

It's been a busy late spring in the endangered species world. Some recent developments:

- Gray wolf: Environmental groups have filed a lawsuit challenging the delisting of the gray wolf in the northern Rockies. The EarthJustice press release is [here](#), complaint [here](#). The gist of the complaint is that the state management plans do not provide enough protection. Meanwhile, [AP reports](#) that Wyoming, where wolves remain on the endangered list because FWS rejected the state's plan to treat them as predators everywhere outside Yellowstone National Park, has filed yet another lawsuit seeking to force delisting within its borders.
- Delta smelt: On May 29, Judge Wanger granted a preliminary injunction against implementation of certain flow restrictions in the latest smelt biological opinion. In a curious set of [findings of fact and conclusions of law](#), Judge Wanger wrote that plaintiff water users were likely to prevail on their claim that FWS was required to undertake NEPA analysis of the Reasonable and Prudent Alternatives in the biological opinion. (RPAs are steps the agency thinks can be taken to achieve at least some of the aims of a proposed action without jeopardizing listed species.) He has ordered FWS not to implement any "unnecessarily restrictive" limits on pumping "unless and until FWS first considers the harm that these decisions and actions are likely to cause humans, the community, and the environment." Judge Wanger is asking the agency to balance on an absolute knife edge, ensuring that it doesn't deny farmers a single drop of water that the fish don't critically require. Naturally, the water users have already said they will bring the same challenge against the new salmon biological opinion. Meanwhile, just to add to the litigation confusion, the Pacific Legal Foundation has filed a lawsuit asserting that ESA protection of the smelt is unconstitutional because the species is found only in California and "has no commercial value." (The complaint is [here](#), PLF's press release is [here](#); the suit also reiterates the statutory arguments made by other water users.) Commerce clause challenges to the ESA have already been rejected by federal courts of appeals in at least five published opinions. There's no reason to think this version will fare any better.
- Snake River salmon: Judge James Redden, who has been hearing a series of cases challenging dam operations in the Snake and Upper Columbia River basins, issued a [letter](#) to the parties in *National Wildlife Federation v. NMFS*, the latest in that series. (The LA Times blog *Greenspace* has the story [here](#); The letter makes it quite clear that Judge Redden views the latest biological opinion, which concluded that none of 13 endangered species are jeopardized by those operations, as arbitrary and capricious. Judge Redden urged the federal defendants to:

develop[] a contingency plan to study specific, alternative hydro actions,

such as flow augmentation and/or reservoir drawdowns, as well as what it will take to breach the lower Snake River dams if all other measures fail[.]

- Flat-tailed horned lizard: The Ninth Circuit, in a case called [Tucson Herpetological Society v. Salazar](#), reversed and remanded the Fish and Wildlife Service's latest decision not to add the flat-tailed horned lizard to the protected list. FWS first identified the lizard as deserving of ESA protection in 1989, and formally proposed to list it in 1993. But the agency, facing heavy political pressure, withdrew the proposed listing in favor of a conservation agreement with state and federal land managers. That decision was overturned by the Ninth Circuit in 2001 (*Defenders of Wildlife v. Norton*, 258 F.3d 1136). In 2003, FWS again withdrew the proposed listing, only to have that decision reversed by the District Court. In 2006, FWS tried a third time, again withdrawing the proposal. The District Court upheld the third withdrawal, but the Ninth Circuit has now sent FWS back to the drawing board one more time. In this latest decision, the Ninth Circuit insisted that FWS must consider the loss of historic range when deciding whether a species is threatened or endangered "throughout all or a significant portion of its range," the standard for listing under the ESA, but upholds FWS's determination that lost lizard habitat, historic and recent, is not "significant." The most important aspect of the decision is its rejection of FWS's evaluation of the evidence that the lizard persists in the remainder of its range. Essentially, the agency had interpreted the lack of evidence of *decline* as support for *persistence*. The court rejected that approach, writing:

If the science on population size and trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence.