DALE GOBLE: A "SIGNIFICANT" CONTRIBUTOR TO ENDANGERED SPECIES ACT SCHOLARSHIP

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I. INTRODUCTION[1]

I met Dale Goble one afternoon toward the end of my first year of law school. I was studying in the law library when a tall, lanky third year student (Mike) to whom I had never spoken before tapped my shoulder. Mike explained that he was graduating that spring, that he had been working as Dale Goble's research assistant, and that Dale had tasked him with finding his own replacement. Mike asked me whether I knew who Dale was (I did) and whether I would be interested in working with him (I was). Mike offered to make introductions and led the way to Dale's office. Mike knocked on the closed door. We heard a surly, "Yeah" in response. Mike opened the door and a slightly wild-haired man surrounded by stacks of papers and books glared at us over his reading glasses, red pen in hand. Mike explained why we were there and as Dale realized we were not there to complain about a lecture or challenge a grade, he visibly relaxed. When Mike told Dale that I would be a good research assistant because I worked for the U.S. Fish and Wildlife Service ("FWS"), a small smile replaced the glare. Mike left shortly thereafter. I stayed and began to get to know Dale. We agreed that I would begin working as Dale's research assistant on Endangered Species Act ("ESA") issues when my second year of law school began. I looked forward to that collaboration throughout the summer, and it was one of the highlights of my law school experience.

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1. In a footnote of an earlier paper, I thanked Professor Dale Goble for his guidance. In this footnote, I wish to thank Professor Goble for everything else: his brilliant, insightful analyses of ESA issues; his cross disciplinary work bridging and merging legal, policy, and scientific issues; and being an incredibly kind and generous person with a wonderful sense of humor. I count myself incredibly lucky to have had the privilege of working with him.

During the time I worked with Dale (and for many years before and after), he was interested in all aspects of the ESA.[2] One of the topics Dale was following was the developing case law about a certain phrase contained in the definitions of threatened species and endangered species in the ESA: a "significant portion of its range" or "SPR."[3] We had many discussions about SPR case law and its practical implications for the agencies responsible for listing species under the ESA. This article continues the thread of our SPR study by providing a brief update on the current state of the SPR case law and policy, after summarizing the evolution of the SPR phrase. This article concludes by identifying the apparently settled, the definitely unsettled, and the seemingly avoidable SPR issues.

II. A BRIEF HISTORY OF "SIGNIFICANT PORTION OF ITS RANGE"

The "significant portion of its range" ("SPR") phrase was added to the Endangered Species Act ("Act") in 1973 to enable the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS" together, the "Listing Agencies") to take earlier and more localized preventative action toward species conservation.[4] The SPR phrase laid largely in repose for the next two decades, until the FWS withdrew its proposal to list the flat-tailed horned lizard in 1997. In justifying its withdrawal, the FWS cited inconclusive data that the species was declining, a reduction in threats, and a recent Conservation Agreement designed to reduce the remaining threats.[5] The Defenders of Wildlife challenged the withdrawal, arguing that threats to the lizard were ongoing and FWS's reliance on a newly minted Conservation Agreement was impermissible.[6] When the District Court upheld the FWS decision, Defenders appealed.[7] In its argument before the Ninth Circuit, Defenders argued that at least four of the five statutory listing factors were present on private land, and destruction of the lizard's habitat on private land would represent an 82% loss in the total amount of available habitat.[8] That large a portion of the lizard's range, Defenders argued, constituted an SPR, and the threats

2. A mere tally of the impressive number of books, book chapters, journal articles, book reviews, and other publications Dale Goble has authored would provide an accounting of the volume of his prodigious scholarship yet utterly fail to convey the breadth and depth of his insights and analyses and the lasting impact both he and his body of work have had on a diverse array of academics and practitioners in multiple fields including law, history, and science.

3. 16 U.S.C. § 1532(6) (2018).

4. Endangered Species Act of 1973, Pub. L. No. 93-205, § 3, 87 Stat. 884 (1973); President Richard Nixon, Special Message to the Congress Outlining the 1972 Environmental Program (Feb. 8, 1972), http:/www.presidency.ucsb.edu/ws/index.php?pid=3731.

5. Withdrawal of the Proposed Rule to List the Flat-Tailed Horned Lizard as Threatened, 62 Fed. Reg. 37,852, 37,859–60 (July 15, 1997).

6. *Defs. of Wildlife v. Babbitt*, No. 97-CV-2330 TW(LSP), 1999 WL 33537981, at *2 (S.D. Cal. June 14, 1999).

7. *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1136 (9th Cir. 2001).

8. *Id.* at 1140, 1143.

to that SPR warranted listing.[9] The FWS argued that listing a species as threatened is equivalent to listing an SPR because the same level of protection results.[10] After declaring the SPR phrase "puzzling" and its use in the Act "in some tension with ordinary usage," the Ninth Circuit rejected both parties' arguments.[11]

At that time, the FWS viewed the SPR phrase as clarifying the evidentiary burden it must meet to determine that a species warrants listing throughout all of its range.[12] Under this "clarification" interpretation, the SPR language rendered a species eligible for protection under the Act only if the species faced threats in a portion of its range that were "so severe as to threaten the viability of the species throughout" all of its range.[13] The problem with this interpretation, according to the Ninth Circuit, was that it conflated the terms "all" and "significant portion" and thereby rendered the SPR phrase superfluous.[14]

After the Ninth Circuit's 2001 decision in the *Defenders* case, a number of listing decisions were challenged on SPR grounds. Different courts took different analytical approaches to evaluating the SPR phrase, and unsurprisingly, came to different results.[15] In 2007, perhaps because the SPR case law was unsettled and challenges to the agencies' SPR interpretation continued, the Department of the Interior Office of the Solicitor ("Solicitor's Office") issued an opinion interpreting the SPR phrase (M-Opinion 37013). The M-Opinion explained that the Secretary has "broad" but not unlimited "discretion in defining what portion of a range is significant," and explained that interpreting SPR as a "substantive standard" would be harmonious with language in sections 4, 7, and 9 of the ESA.[16] This SPR

9. *Id.* at 1140–43.

10. *See* Brief for Bruce Babbit, *Defs. of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (No. 99-56362), 2000 WL 33980128, at *19.

11. *Norton*, 258 F.3d at 1141; *see also Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870 (9th Cir. 2009).

12. Office of the Solicitor, U.S. Dept. of the Interior, Opinion Memorandum M-37013 on The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range" at 2 (Mar. 16, 2007), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37013_0.pdf [hereinafter the M-Opinion].

13. *Id.* at 2.

14. *Norton*, 258 F.3d at 1141–42.

15. *See Tucson Herpetological Soc'y v. Kempthorne*, No. 04-CV-00075-PHX-NVW, 2007 WL 2023477 (D. Ariz. July 12, 2007); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 402 F. Supp. 2d 1198 (D. Or. 2005); *Envtl. Prot. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, No. C-02-5401EDL (N.D. Cal. Mar. 1, 2004); *Sw. Ctr. for Biological Diversity v. Norton*, No. 98-934 (RMU/JMF), 2002 WL 1733618, 15 (D.D.C. July 29, 2002); *Defs. of Wildlife v. Norton*, CA 99-02072 (HHK) (D.D.C. Dec. 13, 2001).

16. M-Opinion, *supra* note 12, at 3, 16, 18.

interpretation became known as the "substantive" interpretation.[17] A few years later, this interpretation was rejected in three cases and implicated in two others.[18]

In May 2011, the Solicitor's Office withdrew its M-Opinion in order "to facilitate FWS's review of the SPR phrase and issuance of new guidance."[19] In December of that year, the Listing Agencies issued a draft SPR policy explaining that a portion of a species' range is "significant" only "if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction."[20] The agencies explained that they would consider this draft SPR policy as "nonbinding guidance."[21]

In 2014, the Listing Agencies published a final policy interpreting the SPR phrase ("Final SPR Policy").[22] Under this policy, the agencies consider a portion of a species' range "significant" if "the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range."[23] In determining whether an SPR is "significant," the agencies "ask whether the species would be in danger of extinction or likely to become so in the foreseeable future without that portion, *i.e.,* if the members of that portion were not just currently imperiled, but already completely extirpated."[24] Under the policy, "range" is defined as "the general geographical area within which that species can be found at the time" of a status determination—a species' current range.[25] Although the Listing Agencies may consider "lost historical range" in their species status analysis, it "cannot constitute a significant portion of

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17. *See, e.g.*, *Ctr. for Biological Diversity v. Jewell*, 248 F.Supp.3d 946, 952 (D. Ariz. 2017).

18. FWS's SPR interpretation was rejected in *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1217–22 (D. Mont. 2010); *WildEarth Guardians v. Salazar*, CV-09-00574-PHX-FJM, 2010 WL 3895682, at *4–6 (D. Ariz. Sept. 30, 2010); and *Ctr. for Native Ecosystems v. Salazar*, No. 09-cv-01463-AP (D. Colo. July 15, 2013). FWS's SPR interpretation was implicated, but not explicitly rejected in two cases because the Court found the challenge to the agency's SPR interpretation mooted by the withdrawal of the Solicitor's Opinion. *See Colo. River Cutthroat Trout v. Salazar*, 898 F. Supp. 2d 191, 210–12 (D.D.C. 2012); *National Assoc. of Home Builders v. Salazar*, 827 F. Supp. 2d 1, 5–6 (D.D.C. 2011).

19. Office of the Solicitor, U.S. Dept. of the Interior, Opinion Memorandum M-37024 on Withdrawal of M-37013 – The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range." (May 4, 2011), http://www.doi.gov/solicitor/opinions/.

20. Draft Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species", 76 Fed. Reg. 76,987 (Dec. 9, 2011).

21. *Id.* at 77,002.

22. Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species", 79 Fed. Reg. 37,577 (July 1, 2014) [hereinafter Final SPR Policy].

23. *Id.* at 37,579.

24. *Id.* at 37,581.

25. *Id.* at 37,609. The agencies explained that "range" includes "those areas used throughout all or part of the species' life cycle, even if they are not used regularly (e.g., seasonal habitats)." *Id.*

a species' range."[26] With this definition, the Listing Agencies purported to set a lower significance threshold than contained in the draft SPR policy.[27] The agencies found a lower threshold appropriate because it would "further the conservation purposes" of the ESA and "more clearly avoid the appearance of similarity" to the clarification interpretation rejected by the Ninth Circuit.[28] The Final SPR Policy failed to resolve matters or forestall challenges.

III. THE CURRENT STATE OF SPR

In the five years since its issuance, the Final SPR Policy has been subjected to numerous challenges, both facial and as-applied. Three trends have emerged in the resulting case law; this section describes these trends.[29]

A. Proper Interpretation of "Significant Portion" Remains Unsettled

In 2017, the District Court of Arizona rejected the three-year-old Final SPR Policy.[30] In *Center for Biological Diversity v. Jewell*, plaintiffs challenged the FWS's 2011 finding that listing the cactus ferruginous pygmy-owl as a threatened or endangered species was not warranted.[31] Their challenge "center[ed] on the proper interpretation" of the SPR phrase.[32] In its 2011 finding, published shortly before the draft SPR policy was issued, the FWS found that two population segments of the

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26. *Id.*

27. *Id.* at 37,579.

28. Final SPR Policy, *supra* note 22, at 37,579. The agencies also noted that "many commenters" had requested a lower significance threshold. *Id.*

29. In all of the cases described in this section, plaintiffs challenged the agency's status determination on multiple grounds; it is beyond the scope of this Comment to address all of these challenges.

30. Ctr. for Biological Diversity v. Jewell, 248 F. Supp. 3d 946, 958 (D. Ariz. 2017).

31. *Id.* at 949–50.

32. *Id.* at 952. The FWS's 2011 determination reversed its 2009 draft 12-month finding that listing the pygmy-owl within the Sonoran Desert Ecoregion (a DPS) was warranted but precluded by other higher priority listings. *Id.* at 953–54. In reaching its 2009 draft finding, the agency applied an SPR interpretation that a portion of a species' range is significant if it "is important to the conservation of the species because it contributes meaningfully to the representation, resiliency, or redundancy of the species, such that its loss would result in a decrease in the ability to conserve the species." *Id.* at 953 (internal quotations omitted). The agency concluded that the Sonoran Desert Ecoregion population of pygmy-owls was "important for [the] long-term survival" of the species "due to its substantial contributions to the resiliency, redundancy, and representation of the species" and that loss of the Sonoran Desert Ecoregion population would mean the loss of "significant ecological, morphological, and genetic diversity." *Id.* at 953–54 (internal quotations omitted). Such loss, the agency stated, would move the species "toward extinction and decrease the ability to conserve the species." *Ctr. for Biological Diversity*, 248 F. Supp. 3d at 954 (internal quotations omitted).

pygmy-owl qualified as distinct population segments ("DPS"), but did not meet the definitions of either a threatened or an endangered species.[33] The agency also concluded that the Sonoran Desert Ecoregion did not represent an SPR despite determining that the ecoregion represented an important portion of both the western DPS and the species as a whole, and that loss of the ecoregion would represent a "significant loss of important habitat and genetic diversity" which might "reduce the viability and potential for long-term survival of the remaining portion of the DPS."[34] Without the ecoregion, the agency explained, the western DPS "may lack sufficient resiliency" to withstand "future environmental changes that are already manifesting themselves within this DPS."[35] The agency concluded, however, that the Sonoran Desert Ecoregion was not significant because the best available information did not indicate that "the remaining portion of the Western DPS" would likely become extinct if pygmy-owls were extirpated from the ecoregion.[36]

Before evaluating the 2011 not warranted determination, the court reviewed the Final SPR Policy.[37] The court concluded that the agencies' efforts "to distinguish the Final SPR Policy from the clarification interpretation rejected by the Ninth Circuit" were "illusory."[38] The court distilled the Final SPR Policy into three conditions that must be satisfied before the agencies would consider listing a species based on threats in an SPR:

(1) the species is neither endangered nor threatened throughout all of its range,

(2) the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be endangered or threatened throughout all of its range, and

(3) the species is endangered or threatened in that portion of its range.[39]

The problem, the court explained, was that it was not possible to simultaneously satisfy all three of these conditions because satisfaction of the second two conditions meant that "a species should properly be determined to be endangered or threatened throughout all of its range."[40] The first condition "actually ensures that a portion of a species' range will never be considered significant based on accurate application of the Final SPR Policy," which is "far from ensuring that the 'significant' and 'all' language of the ESA will retain independent

33. 12-Month Finding on a Petition to List the Cactus Ferruginous Pygmy-Owl as Threatened or Endangered with Critical Habitat, 76 Fed. Reg. 61,855, 61,888–89 (proposed Oct. 5, 2011) (to be codified at 50 C.F.R. pt. 17) (finding that the western and eastern populations each constitute a DPS).

34. *Id.* at 61,892–93.

35. *Id.* at 61,893.

36. *Id.*

37. *Ctr. for Biological Diversity*, 248 F. Supp. 3d at 955–58.

38. *Id.* at 956.

39. *Id.*

40. *Id.*

meaning."[41] Thus, the court concluded, the agencies' significance definition "render[ed] the SPR phrase superfluous by limiting it to situations in which it is unnecessary."[42] The court held the FWS "applied an impermissible construction of the ESA's SPR language" in finding the Sonoran Desert Ecoregion is not an SPR of the pygmy owl's western DPS and vacated and remanded the decision.[43] The court did not invalidate the Final SPR Policy; the Northern District of California did that the following year.

At issue before the Northern District of California was the FWS's status determination for the bi-state sage-grouse DPS ("sage-grouse DPS").[44] As with the cactus ferruginous pygmy-owl, the FWS first proposed to list the sage-grouse DPS as a threatened species, and two years later, withdrew that proposal.[45] In its withdrawal, the agency found that the sage-grouse DPS was stable, and while the potential threats to the sage-grouse DPS "have the potential to act together to negatively affect" the DPS, "completed, ongoing[,] and planned conservation actions have reduced the scope and severity of these impacts."[46] In conducting its SPR analysis, the FWS found that three of the six population management units ("Population Units") were more vulnerable to threats, but not to the degree that the entire DPS was "likely to become an endangered species in the foreseeable future"—even if one of the Population Units was extirpated.[47] Although the available information "may lead some to believe" that the three vulnerable Population Units were "at risk of becoming endangered in the foreseeable future," the agency explained, "substantial" conservation efforts were being applied to those three Population Units and were targeting the largest threats to them.[48] The agency expected these conservation efforts to "[changes] the trajectory" of the entire DPS from where it "was previously considered to be a threatened species, to a point where" the DPS did "not meet the definition of a threatened or an endangered species."[49] As a result, the FWS concluded that listing the DPS was "not

41. *Id.* at 957.

42. *Id.* at 958.

43. *Ctr. for Biological Diversity*, 248 F. Supp. 3d at 959.

44. Desert Survivors v. U.S. Dep't of Interior, 321 F. Supp. 3d 1011 (N.D. Cal. 2018) (granting summary judgment in favor of plaintiffs), *vacated and remanded*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018).

45. Threatened Status for the Bi-State Distinct Population Segment of Greater Sage-Grouse with Special Rule, 78 Fed. Reg. 64,358 (proposed Oct. 28, 2013) (to be codified at 50 C.F.R. pt. 17) (proposing listing as a threatened species); Withdrawal of the Proposed Rule to List the Bi-State Distinct Population Segment of Greater Sage-Grouse and Designate Critical Habitat, 80 Fed. Reg. 22,828 (proposed Apr. 23, 2015) (to be codified at 50 C.F.R. pt. 17) (withdrawing 2013 proposed rule).

46. 80 Fed. Reg. at 22,834.

47. *Id.* at 22,853.

48. *Id.*

49. *Id.*

necessary."[50] Among other things, plaintiffs challenged the agency's SPR determination.[51]

In evaluating the SPR challenge, the Court reviewed the Final SPR Policy and largely reiterated the Arizona District Court's analysis in the pygmy-owl case.[52] Not surprisingly, the Northern District of California concluded that the definition of "significant" described by the Final SPR Policy was an "impermissible interpretation of the [SPR] language in the ESA."[53] Despite finding the Final SPR Policy invalid, the Court proceeded to review the application of it in the FWS's sage-grouse DPS listing determination.[54] The Court found no rational grounds for the agency's unwarranted determination and expressed three main criticisms.[55]

First, the Court criticized the FWS's reliance on a population modeling study that concluded that the population of sage-grouse in the DPS as a whole was stable.[56] Such reliance was inconsistent with the agency's own finding that the model results "must be interpreted 'with caution'" because the model "incorrectly predicted the population trend" in one of the Population Units (Pine Nut) and did not analyze two others (White Mountains and Mount Grant).[57] Second, the agency "failed to show that there was 'sufficient certainty' of effectiveness of future conservation efforts" by analyzing the likelihood of persistence of the DPS as a whole, rather than addressing "the likelihood of persistence of each individual [Population Unit]."[58] Without an individualized assessment of each Population Unit's persistence, the Court explained the agency "had no basis for relying on that analysis . . . to reach conclusions about the Pine Nut, White Mountains, and Mount Grant" Population Units.[59] The Court also found the agency's conclusion insufficiently supported because it relied on observations of nebulous and undefined "multiple" sage-grouse in these three Population Units despite recognizing that each population "may be below the theoretical minimum threshold . . . for long-term persistence."[60] Indeed, the Court noted, the agency itself found "the probability of persistence" in these three Population Units "questionable."[61] Consequently, the Court vacated and remanded the sage-grouse

50. *Id.* at 22,828.
51. Desert Survivors v. U.S. Dep't of Interior, 321 F. Supp. 3d 1011, 1017 (N.D. Cal. 2018).
52. *Id.* at 1073.
53. *Id.* at 1074.
54. *Id.* at 1074–76.
55. *Id.* at 1075.
56. *Id.* Six Population Units comprise the DPS. 80 Fed. Reg. at 22,830.
57. *Desert Survivors*, 321 F. Supp. 3d at 1045, 1075 (quoting 80 Fed. Reg. at 22,831).
58. *Id.* at 1075.
59. *Id.* at 1075.
60. *Id.* ("[N]othing in the record . . . suggest[s] that 'multiple' sage grouse (which could mean just two) would be above that threshold." (quoting 80 Fed. Reg. at 22,838–39)).
61. *Id.*

DPS determination.[62]

This invalidation of the Final SPR Policy placed listing decisions that relied upon the Final SPR Policy in a bind. The queen conch case is one example.[63] After being petitioned to list the queen conch in 2012, NMFS determined that there was "substantial information indicating that" listing may be warranted.[64] In 2014, the agency determined that the species did not warrant listing.[65] In 2016, plaintiffs challenged that determination on numerous grounds, including its finding that the queen conch was not threatened or endangered throughout an SPR.[66] Plaintiffs argued that NMFS's application of the Final SPR Policy was error.[67]

The agency did not disagree and instead argued that any error it made in relying on the Final SPR Policy "was harmless in light of the alternative bases for the significance determination provided in the [listing determination]."[68] In addition to applying the Final SPR Policy, NMFS argued, it had also applied "a more general understanding of significance that weighed biological importance to the species as a whole" and directed the Court to a single sentence in the listing determination.[69] When the Court examined this "general understanding of significance," however, it found the single sentence rationale surrounded by text that "plainly" applied the Final SPR Policy.[70] The Court rejected NMFS's argument as an "impermissible post hoc rationalization" because it first appeared well after the agency's 2014 not warranted determination, in its 2019 notice informing the Court of the Northern District of California's *Desert Survivors* decision.[71] The Court vacated and remanded the agency's decision.[72]

With the Final SPR Policy vacated, the proper interpretation of "significant

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62. *Id.* at 1076.

63. *See generally* Friends of Animals v. Ross, 396 F. Supp. 3d 1 (D.D.C. 2019).

64. 90-Day Finding on a Petition to List the Queen Conch as Threatened or Endangered, 77 Fed. Reg. 51,763, 51,767 (Aug. 27, 2012).

65. Notice of 12-Month Finding on a Petition to List the Queen Conch as Threatened or Endangered, 79 Fed. Reg. 65,628, 65,643 (Nov. 5, 2014).

66. *Friends of Animals*, 396 F. Supp. 3d at 9.

67. *Id.* at 10; *Desert Survivors*, 321 F. Supp. 3d at 1017–18 (remanding decision to FWS); *Desert Survivors*, 336 F. Supp. 3d at 1137 (vacating policy). Both sides agreed that NMFS applied the SPR Final policy. *Friends of Animals*, 396 F. Supp. 3d at 10.

68. *Friends of Animals*, 396 F. Supp. 3d at 10.

69. *Id.*

70. *Id.* at 10–11. NMFS's proffered rationale read: "In addition, there is no evidence that suggests that there is a portion of the species' range which encompasses aspects that are important to the species' specific life history events, where loss of that portion would severally [sic] impact the growth, reproduction, or survival of the species as a whole." *Id.* at 10.

71. *Id.* The Court also noted that the single sentence explanation was inconsistent with the rest of the NMFS' briefing. *Friends of Animals*, 396 F. Supp. 3d at 14.

72. *Id.*

portion" in the SPR phrase remains unsettled. The same may not be true, however, of the proper interpretation of the term "range" in the SPR phrase.

B. "Range" May be Properly Interpreted to Mean the "Current Range" of a Species

The dispute over the meaning of "range" in the SPR phrase is centered on whether the term refers to the historical or current range of a species.[73] This dispute appears to be resolved, as two circuits have recently held that interpreting the term "range" to mean the current range of a species is reasonable.[74]

In *Humane Society v. Zinke*, the D.C. Circuit employed the traditional rules of statutory construction to discern the meaning of the term "range" in the SPR phrase. The Court found that the ESA neither defined the term "range" nor provided clear context from which it could deduce a definition, and dictionary definitions also failed to "illuminate the meaning."[75] The Court then considered whether the FWS's interpretation of "range" as the "current range" was "based on a permissible construction of the statute."[76] The Court found this interpretation permissible because it was consistent with both the use of present tense in ESA provisions discussing species' ranges and the use of "current range" in ESA provisions describing where the Listing Agencies may release experimental populations.[77] The Court also found a "current range" interpretation supported by the fact that threats impacting a species "where it currently lives often affect its continued survival the most."[78] The Court concluded that the FWS's interpretation of "range" as the "current range" of the gray wolf was reasonable.[79]

In *Center for Biological Diversity v. Zinke*, the Ninth Circuit came to a similar conclusion after carefully reviewing the ESA, the Final SPR policy, and its previous decisions grappling with the meaning of "range" in the SPR phrase. The Court noted that the "statutory framework of the ESA" provided "at least some support for interpreting 'range' as the current range of a species, although it may not compel this interpretation."[80] The SPR policy did "not run afoul of the purposes of the ESA,"

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73. *See generally* Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001).

74. *See* discussion *infra* pp. 14–16 (citing Humane Soc'y v. Zinke, 865 F.3d 585 (D.C. Cir. 2017); Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1066–67 (9th Cir. 2018)).

75. *Humane Soc'y*, 865 F.3d at 603–04 (D.C. Cir. 2017).

76. *Id.* at 605 (quoting Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 54 (2011)).

77. *Id.*

78. *Id.*

79. *Id.* at 603. However, the Court rejected FWS's conclusion about the current threats to the species because the agency "categorically excluded the effects of loss of historical range from its analysis." *Id.* The Court described this analytical omission as a "failure to address an important aspect of the problem," and noted that FWS will have to address two issues in its future analysis: "[d]efining the physical boundaries of the relevant historical range" and "[e]stablishing the appropriate timeframe for measuring a species' historical range." *Id.* at 606–607.

80. Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1066–67 (9th Cir. 2018).

the Court determined, because it required the Listing Agencies to "consider the historical range of a species in evaluating other aspects of the agency's listing decision, including habitat degradation" and reduced abundance.[81] Since "the largest threat to potentially endangered or threatened species is" currently occupied habitat, the Court explained, it is reasonable for the Listing Agency to focus on that area of habitat currently occupied by a species when determining whether the species warrants listing in a significant portion of its range.[82] The Court concluded that the FWS' interpretation of "range" as the current range of the arctic grayling was reasonable.[83]

Thus, the definition of "range" appears to be settling into meaning "current range" of a species, provided the Listing Agency considers whether a species' historical range has any effect on a species' current status or resiliency. Since the proper interpretation of "significant portion" remains unsettled, listing determinations will likely turn, perhaps more than ever, on the adequacy of the rationale supporting the Listing Agency's determination. The next section provides three examples of cases in which courts did not reach an SPR interpretation challenge due to unexplained inconsistencies in the Listing Agency's analysis or interpretation of the information underlying its status determination.

C. Unexplained Inconsistencies Result in Remand

In *Defenders of Wildlife v. Jewell*, plaintiffs challenged the FWS's withdrawal of its 2013 proposal to list the wolverine DPS as a threatened species under the ESA.[84] In its withdrawal, the agency explained that "new information and further analysis" of both new and existing information led it to conclude that the threats discussed in the proposed listing rule did not place the wolverine at risk of

81. *Id.* at 1067 (noting that FWS "did consider the arctic grayling's historical range in evaluating the factors that contributed to its negative listing decision").

82. *Id.*

83. *Id.* District courts have also affirmed the "current range" interpretation as reasonable. *See* Desert Survivors v. U.S. Dept. of Interior, 336 F. Supp. 3d 1131 (N.D. Cal. 2018); Defenders of Wildlife v. Jewell, 176 F. Supp. 3d 975, 1010 (D. Mont. 2016).

84. *Defenders of Wildlife*, 176 F. Supp. 3d at 975; *see also* Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 78 Fed. Reg. 7,864 (proposed Feb. 4, 2013) (to be codified at 50 C.F.R. pt. 70); Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 79 Fed. Reg. 47,522 (Aug. 13, 2014) (Withdrawal).

extinction now and were unlikely do so in the foreseeable future.[85] Plaintiffs argued, among other things, that the FWS "unlawfully ignored the best available science" regarding effects of climate change, genetic isolation, and small population size, and its application of the Final SPR Policy to the wolverine was invalid.[86]

In probing the FWS's analysis of climate change effects on the wolverine, the Court found that the agency erred when it "impermissibly cast . . . aside" a key study and essentially demanded "a greater level of scientific certainty than has been achieved in the field to date."[87] In doing so, the Court explained, the FWS "sought certainty beyond what is required by the ESA" and its case law when it "demanded the precise mechanism behind the wolverine's established need for snow for reproductive denning purposes."[88] The Court also rejected the agency's conclusion that the wolverine was not threatened by its small population size and lack of genetic diversity because the Court could find no reasonable connection between the "grim genetic picture for the wolverine" painted by the agency and its conclusion that the circumstances posed no threat because "there have been no observed adverse effects" resulting from the lack of genetic diversity.[89] As a result, the Court found error in the agency's determination that "climate change and projected spring snow cover" and "small population size and low genetic diversity" did not threaten the wolverine DPS viability in the foreseeable future.[90] The Court remanded the determination based on these unexplained analytical inconsistencies.[91] Although the Court did not reach plaintiffs' as-applied SPR challenge, its remand "compel[ed] the agency to revisit its SPR analysis."[92]

The Northern District of California also found error in the FWS's 12-month finding that the Pacific coastal marten DPS did not warrant listing.[93] In its determination, the agency acknowledged that "much of the coastal marten's historical habitat has been lost," but concluded that none of the stressors

85. Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States, 79 Fed. Reg 47,522, 47,545 (Aug. 13, 2014). The FWS conducted an SPR analysis, "found no portions of the range where potential threats are significantly concentrated or substantially greater than in other portions of the range" and concluded that "no portion of the range of the DPS" warranted listing. *Id.*

86. *Defenders of Wildlife*, 176 F. Supp. 3d. at 1000.

87. *Id.* at 1001, 1003.

88. *Id.* at 1003.

89. *Id.* at 1006.

90. *Id.* at 1011.

91. *Id.* at 1011–12.

92. *Defenders of Wildlife*, 176 F. Supp. 3d. at 1007. The Court ruled against plaintiffs' facial challenge to the Final SPR Policy. *Id.*

93. Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 246 F. Supp. 3d 1272, 1286 (N.D. Cal. 2017).

"individually or cumulatively impact" the DPS "to a degree" warranting listing.[94] The agency concluded that no portion of the DPS's range constituted an SPR because "the overall level of stressors [was] not geographically concentrated in one portion" of the range.[95] Plaintiffs argued the FWS erred in concluding the "small and isolated population effects" did not threaten the DPS viability.[96] After reviewing the information on which the FWS based its determination, the Court found that the "best available evidence" supported neither the agency's conclusion that the California population was stable,[97] nor the agency's conclusion that the three DPS populations were not functionally isolated.[98] While these errors "[did] not mean that the [FWS] must list the marten as endangered," the Court explained, it did mean that the agency "could not have properly weighed" that threat factor against the other four statutory factors.[99] This erroneous conclusion "surely influenced" the agency's SPR analysis and resulted in a "flawed" 12-month finding.[100]

Eighteen months later, the Northern District of California held similarly after plaintiffs challenged FWS's withdrawal of its proposal to list the Pacific fisher as a threatened species.[101] In its withdrawal, FWS explained that a "key point" in its determination was that "the best available data [did] not indicate significant impacts at either the population or rangewide scales," despite exposure of the DPS to multiple stressors over "a decade or more."[102] Plaintiffs challenged the agency's withdrawal based on the impacts of three specific stressors: toxicants, population

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94. 12-Month Finding on a Petition to List Humboldt Marten as an Endangered or Threatened Species, 80 Fed. Reg. 18,742, 18,749, 18,768 (proposed Apr. 7, 2015) (to be codified at 50 C.F.R. pt. 17). The DPS is comprised of three populations located in coastal Northern California, Southern Oregon, and Central Oregon. *Id.* at 18,745.

95. *Id.* at 18,771.

96. *Ctr. for Biological Diversity*, 246 F. Supp. 3d at 1277.

97. *Id.* at 1282 (finding "that the best available evidence support[ed] [FWS's] conclusions about the size of the Oregon marten populations, but not the California population").

98. *Id.* at 1284–86 (explaining that "[e]ven if [FWS] sufficiently explained away" the other threats, by "fail[ing] to recognize the California population's isolation and small and declining numbers, it could not have properly assessed whether that []population was . . . 'especially vulnerable to extirpation.'")

99. *Id.* at 1285.

100. *Id.* at 1285–86.

101. Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv., 342 F. Supp. 3d 968 (N.D. Calif.), *amended in part*, 2018 WL 6067546 (N.D. Calif. 2018); *see also* Threatened Species Status for West Coast Distinct Population Segment of Fisher, 79 Fed. Reg. 60,419 (proposed Oct. 7, 2014) (to be codified as 50 CFR pt. 17) (proposal to list as threatened); Withdrawal of the Proposed Rule to List the West Coast Distinct Population Segment of Fisher, 81 Fed. Reg. 22,710 (proposed Apr. 18, 2016) (to be codified as 50 CFR pt. 17) (withdrawal of proposed listing).

102. Withdrawal of the Proposed Rule to List the West Coast Distinct Population Segment of Fisher, 81 Fed. Reg. at 22,713.

size, and wildfires.[103] In reviewing the FWS's analysis of the toxicant threat, the Court found the agency "failed to come to grips with" the findings of a key study and "cherry picked" the data it contained to best support its not warranted determination.[104] The agency "further erred" in its analysis of the effects of sublethal toxicants, the Court explained, by "simply retreat[ing] into 'uncertainty'" rather than rebutting its previous finding that detrimental effects from sublethal toxicants were "likely widespread."[105] The Court concluded that uncertainties as to the degree of toxicant exposure or the effects of such exposure "do not provide the [agency] a rational connection to its conclusion" that toxicant exposure does not pose a threat to the DPS.[106]

The Court also rejected the FWS's conclusion that population trend studies indicated a "statistically stable" DPS.[107] The population growth measure reported in two of the three studies indicated only that the population might be stable, the Court explained, and offering such a measure "as proof of population stability" was an "'error of logic.'"[108] The Court explained that *Tucson Herpetological Society* directs that a Listing Agency "may not affirmatively rely on limited and inconclusive studies (which the [agency] itself recognizes as 'imperfect') as evidence of persistence, and in turn use this 'evidence' of persistence as proof that the stressors pose no threat" to a species.[109] The FWS did so here, the Court concluded, and thereby "failed to make a rational connection between the population trend data and its conclusion that the Pacific fisher population is stable."[110] Based on the flaws in the agency's analyses of toxicant exposure and population stability, the Court found remand (and vacatur) "appropriate" and plaintiff's SPR challenge moot.[111]

In these cases, the courts compared the rationale supporting a proposed listing or warranted determination with the Listing Agency's later rationale purportedly supporting its determination that listing was not warranted. In each case, the courts found unexplained analytical inconsistencies and rejected the

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103. *Ctr. for Biological Diversity*, 342 F. Supp. 3d at 972.

104. *Id.* at 974.

105. *Id.* at 975.

106. *Id.* As the Ninth Circuit held in *Greater Yellowstone Coal., Inc. v. Servheen*, the Court directed, the FWS should have explained "*why* the uncertainty favored delisting instead of some other course of action, such as conducting further studies to help clarify the impact." *Id.* at 976 (citing Greater Yellowstone Coal., Inc. v. Servheen, 655 F.3d. 1015, 1028 (9th Cir. 2011)). "It is not enough for [the Service] to simply invoke 'scientific uncertainty' to justify its action." *Id.* (quoting Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1071 (9th Cir. 2018)).

107. *Ctr. For Biological Diversity*, 342 F. Supp. 3d at 976–77.

108. *Id.* at 977 (quoting Nat. Res. Def. Council, Inc. v. Rauch, 244 F. Supp. 3d 66 (D.D.C. 2017)). According to the Court, the FWS committed "the very same logical error" in both cases. *Ctr. for Biological Diversity*, 342 F. Supp. 3d at 977.

109. *Id.* at 979 (quoting Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 879 (9th Cir. 2009)).

110. *Id.*

111. *Id.* at 979–80.

agency's "not warranted" determination on that basis. When an agency is challenged on changing its position on an issue, courts review the rationale supporting the agency's new position. In the ESA context, however, the analysis and interpretation of information underlying Listing Agencies' determinations have been receiving increased judicial scrutiny. Listing Agencies should not be unduly discouraged by the recent spate of remands, however, because courts have upheld "not warranted" listing determinations when they have found a rational connection between the determination and the underlying science.[112]

III. CONCLUSION

When Dale and I first discussed the SPR case law and policy more than a decade ago, the meaning of SPR did not appear as elusive as it has proved to be. Almost two decades after SPR litigation began, the "range" of a species appears to mean its current range, and the proper interpretation of "significant portion" remains unsettled. Since the Final SPR Policy was vacated in 2018, challenges to "not warranted" listing determinations have turned on the adequacy of the Listing Agency's supporting rationale. Regardless of how the Listing Agencies and courts ultimately construe "significant portion" in the SPR phrase, it is indisputable that Dale Goble's contributions to ESA scholarship are significant—under any definition of the term.

112. *See* Ctr. for Biological Diversity v. Bernhardt, No. 3:18-cv-00064-SLG, 2019 WL 4725124 (D. Alaska Sept. 26, 2019) (affirming the FWS's determination that the pacific walrus does not warrant listing under the ESA).