



**Speaking from Experience: Landowners &
the Endangered Species Act**



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Published by the Western Landowners Alliance, 2017.

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The **WESTERN LANDOWNERS ALLIANCE** advances policies and practices that sustain working lands, connected landscapes and native species.

Our land and natural resources are the foundation of this great nation. From the food on our tables and the water we drink to jobs and recreation, this natural heritage is essential to our economy, our independence and our way of life.

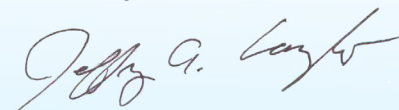
As the owners and managers of private and leased public lands throughout the West, we created the Western Landowners Alliance to advance excellence in the stewardship of these resources. We have a vested financial stake in the well-being of these landscapes, we have boots-on-the-ground experience of owning and managing land, and we care deeply about our neighbors, our communities and future generations.

Our work is founded on the following principles:

- Working lands are an essential component of the western landscape.
- Healthy lands and strong economies go hand in hand.
- Wild places, working lands and human communities all have legitimate places in the landscape and must be considered together.
- The desire to achieve long-term prosperity while conserving our lands, water and wildlife for future generations is a common-ground, non-partisan goal.

We believe a need exists to advance changes in policy, land use and management to secure a positive future. Informed by landowners and in close collaboration with public land management agencies and non-profit partners, we seek to identify constructive paths forward. We look forward to working with you to build a better West.

Sincerely,



Jeff Laszlo
Chair

As a rancher, I've learned that conservation and ranching are not mutually exclusive pursuits. In fact, to do either well you'd have to do them together.

–Jeff Laszlo, Granger Ranches, Montana



“Working lands represent one of the best hopes for conservation”

- National Audubon Society





OPEN LETTER TO READERS

The following articles provide information and landowner perspectives on the Endangered Species Act at a time of deep national divide over environmental regulations. Before delving into details, however, let's step back and consider what's at stake for both wildlife and people.

There is no question that the world is getting more crowded. Each year we add approximately 78 million people to the planet. Even those of us occupying the wide spaces of the West feel it daily as subdivisions creep in around us. According to the Center for American Progress, every 2.5 minutes the West loses a football field's worth of natural area to human development. With every new development, we lose both agricultural capacity and wildlife, both of which are necessary to our own survival.

People often ask why it is important to save a subspecies of a particular mouse or snail or beetle. No one has all the answers but we do know that together, the diverse plant and animal species of the world create the conditions that support human life. Plants grow from living soils supported by complex interactions among micro-organisms that we are barely beginning to understand. We're equally dependent on the life of the seas and on the pollinators that sustain our agricultural crops.

Our relationships with plant and wildlife species go far beyond survival. Most of us care on a deep emotional or even spiritual level about the other life forms that occupy this planet. They make our lives not only possible but also worth living. Who among us wishes to leave future generations with a depleted natural heritage, a world far less rich than the one we inherited?

Given continued human expansion, we can no longer think of conservation merely as the separation of people from wild places. We must learn to co-exist on the working landscapes that provide for our food, energy, fiber and other natural resource needs. We have only just begun to learn how to do this and there is tremendous opportunity ahead if we are willing to work together toward common goals. The debate about the Endangered Species Act should not be about people versus wildlife. It should be about how we can best sustain life and prosperity for all of us on this extraordinarily blessed planet.

Sincerely,

Lesli Allison
Executive Director
Western Landowners Alliance



*“What’s good for the bird
is good for the herd”*

- Tom Sharp, Oregon Rancher



Photo by: Bob Wick - BLM

ENDANGERED SPECIES ACT: OVERVIEW

By Lesli Allison

INTRODUCTION

Adopted in 1973 under the Nixon administration, the Endangered Species Act (ESA) was created to conserve threatened and endangered species and the habitats on which they depend.¹ It became one of America's most powerful environmental laws and, increasingly, one of its most controversial. Supporters credit the act for averting the extinction of 90 percent of species that have come under its protection and public opinion polls consistently show a large majority of Americans support its intent. Critics cite economic impacts, slow rates of species recovery and delisting, conflicts between federally protected predators and livestock, and litigation by environmental organizations as cause to reform or even repeal the act. As Congress evaluates potential changes to the act, both species and landowners have a great deal at stake.

HISTORY

In 1941, the total population of North America's tallest bird, the whooping crane, fell to a low of 16 individuals. The plight of the crane, coupled with national concern over declining populations of whales and other species, led to a series of congressional acts beginning in 1966 and culminating in the passage of the ESA in 1973. The act did the following:

1. Defined "endangered" and "threatened" [[section 3](#)];
2. Defined the term "species" to include any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature [[section 3](#)];
3. Applied broad "take" prohibitions to all endangered animal species and allowed the prohibitions to apply to threatened animal species by special regulation [[section 9](#)];
4. Required federal agencies to use their authorities to conserve listed species and consult on "may affect" actions [[section 7](#)];
5. Prohibited federal agencies from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its "critical habitat" [[section 7](#)];
6. Made matching funds available to states with cooperative agreements [[section 6](#)];
7. Provided funding authority for land acquisition for foreign species [[section 8](#)]; and
8. Implemented CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) protection in the United States [[section 8](#)].²

¹Endangered Species Act, <https://www.fws.gov/endangered/laws-policies/section-2.html>

²<https://www.fws.gov/endangered/laws-policies/esa-history.html>



Photo by: John Noll - USDA

Significant amendments to the act were added in 1978, 1982 and 1988. These included, among other things:

- Critical habitat designations were required, where feasible, at the time of a listing decision;
- The status of species was to be determined solely on biological and trade information without consideration for economic impacts;
- The US Fish and Wildlife Service (FWS) was required to determine the status of a species within one year of a proposal;
- Greater flexibility was provided under Section 10 for experimental populations;
- Section 10 also provided for Habitat Conservation Plans that allowed "incidental take" permits.

INTERPRETATION

No law is perfect and most are subject to some degree of interpretation. The ESA is no exception. For instance, according to the act: "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range..." However, it can be difficult to define what "significant," "portion" and "range" actually mean. Does "significant" mean the majority of a range? Can the "portion" be limited to an isolated section of the range or should it cover the range more broadly? Finally, does "range" mean the historic range of the species, currently occupied range, or potential range? Challenges to FWS recovery plans are often based on interpretations of these terms.

These questions very quickly lead into complex discussions about biology, ecology and economics. What kind of genetic diversity, spatial distribution and population density is required for species survival? What are the economic impacts of maintaining these species across the landscape? Compounding this uncertainty is the fact that science continues to evolve and many questions remain unanswered as to the actual status of various species, their habitat needs and how conservation and recovery might best be accomplished.

Uncertainty and lack of predictability pose challenges for most businesses and for landowners. One of the greatest complaints about the implementation of the ESA is what many call “moving goal posts.” This generally refers to the lack of certainty around which actions can help avert a decision to list the species and to changes in stated recovery goals. In some cases, this occurs in the absence of adequate or timely recovery plans. In other cases, it is because the ESA requires FWS to use the “best available science” in its listing, management and delisting decisions. Not only does the science continue to evolve, but science can also be politicized. As both science and politics change, so can recovery goals. While it makes sense to incorporate new science into recovery decisions, the resulting changes can be frustrating and even economically debilitating for those whose financial investments in land or business enterprises may be at stake.

CONFLICT

There’s a saying coined by Oregon rancher Tom Sharp that is often used in ESA discussion in the West: “What’s good for the bird is good for the herd.” This is to say that land which is managed well enough to provide good habitat for sage grouse or other species will also provide good forage for livestock. Many ranchers agree that conservation and livestock production can go hand in hand. However, there are situations where wildlife and agricultural operations are less compatible. Most notably, carnivores like wolves and grizzlies can prey on livestock. Grazing can also be considered a threat to species like the New Mexico jumping mouse or the Mojave desert tortoise, leading to conflicts and litigation over land use.

In addition, while habitat conservation and livestock operations can be compatible, many other activities on the landscape can conflict with wildlife needs. Poles, fences and windmills, for example, can pose hazards to species such as sage grouse and lesser prairie chicken.

At the heart of these conflicts are questions about priorities, property rights and financial responsibility. Should the needs of an imperiled species take priority over economics and property rights? Is a particular mouse or bird species more or less important than the financial survival of a ranching family or a rural community? Who should pay the costs of conserving and recovering wildlife species?

Conflicts have also arisen between state and federal governments over the implementation of the ESA. Most wildlife species fall under the jurisdiction of state governments and are managed by state wildlife agencies. Once a species is listed as threatened or endangered, however, it comes under the jurisdiction of the federal government and, specifically, the U.S. Fish and Wildlife Service (FWS)³. The jurisdiction reverts to the states once the species is delisted.

³The federal agencies responsible for implementing the ESA are the U.S. Fish and Wildlife Service (FWS) and the U.S. National Oceanic and Atmospheric Administration (NOAA), which includes the National Marine Fisheries Service (NMFS). Because NOAA Fisheries is responsible for marine species exclusively and this publication focuses primarily on non-marine species under the jurisdiction of FWS, this publication consistently refers to the FWS.

In the midst of this, numerous questions arise about the role of states in the listing decision and in the conservation and recovery of the species. The FWS is legally responsible for listed species while state agencies bear many of the economic impacts. In addition, state agencies can have greater knowledge of the landscape, more science and stronger relationships with impacted stakeholders than federal wildlife managers. Almost inevitably, tensions arise between state and federal agencies and local governments. Data-sharing challenges, inadequate funding, court decisions and political pressures increase this friction.

Section 6 of the ESA provides an option for FWS to enter into a cooperative agreement with any state for the management of threatened or endangered species provided that the state establishes and maintains an adequate and active program for the conservation of the species.⁴ Current discussions among stakeholders often call for increased use of Section 6 cooperative agreements. However, disagreements remain over the adequacy of state plans and over funding for the implementation of such plans.

An important point to emphasize is that states have the authority and responsibility for managing most wildlife species until they become imperiled to the point of listing by the FWS as threatened or endangered. Many stakeholders agree that precluding the need to list through pro-active efforts to conserve species and their habitats before they become imperiled is the best and likely most cost-effective solution.

⁴<https://www.fws.gov/endangered/laws-policies/section-6.html>



LITIGATION

Under the “Equal Access to Justice Act” (EAJA), prevailing parties in any civil action brought by or against the United States may be compensated for related costs, including attorneys’ fees. As indicated by its title, the EAJA is intended to provide equal access to the judicial system and level the playing field among stakeholders. One of the primary focal points in discussions about the ESA is that environmental organizations have used the EAJA to file (and fund) numerous ESA-related lawsuits. Many ranchers believe that the most litigious environmental organizations are less interested in recovering species than in driving ranchers, loggers and energy developers off the landscape. Western Watersheds Project states on its website, for example, that “The time has come to end public lands ranching.”

On the flip side of the coin are organizations using litigation to try to curtail environmental regulations. For example, the Mountain States Legal Foundation described itself in a recent press release as “a western nonprofit, public-interest legal foundation with decades of experience challenging application of the Endangered Species Act (ESA).”⁵

Though litigation in general is a powerful and sometimes necessary tool, it can also be counter-productive. For instance, ranchers often express the concern that helping to improve wildlife habitat or restore a species on a public grazing allotment can make them a target for environmental litigation. In addition, litigation also diverts significant funding and FWS personnel that could otherwise be dedicated to on-the-ground conservation and recovery measures. Perhaps most significantly, litigation can impede the kind of trust, relationships and collaboration many see as necessary for long-term solutions, particularly in the complex, multiple-use landscapes of the West. A common viewpoint is that the EAJA is important but that litigation should be used sparingly and only as a last resort.

COLLABORATION

The Sage Grouse Initiative is just one of many successful collaborative efforts that have emerged from the western landscape over the past two decades. Place-based groups, often led by landowners, such as the Malpai Borderlands Group and Blackfoot Challenge have pioneered new, cooperative approaches to integrating land use and conservation. In some cases, the threat of a federal ESA listing helps motivate groups to form and become proactive in order to avoid the listing and its associated impacts. However, once a listing actually occurs, this motivation may actually be diminished, along with opportunities for collaborative, adaptive management. Nevertheless, collaboration can also expedite the recovery of listed species as stakeholders work together toward a shared goal. While collaborative conservation does require investments of time and money, it can also be cost-effective in the long term by reducing higher costs related to regulatory enforcement and litigation.

⁵<https://www.mountainstateslegal.org/news-updates/news-releases/2017/03/29/western-legal-foundation-dismissed-by-ruling-against-utah-landowners>

A quote by Aldo Leopold, "Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest", overlaid on a photograph of a rugged mountain range under a blue sky with white clouds. The foreground shows rolling hills with dry, yellowish grass and some green shrubs.

*“Conservation will
ultimately boil down to
rewarding the private
landowner who conserves
the public interest”*

- Aldo Leopold

SUCCESS OR FAILURE?

Environmental organizations often call the ESA one of the most successful environmental laws in history. Those who oppose the ESA condemn it as a failure. Much depends on how you count. For example, while only about two percent of listed species are considered recovered, the act is credited with preventing the extinction of approximately 90 percent of listed species. It may also be credited with inspiring pro-active conservation measures that help keep species from being listed in the first place. The recent widespread collaborative effort to keep greater sage grouse off the list is a prime example.

Yet the fact that the act can help prevent extinction but has had limited success in fostering recovery of listed species points to several key issues.

First, by preventing harmful actions, ESA regulations can be effective in helping some species survive and recover. For instance, banning DDT enabled bald eagles to recover and banning hunting enabled American alligators to recover. In other cases, however, species have habitat needs that require voluntary, pro-active management. The law can prevent someone from harming a species but it can't force someone to create, restore or maintain habitat. The recovery of critically endangered black-footed ferrets, for example, is dependent in large part on the voluntary cooperation of landowners willing to host and manage the prairie dog colonies on which the ferrets depend. The success of the ESA will always be limited without this kind of cooperation and without sufficient accompanying technical and financial support for proactive conservation.

Second, the way in which the ESA is implemented can actually discourage conservation. For example, if a rancher provides habitat that supports an at-risk species, there is a chance that if that species becomes federally listed, he or she may face grazing or other land-use restrictions. The more habitat and imperiled species a landowner supports, the greater the risk of federal regulatory intervention and environmental litigation. Assurance agreements have been developed to address this concern but technical and financial support to landowners interested in entering these agreements is limited (see side bar).

Finally, as long as non-game species have limited economic value relative to other land uses such as agricultural production, energy development and residential development, wildlife and their habitats will continue to disappear. The ESA alone cannot change this, though it has begun to drive market-based mitigation programs that can help create some of that economic value. At the end of the day, the ESA will only be successful if it is accompanied by the commitments of the states and Congress to provide the public investment, market incentives, assurances and technical support to move beyond listing toward pro-active and meaningful conservation and recovery.



ASSURANCE AGREEMENTS

To protect the species from harm, the FWS has broad authority to restrict land use. In a classic case of “no good deed goes unpunished,” the more habitat and species a landowner helps conserve, the greater the risk of regulatory intervention and economic cost. To address this concern, the FWS developed assurance agreements such as the Candidate Conservation Agreement with Assurances (CCAA) for species being considered for federal listing, and the Safe Harbor Agreement for species that are already listed. The agreements provide landowners with assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agree to at the time they enter into the agreement. However, developing these agreements takes time (up to several years) and money on the part of both the landowner and the chronically understaffed agency. Range-wide assurance agreements that allow multiple landowners to opt-in may be the most efficient means of promoting broad-scale landowner participation.

ESA TOPICS ON THE TABLE

ESA TIMELINES AND LISTING PRIORITIZATION

Under the current act, the FWS has 90 days to evaluate whether a petition for listing warrants further investigation. If it does, the FWS has 12 months to make a listing decision. Some argue that these timelines are too short to gather the necessary science and data, particularly given the rising number of listing petitions and the limited agency staff available to process the petitions. To address the current backlog, the FWS has developed a seven-year work plan. However, the work plan is considered vulnerable to litigation because the FWS is not meeting its statutory deadlines. The US Government Accountability Office found that between 2005 and 2015 plaintiffs filed 141 deadline suits against the FWS and the National Marine Fisheries Service (NMFS). Current recommendations from some sources call for extending the statutory deadlines, enabling the FWS to prioritize species assessments and listings and/or codifying the seven-year work plan. Others believe these measures may only serve to delay listings, further imperiling species, and recommend instead that Congress provide adequate funding to enable the FWS to meet existing statutory deadlines.

ASSURANCES ON PUBLIC LAND

If you are a rancher in the West operating on intermingled public and private lands, restoring habitat and species presents a special conundrum. On private land, landowners may seek an assurance agreement from the FWS stating that if they improve habitat and increase the number of endangered species present on their property, such actions will not result in additional land use restrictions. The same kind of assurance does not extend to public lands because Section 7 of the act requires federal land managers to do whatever is necessary to ensure the protection of listed species.⁶ Ranchers are often concerned that if they provide habitat and thereby increase the number of threatened and endangered species on their grazing allotments or nearby private lands they could be subject to increased land use restrictions, litigation or even loss of their allotment as the result of those species being present in greater numbers. Ranchers worry that this could put them out of business—a powerful disincentive to assisting in species recovery efforts. Providing some form of assurance to ranchers who rise above regulatory minimums to restore species and habitat on both public and private lands could provide significant benefits to both ranchers and species.

CRITICAL HABITAT DESIGNATION

The ESA was amended in 1978 to require, whenever feasible, the designation of critical habitat at the time of listing. Critical habitat is defined as a specific geographic area that contains features essential to the conservation of a threatened or endangered species. The area may be currently occupied by the species or it may not be occupied but is still considered necessary to the recovery of the species. The designation of critical habitat requires federal agencies to consult with the FWS prior to any action on that land to ensure such action does not cause harm to the species. The designation applies to situations in which a federal agency is involved, either in ownership, management or funding. It does not apply to private land actions that do not involve any federal funding, but it can apply if a private landowner is using federal funding for a project.

⁶<https://www.fws.gov/endangered/laws-policies/section-7.html>

Because the listing decision and critical habitat designation is required by statute to be made within a 12-month timeframe, this designation often precedes the development of a recovery plan. Some have argued that critical habitat designations can be overly broad, particularly as they are designated prior to an actual recovery plan, and can unnecessarily curtail land use activities and can devalue private land. The issue has intensified as biologists have begun to try to anticipate future habitat needs in light of climate change. One proposed recommendation is to pair the designation of critical habitat with increased eligibility for assurances and funding for landowners and producers participating in conservation and recovery efforts in those areas.

There is also some question as to whether a critical habitat designation is actually necessary or beneficial in every case. According to a FWS fact sheet, “[T]he critical habitat designation usually affords little extra protection to most species, and in some cases it can result in harm to the species. This harm may be due to negative public sentiment to the designation, to inaccuracies in the initial area designated, and to the fact that there is often a misconception among other federal agencies that if an area is outside of the designated critical habitat area, then it is of no value to the species.”⁷

⁷<https://www.fws.gov/verobeach/MammalsPDFs/CriticalHabitatFactSheet.pdf>



RECOVERY AND DELISTING

Listing a wildlife species as threatened or endangered provides certain protections against further harm but a listing does not equal recovery. Once a species is listed, the FWS is tasked with developing a recovery plan. Because recovery plans take time, cost money and can generate significant controversy and litigation, not all listed species have recovery plans. In some cases, recovery plans are significantly out of date and have not incorporated more recent science. As noted above, recovery planning is greatly complicated by the lack of definition within the act and disagreement among scientists and stakeholders as to what recovery actually means. In the absence of a sound recovery plan, both species and all impacted stakeholders remain in limbo. When a frustrated Congress reduces funding or otherwise curtails the FWS from developing recovery plans, it can compound rather than help resolve the situation.

Suggestions for improving the situation include requiring the FWS at the time of a listing to provide at least a basic outline for recovery and delisting, even when a detailed plan may take longer. There are also calls for greater state involvement in recovery planning teams and for cooperative input in designing conservation measures from experienced practitioners.



SCIENCE AND DATA

While virtually all stakeholders advocate for making ESA-related decisions based on science, the reality is that scientific answers can be elusive and data sharing can be a challenge. One of the confounding things about nature from a research perspective is that it can be so widely variable. Research and conclusions that apply in one location may not apply even a relatively short distance away. This makes science expensive. Efforts to extrapolate findings in one location to a broader geography can sometimes fall short, undermining science's credibility. These challenges are compounded in the study of wildlife, particularly where migrating or cyclical populations are concerned. It can be difficult to isolate causes of species population declines or increases when so many variables are at play. As a result, while the FWS is required to look to "best available science" the research that is available can be fairly sparse. Greater investment is needed to ensure that wildlife management is founded on sound, credible, sufficient science.

The credibility of the research often becomes a bone of contention among stakeholders as well. "Whose science?" is a common question reflecting widespread perceptions that research being developed by any given special interest group is likely to be biased. Recent discussions about science and the ESA have asked the question as to whether the peer-reviewed approach can be trusted to provide unbiased assessments. Critics suggest that the circle of peer reviewers can be relatively small and generally of the same mind, creating an inherent bias in the system. However, at this point in time, peer-reviewed science is considered to be the highest standard available yet not all science used to support ESA decision-making is peer-reviewed. One suggestion that has been proposed is that every recovery team be expected to publish the salient features of a recovery plan in a peer-reviewed journal. The more rigorous the science, the less chance that recovery goal posts will continue to move in the future. Improving data quality, consistency and credibility is essential in improving ESA-related management and decision-making.

Finally, the sharing of data presents a special set of problems for the purposes of the ESA. Fearing that the presence of an endangered species could be detrimental, many landowners do not allow scientists on their lands to collect data. Those who do generally insist that such data remain confidential. States and even some federal agencies have the ability to protect that data from the general public. However, when data is turned over to the FWS, it becomes subject to the Freedom of Information Act (FOIA) and can be accessed by any member of the public on request. Therefore, data sharing between state and federal agencies can be limited. If the FWS cannot access data for non-federal lands, it must rely in its decision-making on the data that is publicly available. This may mean that significant populations of species and habitats are never considered in listing, delisting and recovery management decisions. Data privacy, security and sharing issues need to be resolved to improve ESA implementation.

ECONOMIC IMPACTS AND INCENTIVES

One of the greatest sources of tension over the ESA is the question of who should bear the responsibility and financial impacts of species conservation and recovery. The ESA explicitly prohibits consideration of economic impacts in the listing decision process, a necessary provision to ensure species status determinations are based only on biological rather than political or economic considerations. However, the potential economic impacts of a listing are real and apply disproportionately to certain stakeholders and industries, and particularly to landowners. For instance, a landowner who has invested in the acquisition and management of a parcel of land may be impacted by a species listing whereas a business owner in an urban area will not. Those who have kept lands open and available to wildlife are the ones most directly affected by ESA listings.

Ranchers often point out that many urban-based environmentalists bear few impacts of the regulations and litigation for which they advocate. While society as a whole has displaced species to the point that they can only exist on the remaining open ranchlands, the urban-based population has, in a sense, gotten a “pass” on their share of responsibility for the present situation. This displacement has come not only through urban and suburban development but through transportation, energy development, and recreational use—all things which benefit the general population both economically and in quality of life.

Agricultural profit margins are already very slim to negative on most family farms and ranches. Rising constraints and costs associated with species conservation and recovery not only impact livelihoods and local economies but can also drive lands into development.

While federal conservation programs and emerging mitigation markets provide some funding to incentivize certain conservation actions or to purchase conservation easements to preclude future development, these programs are very limited in scope and do not address the true economic costs of conservation and recovery. In addition, federal funding is declining even as species listings are increasing. Simultaneously, deregulation undermines regulatory mitigation markets. Widening swings of the political pendulum contribute to inconsistency in federal funding programs and instability in mitigation markets, negatively impacting both public and private investments in conservation.

OUR RECOMMENDATIONS

Despite much political and fundraising rhetoric, landowners in the West enjoy and value wildlife and support conservation. Healthy landscapes and healthy economies go hand-in-hand. Investments in conservation integrated into working landscapes provide for the well-being of both wildlife and human communities. The primary public policy emphasis should not be on dismantling or defunding implementation of the ESA, but on identifying cost-effective, pro-active solutions that avoid the need to list species in the first place and accelerate recovery of those that are listed.

1. Recognize and support landowners who maintain habitat and manage for species conservation and recovery rather than penalizing them for their efforts
2. Increase public investment in pro-active conservation to avoid the costly need to list species in the first place
3. Utilize a multi-species, habitat-based approach, where feasible
4. Ensure that experienced practitioners are consulted in developing conservation measures
5. Increase interagency coordination
6. Streamline and improve access to assurance programs
7. Provide some form of assurance on public grazing allotments in exchange for voluntary conservation measures that increase species and habitats
8. Increase the role of place-based collaborative conservation in recovery planning
9. Continue and increase programmatic regional, state-wide and range-wide programmatic, or “umbrella” agreements
10. Clarify definitions within the ESA
11. Provide recovery outlines at the time of a listing decision and detailed recovery plans within specified time frames
12. Require peer-reviewed publication of recovery plans
13. Provide adequate funding for science and a science vetting process by professional scientists and managers knowledgeable in the field
14. Review federal conservation funding programs to assess legitimate barriers associated with the federal nexus and identify solutions

FRONTLINE PERSPECTIVES

Landowners speak from experience on the Endangered Species Act

By Lesli Allison

Landowners who maintain habitat and manage for species conservation and recovery should be recognized and supported rather than penalized for their efforts. It's a message that has been repeated many times since the inception of the ESA.

Yet as obvious as that might seem, the opposite is more often true. Why? Because the presence of a threatened or endangered species has the potential to generate land use restrictions, increased regulations, litigation and increased management costs. It can also impede the implementation of projects designed to improve forest and rangeland health, and even wildlife habitat. In the West, the situation is greatly magnified for livestock producers operating across a mix of private and public lands.

Despite this, most landowners care deeply about their landscapes and wildlife that inhabit them. They feel a personal sense of responsibility towards the full spectrum of species on their land. In many cases, it's not even the increased cost of management or losses of livestock to predators that generates resentment about the ESA. They just don't want to be told what to do by people who often know very little about the realities of land ownership or the challenges of managing to sustain businesses as well as ecological health and species diversity. Few people realize the extent to which landowners are investing in conservation actions. Landowners tend to be very private about their efforts, in part out of fear of being litigated for their efforts.

"If you provide habitat or help sustain species on lands you own or lease, it shouldn't result in a penalty," said Idaho rancher Tom Page. "Provided there's legitimate data to show habitat or population stability or improvement, a landowner should be indemnified from punitive action. If I'm doing good things, don't sue me about it." Page is a member of the Central Idaho Rangelands Network, a coalition of ranchers and conservationists working to improve land, water and grazing management, conserve species and sustain ranching operations.

"I just take it for granted," said Arizona rancher Bill McDonald. "It's part of what you do. You just look after the critters and plants that are on your property." McDonald helped found the Malpai Borderlands Group, an organization of ranchers working together to improve rangeland health, keep ranches intact and conserve wildlife species.

Montana rancher Jeff Laszlo agrees. "Wildlife and species diversity adds to the value of not only our private lands but also our country. Public lands benefit from the habitat and refuge private lands provide for native species. There is a cost however to private landowners and ranchers whose land supports many of these large species. Having said that, it's certainly a joy and privilege to manage for these multiple uses and live in a place that does have an abundance of wildlife species." Laszlo has implemented wetlands restoration projects on his cattle ranch that have dramatically increased the number of wildlife species on his land while also improving pasture productivity for his livestock. He has also been a willing partner working with state and federal agencies to reintroduce trumpeter swans and native fish on his property.

"Wildlife are part of our working environment, part of who we are," said California rancher Karen Sweet. "It's part of what makes it fun." Sweet helps lead the California Rangelands Conservation Coalition, an organization of ranchers, conservationists, state and federal agencies, and academics dedicated to conserving working rangelands.

"As a result of the ESA, we were able to restore a livestock pond that provides habitat for red-legged frogs," she said. "It enabled us, conservation organizations, conservation districts and NRCS to work together. We also have a mitigation property we were able to restore and we're next to a wind-powered project and hoping to benefit by doing mitigation and an easement there. We've had positive relationships because we've been involved with conservation districts and NRCS our whole careers, so we were not afraid of the topic. The critters and the ESA also helped us find a reason that we needed to develop the California Rangelands Conservation Coalition. It brought me new friends."

Landowners not only tend to see wildlife as a positive, most agree with the intent of the ESA in trying to prevent extinctions. However, there is also resounding agreement that conservation efforts should begin well before a species becomes imperiled, that it is a cost and responsibility that should be shared by all, and that collaboration ultimately leads to better outcomes for both people and wildlife than does litigation.

"It's too easy to sue and be rewarded for suing," said McDonald. "Management has been taken away from professionals and put in the hands of court judges. Fortunately there has been a movement toward collaborative solutions recently, and the sage grouse, if that agreement holds, will be an example where the parties come together and make an agreement. That's a really good approach. Court should be the last resort not first."



Wyoming rancher Lenox Baker recently reintroduced endangered black-footed ferrets to his property yet shares concerns with fellow ranchers about the actions of some environmental groups. “The ESA gets into trouble because of organizations that are too one-sided,” he said. “They believe there shouldn’t be cattle on federal lands and when they draw those kinds of lines it creates the kind of animosity that goes on. Every one of these varmints has a group that wants to protect them and that’s good, but at some point they need to get together to come up with a solution other than law suits.”

As New Mexico rancher, Nelson Shirley, sees it, “Until we can get past the concept that any kind of agricultural practice is detrimental to the wild, it will be difficult to have any kind of meaningful discussion.”

McDonald told a story about litigation he faced over the endangered ridge-nosed rattlesnake. “A few years ago I was told by a judge that I might not be able to put my cattle up on the forest because some years ago there was something written in someone’s analysis that said cows could kill a rattlesnake by stepping on the snake or on a rock that the snake was underneath,” he said. “An environmental group ran with that and got a judge to put a hold on cattle grazing, including my allotment, because they said the US Forest Service hadn’t done an accurate job of monitoring rattlesnake populations. Eventually, someone pointed out that the snakes don’t come out in winter when the cows are on the allotment and the forest service was able to demonstrate that they were, in fact, doing monitoring. I was able to go back to my allotment that winter but in the meantime it did disrupt neighbors’ grazing.”

These kinds of situations take time away from the ranch, create legal costs and generate frustration and resentment, even among the most conservation-minded ranchers. They can also keep landowners from taking proactive efforts to conserve and recover imperiled species.

“When I think of the ESA, I think of the fear of something being forced on you that might put you out of business,” said McDonald.

Lazlo said that in the early stages of his wetland restoration project he contemplated including a restoration of the arctic grayling, a salmonid that was being considered for a federal listing. “I had reservations and my neighbors had more,” he said. “Then I heard they weren’t going to be listed, so I thought there was less reason to be as cautious and I went ahead and did it. We’ve just completed the third year of work. The moral of story is that landowners want to work with agencies and NGOs provided it isn’t going to put encumbrances on how they manage their lives or businesses. At the end of the day, collaboration based on common-ground interests may be a more effective way to deal with certain threatened species than regulation.”

Many landowners say the ESA has not had a direct financial impact on them, but for those who graze on public lands or in situations where wildlife needs conflict with agricultural production the impacts can be significant, particularly where agricultural margins are already thin. Shirley, who ranches in the heart of the Mexican gray wolf recovery area, said he incurs higher management costs in the presence of wolves and uncompensated losses of livestock.

For McDonald and others, dealing with ESA-related management issues can be costly mainly in terms of time requirements. “It takes longer to do things like prepare for a prescribed fire and work with the agencies,” he said. “I’ve put a lot of time into this stuff.”

Landowners generally agree that the public, as a whole, has a responsibility for the impacts and costs associated with wildlife conservation and recovery. “Since the North American model says that all wildlife is owned by the public and endangered species are wildlife by definition, then the public ought to bear the cost,” said Shirley. “And if the public not living on the landscape were bearing some of the cost, then, from an equity standpoint, those who live on the land ought to bear some cost as well.”

“We don’t even know the full extent of why we need biodiversity,” said Laszlo. “We just know that when something’s gone it’s gone and it tips the balance of nature and there are consequences to that. We’re all stakeholders. We all should have skin in the game and that skin can come in many forms. If you can afford to do so, you should be helping to fund this stuff. If you are Joe Q Public, you should be educating yourself and supporting those out on the front lines. Moral support and encouragement is equally important.”

At the same time, there is less agreement on the best ways for the public to share in these costs. Many landowners participate in federally funded programs through agencies such as the Natural Resource Conservation Service. These programs, often provided on a cost-share basis, enable landowners to implement conservation practices they may not otherwise be able to afford on their own. Other landowners, however, decline to accept federal dollars for a variety of reasons.

Shirley said he believes some form of a habitat lease and stewardship agreement option could fill an important need and provide a fair deal for ranchers who are being asked to provide habitat for public wildlife. “The concept of leasing land for practices put into place by the landowner would seem to be the most effective, equitable method,” he said.



Offset mitigation programs, such as wetland banking, pay landowners to provide habitat to compensate for lost habitat elsewhere. These payments can take place through an open market system or through programs managed by states or non-profit organizations. However, these opportunities are only available in certain geographic areas where impacts are being generated. For Sweet and Laszlo, mitigation has helped the bottom line for their ranches and enabled them to achieve desired outcomes on the land. For others, these markets are out of reach.

Assurance agreements, technical services, management flexibility and public education also help support landowners in their efforts to conserve wildlife habitat.

“I don’t want people to get the idea that you throw money at a rancher and he’ll be happy,” McDonald said. “Ranchers aren’t out here trying to make as much money as they can off of a square inch of land. They are out here juggling things trying to make it all work. One of the things we can do is simply make people aware of the contribution that we’re making. Lots of people still want ranchers off the land. A big part of it is education. If people don’t understand why the rancher is getting any kind of consideration, then it will be hard for any program to be successful.”

There is strong consensus among many landowners that the optimal solution is to increase the productivity and profitability of working lands in a way that also benefits conservation. “Ideally, working lands would be more economically successful, would be compensated for the work they are doing relative to wildlife species and therefore would have the financial ability to do a better job,” said Shirley. In addition, he observed that if ranches were more economically viable, it would open the doors of ownership to a greater diversity of people and provide for better management than concentrated ownership.

Laszlo agrees. “In many ways this is an economic issue and if I could wave a magic wand it would be to make ranching somehow more profitable and people more willing to take measures to ranch responsibly with an eye on improving the land and a consideration of other things that need that land,” he said. “And as part of that magic wand waving, I would hope that because ranching was more profitable the land could be conserved and passed along to conservation-minded buyers who would be buying something that was sustainable and profitable so that they could continue that work and those processes.”

In ESA debates, there is much discussion about the role of states versus federal agencies. Landowners tend to have different perspectives on the issue depending on their own experience with the different agencies.

“I think states should be preeminent,” McDonald said. “The federal agencies ought to be in a supportive, grant-making role. This is a diverse country with different cultures and landscapes. Homogenizing doesn’t work. It just doesn’t work.”

Shirley would agree, but only if the states had the necessary capacity. “There are very few states that have a game and fish department that deals with non-game species,” he said. “As such, the states are not very well positioned to deal with it. If the structure was different such that they have the financial wherewithal, then that would be the best place to get work done effectively, especially in the West.”

For Sweet, the issue is less about which agency is in charge and more about the quality of their work and engagement with landowners. “Some say that the states know better but I don’t necessarily agree with that,” she said. “They have the same level of botanist that the feds have. A lot of the programs that we deal with have been developed in cubicles, often by people who don’t know that much about land management. If I had my druthers, the people doing that planning would be required to have livestock management courses, not just biology. A lot of ranchers have become pretty well educated about the critters. What qualifies cubicle planners to tell me what to do? One problem with the ESA is that we don’t have cross-pollination of disciplines in the implementation.”

Most agree that greater cooperation among agencies and disciplines is needed. “In my simplistic world view, as with most things, the greatest success comes from collaboration, working together, finding common ground, and being willing to compromise,” Laszlo said. “The state and federal agencies need to figure out the best solution and work together to achieve it.”

In terms of agency interaction, one very common challenge for landowners is the turnover in state and federal agency personnel. In many cases, when relationships can be established, the experience is positive, but it is difficult to establish those relationships and trust with the agencies’ constantly revolving doors.

“The frustrating thing with the government agencies is the turnover, dealing with new people all the time,” McDonald said.

“The turnover in staff is so constant that we can never catch up with it,” Sweet said. Nevertheless, she also said it’s generally been a positive experience. “It’s been quite enlightening and fun to interact with agencies and NGOs,” she said. “The only difficulty we’ve had was in trying to develop regional planning for Habitat Conservation Plans (HCPs) with a regulating employee who was capricious in the process. We could apply the ESA if everybody were collegial and knowledgeable.”



“We give the fish and wildlife people a cabin to stay in and I like them,” said Baker. “It’s been very educational to me. If you get involved in it, you learn a lot. Most of my experience, especially with guys on the ground, is that they are great guys. As you get up higher in the bureaucracy, you get people more worried about regulations.”

McDonald’s Malpai Borderlands Group has pioneered building relationships between ranchers, government agencies and environmental groups for nearly three decades. “It all depends on the group and the individual,” he said. “Some people are not reasonable but you can also work with a lot of these environmental folks.”

“Sometimes the agencies can be a little bit strident and autocratic, but once we work through that and build a relationship based on trust and appreciation then we can find common ground and positive things happen,” said Laszlo.

“We can’t expect computers to be our communication tools,” observed Sweet. “It’s going to have to be kitchen tables or school cafeterias at night with community. The working environment has to be based on trust and we should expect it. You do it with your banker, with your dentist. This is really personal and financial stuff.”

Page observed that NGOs play an important role in creating successful outcomes. “In the ESA package, one thing that is absolutely key is building the necessary community capacity,” he said. “Success stories almost always have an NGO at the center. Places with terrible outcomes are places where no NGO exists. These places are a black hole for conservation. All they get is litigation.”

Another area of broad consensus is that ESA and National Environmental Protection Act (NEPA) regulations can inadvertently get in the way of good projects. “The burden of the NEPA and federal nexus means those projects don’t get done because there is just too much risk and too much cost and not everyone has the ability to get major funding to do these things,” said Page. “We need to figure out a way we can create more programmatic options, so we don’t have to do ten separate consultations for each little project.”

Looking ahead, landowners say they would like to see more science and collaboration, less emotion and litigation.

“I’m big on the science but down on the politics,” said Baker. “We need to act pro-actively. It’s easier to do that than wait until species are threatened before trying to save them. The sage grouse is one of the better models of that.”

In an ideal world, Sweet said, “I’d like to be able to have the FWS staff out for a picnic at the ranch and not worry about it.”

Laszlo said that over time, his thinking about the ESA has evolved. “I recognize now that it’s not somebody else’s job and that we all need to work on it together, and that we all have a stake in being successful.”

McDonald agreed. “I would hope that we’d all be looked upon as partners who all wanted the same thing and if there were differences that we would sit down and work them out. If I’ve learned anything from our experience with the Malpai Borderlands Group, it’s the value of bringing people together and working things out. Most people want to do it that way and it works if they really feel like their feelings are being recognized. That’s still the best way to do it.”



Compensatory Mitigation

Human activity and alteration of natural landscapes can have significant impacts on natural resource function and values. For example, housing and energy developments can eliminate wetlands, displace wildlife or reduce available wildlife habitat. Ideally, such developments should be designed to avoid or minimize as many impacts as possible. When impacts can’t be avoided, compensatory actions can be taken to help mitigate the impacts. This is called “compensatory mitigation” and can be achieved through post-activity restoration at the impacted site or at a new site where similar natural resources can be established or enhanced, and protected.¹ The goal of compensatory mitigation is to minimize the net loss or reduced function of natural resource systems. In some cases mitigation is required by law and in other cases it is voluntary. Compensatory mitigation required by law is most commonly achieved through one of three mechanisms:

- 1. Permittee-Responsible Mitigation:** The permittee is responsible for implementing and ensuring compensatory mitigation in the affected area—usually at the impacted site or within the same watershed.² The permittee retains full responsibility for mitigation success.
- 2. Mitigation Bank:** While the Environmental Protection Agency (EPA) defines a mitigation bank as “a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 [of the Clean Water Act] or a similar state or local wetland regulation,”³ current-day mitigation projects can also include non-aquatic ecosystems such as grasslands. Land and resources in a mitigation bank can be privately or publicly owned. For example, a mitigation banker may develop an agreement with a landowner to restore and preserve wildlife habitat in exchange for financial compensation. The mitigation banker provides the financial investment up front for actions necessary to preserve and restore the resource. In exchange for their investment and work on the land, “the bank operator is allowed to sell habitat credits to developers who need to satisfy legal requirements for compensating environmental impacts of development projects.”⁴
- 3. In-Lieu Fee Mitigation:** Similar to mitigation banks, a third party takes responsibility for the successful implementation of in-lieu fee compensatory mitigation. In this case, the permittee contracts an in-lieu fee program—generally administered through either a public agency or a non-profit organization—to conduct “restoration, creation, enhancement or preservation activities.”² Unlike mitigation banks, which implement restoration and preservation actions before selling credits, in-lieu fee programs typically implement these activities after receiving funding from permittees.

1 Westwise: What’s Interior Secretary Zinke’s beef with “compensatory mitigation?” (<https://medium.com/westwise/whats-interior-secretary-zinke-s-beef-with-compensatory-mitigation-d910873cac60>)

2 U.S. Army Corps of Engineers: Mitigation-qa.pdf (<http://www.nap.usace.army.mil/Portals/39/docs/regulatory/Mitigation/mitigation-qa.pdf>)

3 EPA, Mitigation Banking Factsheet (<https://www.epa.gov/cwa-404/mitigation-banking-factsheet>)

4 MSUSA: www.msusa.com

ENDANGERED SPECIES ACT

Glossary of Common Terms

Source: <https://www.fws.gov/midwest/Endangered/glossary/index.html>

Biological Assessment

A document prepared for the Section 7 process to determine whether a proposed major construction activity under the authority of a federal action agency is likely to adversely affect listed species, proposed species, or designated critical habitat.

Biological Opinion

A document that is the product of formal consultation, stating the opinion of the FWS on whether or not a federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Candidate Species

Plants and animals that have been studied and the FWS has concluded that they should be proposed for addition to the federal endangered and threatened species list. From the February 28, 1996 Federal Register, page 7597: “those species for which the FWS has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list but issuance of the proposed rule is precluded.”

Conservation

From Section 3(3) of the federal Endangered Species Act: “The terms conserve, conserving, and conservation mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided under this act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transportation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.”

Critical Habitat

Specific geographic areas, whether occupied by listed species or not, that are determined to be essential for the conservation and management of listed species, and that have been formally described in the Federal Register.

Endangered

The classification provided to an animal or plant in danger of extinction within the foreseeable future throughout all or a significant portion of its range.

Habitat

The location where a particular taxon of plant or animal lives and its surroundings (both living and nonliving) and includes the presence of a group of particular environmental conditions surrounding an organism including air, water, soil, mineral elements, moisture, temperature, and topography.

Habitat Conservation Plan (HCP)

A plan which outlines ways of maintaining, enhancing, and protecting a given habitat type needed to protect species. The plan usually includes measures to minimize impacts, and might include provisions for permanently protecting land, restoring habitat, and relocating plants or animals to another area. An HCP is required before an incidental take permit may be issued.

Harm

An act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering.

Incidental Take

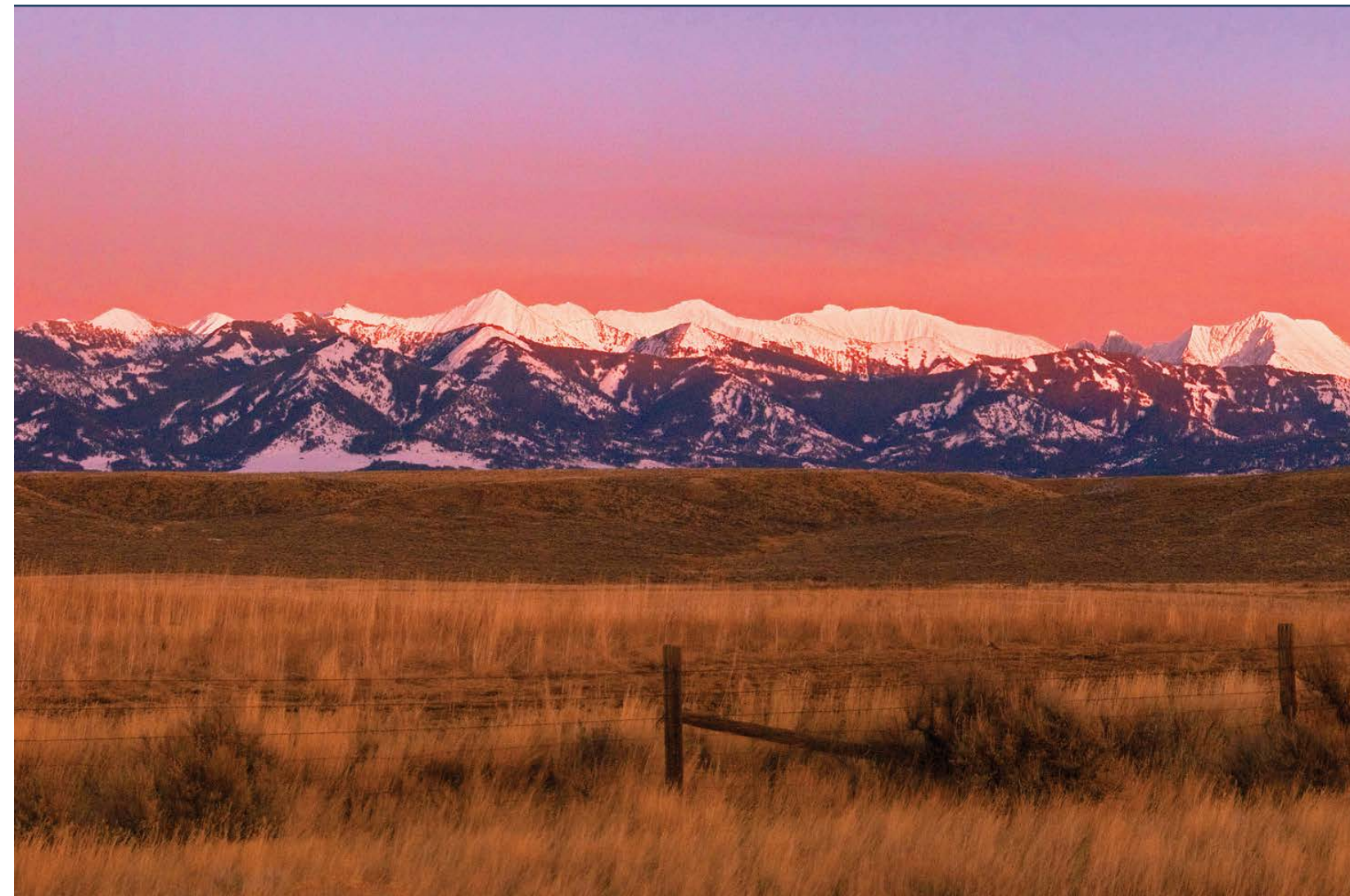
Take that results from, but is not the purpose of, carrying out an otherwise lawful activity.

Listed Species

A species, subspecies, or distinct vertebrate population segment that has been added to the federal lists of Endangered and Threatened Wildlife and Plants as they appear in sections 17.11 and 17.12 of Title 50 of the Code of Federal Regulations (50 CFR 17.11 and 17.12).

Listing

The formal process through which the FWS adds species to the federal List of Endangered and Threatened Wildlife and Plants.



Listing Priority

A number from 1 to 12 indicating the relative urgency for listing plants or animals as threatened or endangered. The criteria used to assign this number reflect the magnitude and immediacy of threat to the species, as well as the relative distinctiveness or isolation of the genetic material they possess. This latter criterion is applied by giving a higher priority number to species which are the only remaining species in their genus, and a lower priority number to subspecies and varieties. These listing priorities are described in detail in the Federal Register on September 21, 1983, as pages 43098-43105.

Propose

The formal process of publishing a proposed federal regulation in the Federal Register and establishing a comment period for public input into the decision-making process. Plants and animals must be proposed for listing as threatened or endangered species, and the resulting public comments must be analyzed, before the FWS can make a final decision.

Proposed Species

Any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under Section 4 of the Endangered Species Act.

Range

The geographic area a species is known or believed to occupy.

Recovery

The process by which the decline of an endangered or threatened species is arrested or reversed, or threats to its survival neutralized so that its long-term survival in nature can be ensured.

Species

From Section 3(15) of the federal Endangered Species Act: "The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." A population of individuals that are more or less alike, and that are able to breed and produce fertile offspring under natural conditions.

Species of Concern

"Species of concern" is an informal term that refers to those species which might be in need of concentrated conservation actions. Such conservation actions vary depending on the health of the populations and degree and types of threats. At one extreme, there may only need to be periodic monitoring of populations and threats to the species and its habitat. At the other extreme, a species may need to be listed as a federal threatened or endangered species. Species of concern receive no legal protection and the use of the term does not necessarily mean that the species will eventually be proposed for listing as a threatened or endangered species.

Take

From Section 3(18) of the federal Endangered Species Act: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Threatened

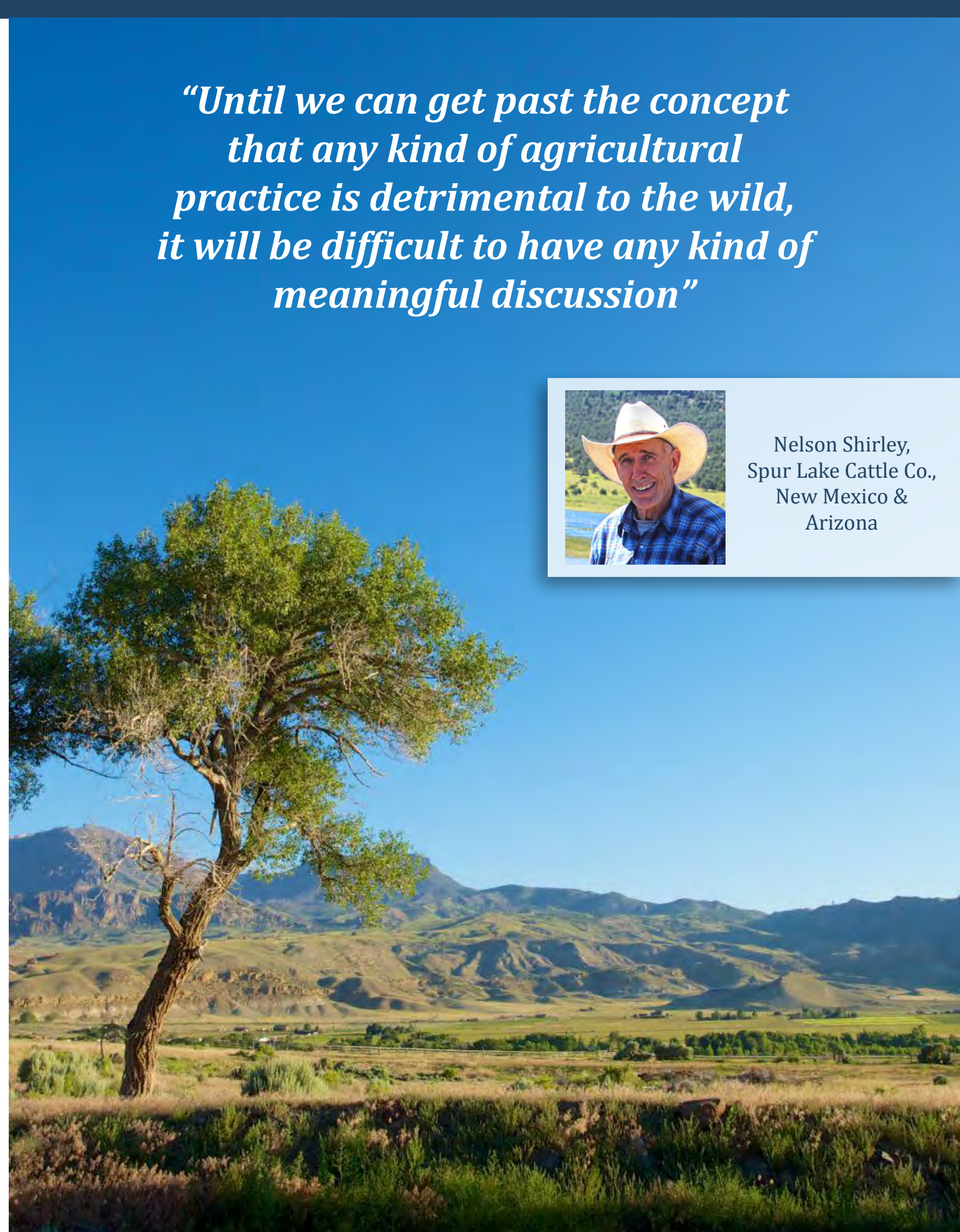
The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.



"Until we can get past the concept that any kind of agricultural practice is detrimental to the wild, it will be difficult to have any kind of meaningful discussion"



Nelson Shirley,
Spur Lake Cattle Co.,
New Mexico &
Arizona



ENDANGERED SPECIES ACT SECTION SUMMARIES

SECTION 2: PURPOSE

FWS defines the purpose of the ESA as “To provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved...”¹

SECTION 4: LISTING DETERMINATIONS

Species Determination: Threatened or endangered determination is based exclusively on scientifically demonstrated biological status—not economic or other factors.

Five factors are considered to determine whether a species is threatened or endangered, or to determine that listing is unwarranted:

- Damage to, or modification or destruction of, a species’ habitat
- Overutilization of the species for commercial, recreational, scientific, or educational purposes
- Disease or predation
- Inadequate existing protection or regulatory mechanisms
- Other natural or human-caused factors affecting continued existence

Candidate Species: The FWS maintains a list of candidate species and reviews each candidate species annually until it is either listed or determined to no longer be a candidate. Candidate species receive no legal protection under the ESA. However, FWS may work with private and public entities to implement conservation efforts that may prevent listing.

Protection: The ESA protects threatened and endangered species by prohibiting “takes” of listed species. Interstate or international trade of listed species, including parts and products, is also prohibited, except under a federally issued permit.

Recovery: FWS designs and implements a recovery plan for a listed species with the assistance of a species expert; federal, state, and local agencies; tribes; non-governmental organizations; and other stakeholders. Recovery plans detail the necessary steps to ensure species recovery, including specific tasks and partners, delisting criteria, timetables, and cost estimates.

4(d) Rule: Under the ESA, prohibited activities are defined for endangered species; however, the ESA allows the FWS to define the prohibited activities for threatened species. These prohibited activities are defined through a special rule under Section 4(d) of the ESA. The 4(d) Rule makes it possible for the FWS to simplify “take” prohibitions for a given species in order to help incentivize conservation actions.

SECTION 3: DEFINITIONS¹

Endangered Species: “Any species which is in danger of extinction throughout all or a significant portion of its range.”

Threatened Species is “Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”

Take: “...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

Critical Habitat: “Specific areas within the geographical area occupied by the species at the time it is listed” that are (1) “essential to the conservation of the species,” and (2) “which may require special management considerations and protection.” Critical Habitat also includes areas “outside the geographical area occupied by the species at the time it is listed that are essential for the conservation of the species.”

SECTION 6: COOPERATION WITH THE STATES

The FWS recognizes the critical role that states and private lands play in conserving species; over half of listed species depend on private lands for some if not a significant portion of their remaining habitat. States are encouraged to develop conservation programs for threatened and endangered species, and private landowners are incentivized to implement management activities that benefit these species.

States with conservation programs for endangered and threatened species qualify for federal funding through the Cooperative Endangered Species Conservation Fund. Grants can be used to support “management, research, monitoring and outreach projects that have direct conservation benefits for listed species, recently delisted species, and candidate species that reside within that state”².

1. US Fish & Wildlife Service: www.fws.gov

2. National Oceanic and Atmospheric Administration Fisheries www.nmfs.noaa.gov

ENDANGERED SPECIES ACT SECTION SUMMARIES

SECTION 7: INTERAGENCY COOPERATION

Federal agencies must ensure that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species”¹. Federal agencies and private individuals or those working with them are required to cooperate with the Secretaries of Interior and Commerce in carrying out activities that conserve a listed species, and avoiding activities that may harm that species. They must consult with FWS or NOAA to ensure planned activities do not pose a threat to endangered or threatened species, or to critical habitat. During a consultation, the FWS submits a biological opinion—a formal, scientific document that assesses a project’s likelihood of jeopardizing a listed species or its critical habitat.

Depending on the biological opinion and in case of a “jeopardy” opinion, the agency carrying out the proposed activity will work with FWS or NOAA to modify the activity or provide “reasonable and prudent alternatives” that allow the project to move forward¹. It is rare for the FWS to issue a “jeopardy” opinion and even more so for a project to be cancelled altogether.

A number of exceptions exist, including incidental takes by federal agencies, national security issues, possession of a preexisting historical item (e.g. ivory), certain actions by Alaskan Natives, and experimental populations, among others. Many of these exceptions are defined in Section 10.

SECTION 9: PROHIBITED ACTIVITIES

The following list of restrictions apply to prohibited actions related to a listed animal or plant, including restrictions on private development. The “Take” prohibition applies equally to federal agencies:

- Importing or exporting endangered species into or out of the United States
- “Taking” any endangered species with the US, US territories, territorial seas, and the high seas, including terrestrial and aquatic plants and animals.
- Possessing, selling, delivering, carrying, transporting, or shipping—by any means—any endangered species that has been unlawfully taken, in the course of any commercial activity.
- Engaging in interstate or foreign commerce in endangered species.
- Violating any Secretary of Interior regulations pertaining to endangered or threatened species.

SECTION 8: INTERNATIONAL COOPERATION

The federal government has permission to cooperate with foreign governments in the conservation and recovery of listed species through funding for training, research, and law enforcement. Section 8a describes US participation in two international wildlife conservation treaties: (1) The Convention on International Trade in Endangered Species of Wild Fauna and Flora, and (2) The Convention on Nature Protection on Wildlife Preservation in the Western Hemisphere.

SECTION 10: EXCEPTIONS

Section 10 allows for some flexibility with regards to Section 9 prohibitions, and provides incentives for landowners to participate voluntarily in activities conducive to species recovery on their land.

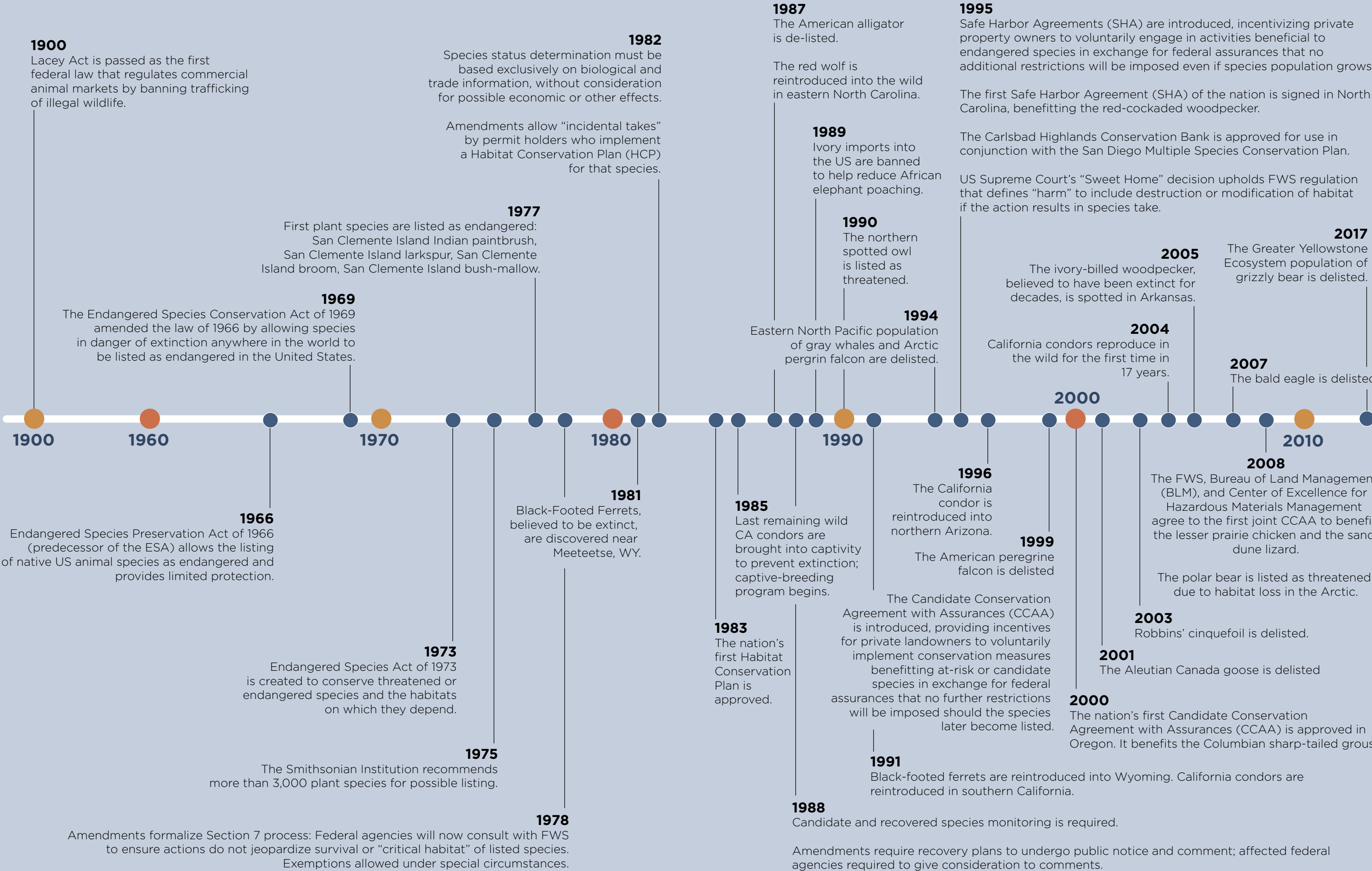
Incidental Take Permits are allowances created for accidental “takes” on private lands; “takes” must be incidental to otherwise lawful activities, and not the direct purpose. Landowners, tribes, or other entities must first develop a Habitat Conservation Plan, allowing development and other activities to proceed so long as the impacts to species’ habitat are kept to a minimum and do not reduce the likelihood of species survival and recovery.

Safe Harbor Agreements (SHAs) are voluntary agreements between a non-federal entity and FWS or NOAA. Engaged entities commit to conservation activities that help foster the recovery of a listed species by improving or maintaining habitat. In exchange, they receive formal assurances that no additional restrictions or changes in management will be imposed without their consent. At the end of the agreement, the landowner may return the property to baseline conditions that existed before the SHA was signed; however, doing so discontinues assurances included in the SHA.

Candidate Conservation Agreements with Assurances (CCAA). Like SHAs, CCAA are voluntary signed agreements between a private, non-federal entity and the FWS or NOAA. Unlike SHAs, CCAAs target at-risk or threatened species before they are listed. In return for implementing conservation plans for an at-risk species, landowners are given allowances for incidental “takes” and receive assurances that no additional requirements will be imposed on them if the species becomes listed.

10(j) Rule: Experimental Populations. A specific population of a listed species is designated as “experimental” when it is reintroduced outside of its current range, when doing so helps ensure survival and recovery. The population is then further determined as either “essential” or “nonessential” to the continued survival of the species as a whole. For “nonessential, experimental” designations, the “take” prohibitions and consultation requirements may be reduced, thereby protecting individuals and other entities who accidentally harm the species while engaged in otherwise legal activities. This eases potential regulatory burdens for landowners and their neighbors. The rule is complimentary to any Safe Harbor Agreements that may also be in place.

ENDANGERED SPECIES ACT TIMELINE



CASE STUDIES

Endangered Species Act Stories from the Field

By Andy Jones & Virginie Pointeau

The Black-Footed Ferret

THE SPECIES AND HISTORY

Since 1967, black-footed ferrets have been listed as endangered and were thought to be completely extinct until a remnant population was discovered near Meeteetse, Wyoming, in 1981. By 1986, disease had reduced that population to just 18 individuals. The survivors were captured and became the foundation for a successful and ongoing captive breeding and reintroduction program.

Considered a “flagship species” of the North American prairie, the black-footed ferret faces many challenges on its road to being delisted from the ESA. Among the most eminent threats are loss of habitat, disease and related declines in prey. Prairie dogs make up more than 90 percent of a ferret’s diet and can be particularly vulnerable to sylvatic plague, which can wipe out entire colonies, leaving ferrets without their primary food source.

According to John Hughes, a wildlife biologist with the FWS National Black-Footed Ferret Conservation Center in Wellington, Colorado, there are an estimated 300 ferrets in five FWS captive-rearing facilities and another 400 animals in the wild, at 28 reintroduction sites. Hughes says the FWS has a modest goal of establishing 3,000 ferrets in the wild.



The Safe Harbor program has catalyzed the release of 275 black-footed ferrets onto private ranch and tribal lands (2.4 million acres worth) in Colorado, Kansas, Arizona and Montana. Private, state and tribal lands with sufficient prairie dog populations for at least 30 breeding adult ferrets are eligible across the species’ 12-state historical range. In 2017, Hughes says FWS is hoping to do at least two more introductions, possibly in New Mexico or South Dakota: “If we can get to 100 or more reintroduction sites, we can get to our de-listing goal.”

Since the discovery of the last remnant population of black-footed ferrets near Meeteetse, Wyoming, in 1981—two years after the species was believed to have gone extinct—that state in particular has been an important target for black-footed ferret reintroductions. However, the Wyoming state government has been reluctant to entertain the idea of reintroductions amid a host of concerns about the ESA from private landowners.

Under Section 10(j) of the ESA, a specific species population is designated as “nonessential, experimental,” which means that the “take” prohibitions and consultation requirements of the ESA are relaxed for that particular population. This eases potential regulatory burdens for landowners who agree to a reintroduction, and for their neighbors. In fact, this designation applies to all ferrets in the state on non-federal lands. The rule is complimentary to any Safe Harbor Agreements that may also be in place.

According to Tyler Abbot, the FWS Field Supervisor in Cheyenne, the rule makes reintroducing black-footed ferrets in Wyoming a much less controversial proposition for landowners.

“Let’s say we do an SHA with a ranch and we reintroduce black-footed ferrets, but the neighbors are concerned that ferrets are going to get on their property,” posits Abbot. “They are concerned they will hurt one or that they’ll be responsible for taking a species, but 10(j) says if that happens it is considered an ‘incidental take,’ meaning that if a neighbor accidentally kills one, he’s covered and won’t be prosecuted.”

THE STAKEHOLDERS AND THE PLAN

Since the development of the SHA in 2013, ten landowners have enrolled, eight of whom receive incentives through the USDA-NRCS’s Environmental Quality Incentives Program. Landowners who agree to a ten-year SHA term and accept the incentives are paid to monitor their prairie dog populations.

Western Landowners Alliance advisory board member Rick Danvir was the wildlife manager at Deseret Western Ranches in northeastern Utah when the ranch began the SHA process without incentives for the black-footed ferret. He thinks a locally-based collaborative process is essential and that one of the most important messages to deliver to other ranchers is that neighboring lands are protected under the range-wide Safe Harbor, providing protections for “incidental takes.”

“Everybody’s safe basically,” Danvir says. “Unless you walk out and shoot one between the eyes.”

In Wyoming specifically, the FWS finalized 10(j) Rule in October, 2015, with the support of the Wyoming Game and Fish Department. In July, 2016, ferrets were reintroduced on the ranches where the last survivors had been discovered thirty-five years earlier: the Lazy BV and Pitchfork Ranches near Meeteetse.



The current owner of the Pitchfork Ranch, Lenox Baker, says it has been rewarding to have black-footed ferrets on the property again, and that 10(j) Rule helped ease the concerns of some of his neighbors.

“We were looking forward to it and were in this from the very beginning,” he says. “We were glad to have the prairie dogs back too. This is a nice species and once they’re gone, they’re gone.”

OUTCOMES AND LESSONS LEARNED

The FWS strategy for the programmatic Safe Harbor was to enroll at least three new properties per year, but Hughes says that before the FWS gets too many populations going, they need to focus on disease control. The agency continues to work on better vaccinations and cheaper and more dependable means of delivery.

In Wyoming, with the July 2016 reintroduction being the first in the state since the implementation of 10(j) Rule, it’s hard to say whether it has been a success for the ferrets. Baker says he has been impressed by Wyoming Game and Fish’s monitoring efforts so far, and is looking forward to seeing how the population (35 were released on the two ranches) is doing by summer 2017.

In Abbot’s mind, at least, the reintroduction would’ve never happened without 10(j) Rule. “This is about how we accomplish recovery of the black-footed ferret,” he says. “This provides some flexibility to address public concerns and is a policy tool that provides an opportunity to get more done.”

Greater Sage-Grouse

By Andy Jones & Virginie Pointeau

Tom Sharp, a rancher in southeast Oregon, chaired the steering committee to develop a programmatic Candidate Conservation Agreement with Assurances, or CCAA, for the greater sage-grouse in Harney County. That core document became the model for five more CCAA programs in other Oregon counties. When trying to convince his fellow ranchers to enroll, he employed a simple, yet understandable moniker: “What’s good for the bird is good for the herd.”



Oregon Rancher, Tom Sharp
Photo courtesy of Tom Sharp

THE SPECIES AND HISTORY

The greater sage-grouse is the largest grouse in North America and its range is in the western U.S. and southern Alberta and Saskatchewan. Its diet is primarily sage, grass and insects, and loss of habitat is its primary threat. Given the vast extent of its geographic range, a federal listing of the bird as endangered would have enormous implications for energy, agriculture and many other land uses. The potential listing set into motion one of the most significant, voluntary wildlife conservation efforts ever in North America.

In 2010, the Department of Interior designated the greater sage-grouse as “warranted but not precluded.” Five years later, on Sept. 22, 2015, the department issued a decision to not list the bird as “threatened” or “endangered” under the ESA. Instead, the department would rely on new management plans, state actions and programs like the CCAA. There are currently six programmatic CCAAs in southeastern Oregon. The program is overseen by the FWS with the Soil and Water Conservation Districts in each county serving as permit holders.

THE STAKEHOLDERS AND THE PLAN

Sharp says he became involved in May 2011, not long after the “warranted but not precluded” ruling.

“I was concerned about protecting our investments and our land and improvements so I became active,” he says about his involvement as chair of the Harney County CCAA steering committee.

One of the reasons Sharp says his “good for the bird, good for the herd” slogan was so applicable to the CCAA was the fact that they chose to look at the health of the entire ecosystem rather than focusing solely on the greater sage-grouse. It stands to reason, he says, that when you implement conservation measures that improve habitat—actions such as removing juniper and invasive weeds like Medusahead; marking fences to prevent in-flight collisions; creating grazing plans that keep cattle away from grouse breeding areas; and improving water sources—it not only makes life better for the greater sage-grouse, but also for any species who inhabit the land, including cattle. For the greater sage-grouse, restoring habitat on private lands is especially critical: an estimated 40 percent of greater sage-grouse range in eleven western states is found on private land.



According to Sharp and Harney County Soil and Water Conservation District Manager Marty Suter-Goold, scientists working out of the Eastern Oregon Agricultural Research Center in Burns—specifically Dr. Chad Boyd and Dr. Tony Svejcar—were instrumental in creating a framework for the CCAA and the types of conservation measures that would be the most beneficial to the greater sage-grouse and the ecosystem as a whole.

OUTCOMES

To date, there are 30 enrollees in the six counties involved in the CCAA, representing more than 450,000 acres of Priority Habitat, but those numbers don't represent the overwhelming interest in the program from landowners. Suter-Goold says that in Harney County there are 71 landowners who have signed letters of intent. These landowners, plus the ten current enrollees, would represent more than half of the 1.1 million acres of private land that is eligible for the program in the county.

Private landowners who sign on to a CCAA with FWS, and agree to implement certain habitat improvements, are in return sheltered from additional regulation for 30 years, even if the greater sage-grouse becomes listed as an endangered species.

Sharp says it's important to place emphasis on the collaborative nature of the CCAA. Ranchers and other members of the local community, together with a host of government agencies, both at the state and federal levels—including the Bureau of Land Management, the US Forest Service, and the FWS—set an inspiring precedent by working so closely together to develop the CCAA and help ensure a viable habitat for the greater sage-grouse. "What's most important is that agencies listen, hear and collaborate with stakeholders that will be affected," he said. "And that we continue to have these programs and processes that enable that to occur."

While many consider the collaborative sage-grouse conservation model to be among the most successful in history, not everyone agrees. Plans for conserving sage-grouse on federal lands have been criticized by some stakeholders, including several states, as too restrictive.

Members of Congress have introduced riders on legislation to block the federal conservation plans. However, preventing the agencies from carrying out the plans could lead to getting the sage-grouse listed as an endangered species, and subsequently undermining--and effectively undoing--years of successful collaboration between private landowners and government agencies.

Listing the greater sage-grouse and consequently imposing crippling restrictions on local economies based on ranching, recreation and energy development could be fatal to the bird, and harmful to rural communities. Collaboration between ranchers, sportsmen, conservationists, and state and federal agencies is the only path forward to ensure win-win outcomes for the greater sage-grouse and those who make a living off the land.



Lahontan Cutthroat Trout

By Ted Williams

The threatened Lahontan cutthroat trout, once thought extinct, is being resurrected by Nevada ranchers who understand that cattle and trout both depend on clean water and healthy terrestrial vegetation. Jon Griggs of the Maggie Creek Ranch and Dan Gralian of the T Lazy S Ranch have sought and received stream-restoration help from the Bureau of Land Management, Fish and Wildlife Service, Nevada Department of Wildlife, Trout Unlimited and the Newmont Mining Corporation. Lahontan cutthroats have returned to Beaver, Coyote and Maggie creeks. Twenty-five miles of Susie Creek and its feeder streams have been improved via good grazing practices and well-placed fencing. So dramatically have stream conditions improved on Susie Creek that Lahontans will soon be reintroduced to that system.

For stream repair and good grazing Gralian has received the state's Outstanding Rancher Award. And Griggs has been honored with an Environmental Stewardship Award sponsored by the Fish and Wildlife Service, Natural Resources Conservation Service and various livestock organizations.

Upper Columbia River Chinook Salmon, Steelhead and Bull Trout

By Ted Williams

With federal, state, industry and non-governmental organization help, ranchers in the upper Columbia River basin have banded together to reconnect tributaries desiccated by ancient irrigation diversions. The new surge of cold water has greatly expanded spawning habitat for threatened bull trout, endangered Chinook salmon and steelhead in the Lemhi River. Now re-watered Lemhi tributaries are rippling with juvenile salmon and steelhead.

The expensive, labor-intensive stream reconnections have brought companies back to the watershed, recovering a moribund economy. In the town of Leadore the school faced closure for lack of students and teachers, but the influx of companies commissioned for reconnection work (most staffed by young parents who had left town) has saved the school. "I cannot overstate the impact this conservation work has had on our valley," declares rancher Merrill Beyeler.



Fluvial Arctic Grayling

By Ted Williams

Montana's Big Hole River system sustains almost the entire population of fluvial (river-dwelling) Arctic grayling in the contiguous states. A conservation effort similar to the Sage Grouse Initiative convinced the U.S. Fish and Wildlife Service in 2014 not to list this "distinct population segment" (a designation built into the ESA to counter the argument that a species or subspecies doesn't have to be saved in one region if it survives in another).

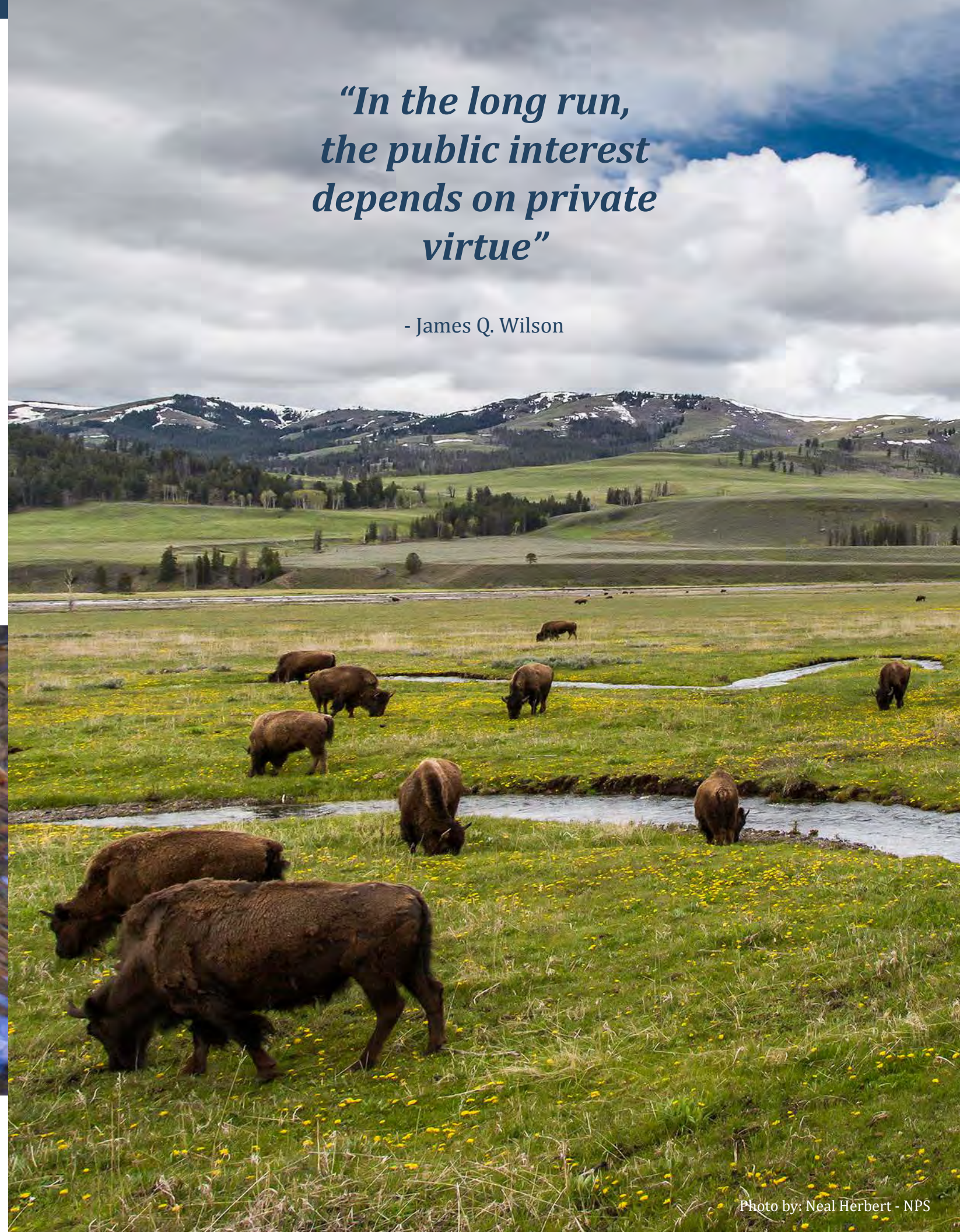
Originally, recovery of imperiled species was difficult on private land. But the development of CCAAs has provided the ESA with adaptability by guaranteeing landowners won't be prosecuted for inadvertent "takes" of a species if it gets listed. With the grayling CCAA ranchers are replacing water diversions with wells, installing fish ladders and screens, fencing cattle from riparian zones, and planting willows along stream banks.

What's good for grayling (water conservation) turns out to be good for livestock production. Now ranchers can grow hay in dry periods. If a landowner is diverting river water, the federally funded assistance programs will pay for wells, solar-powered pumps and stock tanks. With federal assistance Rick Powers, owner of LaMarche Creek Ranch, has installed two wells and three stock tanks and fenced off LaMarche Creek, a Big Hole tributary. "We're irrigating hay and we're using substantially less water," he said. "We have heavy organic soils; and what we're learning is that once the ground is saturated you don't need anywhere near as much water to keep it saturated."



*"In the long run,
the public interest
depends on private
virtue"*

- James Q. Wilson



- Are essential to western rural and urban economies
- Sustain up to 80% of wildlife species
- Provide the natural resources that feed, water and fuel the nation

And they are disappearing

Recommendations to Conserve and Restore Working Lands and Rural Economies

Invest in the West

Smart investments to conserve and restore working lands can yield positive returns for taxpayers and stimulate rural economies:

To create jobs and revitalize rural economies, re-invest in working lands and the natural resources they supply

Leverage public dollars with private landowner investment and cooperation

Invest in next generation ranchers and farmers

Build on Success

These programs work and can be expanded for even better outcomes:

Safe Harbor and CCAA assurance agreements

NRCS Working Lands For Wildlife

FWS Partners for Fish and Wildlife

“All Hands All Lands” collaborative partnerships

Farm Bill Conservation Title

Get out in Front

Proactive investment can deliver better results at lower cost than reactive management driven by crisis and conflict:

Support pro-active, voluntary conservation to avoid species becoming imperiled

Prioritize forest health: fix the USFS fire budget

Improve collaborative frameworks within agencies

Design economic and tax policies to keep family farms and ranches intact

Work Together

Managing land is complex and requires holistic thinking, flexibility and adaptation:

A comprehensive strategy for federal lands restoration

Habitat vs. single species conservation

Interagency coordination and improved outreach to landowners

Programmatic flexibility for adaptive management

Build relationships based on trust to achieve shared goals

Any good business reinvests in the people and resources that sustain it. As a nation, we ***must*** do the same

"Innovative stewardship and conservation progress on working lands remains under-represented politically and socially, and is not sufficiently funded or valued by markets. We must change that."

-- Mary Conover, Mountain Island Ranch and founding WLA Board Member



Western Landowners Alliance

The Western Landowners Alliance was established by landowners to improve the ecological health and economic prosperity of working lands in the American West.

WLA recognizes that economic vitality and conservation go hand-in-hand. Given that private lands encompass the most productive and biologically diverse landscapes, including the majority of water resources, landowners have a pivotal role to play in shaping the future. WLA provides a collective voice, a peer network and a shared knowledge base for landowners striving to keep the land whole and healthy. We bring the perspective of landowners to bear on the major issues of the day, advancing pragmatic, common ground solutions that sustain working lands, connected landscapes and native species.

Through our individual stewardship and collective action, we are committed to leaving the world a better place.

We invite you to join us

Website: www.westernlandownersalliance.org

Twitter: <https://twitter.com/VoiceofWLA>

Facebook: <https://www.facebook.com/westernlandownersalliance/>