Center for American Progress

Under Threat

The Endangered Species Act and the Plants and Wildlife It Protects

By Jim Lyons

November 2017

Center for American Progress

Under Threat

The Endangered Species Act and the Plants and Wildlife It Protects

By Jim Lyons

November 2017

Contents

1 Introduction and summary

3 The ESA has been threatened since its enactment

5 Issues driving current efforts to amend the Endangered Species Act

5 Inadequate focus on recovery

7 Perceived delays

8 Lack of flexibility

15 Expanded state role in protecting threatened and endangered wildlife

20 Conclusion: There is no immediate need to amend the ESA

23 About the author

23 Acknowledgments

25 Endnotes

Introduction and summary

The Endangered Species Act (ESA) is one of a number of visionary statutes enacted in the 1970s that provide a foundation for the protection, restoration, and enhancement of the nation's natural resources and environment.[1] Moreover, as the last line of defense for species of flora and fauna that face extinction, the ESA is unique and essential.

In his most recent book, *Half-Earth: Our Planet's Fight for Life*, E.O. Wilson—one of the world's leading naturalists, Pulitzer Prize-winning author, and scholar—highlighted the threat of accelerating species loss. Wilson wrote, "The variety of life-forms on Earth remains largely unknown to science. The species discovered and studied well enough to assess, notably the vertebrate animals and flowering plants, are declining in number at an accelerating rate—due almost entirely to human activity."[2]

Buttressing Wilson's work, institutions that monitor the loss of biodiversity, such as the International Union for Conservation of Nature (IUCN), reinforce the urgent need to protect remaining species and their habitats.[3] According to the IUCN, "[T]he rapid loss of species we are seeing today is estimated by experts to be between 1000 and 10,000 times higher than the 'background' or expected natural extinction rate (a highly conservative estimate). Unlike the mass extinction events of geological history, the current extinction phenomenon is one for which a single species—ours—appears to be almost wholly responsible."[4]

Despite the ESA's increasing importance, however, critics of the act are actively trying to change it, concerned that it causes undue delays, increases costs, and contributes to uncertainty in project development. A recent report by the U.S. Department of Commerce identified the ESA as a "statutory authority where regulatory processes may be harming energy independence and economic opportunity."[5] Similarly, a Department of the Interior report claimed that "the time and expense associated with satisfying the interagency consultation requirements are unnecessarily burdensome."[6] Thus far in the 115th Congress, policy-

makers have introduced 59 legislative measures that are intended to undermine the ESA—by directly amending it, by removing protections for specific species, by exempting certain agencies or activities from the ESA's requirements, or by nullifying biological opinions.[7] In fact, the House Natural Resources Committee has reported five bills to reform the ESA that are awaiting passage by the full U.S. House of Representatives.[8] Moreover, the Western Governors' Association (WGA) has made recommendations to modify the ESA further, including measures that could weaken the law's effectiveness.[9]

This report examines several issues at the core of ESA critics' rationale for changing the law. While the report concludes that some improvements in the law's application may be warranted, the ESA has proven to be an effective tool for preventing the extinction and contributing to the recovery of native wildlife.

From the outset, the ESA was crafted to be a flexible statute. As a result, past administrations have used the ESA to develop innovative strategies and creative solutions to protect species, while permitting projects to move forward where impacts can be mitigated and harm to species can be minimized or even avoided. For instance, the successful state-federal effort to avoid the need to list the greater sage-grouse as threatened or endangered[10] illustrates one of the ESA's most important elements—its emphasis on conserving ecosystems on which species depend to avoid the need to add species to the threatened or endangered list.

If Congress is looking to improve the ESA, a place to start would be to ensure that the agencies responsible for its implementation—the U.S. Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce—have adequate funding. Providing the services with the funding that they require to carry out their duties is essential to ensure species recovery and to encourage the type of collaborative conservation efforts among federal, state, local, and private partners necessary to prevent the destruction of ecosystems. Such destruction can lead to species endangerment and ultimately to the need to invoke the ESA to prevent species from becoming threatened or endangered.

Opening the ESA to legislative changes in the current political environment, especially given increasing evidence of the accelerating loss of biodiversity, is not only unnecessary, but it also threatens the viability of the law itself. At its core, ESA is meant to prevent the extinction of species imperiled by loss of habitat caused by unchecked growth and development.

The ESA has been threatened since its enactment

Two decades ago, Michael Bean, former principal deputy assistant secretary for Fish and Wildlife and Parks, U.S. Department of the Interior, and author of *The Evolution of National Wildlife Law*, characterized the conflict over the Endangered Species Act as a battle between "two camps." In congressional testimony regarding proposed legislation to amend the ESA in 1997, Bean stated:

> *Two camps have put two quite starkly different views of the Act before you. The environmental camp—my camp—has argued that the existing law must be strengthened, that it is not accomplishing its vitally important goal of conserving rare species as effectively as it must if it is to stave off a flood of extinctions. The other camp has argued that the existing law is unduly onerous for those whose activities it regulates, and must be made less so. Unable to choose between these two divergent views, Congress has done nothing.*[11]

More recently, Wyoming Gov. Matt Mead (R), serving as chair of the Western Governors' Association, launched the Species Conservation and Endangered Species Act Initiative in an effort to revisit provisions of the ESA. Gov. Mead explained the purpose of the initiative as follows:

> *When species are listed under the Endangered Species Act (ESA), the directive should be bigger than preventing extinction. It should be recovery and when a species is recovered it should be delisted so resources can be redirected to protect another species that is truly imperiled. The current implementation of the ESA often deters meaningful conservation efforts and divides, rather than unites people.*[12]

The WGA initiative focuses on identifying opportunities to improve the efficacy of the ESA and avoid the need to list a species through early identification of sensitive habitat. Specific subjects include: incentivizing proactive voluntary conservation; listing, critical habitat designation, recovery, and delisting; the role

of state and local governments in species conservation and ESA implementation; landscape-scale conservation and ecosystem management; and best available science.[13] Subsequently, the Western governors recommended that Congress amend and reauthorize the ESA based on seven broad goals:[14]

1. Require clear recovery goals for listed species, and actively pursue delisting of recovered species.

2. Increase the regulatory flexibility of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to review and make decisions on petitions to list or change the listing status of a species under the ESA.

3. Enhance the role of state governments in recovering species.

4. Ensure the use of sound science in ESA decisions.

5. Recognize that incentives and funding for conservation are essential.

6. Define the term "foreseeable future."

7. Make sure states are full partners in listing, critical habitat designations, recovery planning, and delisting decisions, particularly when modeling is used in analysis.

All these goals could be addressed administratively under the current ESA or are already being addressed through changes in policy and implementation using the flexibility that currently exists in the statute. The Fish and Wildlife Service continues to work to improve collaboration and coordination with the states on most if not all the issues raised by the WGA in regard to full ESA implementation. This collaboration is likely to continue under the current administration, provided that the administration recognizes the value of the state-federal partnership. Rather than amend the statute, Congress could be most helpful by fully funding efforts to implement the ESA, including providing resources to review the increasing number of listing petitions,[15] to expand incentives for voluntary conservation measures to benefit at-risk species, and to develop and implement recovery plans fundamental to efforts to delist species.

Issues driving current efforts to amend the Endangered Species Act

The issues at the center of current efforts to amend the ESA essentially come down to four primary concerns: 1) that there is an inadequate focus on species recovery; 2) that there are significant delays in consultations for listed species; 3) that there is a lack of flexibility in the act's implementation; and 4) that states should play more of a role in ESA implementation.

Let's examine each of these rationales to assess the validity of ESA critics' claims and to illustrate why changes to the law are not necessary.

1. Inadequate focus on recovery

In 2014, a congressional ESA working group co-chaired by then-Reps. Doc Hastings (R-WA) and Cynthia Lummis (R-WY) evaluated the performance of the ESA during its four decades of existence and concluded, "with a species recovery rate of only two percent, the ESA has proven to be ineffective at protecting truly imperiled species."[16] This criticism mirrors the more recent comments of former Western Governors' Association Chairman and current Wyoming Gov. Matt Mead in testimony before the Senate Environment and Public Works Committee in 2016: "By any measure, the ESA is broken. Since 1973, less than one percent of the 2,280 species listed has been removed from the list. Either listing has not led to recovery or recovered species have been kept on the list."[17]

However, recovering species on the ESA list is only one purpose of the act. Measuring success only through the number of species delisted misses an important part of the story and does not consider whether the law is preventing the extinction of species, as it was designed to do. Through this lens, the ESA has been very successful. Scientists estimate that at least 227 threatened species would have become extinct without the ESA.[18] The bald eagle, red wolf, and California condor, for example, would no longer exist if not for the ESA.

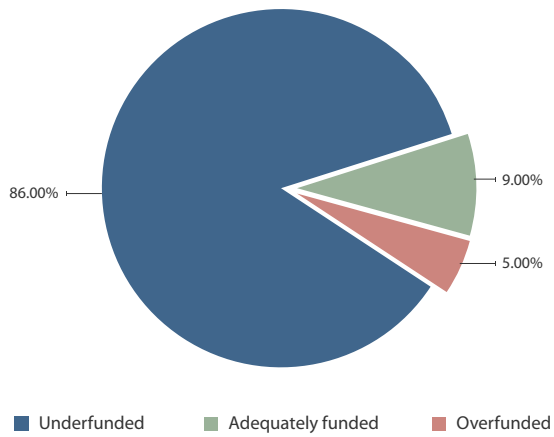
A clear impediment to delisting species is the accelerating number of species at risk of extinction, stagnant agency funding for ESA implementation in general, and inadequate funding for the implementation of recovery plans. As a result, funding and the number of personnel dedicated to the conservation of threatened and endangered species have steadily declined, while costs associated with the listing process, consultations, recovery plan development, and critical habitat designations continue to grow. In fact, species recovery efforts have been underfunded for decades.

From 1980 to 2014, the vast majority of listed species with recovery plans were underfunded—receiving less than 90 percent of the amount needed for recovery.[19]

FIGURE 1

Species recovery has been chronically underfunded

Funding levels for Endangered Species Act recovery plans



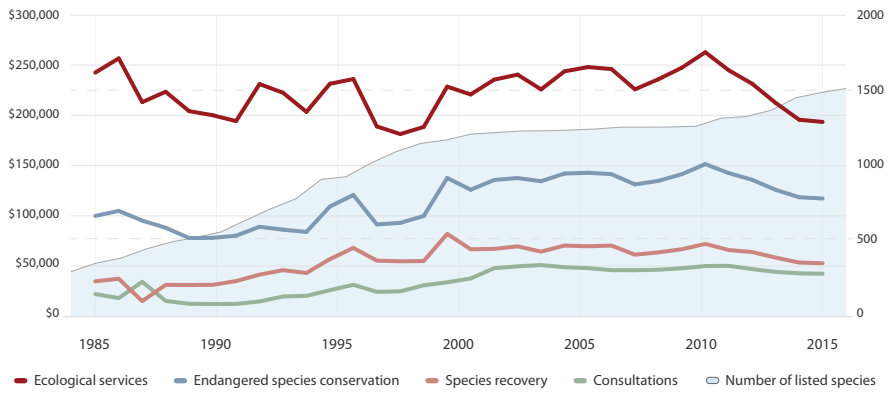
Source: Leah R. Gerber and James A. Estes, "Conservation triage or injurious neglect in endangered species recovery," Proceedings of the National Academy of Sciences of the United States of America 133 (13) (2016): 3563-3566.

In fact, the amount of funding per species across all endangered species programs at the Fish and Wildlife Service has decreased since 2010.

FIGURE 2

Funding has not kept pace with species listings

Budget appropriations per species listings, by year and ESA activity



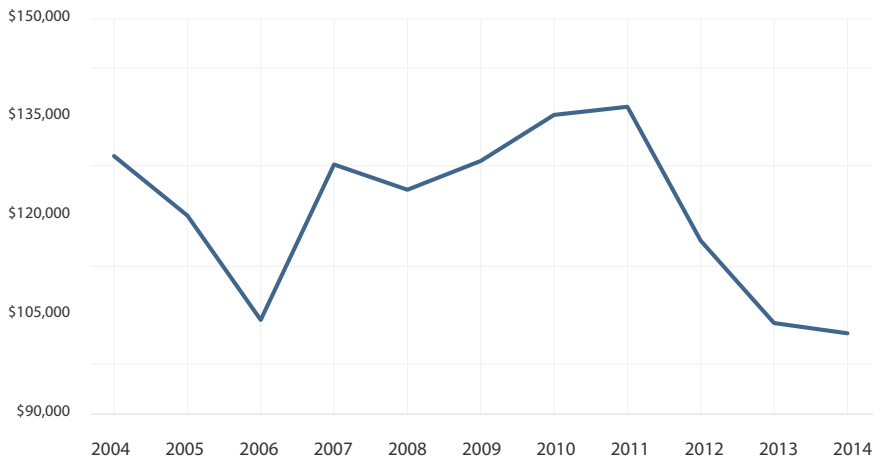
Source: Leah R. Gerber and James A. Estes, "Conservation triage or injurious neglect in endangered species recovery," Proceedings of the National Academy of Sciences of the United States of America 133 (13) (2016): 3563-3566.

This decline is the result of congressional failure to ensure that funding keeps apace with current ESA program needs, combined with the continued increase in the number of listed species. Since 2011, expenditures per-species to protect listed species has been reduced substantially, by approximately 25 percent not accounting for inflation.[20]

FIGURE 3

The U.S. Fish and Wildlife Service has been spending less to protect listed species

Expenditures per species, by year



Source: U.S. Fish and Wildlife Service, "Expenditure Report" (2004-2014), https://www.fws.gov/Endangered/esa-library/.

The most recent budget proposal for the FWS illustrates how the Trump administration's proposed fiscal year 2018 budget would only exacerbate the problem. The administration's FY 2018 budget request for ESA activities associated with domestic species listing; critical habitat; and recovery for proposed, threatened, and endangered species is approximately $1.3 million, $1.3 million, and $3.5 million less, respectively, compared with the FWS' budget for these activities in the prior fiscal year.[21] Not unlike the increasing public concern for the growing maintenance backlog for National Park Service facilities and infrastructure,[22] species in need of recovery plans[23] and the need for resources to implement completed recovery plans will continue to grow, adding to criticisms that the ESA is not working.

Using the number of species recovered to measure the ESA's effectiveness while Congress continues to underfund recovery efforts amounts to setting the FWS and the National Marine Fisheries Service—and the ESA—up for failure. Given that the number of listed species continues to grow, even stable funding for ESA implementation will never permit the services to make significant progress in recovering listed species. Such funding will certainly not allow ESA to be implemented as Congress intended when it passed the statute in 1973 by a unanimous vote in the Senate and with only four dissenting votes in the House.[24]

2. Perceived delays

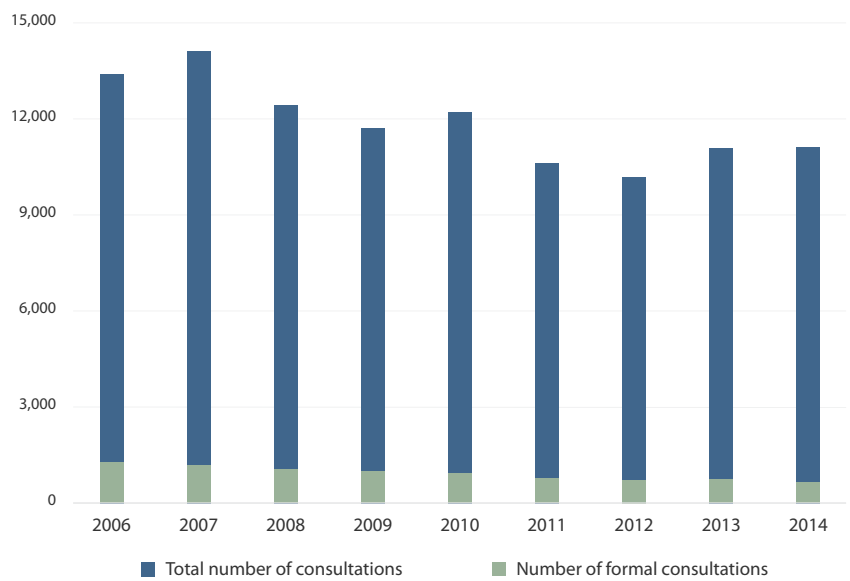
One of the most common—and unsubstantiated—charges against the ESA is that it impedes planning and development by requiring lengthy consultations and costly modifications to projects to accommodate species. But a recent analysis of Section 7 consultations refutes this claim. Section 7 is the section of the ESA that requires project proponents to consult with the relevant federal agency regarding projects on federal lands that could potentially affect listed species and/or their habitat.[25] The researchers and authors, Jacob Malcom and Ya-Wei (Jake) Li, analyzed all 88,290 consultations made by the FWS from January 2008 through April 2015. They found that:

> *In contrast to conventional wisdom about section 7 implementation, no project was stopped or extensively altered as a result of FWS finding jeopardy or adverse modification during this period. We also show that median consultation duration is far lower than the maximum allowed by the Act, and several factors drive variation in consultation duration. The results discredit many of the claims about the onerous nature of section 7.*[26]

FIGURE 4

Formal consultations represent a small portion of total consultations

Endangered Species Act consultations, by fiscal year



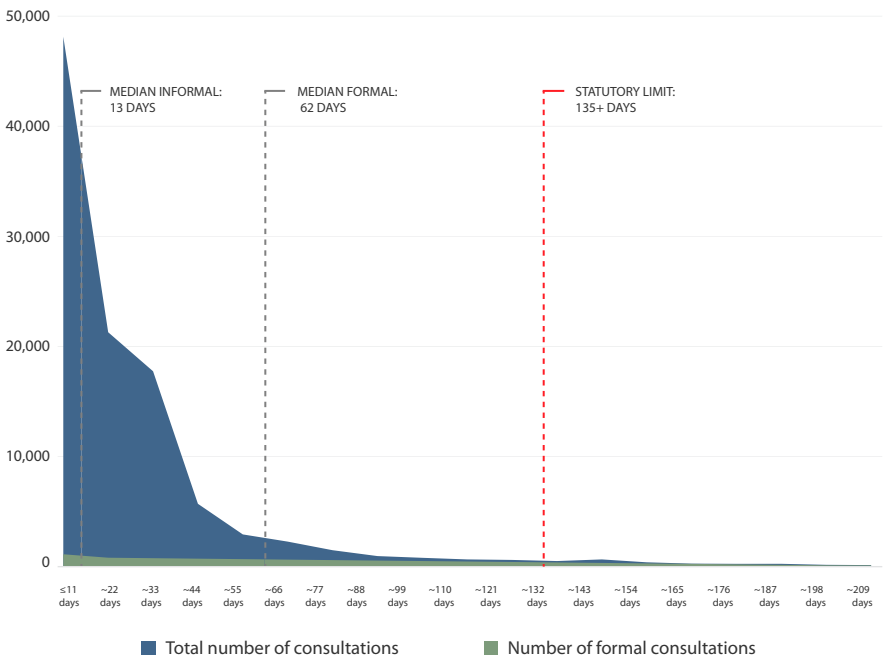
Source: Center for Conservation Innovation at the Defenders of Wildlife, "Endangered Species Act consultation explorer," available at https://cci-dev.org/shiny/open/section7_explorer/ (last accessed November 2017).

As illustrated by Figure 4, of the 88,290 consultations recorded by the FWS from January 2008 through April 2015, only 7.7 percent of projects during this time period required formal consultation. And as illustrated by Figure 5, the median recorded time for informal consultations was 13 days, compared with 62 days for formal consultations—which are required when the service determines that the proposed action could result in jeopardy for a federally listed endangered species. While 20 percent of the formal consultations did exceed the FWS statutory limit of 135 days for formal consultations, the large majority of these were completed by a mutually agreed upon extension. As this study indicates, nearly 99 percent of all formal and informal consultations recorded by the FWS during this time frame were completed within established timelines. Clearly, the actual timelines for these FWS ESA consultations are very different from the gridlock some accuse the ESA of causing and challenge the assertions made by Trump administration officials that complying with the ESA is "unnecessarily burdensome."

FIGURE 5

Consultations required under the Endangered Species Act are typically approved within weeks

Time to approval, by consultation type



Source: Center for Conservation Innovation at the Defenders of Wildlife, "Endangered Species Act consultation explorer," available at https://cci-dev.org/shiny/open/section7_explorer/ (last accessed November 2017).

3. Lack of flexibility

A common charge against the ESA is that it is inflexible and rigid and therefore unable to adapt to change. Yet previous administrations have made extensive efforts over many years to improve species conservation efforts through proactive, innovative, and voluntary measures.

While the language of the ESA is practically identical to what it was nearly 30 years ago in 1988—the last time that Congress significantly amended it—the administration of the law is now dramatically different. Unlike in the past, when landowners encountered strict prohibitions limiting their actions (see examples below), today, landowners can—and do—enter into a variety of novel conservation agreements. These tailored agreements are designed to keep declining species off the endangered list or to hasten the recovery of those already on the list, while also giving landowners a strong measure of much sought regulatory predictability.

Through such agreements, along with related policy initiatives and innovative regulatory efforts, ESA administrators have shown the act to be flexible, adaptable, and responsive to needs that arise. In fact, the use of this discretionary implementation authority has prompted some in the conservation community to argue that the ESA's authority has been exercised too broadly.

The next sections discuss some of the innovations developed to facilitate implementation of conservation practices on public and private lands under the ESA.

Habitat conservation plans and the 'no surprises' policy

When the ESA was enacted in 1973, it contained a sweeping prohibition against the "take" of any endangered wildlife species,[27] a prohibition that the FWS and the NMFS interpreted to include habitat modification that could harm a protected animal. For very few activities—principally scientific research and actions to enhance the propagation or survival of a listed species—permits could be issued to allow otherwise prohibited taking. The result of this broad prohibition, and the narrow set of activities potentially exempted from it, was that many otherwise lawful activities could unintentionally conflict with the ESA with no mechanism available to secure an exemption from its prohibitions.

In 1982, Congress responded to this situation by authorizing permits that could exempt a nearly limitless category of activities from the act's take prohibition. As a result, anyone engaged in an otherwise lawful activity had a means of complying with the act by getting an incidental take permit. To secure such a permit, however, an applicant had to develop and commit to implement a habitat conservation plan that minimized and mitigated the adverse effects of the authorized taking to the maximum extent practicable.

Implementation of this statutory provision has been highly innovative. On its face, the provision seemed to contemplate permits for discrete projects undertaken at one site by an individual landowner. While often used for such projects, more creative use has been made by units of local government that have zoning or similar land use authority. Countywide habitat conservation plans in California, Texas, Utah, and elsewhere have made possible the issuance of a single permit that authorizes all development activities that are consistent with local zoning ordinances, as well as the integration of conservation and development over a period of many decades.[28]

For local governments and local landowners to be able to rely on such permits, they needed assurance that a plan, once approved, would be stable and would not be revised each time new information surfaced about the needs of listed species or the impacts of permitted development on listed species. The FWS and the NMFS acknowledged the legitimacy of the need for permittee assurance by announcing a no surprises policy—that the services would not revisit permits and require additional mitigation in the face of unforeseen circumstances. That innovative assurance, though controversial at the time,[29] has been highly successful at motivating both local governments and landowners to pursue habitat conservation plans and their associated incidental take permits. Those plans have made possible the establishment of thoughtfully designed systems of conservation reserves, while at the same time facilitating all manner of development activities.

Habitat conservation plans have also fostered a practice known as conservation banking. This practice grew out of a realization that conservation measures would need to offset the effects of foreseeable future development on listed species. Rather than wait to implement compensatory mitigation measures when development occurs, conservation banking permits mitigation ahead of development, thus providing development interests with a ready-made mitigation option. Significantly, conservation banking became a way for entrepreneurial landowners to turn rare species on their land into assets and a means of generating income, rather than liabilities. By investing in conservation of those species and generating

mitigation credits that the FWS and the NMFS recognized, conservation bankers could generate income for themselves while providing development interests with a preapproved means of meeting their mitigation obligations. Through this innovative financing mechanism, scores of conservation banks have been established and used to protect habitat essential to species conservation.[30]

Safe harbor agreements

Another challenge that the administrators of the ESA faced concerned the act's unintended consequences for landowners who voluntarily undertook beneficial management activities on their land. If those activities attracted an endangered species to their land or expanded the number or distribution of a species that was already present there, the likely result for landowners was new land use restrictions to avoid any taking of the affected species. Ironically, the one certain way to avoid entanglement in the ESA's regulatory restrictions was to manage one's land in a way that did not attract endangered species to it—a result that was contrary to the act's very purpose.

To resolve this dilemma, in the mid-1990s, the FWS aggressively promoted what are called safe harbor agreements.[31] Landowners with a safe harbor agreement could implement beneficial management practices likely to attract or increase the presence of endangered species on their land. In return, the FWS assured them that no new or additional land use restrictions would be imposed because of the landowner's voluntary land management activities, nor would the landowner be required to maintain habitat beyond its original, or baseline, condition. In essence, landowners with safe harbor agreements can "lay out the welcome mat" on their land for endangered species, secure in the knowledge that doing so will not limit the future use of that land. Landowners have responded favorably to this approach. For the red-cockaded woodpecker, the endangered species for which safe harbor agreements were first developed, there are now statewide agreements in eight states in which hundreds of forest landowners who collectively own hundreds of thousands of acres of forest participate.

Although safe harbor agreements were a novel idea, an amendment to the ESA was not required to bring them about. Instead, it only took the creativity to fashion an innovative application of a provision that had been part of the law since its inception in 1973. In authorizing safe harbor agreements and the permits that effectuate them, the FWS recognized that enabling private landowners to manage

their land to attract or increase an endangered species would enhance the survival of those species. While the jury is still out for many safe harbor agreements, the agreements for the endangered red-cockaded woodpecker have resulted in demonstrable benefits. Red-cockaded woodpecker numbers have increased rangewide in response to recovery and management programs, from an estimated 4,694 active clusters in 1993 to 6,105 in 2006. On private lands, more than 40 percent of the known red-cockaded woodpeckers are benefiting from management approved by the FWS through memorandums of agreement, safe harbor agreements, and habitat conservation plans.[32]

Candidate conservation agreements with assurances

The success of safe harbor agreements in incentivizing beneficial management for listed species led to the development of somewhat analogous agreements for so-called candidate species—seriously declining species formally recognized by the FWS as warranting proposed listing but lacking sufficient funds to do so. While landowners and others have no legal duty to protect or avoid harming candidate species, they often share a desire to keep candidate species from needing to be listed. However, a familiar dilemma can arise: If landowners, for example, seek to help conserve a candidate species on their land and that species nevertheless becomes a listed species, then landowners may face greater land use restrictions because of their earlier voluntary efforts, which helped preserve or expand a given population.

The administrative solution was the establishment of a new program that offered a candidate conservation agreement with assurances (CCAA). Landowners who enter into a CCAA agree to undertake specified conservation measures on their property for a candidate species. The assurance landowners get in return is that if the species is later listed, they will not be required to do more than already agreed to under their agreement. A variety of landowners have embraced CCAAs. Indeed, in instances such as the case of the Upper Missouri River population of the Arctic grayling, there have been enough landowners willing to enroll in CCAAs to persuade the FWS that these species did not in fact need to be listed as endangered or threatened species.[33] CCAAs for the greater sage-grouse also contributed to the FWS' finding that this species did not need to be listed.[34]

Tailored rules for threatened species

A final example of administrative flexibility in ESA implementation concerns the prohibitions that apply to threatened species. For endangered species, the act includes an extensive list of automatic prohibitions against taking, importation, exportation, sale in interstate commerce, transport in interstate commerce, and more.[35] In contrast, there were no automatic prohibitions for threatened species. Instead, Section 4(d) of the ESA authorized the FWS to prescribe such regulations as it deemed necessary and advisable for the conservation of a threatened species.[36]

Notwithstanding this statutory discretion, for many years the FWS applied a uniform set of prohibitions to most threatened species that were nearly identical to those that applied automatically to endangered species. More recently, however, the FWS has been criticized for dramatically increasing its listing of species as "threatened" instead of "endangered," taking advantage of the greater regulatory flexibility available for threatened species. Specifically, critics argue that it allows the FWS to list some more controversial species with few protective prohibitions, making the long-term conservation of the species much more uncertain.[37] The FWS rationalizes this less restrictive approach as focusing regulatory prohibitions on the types of activities that represent the most serious threats to the species while exempting those activities that represent more minor threats.[38]

4. Expanded state role in protecting threatened and endangered wildlife

Currently, Section 6 of the ESA requires the relevant secretary to cooperate with states in conserving protected species through cooperative agreements to provide financial and technical assistance in support of states' threatened and endangered species programs.[39] While most state-level endangered species acts are relatively limited in comparison to the federal law, states are seeking a larger role in carrying out the purposes of the ESA, including having a more dominant role in dealing with listed and candidate species.[40] Wyoming's "Core Area Strategy"—an effort to conserve the greater sage-grouse—and similar state initiatives to conserve grouse illustrate the increasing interest among states in dealing with potentially threatened, endangered, and candidate species as a means of precluding the need to list them under the ESA.[41]

While the act requires federal collaboration with the states, many states believe that they should play a much greater role in determining what species should be given priority for ESA listing reviews; in determining if a species should be listed or delisted; and in designating critical habitat and developing recovery plans. This issue is central to the current efforts to amend the ESA, and should the states' role be significantly expanded, it would represent a fundamental shift in how wildlife and public lands are managed in the United States.

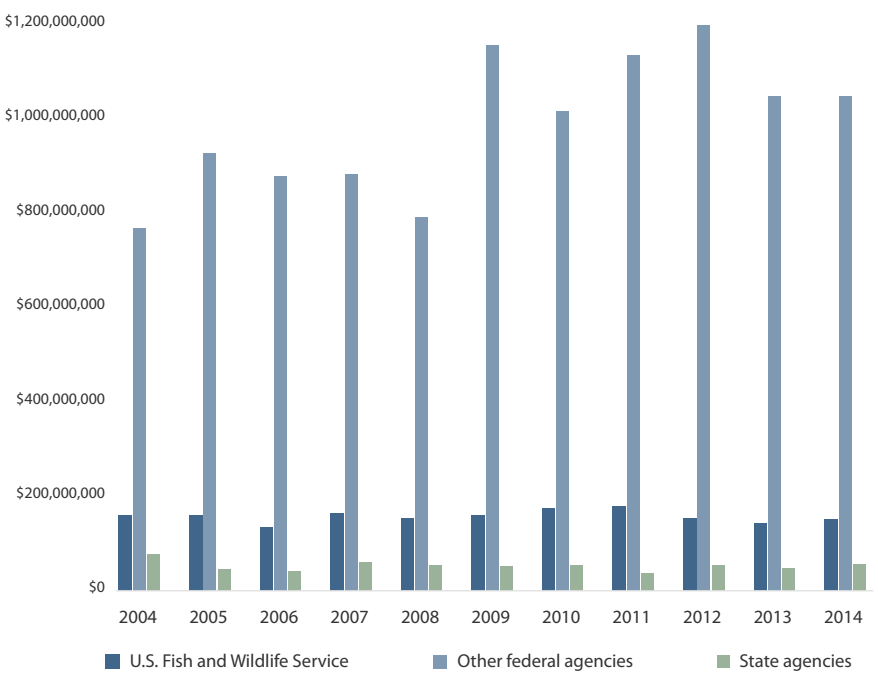
Partially in response to this new state effort, the FWS and the NMFS updated the ESA Cooperative Policy of 1994 to clarify further the role of the states in implementing the act. In February 2016, the services issued the Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities.[42] This updated policy further clarified implementation of Section 6 of the ESA and expanded measures to ensure federal collaboration with the states in prelisting conservation, listing, consultation, habitat conservation planning, and recovery activities.

On its face, this effort to expand the working relationship and information-sharing between the FWS, the NMFS, and the states is positive. In fact, many states lack the capacity—both staffing and funding—to engage in ESA activities and, historically, have invested significantly less money in the conservation of listed species. And while there may be additional incremental changes that could be made administratively to give states a greater role in listed species conservation, states' uneven and inconsistent funding for wildlife conservation is a significant impediment to expanding their role. One recent study compared federal and state spending on listed species conservation; on average, over the study's course, states combined spent slightly more than one-quarter of the amount—26 percent—of what the FWS spent on threatened and endangered species conservation.[43] If the FWS and the NMFS were to step back and play a much-reduced role in implementing the conservation provisions of the ESA, the states could not fill the gap without substantial additional funding. At present, most states simply lack the financial resources to be able to step up and effectively replace the diminished federal investment in species conservation and recovery.

FIGURE 6

Federal agencies spend the most on Endangered Species Act programs

Expenditures on ESA programs, by agency



Source: U.S. Fish and Wildlife Service, "Expenditure Report" (2004-2014), https://www.fws.gov/Endangered/esa-library/.

Case study: The greater sage-grouse conservation strategy

The successful effort to conserve the greater sage-grouse across its remaining 11-state range offers many lessons to inform future efforts to conserve fish and wildlife species long before they reach the threshold that requires listing as threatened or endangered under the ESA.

The greater sage-grouse conservation effort was comprehensive, coordinated, and collaborative, addressing the conservation needs of the sage-grouse on public and private lands through the combined effort of state and federal conservation agencies, private landowners, public land users, and other stakeholders. Early engagement among these partners built a level of trust and a means of communicating to ensure that the views and concerns of all parties were considered in developing the strategy.

The conservation strategy focused on protecting, restoring, and improving habitat for the greater sage-grouse and, as such, is consistent with the stated purpose of the 1973 ESA—to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[44] An added benefit of the strategy's focus on the health of the sagebrush ecosystem—one of the most endangered ecosystems in North America[45]—is that the more than 350 species associated with the sagebrush ecosystem[46] will also benefit from this conservation effort and help preclude the need to list other species associated with that ecosystem.

The strategy was designed and implemented at the landscape level to address the habitat protection, restoration, and enhancement needs of the greater sage-grouse across its remaining range. In this regard, it was largely consistent with many of the findings of the Western Governors' Association Species Conservation and Endangered Species Act Initiative.[47]

The foundation for the greater sage-grouse conservation strategy was the best available science generated by a team of sage-grouse experts from the states and the FWS that identified threats to the species and strategies for addressing them. Added scientific analysis was provided by the U.S. Geological Survey (USGS) to address specific questions or concerns that arose throughout the process of developing the overall sage-grouse conservation strategy. For example, the USGS conducted a literature review of the impacts of different types of disturbance and their distances from greater sage-grouse on the grouse's behavior and contributed extensively in developing the rangeland fire strategy to address this threat to the grouse in the Great Basin.[48]

The strategy was developed through a collaborative effort led by the Sage-Grouse Task Force composed of representatives of the governors' offices and their fish and wildlife agency leads, as well as representatives of the various federal agencies involved in design and implementation of the sage-grouse conservation strategy. The state-federal partnership that produced the strategy demonstrated the capacity to coordinate and collaborate under the existing statute, as well as the benefits of doing so.

Through the efforts of the FWS and the Natural Resources Conservation Service, voluntary incentives and funding for conserving sage-grouse habitat were provided. The FWS worked with public land permittees and private land owners to develop candidate conservation agreements (CCAs) with grazing permittees on

public lands and CCAAs that led to the enrollment of millions of acres of private grazing lands in Oregon, Montana, and Wyoming in conservation agreements both to protect and improve sage-grouse habitat and to assure landowners that their investments in conservation practices would be accepted should the species ultimately be listed. Through the Sage Grouse Initiative (SGI), the Natural Resources Conservation Service used science-based analysis to develop and implement conservation measures to protect and restore millions of acres of sagebrush habitat on private lands through voluntary means, with millions of dollars of financial assistance provided to implement specific conservation practices to benefit greater sage-grouse habitat.[49]

Most importantly, by obtaining a decision from the FWS that listing the greater sage-grouse as threatened or endangered was not warranted as a result of the comprehensive sage-grouse conservation plan, the strategy achieved one of the principle objectives of the recently adopted WGA policy statement on species conservation and the ESA: to "support all reasonable management efforts to conserve species and *preclude the need to list a species under the ESA* [emphasis added]."[50]

The Sage-Grouse Task Force was chaired by Wyoming Gov. Matt Mead and Colorado Gov. John Hickenlooper (D), and the sage-grouse conservation strategy had the bipartisan support of nearly all the Western governors involved.[51] Last year, Mead testified before the Senate Environment and Public Works Committee that the FWS decision not to list the greater sage-grouse was "a success and reflects a bright future for the Greater sage-grouse in Wyoming and in the West."[52] And despite the misguided efforts of the Trump administration to reopen for revision the Bureau of Land Management and U.S. Forest Service plans affecting 55 percent of the remaining sage-grouse habitat, the sage-grouse conservation strategy also points the way to a more efficient and effective approach to implementing the ESA in the future.[53]

Conclusion: There is no immediate need to amend the ESA

The evidence suggests that if adequately funded and effectively implemented, the Endangered Species Act can work to protect threatened and endangered species from extinction on public and private lands with minimal impacts to their economic uses.

The flexibility provided in the ESA has been used extensively to develop administrative policies, programs, and strategies to improve the act's implementation and address many of the concerns of the law's critics. In some instances—as illustrated by perceived, and unfounded, problems with FWS Section 7 consultations—the rhetoric does not square with reality. And despite political differences, state and federal wildlife managers have found ways to resolve major issues affecting the listing and delisting of species and, apart from the delisting of the gray wolf in Montana, have kept Congress from circumventing the ESA.[54]

If one searches the text of the ESA for the terms "no surprises," "safe harbor agreement," "candidate conservation agreement with assurances," and "conservation banking," they are not there. Nevertheless, these and other innovative administrative conservation tools are part of the daily language of the ESA's implementation—all products of a serious effort by the Fish and Wildlife Service and the National Marine Fisheries Service to find innovative, workable responses to the challenges that have arisen in carrying out the law. These creative administrative policies have been possible, and they have worked, because the provisions of the ESA are not rigid and unbending but are instead flexible and capable of being adapted to the exigencies of the day. Most importantly, these innovative policies have not exhausted the universe of creative possibilities. Still others are likely—indeed, almost certain—to be found as the goal of conserving species at risk of extinction faces new challenges that require novel solutions.

The real impediments to implementing the ESA more effectively, and addressing specific substantiated concerns raised by ESA critics, appear to be inadequate resources—specifically, the lack of funding and people needed to implement the ESA; the accelerated pace of change across the nation's remaining wildlands that

is causing a concurrent increase in proposed listings; and the continuing jurisdictional tension between the FWS and various states over who should be in charge when it comes to managing imperiled wildlife resources in particular states or regions of the country.

Ultimately, success in preventing the need to list species as threatened or endangered to avoid extinction relies on a commitment to early intervention to protect the habitats of species whose populations are in decline. More than four decades ago, the authors of the ESA made clear that conserving the ecosystems upon which species depend is a principal purpose of the act and the key to species' survival. Yet the penchant of the human species to procrastinate when it comes to addressing issues that might be difficult or controversial seems, with rare exception, to overrule better judgement and common sense and preclude conservation actions that might be initiated to prevent the need for listing a species under threat. As a result, species are often pushed to the brink of extinction before action is initiated, which limits options for conserving the species and incurs greater costs when doing so. The blame then falls on the ESA, when the true fault lies in our collective failure to recognize that "an ounce of prevention is worth a pound of cure."

The successful outcome of the greater sage-grouse conservation strategy offers a new paradigm for conservation in general and for implementing the ESA in particular. This point was acknowledged in a June 2016 WGA report that noted, "Some have cited this multi-faceted conservation effort as the 'future of conservation,' where individual species are protected through collaborative landscape-level efforts that transcend political boundaries."[55] Consistent with the June 2017 Western governors' policy statement, the Western governors agreed that a prophylactic approach to protecting habitat to prevent species endangerment is the better course. That approach is to implement "all reasonable management efforts to conserve species and preclude the need to list a species under the ESA."[56]

While other elements of the WGA policy statement may be controversial and of questionable utility in improving ESA implementation—particularly recommendations to amend the act at this time—clearly, a key to implementing the ESA successfully is initiating proactive actions to conserve a species and its habitat well in advance of reaching the point where habitat loss and declining species numbers necessitate invoking the statute. In this way, any sanctions associated with the take of a species or its habitat can be avoided, and any costs associated with required conservation measures, should jeopardy be found to occur, can be minimized and often mitigated. Simply put, the best way to reduce the cost of recovery and any

impacts to private landowners and public land users in areas of habitat critical to a species' survival is to prevent the need to recover the species in the first place. Implementing proactive actions to conserve habitat or mitigate adverse actions that could lead to endangering a species is also the most effective way to ensure that states are full partners in conservation efforts, since—except for federal trust species[57] and migratory birds—the relevant federal agencies traditionally play a limited role in the management of nonlisted species of wildlife on state and private lands. Wyoming's Core Area Strategy, which was adopted in 2008 to conserve greater sage-grouse habitat, and voluntary adoption of candidate conservation agreements and candidate conservation agreements with assurances by ranchers across the remaining range of the greater sage-grouse best illustrate this point.

Contrary to popular belief, the ESA is not rigid but malleable. With rare exception, the act is not the cause of long and costly project delays. More often, the ESA has been the catalyst for innovation and collaboration that has helped both species conservation and commerce.

As evidenced by the sage-grouse experience, with forethought and a commitment to habitat conservation, stakeholders can implement the ESA effectively by focusing proactively on conservation measures to protect, restore, and enhance the health of the ecosystem on which species depend. Moreover, by focusing on conservation of the ecosystem as opposed to an individual species in that ecosystem, the potential exists to reduce the need to list other species in that same ecosystem.

Tinkering with the ESA to avoid listings, to delist species legislatively, and to circumvent sound science and conservation in order to permit actions that may, in fact, adversely affect a threatened or endangered species is a slippery slope. Certainly, more funding for ESA implementation in general, and for habitat conservation and species recovery in particular, would be beneficial. But statutory changes in the ESA, particularly in the current political climate, are not needed and are more likely to endanger the ESA.

About the author

Jim Lyons is a senior fellow at the Center for American Progress, where he focuses on public land policy, natural resource conservation, and endangered species issues. Lyons has also been a lecturer and research scholar at the Yale School of Forestry & Environmental Studies since 2000.

Acknowledgments

The author would like to thank Michael Bean for his counsel and contributions to this report, specifically regarding measures adopted under the current ESA that demonstrate the flexibility of the act.

Endnotes

1 *Endangered Species Act* (7 U.S.C. § 136, 16 U.S.C. § 1531 et seq.).

2 E.O. Wilson, *Half-Earth: Our Planet's Fight for Life* (New York: Liveright Publishing, 2016).

3 International Union for Conservation of Nature, "IUCN Red List of Threatened Species," available at https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species (last accessed November 2017).

4 Species Survival Commission and Species Programme, "The IUCN Red List of Threatened Species: Species Extinction – The Facts" (2007), available at http://cmsdata.iucn.org/downloads/species_extinction_05_2007.pdf.

5 Memorandum to Mick Mulvaney from Wilbur Ross and James Uthmeier, "The Department of Commerce's Final Report Reviewing Agency Actions as Required by Executive Order 13783, 'Promoting Energy Independence and Economic Growth'," October 25, 2017, available at https://www.commerce.gov/sites/commerce.gov/files/the_department_of_commerces_final_report_reviewing_agency_actions_as_required_by_executive_order_13783_promoting_energy_independence_and_economic_growth.pdf.

6 U.S. Department of the Interior, *Review of the Department of the Interior Actions that Potentially Burden Domestic Energy* (2017), available at https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf.

7 Defenders of Wildlife, "Summary of Legislative Attacks on the Endangered Species Act in the 115th Congress," available at http://www.defenders.org/publications/chart-of-esa-attacks-in-115th-congress.pdf (last accessed November 2017).

8 House Committee on Natural Resources, "Bills to Modernize Endangered Species Act Advance Through Committee," Press release, October 4, 2017, available at https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=403024.

9 Western Governors' Association, "Species Conservation and the Endangered Species Act," Policy Resolution 2017-11 (2017), available at http://westgov.org/images/editor/2017-11_Species_Conservation_and_the_ESA_for_web.pdf.

10 Jim Lyons, "Lessons Learned from the State-Federal Effort to Conserve the Greater Sage-Grouse" (Washington: Center for American Progress, 2017), available at https://www.americanprogress.org/issues/green/reports/2017/07/24/436367/lessons-learned-state-federal-effort-conserve-greater-sage-grouse/.

11 Senate Environment and Public Works Committee, "Testimony of Michael J. Bean before the Senate Committee on Environment and Public Works concerning S. 1180, the Endangered Species Recovery Act of 1997 on behalf of Center for Marine Conservation, Environmental Defense Fund, and World Wildlife Fund, September 23, 1997," available at https://www.epw.senate.gov/105th/bean.htm (last accessed November 2017).

12 Western Governors' Association, "Special Report: Western Governors' Species Conservation and the Endangered Species Act Initiative: the Chairman's Initiative of Gov. Matthew H. Mead" (2016 "Dear Friends and Colleagues" letter, available at http://westgov.org/images/editor/ESA_Report_2016_Exec_Summary_for_Web.pdf.

13 Western Governors' Association, "Species Conservation and Endangered Species Act Initiative: the Chairman's Initiative of Gov. Matthew H. Mead" (2016), available at http://westgov.org/images/editor/ESA_Report_2016_Exec_Summary_for_Web.pdf.

14 Western Governors' Association, "Species Conservation and the Endangered Species Act," Policy Resolution 2017-11.

15 Todd Woody, "Wildlife at Risk Face Long Line at U.S. Agency," *The New York Times*, April 20, 2011, available at http://www.nytimes.com/2011/04/21/science/earth/21species.html.

16 Reps. Doc Hastings and Cynthia Lummis, "Endangered Species Act: Report, Findings and Recommendations of the Congressional Working Group" (Washington: House Natural Resources Committee, February 4, 2014), available at https://robbishop.house.gov/uploadedfiles/esa_working_group_final_report_113th.pdf.

17 Gov. Matthew H. Mead, Remarks before the U.S. Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife on Endangered Species Act Reform, September 29, 2015, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=2C35FDB9-07B0-46D7-B7EF-EB5F4E-07AC17.

18 Noah Greenwald and others, "Conservation: The Endangered Species Act at 40," *Nature* 504 (2013): 369–370.

19 Michael Evans, "The Importance of Properly Funding the ESA," Defenders of Wildlife, June 5, 2017, available at https://cci-dev.org/analysis/ESA_funding/.

20 Ibid.

21 Fish and Wildlife Service, *Budget Justifications and Performance Information: Fiscal Year 2018* (U.S. Department of the Interior, 2017), available at https://www.fws.gov/budget/2018/FY2018-FWS-Greenbook.pdf.

22 Nathan Rott, "National Parks Have A Long To-Do List But Can't Cover The Repair Costs," National Public Radio, March 8, 2016, available at https://www.npr.org/2016/03/08/466461595/national-parks-have-a-long-to-do-list-but-cant-cover-the-repair-costs.

23 U.S. Fish and Wildlife Service, "Environmental Online Conservation System," available at https://ecos.fws.gov/ecp0/reports/box-score-report (last accessed November 2017).

24 Ballotpedia, "History of the Endangered Species Act," available at https://ballotpedia.org/History_of_the_Endangered_Species_Act (last accessed November 2017).

25 U.S. Fish and Wildlife Service, "Endangered Species Act | Section 7," available at https://www.fws.gov/endangered/laws-policies/section-7.html (last accessed November 2017).

26 Jacob W. Malcom and Ya-Wei Li, "Data contradict common perceptions about a controversial provision of the US Endangered Species Act," *Proceedings of the National Academy of Sciences of the United States of America* 112 (52) (2015): 15844–15849.

27 According to the U.S. Fish and Wildlife Service, "'Take' is defined as 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.' Through regulations, the term 'harm' is defined as 'an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.' Listed plants are not protected from take, although it is illegal to collect or maliciously harm them on Federal land." See Fish and Wildlife Service, *ESA Basics: 40 Years of Conserving Endangered Species* (U.S. Department of the Interior, 2013), available at https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf.

28 Alejandro E. Camacho, Elizabeth M. Taylor, and Melissa L. Kelly, "Lessons from Area-wide, Multi-agency Habitat Conservation Plans in California" (Irvine, CA: University of California, Irvine, School of Law, 2015), available at http://www.law.uci.edu/academics/centers/cleanr/CLEANR-HCPReport-2015march.pdf.

29 Jessica Ferrell, "Court Upholds ESA 'No Surprises' Rules, Boosts Confidence in Habitat Conservation Plans," Marten Law, October 10, 2007, available at http://www.martenlaw.com/newsletter/20071010-no-surprises-rules.

30 April Reese, "Conservation Banking Gains Ground," E&E News, January 8, 2009, available at https://www.eenews.net/stories/72832.

31 U.S. Fish and Wildlife Service, *Safe Harbor Agreements for Private Landowners* (U.S. Department of the Interior, 2017), available at https://www.fws.gov/endangered/esa-library/pdf/harborqa.pdf.

32 U.S. Fish and Wildlife Service, "Red-cockaded Woodpecker Recovery," available at https://www.fws.gov/rcwrecovery/ (last accessed November 2017).

33 Tom Kuglin, "No Endangered Species Listing for the Arctic Grayling," *Independent Record*, August 19, 2014, available at http://helenair.com/news/local/no-endangered-species-listing-for-arctic-grayling/article_1e27f31f-d98d-5be3-a3c3-d471a4ff4727.html.

34 U.S. Fish and Wildlife Service, "Sage-Grouse: The Status of the BLM and Forest Service's Efforts to Implement Amendments to Land Use Plans and Specific Management Plans Regarding Sage Grouse Conservation," available at https://www.doi.gov/ocl/sage-grouse (last accessed November 2017).

35 *Endangered Species Act* (7 U.S.C. § 136, 16 U.S.C. § 1531 et seq.).

36 Sarah Stauffer Curtiss, "A Necessary Tool for Conservation: The Case for Section 4(D) of the Endangered Species Act." *Endangered Species Act: Current and Emerging Issues Affecting Resource Development*, Paper 7C (Westminster, CO: Rocky Mountain Mineral Law Foundation, 2015), available at http://files.stoel.com/files/107137_A%20Necessary%20Tool%20for%20Conservation%20-%20The%20Case%20for%20Section%204(d)%20of%20the%20ESA.pdf.

37 Tanya Sanerib, Cynthia Elkins, and Noah Greenwald, "Lethal Loopholes: How the Obama Administration is Increasingly Allowing Special Interests to Endanger Rare Wildlife" (Tucson, AZ: Center for Biological Diversity, 2016), available at https://www.biologicaldiversity.org/programs/biodiversity/endangered_species_act/pdfs/Lethal_Loophole_4d_Rule_Report.pdf.

38 Personal communication from Michael Bean, former principal deputy assistant secretary for Fish and Wildlife and Parks, U.S. Department of the Interior, and author of *The Evolution of National Wildlife Law*, September 2017.

39 U.S. Fish and Wildlife Service, "Endangered Species Act | Section 6," available at https://www.fws.gov/endangered/laws-policies/section-6.html (last accessed November 2017).

40 M. Nie and others, "Fish and Wildlife Management on Federal Lands: Debunking State Supremacy," *Environmental Law* 47 (4) (2017).

41 U.S. Fish and Wildlife Service and others, "Greater Sage-Grouse Conservation in Wyoming," available at https://www.fws.gov/greatersagegrouse/factsheets/WyomingGrSGFactSheet_FINAL%20(1).pdf (last accessed November 2017).

42 U.S. Government Publishing Office, "Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities," 81 FR 8663-8665, available at https://www.fws.gov/endangered/laws-policies/revised-policy-state-agencies.html (last accessed November 2017).

43 Evans, "The Importance of Properly Funding the ESA."

44 *Endangered Species Act of 1973*, 16 U.S.C. (1531-1544, 87 Stat. 884), as amended – Public Law 93-205.

45 U.S. Geological Survey, "USGS—Providing Scientific Understanding of the Sagebrush Biome" (2005), available at: https://fresc.usgs.gov/products/fs/fs2005-391.pdf.

46 Michael J. Wisdom, Mary M. Rowland, and Lowell H. Suring, eds., *Habitat threats in the sagebrush ecosystem: methods of regional assessment and applications in the Great Basin* (Lawrence, Kansas: Alliance Communication Group, 2005).

47 Western Governors' Association, "Special Report: Western Governors' Species Conservation and the Endangered Species Act Initiative: the Chairman's Initiative of Gov. Matthew H. Mead."

48 Daniel J. Manier and others, "Conservation Buffer Distance Estimates for Greater Sage-Grouse—A Review" (U.S. Geological Survey, 2014), available at https://pubs.usgs.gov/of/2014/1239/; Matthew J. Germino, "Wildfire Impacts, and Post-Fire Rehabilitation and Restoration," available at https://fresc.usgs.gov/research/research-Page.aspx?Research_Page_ID=109 (last accessed November 2017).

49 Sage Grouse Initiative, "Wildlife Conservation Through Sustainable Ranching," available at https://www.sagegrouseinitiative.com/ (last accessed November 2017).

50 Western Governors' Association, "Species Conservation and the Endangered Species Act," Policy Resolution 2017-11.

51 Associated Press, "Wyoming Governor, Western Interests Again Debate Sage Grouse," K2 Radio, November 12, 2017, available at http://k2radio.com/wyoming-governor-western-interests-again-debate-sage-grouse/.

52 Mead, Remarks before the U.S. Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife on Endangered Species Act Reform.

53 U.S. Bureau of Land Management, "Secretary of the Interior Ryan Zinke Statement on Sage Grouse Report," Press release, August 7, 2017, available at https://www.blm.gov/press-release/secretary-interior-ryan-zinke-statement-sage-grouse-report.

54 Phil Taylor, "Budget's Wolf Delisting Opens Pandora's Box of Species Attacks, Enviro Groups Warn," *The New York Times*, April 13, 2011, available at http://www.nytimes.com/gwire/2011/04/13/13greenwire-budgets-wolf-delisting-opens-pandoras-box-of-s-99159.html.

55 Western Governors' Association, "Special Report: Western Governors' Species Conservation and the Endangered Species Act Initiative: The Chairman's Initiative of Gov. Matthew H. Mead" (2016), available at http://westgov.org/images/editor/ESA_Report_2016_Exec_Summary_for_Web.pdf.

56 Western Governors' Association, "Species Conservation and the Endangered Species Act," Policy Resolution 2017-11.

57 "At the heart of the Service's mission are the conservation and management of the Federal Trust Species: migratory birds; threatened and endangered species; inter-jurisdictional fish; certain marine mammals; and species of international concern. It is estimated that 73% of our Nation's land is privately owned and that the majority of our fish and wildlife resources occur on those lands. Consequently, the conservation lands held by Federal and state agencies and other conservation groups cannot completely provide for fish and wildlife needs. Because the habitat needs of all Trust Species cannot be met solely on public lands, public funds are also expended on private lands to accomplish habitat improvements through cooperative conservation programs such as the Partners Program." See U.S. Fish & Wildlife Service, "Partners for Fish and Wildlife Program," available at https://www.fws.gov/partners/aboutus.html (last accessed November 2017).

Our Mission

The Center for American Progress is an independent, nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action. Our aim is not just to change the conversation, but to change the country.

Our Values

As progressives, we believe America should be a land of boundless opportunity, where people can climb the ladder of economic mobility. We believe we owe it to future generations to protect the planet and promote peace and shared global prosperity.

And we believe an effective government can earn the trust of the American people, champion the common good over narrow self-interest, and harness the strength of our diversity.

Our Approach

We develop new policy ideas, challenge the media to cover the issues that truly matter, and shape the national debate. With policy teams in major issue areas, American Progress can think creatively at the cross-section of traditional boundaries to develop ideas for policymakers that lead to real change. By employing an extensive communications and outreach effort that we adapt to a rapidly changing media landscape, we move our ideas aggressively in the national policy debate.

Center for American Progress

1333 H STREET, NW, 10TH FLOOR, WASHINGTON, DC 20005 • TEL: 202-682-1611 • FAX: 202-682-1867 • WWW.AMERICANPROGRESS.ORG