

# Conserving Habitat Before It Is Too Late

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### Recommended Citation

35 Pub. Land & Resources L. Rev. 147

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## Conserving Habitat Before It Is Too Late

Jack G. Connors\*

I. INTRODUCTION.....	148
II. THE ENDANGERED SPECIES ACT .....	148
A. ESA § 2 – Purpose.....	149
B. ESA § 4 – Listing a species as endangered or threatened.....	150
C. ESA § 6 – Cooperation with the States.....	151
D. ESA § 7 – Inter Federal Agency Consultation.....	153
E. ESA § 9 – Prohibited Acts.....	154
F. ESA § 10 – Exceptions .....	155
III. THE INABILITY OF THE ESA TO PROTECT UNLISTED SPECIES PRIOR TO LISTING .....	156
A. The ESA incentivizes landowners to prevent listed or declining species from occupying their land .....	156
B. The ESA prevents landowners from taking beneficial actions that might have short-term negative impacts.....	157
IV. PROGRAMS CREATED TO PROVIDE FLEXIBILITY FOR LANDOWNERS AND PROTECT VULNERABLE SPECIES .....	157
A. Habitat Conservation Plans.....	158
B. Candidate Conservation Agreements.....	159
C. Candidate Conservation Agreements with Assurances .....	160
D. Safe Harbor Agreements.....	161
E. Conservation Banking.....	161
V. THE ABILITY FOR SPECIES TO FALL THROUGH THE CRACKS .....	163
A. The need to codify the precautionary principle in the ESA....	164

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\* Juris Doctor, University of Montana School of Law, December 2013. I would like to thank Professor Martha Williams for her support with this article and her wonderful Wildlife Law class. I am also grateful for the help and encouragement of the editors and staff of the Public Land and Resources Law Review. I would like to thank the faculty of the University of Montana School of Law for selecting this article for the annual Edward A. Cremer III Environmental Law Award for the best environmental law research paper of the year.

B.	Set a floor for scientific knowledge about a species before granting assurances .....	164
C.	Punish preemptive habitat destruction .....	165
D.	Categorical exclusions for proven beneficial activities .....	165
VI.	CONCLUSION .....	166

## I. INTRODUCTION

The Endangered Species Act (ESA) is our nation's landmark environmental protection statute. It is a bold commitment to preserving endangered and threatened species. However, protecting vulnerable species is not without costs to governmental agencies and landowners. These economic and efficiency costs have made the law controversial. This article will avoid the question of the relative merits of the law; instead, it will focus on the law's ability to protect not only endangered and threatened species, but also unlisted species that are in decline through innovative programs to protect habitat.

To lay the groundwork for understanding the ESA's ability to prevent species from becoming threatened in the first instance; this article will start with an introduction to the ESA. It will then identify some of the problems landowners have faced under the original strict implementation of the law. Next, it will address the new programs the federal government has developed to provide greater flexibility in the law through stakeholder participation in voluntary conservation agreements. Finally, it will suggest incremental advancements in the law and its implementing regulations to further protect vulnerable species and the habitat they rely upon.

## II. THE ENDANGERED SPECIES ACT

The ESA was passed as a reaction to the alarming number of species that had become extinct during the rapid expansion of the nation. In the 1970s, when the law was enacted, at least one species per year was going extinct and the number was accelerating.<sup>1</sup> The growth of the environmental movement and public outrage over the loss of these species caused Congress to act. Believing that biodiversity held unknown

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1. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 176 (1978).

scientific and medical benefits for humankind, Congress passed the ESA in 1973 to act as a “road block” in the path of future extinctions.<sup>2</sup> The law was intended to be overly prescriptive to account for the lack of scientific certainty in the rate and causes of the decline in species populations.<sup>3</sup> Although the concept was common in Europe at the time, this was one of the first expressions of the “precautionary principle” in American law. Briefly stated, the precautionary principle ensures that when there is scientific uncertainty about the effect of a proposed action, policy makers should pursue the most conservative option possible.<sup>4</sup> Basically, it is better to prevent the decline of a species than it is to try to recover a depleted population caused by a mistake.

#### A. ESA § 2 – Purpose

The stated purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”<sup>5</sup> Five years after the law’s enactment, the Supreme Court stated, “the language, history, and structure of [the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”<sup>6</sup> Despite the nation’s desire to make protecting vulnerable species our highest priority, the ESA has had little substantive impact; instead, the law lays out the procedural requirements that a federal agency must comply with before it can act.<sup>7</sup>

The Interior Department’s U.S. Fish and Wildlife Service (FWS) and the Commerce Department’s National Marine Fisheries Service

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2. *Id.*

3. Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. Envtl. L.J. 279, 285 (1997–1998).

4. James Cameron and Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. Intl. & Comp. L. Rev. 1, 3 (1991).

5. 16 U.S.C. § 1531(b) (2012).

6. *Tennessee Valley Auth.*, 437 U.S. at 174.

7. Martha F. Phelps, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. Envtl. Aff. L. Rev. 175, 178 (1997).

(NMFS) co-administer the ESA.<sup>8</sup> The FWS<sup>9</sup> has primary responsibility for terrestrial and freshwater organisms, while the NMFS is responsible for marine wildlife and anadromous fish such as whales and salmon.<sup>10</sup>

*B. ESA § 4 – Listing a species as endangered or threatened*

A species may be listed as either endangered or threatened. An endangered species is one that is in danger of extinction throughout all or a significant portion of its range.<sup>11</sup> A threatened species is one that is likely to become endangered within the foreseeable future.<sup>12</sup> Even if a species as a *whole* is doing well, a distinct population segment may be listed if it meets the statutory criteria.<sup>13</sup> Listing a species is the threshold event that triggers the protections of the ESA.<sup>14</sup> Once listed, a species is broadly protected from “harm.”<sup>15</sup> This makes the decision to list “critically important because it sets in motion the [ESA’s] other provisions.”<sup>16</sup> The listing decision is based on five criteria:

(A) the present or threatened destruction, modification, or curtailment of [the species’s] habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E)

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8. FWS, *ESA Basics: 40 Years of Conserving Endangered Species* 1 (Jan. 2013) (available at [http://www.fws.gov/endangered/esa-library/pdf/ESA\\_basics.pdf](http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf)) [hereinafter FWS, *ESA Basics*].

9. Unless noted otherwise, this article will use FWS to refer to both the FWS and the NMFS.

10. Chad W. Lamer, *Habitat Conservation Plans: Balancing the Endangered Species Act’s Protections of Threatened and Endangered Species while Providing Landowners with Options for the Development of Land Containing Critical Habitat Areas*, 18 Penn. St. Envtl. L. Rev. 25, 26 (2009–2010).

11. 16 U.S.C. § 1532(6) (2012).

12. *Id.* at § 1532(20).

13. *ESA Basics*, *supra* n. 8, at 1.

14. 50 C.F.R. §§ 17.11, 17.12 (2013).

15. *Id.* at § 17.3 (Harm is defined as “an act which actually kills or injures wildlife. Such 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.”).

16. S. Rep. No. 418, at 10 (1982).

other natural or manmade factors affecting [the species'] continued existence.<sup>17</sup>

Additionally, the ESA instructs the FWS to consider efforts made by states, foreign nation, or Indian tribe to protect the species when making a listing decision.<sup>18</sup> Although it may consider these conservation efforts, Congress specifically forbade the FWS from considering the economic impacts of listing the species.<sup>19</sup> If the agency finds that listing a species as threatened or endangered is warranted based on one or more of the five factors, the agency must list the species.<sup>20</sup>

The FWS also maintains a list of “candidate” species for which it has sufficient information to warrant listing, but that it is precluded from listing at the time because of limited financial resources or the presence of higher priority species.<sup>21</sup> Listing a species as warranted but precluded “encourage[s] Federal agencies and other appropriate parties to take these taxa into account in environmental planning.”<sup>22</sup>

### C. ESA § 6 – Cooperation with the States

In 1896, the U.S. Supreme Court decided in *Geer v. Connecticut* that state governments have the sole authority to regulate wildlife within their borders.<sup>23</sup> However, over time, this exclusive authority has eroded. In 1900, Congress passed the Lacey Act that made it illegal to transport illegally killed wildlife across state lines.<sup>24</sup> In 1918, Congress enacted the Migratory Bird Treaty Act, which implemented the 1916 Migratory Bird Treaty between the United States, Mexico, and Great Britain.<sup>25</sup> This law made it illegal to kill certain listed species of birds that crossed state or

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17. 16 U.S.C. § 1533(a)(1)(A)–(E).

18. *Id.* at § 1533(b)(1)(A).

19. H.R. Rpt. 97–567 at 20 (May 17, 1982).

20. 50 C.F.R. § 424.11(c).

21. *Id.* at § 424.02(b).

22. *Annual Notice of Review*, 54 Fed. Reg. 554 (Jan. 6, 1989).

23. *Geer v. Connecticut*, 161 U.S. 519 (1896).

24. 16 U.S.C. §§ 3371–3378.

25. *Id.* at §§ 703–712. Canada was not an independent nation at the time and was still part of Great Britain.

international boundaries.<sup>26</sup> At that time, federal control of migratory birds was acceptable because they were viewed as *sui generis* based on their international range.<sup>27</sup> Since then, as part of the general expansion of federal powers, the federal government has asserted more power to regulate wildlife; however, it still does not have plenary power to regulate all wildlife within the nation.<sup>28</sup> That is why the ESA includes a section directing the FWS to cooperate with state governments to achieve the goal of preventing extinctions.<sup>29</sup> Without voluntary cooperation, the FWS would have no tools to prevent a species from declining to the point where it must be listed.

Section 6 directs FWS to cooperate with states to the maximum extent practicable to conserve both listed and unlisted species.<sup>30</sup> It allows states to enter into agreements for the administration and management of endangered or threatened species within their borders.<sup>31</sup> This is an example of cooperative federalism where national policy is set by the

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26. *Id.* at § 703(a) (“Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain . . .”).

27. *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (“Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.”).

28. George Cameron Coggins and William H. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered*, 61 Iowa L. Rev. 1099, 1136 (1976).

29. *Id.*

30. 16 U.S.C. § 1535.

31. *Id.* at § 1535(b).

federal government and individual states are allowed to achieve the goal in a way that best suits its citizens.<sup>32</sup> The authority for states to enter into collaborative stewardship agreements is important because they retain management authority over candidate species until they are listed.<sup>33</sup> This creates an incentive for states to maintain at least the *status quo* of a species.

#### D. ESA § 7 – Inter Federal Agency Consultation

Although Section 7 is a procedural section and does not provide any substantive protections, it “provides some of the most valuable and powerful tools to conserve listed species, assist with species’ recovery, and help protect critical habitat.”<sup>34</sup> Section 7(a)(2) requires all federal agencies to ensure that a proposed action will not jeopardize the existence of a listed species or result in the destruction or adverse modification of its critical habitat by consulting with the FWS before the agency authorizes, funds, or carries out any action.<sup>35</sup> In fulfilling this requirement, the agency must use the best scientific and commercial data available.<sup>36</sup>

To respond to an agency’s request for consultation, the FWS produces a biological opinion detailing how the agency’s proposed course that of action will affect the species and its critical habitat.<sup>37</sup> If it finds the action will jeopardize a species or adversely modify its habitat, the FWS must suggest reasonable alternatives to the agency’s preferred course of action that would reduce the amount of harm to the species.<sup>38</sup> Unlike during a listing decision, the FWS may consider the economic impacts of

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32. See Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328; Clean Water Act 33 U.S.C. §§ 1251–1387; and Clean Air Act 42 U.S.C. §§ 7401–7626 for other examples of statutes using cooperative federalism.

33. 16 U.S.C. § 1535.

34. *Final ESA Section 7 Consultation Handbook* 1–1 (Mar. 1998) (available at [http://www.fws.gov/endangeredesa-librarypdfesa\\_section7\\_handbook.pdf](http://www.fws.gov/endangeredesa-librarypdfesa_section7_handbook.pdf)).

35. 16 U.S.C. § 1535(a)(2).

36. *Id.*

37. *Id.* at § 1535(a)(3)(A).

38. FWS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference under Section 7 of the Endangered Species Act* (Mar. 1998) (available at [http://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf)).



the alternatives it proposes.<sup>39</sup> To ensure that an agency does not attempt to act first and ask for forgiveness later, the section also prevents an agency from making an irreversible or irretrievable commitment of resources before it has obtained the FWS's biological opinion.<sup>40</sup>

### *E. ESA § 9 – Prohibited Acts*

Section 9 is the teeth of the ESA.<sup>41</sup> It makes it unlawful for a person to “take” a listed species without a permit and imposes criminal and civil punishments for doing so.<sup>42</sup> The act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”<sup>43</sup> The term “harm” is defined as “an act which actually kills or injures fish or wildlife [including] significant habitat modification or degradation.”<sup>44</sup>

Because of the harsh punishments possible for running afoul of Section 9, it is the stick that the FWS uses to entice landowners to enter into the voluntary conservation agreements.<sup>45</sup> However, at times the FWS

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39. Pamela Baldwin, *The Endangered Species Act: Consideration of Economic Factors* 5 (Cong Research Serv. April 15, 2003) (available at [http://www.law.umaryland.edu/marshallersreportscrs/documents/RL30792\\_04152003.pdf](http://www.law.umaryland.edu/marshallersreportscrs/documents/RL30792_04152003.pdf)) (“Therefore, although economic factors are not to be considered in the listing of a species as endangered or threatened, economic factors must be considered when deciding whether and where to designate critical habitat, and some habitat areas may be excluded from designation based on such concerns, unless the failure to designate the habitat would result in the extinction of the subject species.”).

40. 16 U.S.C. § 1535(d).

41. *Id.* at §1538.

42. *Id.* at §1538(a)(1) (“Except as provided in sections 1535 (g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States . . .”).

43. *Id.* at § 1532(19).

44. 50 C.F.R. § 222.102.

45. Kirsten Uchitel, *Pece and Cooperative Conservation: Innovation or Subversion under the Endangered Species Act?*, 26 J. Land, Resources & Env'tl. L. 233, 262 (2006) (noting that under the second Bush Administration the FWS preferred to use incentives such as “cooperation, innovation, and entrepreneurship” rather than “sticks”—“fees, fines and punishment as the primary tools with which to achieve environmental results.”); Sheldon, *supra* n. 3, at 293 (“The first prosecution for a

has lacked the will or political capital to prosecute violations of the ESA.<sup>46</sup> At other times, violators have received punishments equal to or less than the cost of entering into the conservation agreements that Section 9 should encourage.<sup>47</sup> When the punishment for violating Section 9 is less than the costs of not violating the law, there is little incentive for landowners to take proactive steps to avoid taking endangered species.

#### F. ESA § 10 – Exceptions

Section 10(a) allows the FWS to issue permits for the incidental take of a species that would otherwise be prohibited by section 9.<sup>48</sup> In order to obtain an incidental take permit (ITP) the applicant must prove (i) the take will be incidental to a lawful activity, (ii) the applicant will to the maximum extent practicable, minimize and mitigate the impacts on the species, (iii) that it has an adequate source of funding, and (iv) issuing the permit will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.<sup>49</sup>

Congress added this section in response to the *Palila* decisions, wherein the full extent of acts that may result in a “take,” and be enjoined under Section 9, was revealed.<sup>50</sup> In *Palila v. Hawaii Dep’t. of Land & Natural Resources*, the Ninth Circuit Court of Appeals held that when the state of Hawaii allowed wild sheep to destroy the Palila’s (an endangered bird) designated critical habitat, that action constituted a take under the ESA.<sup>51</sup> The court therefore ordered the State to remove the sheep.<sup>52</sup> Congress reacted in 1982 by adding Section 10(a) to the ESA to allow for the incidental take of a species.<sup>53</sup> This small retreat from the absolute

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taking based on significant modification of endangered species habitat did not occur until 1990, seventeen years after the ESA was passed.”).

46. Uchitel, *supra* n. 45, at 262.

47. *Id.*

48. 16 U.S.C. at § 1539(a).

49. *Id.* at § 1539(a)(2)(B).

50. Sheldon, *supra* n. 3, at 295.

51. *Palila v. Hawaii Dep’t. of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981).

52. *Id.*

53. Sheldon, *supra* n. 3, at 293 (“Prior to the *Palila* cases in 1979 and 1981, the only court to consider the application of Section 9 to habitat impacts adopted a limited reading of the section’s reach.”).

prohibition on take has allowed the FWS to fashion creative programs that allow for limited take of a species in exchange for conservation commitments from landowners.

### III. THE INABILITY OF THE ESA TO PROTECT UNLISTED SPECIES PRIOR TO LISTING

A weakness in the ESA is the lack of authority to take actions that would prevent the listing of a species in decline. By the time a species is almost extinct, the cost of recovery is much higher. Taking action before it is too late would decrease the overall cost to landowners and the government.

#### *A. The ESA incentivizes landowners to prevent listed or declining species from occupying their land*

Private land is free from regulation under the ESA unless a listed species, or its designated critical habitat, can be found on his land.<sup>54</sup> Therefore, it is relatively easy for a landowner to evade the ESA by eliminating the species' habitat from his land. This will remove the species or prevent it from recolonizing land that was once part of its range. This evasive action involves exactly what the law was intended to avoid — the destruction of an endangered species' habitat.<sup>55</sup> As the National Association of Home Builders explains in their *Developer's Guide to Endangered Species Regulation*:

[T]he highest level of assurance that a property owner will not face an ESA issue is to maintain the property in a condition such that protected species cannot occupy the property. . . . This is referred to as the "scorched earth" technique.<sup>56</sup>

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54. Barton H. Thompson, *Conservation Options: Toward a Greater Private Role*, 21 Va. Envtl. L.J. 245, 295 (2002–2003).

55. Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 27 J.L. & Econ. 27, 28 (Apr. 2003).

56. National Association of Home Builders, *Developer's Guide to Endangered Species Regulation*, 109 (Home Builder Press 1996).

The cost to a landowner of allowing an endangered species to occupy their land creates an incentive to make it inhospitable for vulnerable species. A possible solution to this problem that involves punishing preemptive habitat destruction is suggested below.

*B. The ESA prevents landowners from taking beneficial actions that might have short-term negative impacts*

The ESA imposes an absolute prohibition on the unpermitted take of a listed species.<sup>57</sup> However, sometimes an action taken to improve habitat for a listed species will result in a limited, but illegal, take of the species. For example, the Montana DNRC listed the ability to remove culverts to restore stream connectivity and reduce sedimentation as one of their priorities for protecting the endangered Bull Trout.<sup>58</sup> However, the removal of the culverts would be illegal because it would result in the temporary impairment of the stream and result in the nominal “take of the species.”<sup>59</sup>

#### IV. PROGRAMS CREATED TO PROVIDE FLEXIBILITY FOR LANDOWNERS AND PROTECT VULNERABLE SPECIES

Except for the drafters of the law, almost no one understood how powerful the ESA would be when it was enacted. However, because it is such a powerful law, people have been fighting to repeal or modify it from day one.<sup>60</sup> Efforts to avoid the strictures of the law have come in many forms: attempts to repeal the law, legislation to defund the FWS’s authority to list new species or designate critical habitat, and non-enforcement.<sup>61</sup> In response to these criticisms, the FWS has created

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57. 16 U.S.C. §1538(a)(1).

58. Montana Department of Natural Resources and Conservation, *Forested State Trust Lands Habitat Conservation Plan: Final EIS*, vol. 1, p. 3–31 (Sep. 2010) (available at [http://leg.mt.gov/content/publications/mepa2010/dnr0923\\_2010001a.pdf](http://leg.mt.gov/content/publications/mepa2010/dnr0923_2010001a.pdf)).

59. *Id.*

60. Keith W. Rizzardi, *The Duty to Advise the Lorax: Environmental Advocacy and the Risk of Reform*, 37 Wm. & Mary Envtl. L. & Policy Rev. 25, 57 (2012) (available at <http://scholarship.law.wm.edu/wmelpr/vol37/iss13>).

61. *Id.*

programs that allow landowners to act proactively to conserve their land and avoid Section 9 liability while protecting listed species.<sup>62</sup>

### A. Habitat Conservation Plans

As discussed above, in 1982, the rigidity of Section 9 prompted Congress to amend the ESA to add Section 10(a).<sup>63</sup> This allows a landowner who thinks their actions may harm a listed species to develop a conservation plan and obtain an ITP to avoid an illegal take of the species.<sup>64</sup> The conservation plan must identify the likely impacts on the species and the measures the permit applicant is willing to undertake to minimize and mitigate those impacts.<sup>65</sup> These conservation plans have come to be known as “habitat conservation plans” or “HCPs.” In 1996, the FWS issued “detailed but flexible guidelines” for drafting an HCP and obtaining an ITP.<sup>66</sup>

The five criteria for approving an HCP are:

(1) the take will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking; (3) the applicant will ensure adequate funding for the plan; (4) the take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) any other measures FWS may require.<sup>67</sup>

These criteria are important because the FWS must approve an HCP and issue the applicant an ITP if these conditions are met.<sup>68</sup> Determining what level of mitigation efforts is the “maximum amount practical” is important but difficult because an HCP will always allow some level of impact on a listed species that could be further reduced

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62. 16 U.S.C. at § 1539(a).

63. Sheldon, *supra* n. 3, at 293

64. Lamer, *supra* n. 10, at 38.

65. 16 U.S.C. § 1539(a)(2)(A).

66. FWS, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* 3–38 (Nov. 4, 1996) (available at <http://www.fws.gov/endangered/esa-library/pdf/HCPBKTOC.PDF>).

67. 16 U.S.C. § 1539(a)(2)(B).

68. *Id.*

towards zero. The case law is not clear on the issue, but at a minimum, the FWS must state what additional mitigation efforts it considered and why it rejected those additional measures as impracticable.<sup>69</sup>

One criticism of the HCP process is the relatively low level of conservation measures that are required to obtain an ITP.<sup>70</sup> By definition, an ITP allows for the “take” of a listed species or the destruction of its habitat. All that an applicant must show is that the impact on the species “will not appreciably reduce the likelihood of survival and recovery of the species in the wild.”<sup>71</sup> This is not a high threshold and it could allow a species to slip through the cracks. One suggestion to improve the process would be to require the application to prove that the project will provide a net conservation benefit for the covered species. Granting an ITP is a matter of administrative grace and more should be asked of an applicant in exchange for immunizing the applicant from liability under the ESA.

### *B. Candidate Conservation Agreements*

Candidate Conservation Agreements (CCA) are formal voluntary agreements between the FWS and one or more parties. The purpose of a CCA is to address the conservation needs of candidate species and other unlisted species in decline.<sup>72</sup> Because a landowner does not receive protections from future ESA enforcement, CCAs have been used mostly by federal agencies and Indian tribes.<sup>73</sup> Federal agencies are not eligible for the assurances discussed below because that would negate their mandatory duty under Section 7 to consult with the FWS before taking any action that might adversely affect a listed species.<sup>74</sup>

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69. See e.g. *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1292 (E.D. Cal. 2000) (finding the FWS had acted in an arbitrary and capricious manner when it did not consider an alternative involving greater mitigation measures).

70. John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery: An Introduction to a Series of Articles on Habitat Conservation Plans*, 27 *Envtl. L.* 755, 757 (1997).

71. 16 U.S.C. § 1539(a)(2)(B)(iv).

72. FWS, *Candidate Conservation Agreements* (Mar. 2011) (available at <http://www.fws.gov/Endangered/esa-library/pdf/CCAs.pdf>) [hereinafter FWS, *Candidate Conservation Agreements*].

73. Phelps, *supra* n. 7, at 175.

74. 16 U.S.C. § 1535.

*C. Candidate Conservation Agreements with Assurances*

The FWS developed Candidate Conservation Agreements with Assurances (CCAA) to address landowners' desires to obtain assurances that they will not have to take additional measures when the species is later listed if they comply with the terms of the CCAA.<sup>75</sup> This program gives non-Federal landowners incentives to voluntarily implement conservation measures to protect candidate species on their land.<sup>76</sup> There are several assurances that a CCAA provides. First, the level of conservation measures that the landowner will be required to undertake is set when the CCAA is approved and cannot be modified when the species is later listed, even if the CCAA was based on incorrect assumptions about the species.<sup>77</sup> Second, the landowner is immune from liability under Section 9 for the activities approved in the CCAA.<sup>78</sup>

To receive these assurances, an applicant must prove that the conservation measures in the proposed CCAA would preclude the need to list the species if combined with the same level of conservation measures on all other properties throughout the species' range.<sup>79</sup> To determine whether a CCAA meets this standard, the FWS looks for reductions in threats to the species on the property, the degree to which the conservation benefits offset the impacts from any take that might occur, and the hypothetical effects of conservation measures on the other properties.<sup>80</sup> For candidate species, the FWS assesses the degree to which the conservation measures in the CCAA address the factors in the five listing factors discussed above.<sup>81</sup> For non-candidate species, the FWS conducts a

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75. FWS, *Candidate Conservation Agreements*, *supra* n. 72.

76. *Id.*

77. *Id.*

78. *Id.*

79. FWS, *Draft Candidate Conservation Agreements with Assurances Handbook* 14 (June 2003) (available at <http://www.fws.gov/endangered/esa-library/pdf/handbooktext.pdf>).

80. *Id.*

81. Amelia Orton-Palmer, *Candidate Conservation Agreements and Candidate Conservation Agreements with Assurances under the ESA*, 2 Rocky Mountain Mineral Law Foundation Paper No. 9 (2012) (available at <http://trove.nla.gov.au/result?q=amelia%20palmer>).

similar analysis based on the best information available on the species and its threats.<sup>82</sup>

When there is less information about a species, the decision on the amount of conservation measures to require in order to obtain the protections of a CCAA is more speculative. This could result in the FWS making a commitment that last for decades based on incorrect information. As discussed below, the requirement for approving a CCAA should be amended to require the FWS to apply the precautionary principle before granting these irrevocable assurances.

#### *D. Safe Harbor Agreements*

Safe Harbor Agreements (SHA) provide regulatory assurances for landowners who voluntarily agree to aid in the recovery of listed species by improving or increasing the amount of habitat on their land. As part of a SHA, a landowner agrees to improve their land to benefit a listed species for a set amount of time.<sup>83</sup> Once the period is over, the landowner may restore his land to its baseline condition without risking violating Section 9, even if it results in the “take” of the species or the destruction of habitat.<sup>84</sup>

#### *E. Conservation Banking*

One of the more innovative new programs that the FWS has developed is the conservation-banking program.<sup>85</sup> A conservation bank is a tract of land that is permanently protected and actively managed to benefit an endangered species. The land in the conservation bank is used to offset the loss of similar habitat elsewhere.<sup>86</sup> Conservation banking is a free-market approach based on the limited supply of land suitable for conservation.<sup>87</sup> Credits are given to a landowner who enters into a

82. *Id.*

83. FWS, *Safe Harbor Agreements for Private Landowners* (July 2011) (available at <http://www.fws.gov/endangered/esa-library/pdf/harborqa.pdf>).

84. *Id.*

85. FWS, *Conservation Banking: Incentives for Stewardship* (Aug. 2012) (available at [http://www.fws.gov/endangeredesa-library/pdf/conservation\\_banking.pdf](http://www.fws.gov/endangeredesa-library/pdf/conservation_banking.pdf)).

86. *Id.*

87. *Id.*



conservation bank agreement with the FWS to protect and manage their land for one or more listed species.<sup>88</sup> The protections are permanent and must be funded by a self-sustaining endowment.<sup>89</sup> Other landowners in the area who are proposing a project that will affect a listed species may purchase the conservation credits in order to comply with the ESA.<sup>90</sup> Conservation banking benefits the species by allowing development on several smaller tracts but creating one larger tract that is actively managed to protect the species.<sup>91</sup>

These agreements have several advantages. They increase ecosystem connectivity because, in exchange for allowing multiple isolated parcels to be modified, a larger tract of land is protected as a single unit.<sup>92</sup> They also allow for a one-time reduction in a species or its habitat in exchange for permanently protected habitat for the remaining members of the species.<sup>93</sup> Conservation banking is not a new concept, instead, the FWS modeled it after the popular wetland mitigation banks that are part of Section 404 of the Clean Water Act.<sup>94</sup> The idea that a person may pay money to harm an endangered species is a large departure from the original ideals of the ESA. An interesting example of combining conservation banking with an HCP is the agreement between TransCanada and FWS.<sup>95</sup> This agreement allows TransCanada to comply with the ESA

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88. *Id.*

89. *Id.*

90. *Id.*

91. FWS, *ESA Basics*, *supra* n. 8, at 1.

92. FWS, *Conservation Banking*, *supra* n. 85.

93. J. B. Ruhl, Alan Glen, and David Hartman, *Practical Guide to Habitat Conservation Banking Law and Policy*, 20 *Nat. Resources & Env.* 26 (2005-2006).

94. FWS, *Guidance for the Establishment, Use, and Operation of Conservation Banks 2* (May 2, 2003) (available at [http://www.fws.gov/endangered/esa-library/pdf/Conservation\\_Banking\\_Guidance.pdf](http://www.fws.gov/endangered/esa-library/pdf/Conservation_Banking_Guidance.pdf)) (“The main concept behind wetland mitigation banking is similar to that of conservation banking; to provide compensation for adverse impacts to wetlands and other aquatic resources in advance of the impact. Under the guidelines established for section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act, impacts to wetlands are mitigated sequentially by avoiding impacts, minimizing impacts, and then, as a last resort, compensating for those impacts.”).

95. Enercon Services, *Draft Habitat Conservation Plan TransCanada Keystone Pipeline, LP: Gulf Coast Project* (Aug. 15, 2012) (available at <http://www.fws.gov/southwest/es/Oklahoma/Documents/ABB/Final%20Draft%20Keystone%20HCP%2020120815.pdf>).

while it constructed and operates the southern portion of the Keystone XL pipeline between Cushing, Oklahoma and Nederland, Texas, which will result in the “take” American burying beetles (an endangered species).<sup>96</sup> In addition to mitigation and avoidance measures, the HCP calls for TransCanada to purchase a 1,600-acre tract of land to act as substitute habitat for the American burying beetle habitat that was lost during construction phase.<sup>97</sup> TransCanada paid a third-party conservation group three-million-dollars to operate the conservation bank for perpetuity.<sup>98</sup> If the impacts of the project on the beetle are not as large as expected, TransCanada will be able to sell the excess American burying beetle impact credits to other developers.<sup>99</sup>

The conservation-banking concept is new, and it has not been thoroughly tested in the courts. However, if we are willing to accept the idea that it is okay to put a price tag on our most vulnerable species, the free market may provide a path to recovery that the original blanket prohibition on take in the ESA was unable to provide.

## V. THE ABILITY FOR SPECIES TO FALL THROUGH THE CRACKS

The FWS has been successful in fulfilling Congress’ mandate to provide flexibility in the application of the ESA. Using its strong bargaining position, the FWS is able to construct agreements with landowners while remaining consistent with the “no jeopardy” provision of the ESA.<sup>100</sup> This flexibility, however, might be the crack in the roadblock that allows for more extinctions. With minor modifications, these programs could be reinforced to ensure that a species does not fall through the regulatory cracks.

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96. *Id.* at 3.

97. TransCanada, *Keystone McAlester Conservation Area American Burying Beetle Permittee Responsible Conservation Plan 3* (Nov. 16, 2012) (available at [http://www.fws.gov/southwest/es/OklahomaDocuments/TE\\_Species/Keystone/HCP%20Appendix%20B%20KMCA%20Conservation%20Plan.pdf](http://www.fws.gov/southwest/es/OklahomaDocuments/TE_Species/Keystone/HCP%20Appendix%20B%20KMCA%20Conservation%20Plan.pdf)).

98. FWS, *Agreement between the U.S. Fish and Wildlife Service, the U.S. Department of State, and TransCanada Keystone Pipeline 3* (no date) (available at <http://keystonepipeline-xl.state.gov/documents/organization/181193.pdf>).

99. TransCanada, *supra* n. 97, at 8.

100. Uchitel, *supra* n. 45, at 262.

*A. The need to codify the precautionary principle in the ESA*

In order to entice landowners to voluntarily take preemptive actions to protect vulnerable species, there must be a benefit to the landowners to take action. Currently, the FWS offers several incentives for landowner cooperation, including issuance of ITPs and providing assurances that no additional commitments of resources will be required if they comply with the terms of the permit.<sup>101</sup> This compromise from the ideal of preventing all “take” of a listed species is reasonable and necessary if we, as a society, want landowners to be proactive about protecting species and habitat conservation. However, there is the possibility for not only intentional exploitation of these exceptions, but also for unintended consequences. , Congress acknowledged that science often lags behind development when it enacted the ESA and made the decision to place the survival of endangered species as the “highest of priorities.”

The precautionary principle’s requirement to take small steps until there is scientific certainty should be explicitly incorporated into the ITP approval process. With endangered species, a small mistake in allowing the take of a species or the modification of its habitat can have long lasting consequences. The maxim “first, do no harm” should be our nation’s guiding principle when allowing landowners to “take” an endangered species or species in rapid decline.

*B. Set a floor for scientific knowledge about a species before granting assurances*

The requirement to show that a project will not jeopardize the survival of a species — especially when there is limited scientific knowledge about the species — is a low threshold to meet. However, that is all that is currently required to get a permit to take a vulnerable species for decades. This threshold is even lower with unlisted species that are in rapid decline because there is even less known about them.

There should be a requirement to obtain a minimum level of scientific knowledge about the species that will be affected by a project, including their habitat, place in the food chain, population trend, and resilience to change, before the FWS makes any long-term commitments.

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101. See the programs discussed in Section IV.

The FWS requires some level of knowledge about a species before taking action, but the level of inquiry is determined on a case-by-case basis. If there was a set minimum level of knowledge about a species as a pre-condition to applying for a permit, applicants would know what was expected of them and the FWS could make better decisions. It would also create an incentive for collaboration between landowners, conservationists, and local governments to build up a greater knowledge of species in the area. Increasing the knowledge about a species provides benefits not only to the species, but also to the ecosystem as a whole.

### *C. Punish preemptive habitat destruction*

Landowners find it too easy to avoid the ESA by destroying habitat on their land solely to prevent a vulnerable species from occupying it. This evasive action is exactly what the law was intended to avoid. The ESA could be amended to punish landowners who destroy habitat solely to drive away a listed species. This is not to say that the federal government should be involved in every land-use planning decision. Landowners should be free to use their land however they choose, but when a person's only motivation for destroying the very habitat that a species needs to survive is to avoid regulation under the ESA, they are also avoiding their shared responsibility as a citizen of the nation. Preventing the extinction of endangered species is everyone's responsibility, and a landowner should not be allowed to place additional burdens on his neighbors by eliminating the habitat on his land.

Although proving a landowner intentionally destroyed habitat to avoid the ESA may be difficult, there would be cases when the circumstantial evidence was so strong that it would be possible. And the simple fact that destroying habitat to displace a vulnerable species is illegal would prevent parties like the National Association of Homebuilders from proposing this as a viable alternative.

### *D. Categorical exclusions for proven beneficial activities*

As a roadblock statute, Congress designed the ESA to impose an absolute prohibition on the unpermitted "take" of a listed species. However, sometimes this prevents conservation minded parties from taking actions to improve habitat for those species. One way to encourage landowners to take actions that will benefit a species, but might result in a

limited amount of harm, would be to create a categorical exclusion for these types of actions.

A way to implement this process with limited administrative overhead would be to allow a landowner to file a “notice of beneficial action with the possibility of incidental take” with the FWS. In the notice, the landowner would explain his plan and why the benefits to the species far outweigh the amount of harm. Once filed with the FWS, the landowner could proceed with the action without waiting for approval. The FWS would have the documentation that it needs to follow up to ensure that the impacts were as limited, and the benefits as large, as claimed in the notice. If the landowner misrepresented the extent of the take, the FWS could invalidate the permit and prosecute the landowner under Section 9. If the landowner complied with the terms of the notice of beneficial take, and the contents of notice of the complied with the regulations, they would be protected.

A categorical exclusion would lower the costs to landowners who want to improve habitat for endangered species. This idea may be controversial, but we have to make tough choices to advance habitat conservation. Although it could be subject to fraud, the FWS would know where to look for abuses and who was responsible.

## VI. CONCLUSION

The FWS is doing a good job of using its freedom to craft creative solutions to advance the policies of the ESA. While these programs are new, they tend to be the least controversial parts of the law. This willingness to experiment should be encouraged, but the FWS should remember that preventing the decline of vulnerable species and preserving habitat should be the goal of any project that it approves. To that end, modest advancements could ensure there are effective sideboards on the FWS authority.

Every species and ecosystem is different, and the FWS must retain the flexibility to design programs that address the circumstances on the ground. When presented with a minimum level scientific knowledge about a species the FWS will be able to negotiate agreements that are more accurate. With enhanced authority to punish preemptive habitat destruction, there will be more habitat and the costs of recovery will be more equitably shared. Finally, enacting a categorical exclusion that allows a landowner to file a notice of intent to improve habitat for an

endangered species would be a small step towards making it easier for landowners to do the right thing while lowering the costs of compliance.