15 were reintroduced into the central Idaho Wilderness Area. Over the next year an additional 37 wolves were reintroduced into these two areas. In 1996, the reintroduced wolves comprised approximately half of the then existing wolves in the Rocky Mountains. By 1999, the total Rocky Mountain Wolf population was estimated to consist of 400 individuals with less than one fourth of those being attributed to the naturally occurring population in Montana. Over half of the current population of wolves in the Rocky Mountain are the progeny of the reintroduced groups. Proposal to Reclassify, *supra* note 22, at 43457.

184. Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60252, 60254 (Nov. 22, 1994); Establishment of a Nonessential Experimental Population of Gray Wolves in Central Idaho and Southwestern Montana, 59 Fed. Reg. 60266, 60269 (Nov. 22, 1994).

185. See Proposal to Reclassify, *supra* note 22, at 43467-68. Experimental

This management flexibility is possible because species members that are part of a population designated as experimental are considered to be non-essential to the continued existence of the species and therefore, are treated as threatened, not endangered species.¹⁸⁷ Although these populations still receive protection under the ESA, their threatened status has permitted special regulations to be promulgated. These special regulations allow landowners and livestock producers to employ non-injurious harassment techniques in order to protect their livestock from wolves who apparently have depredation on their minds.¹⁸⁸ Also, under certain circumstances, landowners and livestock producers are allowed to kill depredating wolves.¹⁸⁹ Similar special regulations have been provided for the state of Minnesota since 1985.¹⁹⁰ These special regulations have been successful in addressing local concerns about livestock loss and overburdensome Federal regulation.¹⁹¹

Concurrent with the proposal to reclassify the Rocky Mountain and Western Great Lakes wolves to threatened status, the FWS is proposing new special regulations to cover the populations of wolves not presently covered by special regulations.¹⁹² In the Rocky Mountain DPS, wolf populations outside of the nonessential experimental populations will be affected by the proposed new special regulations.¹⁹³ Greater management flexibility is provided by the newer regulations primarily in the form of a permit system.¹⁹⁴ Under specific circumstances, permits could be issued to citizens authorizing deliberate wolf harassment in an injurious nature.¹⁹⁵ Permits would also authorize citizens to take wolves

populations are authorized for release when it is determined by the Secretary of the Interior that such a release will further the conservation of the species. Members of an experimental population are treated as threatened species, 16 U.S.C. 1539(j) (2000), and the ESA allows the Secretary to issue regulations to protect and to provide for the conservation of the species listed as threatened. 16 U.S.C. 1533(d) (2000).

186. Public Comment was allowed for the proposed reintroduction rules. Among the issues that surfaced was the recognition that the Fish and Wildlife Service "proposed a very liberal experimental rule to accommodate concerns of local residents and the affected States." Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. at 60259 (Nov. 22, 1994).

187. The Secretary of the Interior has the authority to designate experimental populations as nonessential to the continued existence of the species. 16 U.S.C. 1539(j)(2)(B) (2000). The reintroduced wolves in Idaho and Wyoming were designated as nonessential populations. 50 C.F.R. § 17.84 (2000).

188. 50 C.F.R. § 17.84 (2000).

189. 50 C.F.R. § 17.84 (2000).

190. 50 C.F.R. § 17.40(d) (2000).

191. Proposal to Reclassify, *supra* note 22, at 43481.

192. Proposal to Reclassify, *supra* note 22, at 43481, 43486-87.

193. Proposal to Reclassify, *supra* note 22, at 43480.

194. Proposal to Reclassify, *supra* note 22, at 43481-84.

195. Proposal to Reclassify, *supra* note 22, at 43484.

in the act of attacking domestic animals on private land and livestock, livestock guard, or herding animals on public lands outside the experimental areas.¹⁹⁶ The proposed new regulations would also permit federal government agents to use lethal means to remove problem wolves and permits could be issued to allow citizens to take wolves that have been determined to be a danger to domestic animals.¹⁹⁷ In addition, minimal human land-use restrictions would apply under the new regulations.

Confirmation of attacks on livestock and domestic animals will be made by federal government agents, thereby lessening the chance of excessive wolf mortality.¹⁹⁸ It is expected that the wolves that are killed as a result of these new special regulations will be members of the species that exhibited behavioral traits undesirable in the wild population.¹⁹⁹

The proposed new special regulations for the Western Great Lakes DPS will not apply to the Minnesota wolf population, which will continue to be covered by the special regulations promulgated in 1985.²⁰⁰ The thrust of these proposed new special regulations is to allow appropriate state agencies and Tribal authorities to kill depredating wolves.²⁰¹ Although there has never been a reported human death due to a wolf attack,²⁰² the killing of a wolf out of fear for human life or safety is, and will continue to be legal.²⁰³

By addressing local concerns and permitting citizens to confront menacing wolves, illegal and excessive killing of the species can be avoided.²⁰⁴ This focus of management efforts on the occasional problem wolf will promote public tolerance of non-depredating wolves.²⁰⁵

Just as state management plans recognize the need for human land-use behavior to change to allow for the co-existence of wolves and humans, the federal plans recognize the necessity to provide methods by which humans can protect their livelihood from wayward wolves.

C. *Final Step In Reclassification*

In July of 2000 the Fish and Wildlife Service published a proposal

196. Proposal to Reclassify, *supra* note 22, at 43484.

197. Proposal to Reclassify, *supra* note 22, at 43485.

198. Proposal to Reclassify, *supra* note 22, at 43484.

199. Proposal to Reclassify, *supra* note 22, at 43484.

200. Proposal to Reclassify, *supra* note 22, at 43480.

201. Proposal to Reclassify, *supra* note 22, at 43487.

202. U.S. Fish and Wildlife Service, *Gray Wolf*, http://species.fws.gov/bio_gwol.html (June 1998).

203. See 16 U.S.C. 1540(a)(3), (b)(3) (2000).

204. Proposal to Reclassify, *supra* note 22, at 43480.

205. Proposal to Reclassify, *supra* note 22, at 43481.

to reclassify and remove the gray wolf from the list of endangered and threatened wildlife in portions of the lower 48 states.²⁰⁶ In order for a living species or distinct population segment to be reclassified or delisted, five factors must be examined to determine if the species survival is viable without the applicable protections afforded by the ESA.²⁰⁷ Based on the best scientific and commercial data available, the Fish and Wildlife Service must evaluate the following factors: the present or threatened destruction, modification, or curtailment of the species habitat or range; over utilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the species' continued existence.²⁰⁸

Upon examination of the reclassification factors the FWS determined that four²⁰⁹ distinct population segments provide significant potential for the species' recovery and these populations segments have been proposed by the FWS to be reclassified to threatened status.²¹⁰ The remaining gray wolf populations in the lower 48 states would be delisted.²¹¹ While the FWS acknowledges that illegal killing of gray wolves has occurred despite the protection under the ESA,²¹² the simultaneous increase in wolf numbers substantiates the conclusion that human-caused wolf mortality currently is not a significant threat to the survival of the species.²¹³ As mandated by the ESA²¹⁴, the FWS has requested public comment concerning the proposed reclassification.²¹⁵

IV. Proposal For Increased Protection of the Amur Tiger Using the Success With the Gray Wolf as a Model.

Within the 26 years since the Gray wolf was listed as an endangered species, the legal protections afforded and plans implemented have allowed the species to increase from approximately 1000 individuals to an estimated 2800 individuals.²¹⁶ The Amur tiger has been legally protected from poaching in Russia since 1947 when the population was estimated to be less than 50 individuals, and in the 53 years since then,

206. Proposal to Reclassify, *supra* note 22, at 43450.

207. See 50 C.F.R. § 424.11(c) (2000).

208. See 50 C.F.R. § 424.11(c)-(d) (2000).

209. Only two have been discussed in this comment.

210. Proposal to Reclassify, *supra* note 22, at 43458-72.

211. Proposal to Reclassify, *supra* note 22, at 43474.

212. Proposal to Reclassify, *supra* note 22, at 43465.

213. Proposal to Reclassify, *supra* note 22, at 43466-67.

214. 16 U.S.C. § 1533(b)(5) (2000).

215. Proposal to Reclassify, *supra* note 22, at 43490-91.

216. These figures account for only the Western and the Western Great Lakes distinct population segments. Proposal to Reclassify, *supra* note 22, at 43455-58.

the population has increased to approximately 400 individuals.²¹⁷ Statistically, the Amur tiger population in Russia appears to have made a more dramatic revival than the Gray wolf in the United States.²¹⁸ However, the Russian Federation government admits that the continued existence of the Amur tiger is still in jeopardy.²¹⁹ The United States government, on the other hand, not only believes that the continued existence of the Gray wolf is not in jeopardy, but also is confident that some of the species' legal protections can be removed.²²⁰ Moreover, the United States government expects full restoration of the species in four distinct population segments in the foreseeable future, at which time no federal legal protections will be necessary.²²¹

The United States has a legal plan that works for the conservation of endangered species.²²² Through adoption of certain aspects of the United States' endangered species law the Russian Federation should be able to ensure survival of the Amur tiger. The aspects of the United States laws that have helped achieve success with the Gray wolf, and which the Russian Federation laws are lacking include: a broad scope of protection for the endangered species,²²³ stiff penalties and strict enforcement of those penalties,²²⁴ and public involvement in endangered species management.²²⁵

217. Gennaddii Vladimirovich Kolonin, *The World of Nature: Let's Protect the Amur Tiger*, ENVIRONMENT AND NATURAL RESOURCE BULLETIN, Sept. 2000, <http://gazeta.priroda.ru> (document on file with The Penn State Environmental Law Review).

218. The figures show a 280% increase in Gray wolves over a 26 year period versus an 800% increase in Amur tigers over a 53 year period. Doubling the period of wolf recovery would practically equal the period of tiger recovery but would only, all things remaining constant, result in a 560% increase in wolves versus the 800% increase for tigers. On their face, the statistics appear to suggest that the tiger recovery has been more successful. This is not, however, a valid statistical analysis. Proposal to Reclassify, *supra* note 22, at 43455-58; Gennaddii Vladimirovich Kolonin, *The World of Nature: Let's Protect the Amur Tiger*, ENVIRONMENT AND NATURAL RESOURCE BULLETIN, Sept. 2000, <http://gazeta.priroda.ru> (document on file with The Penn State Environmental Law Review).

219. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary].

220. Proposal to Reclassify, *supra* note 22, at 43450.

221. Proposal to Reclassify, *supra* note 22, at 43477.

222. 16 U.S.C. §§ 1531-44 (2000); Proposal to Reclassify, *supra* note 22, at 43450.

223. *TVA v. Hill*, 437 U.S. 153, 180 (1978) (stating that the Endangered Species Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation").

224. Proposal to Reclassify, *supra* note 22, at 43462 (stating that "the large fines and prison sentences provided for by the Act for criminal violations are believed to substantially discourage and minimize the illegal killing of wolves . . .").

225. 16 U.S.C. §§ 1533(b)(5),(h) (providing for public notice and comment), 1535 (providing for cooperation with States), 1540 (providing for citizen suits).

A. *Broader Scope of Protection*

The broad scope of protection afforded species under the United States Endangered Species Act is reflected in the definition of the Act's prohibition on the "taking"²²⁶ of a species, which includes possession²²⁷ of a species member and unintentional and indirect actions that cause harm to the species.²²⁸ The Federation's current laws only prohibit poaching that causes "substantial damage to nature."²²⁹ Acts such as illegal logging, which may destroy tiger habitat, are not legally considered to be either direct or indirect damage to tigers. Whether a tiger dies from a poacher's bullet, or because a logger cut down her home, or as a result of a food shortage due to ungulate poaching, a human has still caused her death. The latter two examples are examples of substantial damage to nature, twofold, and should be punishable under Federation law.

Possession of tiger parts is also not illegal in Russia.²³⁰ It is such possession that progresses from the death of a tiger, and then feeds the illegal market's demand for tiger parts. If someone possesses a tiger part it is likely they know who killed the tiger, and who will be illegally smuggling the tiger part out of Russia. If possession of a tiger part were to be made unlawful, anyone in the supply chain could be subject to punishment. Such a law would make Inspection Tiger's efforts even more effective in achieving one of the objectives²³¹ of the Federation Special Federal Program <<Conservation of the Amur Tiger>>; the blocking of the channels of illegal trade in tigers, their parts, and derivatives. Moreover, plea bargains could be made with the apprehended possessor and information regarding the poacher and the smuggler could be exchanged for a more lenient penalty.

B. *Stiffer Penalties and Stricter Enforcement*

Another legal method that could be employed to aid in the blocking of illegal trade channels is promulgation of stiffer penalties. The CITES

226. 16 U.S.C. § 1538(a)(1)(B) (2000).

227. 16 U.S.C. § 1538(a)(1)(D) (2000).

228. *Babbit v. Sweet Home Chapter of Communities For A Greater Oregon*, 515 U.S. 687, 705, 707 (1995).

229. 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb., 2, 2001), translated by Professor Alexander Merezhko.

230. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 73.

231. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 2 [Primary Goals, Objectives and Program Implementation Phases].

Tiger Missions Technical Team has recommended changing the current penalties to reflect the economic conditions in the tiger territories.²³² Since fines cannot realistically be paid by indigents, penalties in the form of incarceration should be imposed.²³³ The Russian parliament, the Duma, should set minimum jail terms since inadequate application of the law appears to be a concern related to the Russian court system.²³⁴ These jail terms should include limited, or no probation opportunities. Foreigners who are apprehended in association with tiger smuggling or poaching could be assessed stiffer fines, also with a minimum established by the Duma. Civil penalties could be provided for offenses related to the tiger trade.²³⁵ In sum, the Federation needs to establish penalties that act as much as a deterrent, as they do a punishment. By limiting the discretion of the courts to impose meager penalties, the seriousness of a violation of tiger protection laws would be clear.

The penalties the United States laws impose are demonstratively more severe than those imposed by the Russian Federation Criminal Code.²³⁶ It is believed that the high fines and long jail terms have acted as a deterrent to the poaching of, and trade in, Gray wolves.²³⁷ In addition, the United States laws include a citizen enforcement incentive in the form of a reward garnished from the fine imposed on the violator

232. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 78.

233. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 78.

234. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 1 [Executive Program Summary]. Another possibility is for prosecution of offenders to be conducted by a CITES tribunal using Federation law. CITES could establish a presence in Vladivostok, the heart of Amur tiger country and within prominent view of the illegal Asian tiger market. The CITES Tiger Missions Technical Team has already proposed that branch offices of CITES be located in the Federation. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 78.

235. Under current Federation law, no civil penalties apply to poachers of tigers or possessors of tiger parts. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 78.

236. See 16 U.S.C. § 3373(a), (d) (2000); 16 U.S.C. § 1540(a), (b) (2000). Compare 26 UK RF 258, <http://upka.narod.ru/zakoni/26.htm> (last visited Feb. 2, 2001), translated by Professor Alexander Merezko.

237. Proposal to Reclassify, *supra* note 22, at 62, 65-66.

of the act.²³⁸

A similar reward system should be established for Russian citizens who provide information that leads to the arrest and conviction of individuals involved in illegal activities associated with the Amur tiger. Funds for these rewards could be garnered from the stiffer fines paid by foreign violators of the laws, or solicited from environmental organizations. In the Russian territories that are home to the tiger and where the local communities are suffering from economic depression, a monetary reward for citizen-enforcers makes sense.

C. Public Involvement

The Federation's Special Federal Program <<Conservation of the Amur Tiger>> recognizes the need to take into account the interests of local communities in all tiger conservation efforts.²³⁹ A monetary incentive for public involvement in the enforcement of tiger laws is one opportunity for consideration of local interests. Another opportunity presents itself in the form of the program's proposed establishment of ecological corridors between specially protected reserves, refuges, and parks.²⁴⁰ The role of these corridors is to provide a migration path for tigers where human impact is legally restricted between specially protected areas.²⁴¹ Despite the planned role of these corridors, such a land use concept has no legislative precedent under Federation law.²⁴² Issues such as tiger ecology, current and future land ownership, current and future land use, and road use and density will need to be considered.²⁴³ Furthermore, the final legal definition of ecological corridor will need to accommodate both protections for tigers and uses for people.²⁴⁴ Experiences in the United States suggest that public involvement in drafting state wolf management plans have increased public support for wolf recovery.²⁴⁵ With similar public involvement in

238. See 16 U.S.C. § 3375(d) (2000); 16 U.S.C. § 1540(d) (2000).

239. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Program Activities].

240. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories].

241. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Creating a Network of Specially Protected Nature Territories].

242. RIDING THE TIGER 278, 294 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

243. RIDING THE TIGER 288-93 (John Seidensticker et al. eds., Cambridge Univ. Press 1999).

244. On the Special Federal Program <<Conservation of the Amur Tiger>>, *supra* note 2, at art. 3 [Program Activities], [Creating a Network of Specially Protected Nature Territories].

245. Proposal to Reclassify, *supra* note 22, at 43472.

the determination of the tiger protections and citizen-use rights to be established in the ecological corridors for the Amur tiger, the promotion of public tolerance for shared land use with tigers is likely to be achieved.

Public involvement in the development of special regulations for the Amur tiger, akin to those used for wolf management flexibility in the United States,²⁴⁶ may also promote a healthy public attitude for Amur tiger recovery. Such special regulations could prove to be a valuable tool in both protecting tigers from angry livestock owners, as well as allowing livestock owners to retain a sense of control over their local needs. Instead of a livestock owner being required to receive approval from the State Committee on Environmental Protection in Moscow²⁴⁷ in order to kill a depredating tiger, the decision could be made immediately by the livestock owner. Subsequent investigation by the Regional Committee or Inspection Tiger would provide a check system against wanton tiger slayings. Empowerment of this nature, while likely to improve citizen's attitudes towards coexistence, would have to be considered carefully in light of the increased danger to humans from wounded tigers.²⁴⁸ The Russian Federation has a solid legal foundation and a comprehensive conservation program prepared to ensure the future of the Amur tiger. By using the United States successes with the Gray wolf as a model, additions can be made to the Federation's legal foundation and conservation plan. A broader scope of protection for the Amur tiger, stiffer fines for tiger-law breakers and stricter enforcement measures, as well as public involvement in the conservation effort will help to expedite the process of guaranteeing survival of the world's largest cat. But even with the promulgation of the most exacting laws and genuine community involvement, without action and prosecution, the poachers will win.

V. Future of the Amur Tiger

The future existence of the Amur tiger is not guaranteed. The existing legal protections have not been successful in maintaining a viable population of the species through the removal of the threats to the species. While reintroduction of more Amur tigers into the Russian Far East from existing zoo populations may seem desirable, such a program

246. Proposal to Reclassify, *supra* note 22, at 43480-84.

247. *Tiger—Technical Missions*, <http://www.unep-wcmc.org/index.html?http://www.unep-wcmc.org/CITES/redirect.htm~main>, CITES Bodies, Standing Committee, 42nd Meeting, 10 [Issues Relating to Species], c) [Tiger], ii [Technical Missions] *supra* note 3, at 72.

248. Rules On How People Should Behave and Maintain Livestock in Areas of Tiger Habitat, *supra* note 64, at 5, 7.

is not a feasible solution to the low population problem.²⁴⁹ It hardly makes sense to introduce animals into the wild when assurances for their survival are not in place. Until a broader scope of legal protection is promulgated, a hard stand on poaching is taken, and a legal context for ecological corridors established, reintroduction should not be considered.

Possession of tiger parts must be made illegal in Russia. High conviction rates of tiger-law violators must be made a reality. The Amur tiger must have a place to live, safe from poachers' bullets and illegal logging. The Tiger habitat must have abundant prey species and support from the local communities for recovery. The adoption of these measures would provide a clear message—the Russian Federation is committed to Amur tiger conservation.

Once these measures are instituted, the United States' success with reintroduction of the Gray wolf could prove to be a valuable reference for a future Amur tiger reintroduction program. The framework established in the ESA could be adopted for Russian Federation species reintroduction legislation. Accordingly, experiences gained by the United States Fish and Wildlife Service through its Gray wolf reintroduction program could aid in the establishment of a healthy, long-term Amur tiger population in the Russian Far East.

But before any reintroduction program, the fate of the Russian Federation State Committee on Environmental Protection's program, <<Conservation of the Amur Tiger>>, will need to be decided by Federation President Vladimir Putin. Putin's decision will be the opening line in the Russian Federation's message of commitment regarding tiger conservation. Such a message could preserve more than just one species.

Conservation of the Amur tiger could also prove to be conservation of people. If there is any scientific veracity to the beliefs of traditional Asian medicine practitioners, preservation of the Amur tiger could afford modern science the opportunity to replicate the magical chemical compounds believed to exist in the tiger. A world with tigers could be a world without epilepsy, rheumatism, skin disease, and paralysis.

John C. Porter
Tiger-law Hunter

249. Interview with Dr. Dale Miquelle, Biologist, World Conservation Society, in Vladivostok, Russ. (Mar. 2, 2001).

