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# Collaborative Management as a Mechanism For Incentivizing Private Landowners and Protecting Endangered Species

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## COMMENT

# COLLABORATIVE MANAGEMENT AS A MECHANISM FOR INCENTIVIZING PRIVATE LANDOWNERS AND PROTECTING ENDANGERED SPECIES

by: Ashley Graves\*

### ABSTRACT

*Currently, the Endangered Species Act is falling short of its potential. Even though the Endangered Species Act has provided protection for endangered and threatened species and helped some species to recover and even thrive, the fact that most listed species' habitat is on private land remains a hurdle that has not yet been overcome. In fact, the stringent requirements imposed upon private landowners often put endangered and threatened species at risk as some private landowners will use any means possible to stop the government from finding endangered or threatened species on their land. Because of this, the United States Fish and Wildlife Service should consider implementing a policy of collaborative management to ensure that protected species receive the protection they need to recover and thrive. To do this, the agency should consider applications by private landowners to participate in the collaborative process on a case-by-case basis and work with a strong, preferably neutral, entity to ensure that no individual stakeholder—whether government, company, or individual—takes advantage of the collaborative process. These policies can be best implemented through the Endangered Species Act's experimental populations clause before moving the collaborative-management policy towards broader implementation across other areas of the Endangered Species Act. Right now, the question is no longer if agencies can implement collaborative strategies, but how these agencies can begin the process of reforming their regulations to include collaboration. Therefore, this Article offers recommendations on how the U.S. Fish and Wildlife Service can implement collaborative management to best protect both endangered and threatened species and provide incentives to private landowners to participate in the process.*

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I. INTRODUCTION

The United States has not always protected its wide variety of native species. In fact, even when Congress established the first national park—Yellowstone National Park—the enabling legislation directed the Secretary of the Interior to “provide against the wanton destruction of the fish and game found within [the] Park,” effectively creating a policy of protecting livestock and desirable wildlife species, such as elk, at the cost of predatory species, such as the gray wolf or the grizzly bear.<sup>1</sup> As a result, the grizzly bear and the gray wolf in the Greater Yellowstone Area, including within the National Park, were hunted to virtual extinction within the next 100 years.<sup>2</sup>

However, United States policy changed in the 1960s and 1970s as people recognized the importance of protecting the environment. During this time period, the United States, recognizing the importance of environmental reform, began a process of enacting laws regarding the environment, which led “to the passage of many laws designed to correct the mistakes of the past and help prevent similar mistakes in the future.”<sup>3</sup> One of these laws was the Endangered Species Act (“ESA”), a law that not only required the protection of endangered species, but, if possible, required the restoration of endangered species that were eliminated from their natural habitat.<sup>4</sup>

The gray wolf is an outstanding example of an ESA success story. In 1978, the United States Fish and Wildlife Service (“FWS”) listed the gray wolf as an endangered species, beginning the process of restoring the gray wolf population to its natural habitat.<sup>5</sup> Twenty-one years later, from 1995–1996, thirty-one gray wolves were introduced back into Yellowstone National Park as an “experimental population,”<sup>6</sup> and the results have been striking. The gray wolf population in the Greater Yellowstone Area has increased exponentially, and preliminary data shows that the reintroduction of the wolves to the Yellowstone ecosys-

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1. *Wolf Restoration*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/nature/wolf-restoration.htm> (last updated Dec. 15, 2017) [<https://perma.cc/YT32-J2EF>].

2. *Id.*; *Grizzly Bears*, NAT’L PARK SERV., <https://www.nps.gov/yell/learn/nature/grizzlybear.htm> (last visited Sept. 4, 2018) [<https://perma.cc/D46G-AKLP>].

3. *Wolf Restoration*, *supra* note 1.

4. *Id.*

5. *Gray Wolf (Canis Lupus)*, U.S. FISH & WILDLIFE SERV., <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A00D> (last visited Sept. 4, 2018) [<https://perma.cc/Y37U-GAM8>].

6. *Wolf Restoration*, *supra* note 1.

tem will contribute to greater biodiversity throughout the entire Greater Yellowstone Area.<sup>7</sup> Additionally, gray wolf populations across the Northern Rockies have continued to be “robust, stable, and self-sustaining exceeding recovery goals in Idaho, Montana, and Wyoming since 2002” and making the wolf restoration a resounding success.<sup>8</sup>

However, not everyone has celebrated the gray wolf’s recovery in the United States. Ranch owners in many states such as Colorado, Montana, Idaho, and Wyoming have been particularly frustrated with the presence of so many predators threatening their livestock, businesses, and safety as species such as the gray wolf and the grizzly bear have experienced population booms, particularly in the Northwest.<sup>9</sup> And their fears are well-founded. For example, the FWS predicted that ranchers stand to lose as much as \$1,800–\$30,500 annually due to wolves preying on livestock in only the Yellowstone area,<sup>10</sup> a financial-loss range that would be devastating for small ranch owners who live on the financial edge.

Furthermore, the requirements of the ESA are stringent and often result in a “piecemeal application of the ESA with no overarching plan for how best to preserve endangered or threatened species.”<sup>11</sup> The stringent requirements combined with the lack of an overarching plan for recovery ultimately leaves private landowners feeling as if they have no control over their own land. For example, when asked about the reintroduction of the wolves to the Greater Yellowstone Area, one rancher stated that he felt that the gray wolf reintroduction decision was “shoved ‘down [his] throat with a plunger.’”<sup>12</sup>

Therefore, two opposing views exist regarding ESA regulation. Supporters of the ESA often point to the importance of species, arguing that the survival of species is of utmost importance because one can never know the effect that the eradication of a species will have on the

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7. *Id.*

8. *Gray Wolves in the Northern Rocky Mountains*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/mountain-prairie/es/grayWolf.php/> [<https://perma.cc/A77E-VSVV>] (last modified Aug. 1, 2018).

9. See Leslie Kaufman, *After Years of Conflict, a New Dynamic in Wolf Country*, N.Y. TIMES (Nov. 4, 2011), <http://www.nytimes.com/2011/11/05/science/earth/conflict-over-wolves-yields-new-dynamic-between-ranchers-and-conservationists.html?mcubz=0> [<https://perma.cc/4A97-L8F5>].

10. U.S. FISH & WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO 19 (1994), [https://www.fws.gov/mountain-prairie/es/species/mammals/wolf/EIS\\_1994.pdf](https://www.fws.gov/mountain-prairie/es/species/mammals/wolf/EIS_1994.pdf) [<https://perma.cc/6ZS8-6WW7>].

11. Eric Fisher, Comment, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371, 372 (1996).

12. Kaufman, *supra* note 9.

rest of the ecosystem.<sup>13</sup> These supporters are thankful for this type of rigid legislation and take pride in “their government for upholding such high standards when it comes to preserving rare species of plants and animals.”<sup>14</sup> ESA advocates emphasize that the ESA would not be effective if it were not absolutist because, without such strong provisions in the statute, the ESA would likely fail to ensure the recovery of an endangered or threatened species at all.<sup>15</sup> In their view, the ESA is effective because it takes an “absolutist stance” regarding threats to endangered species, without which the ESA loses all purpose.<sup>16</sup>

Alternatively, critics of the ESA argue that the statute actually punishes private landowners whose private property is the last remaining habitat for endangered and threatened species by “imposing significant regulatory burdens on them.”<sup>17</sup> These critics argue that Congress probably would not have passed the ESA had its intrusive effect on private rights been apparent. These critics point out that Congress created a statute that devolved into a “bureaucratic mess that no longer benefits humans, but instead overburdens private landowners and development and values species’ needs above human needs.”<sup>18</sup> In their view, a statute that was designed to protect species such as gray wolves, bears, and whooping cranes has instead become a “powerful and far-reaching land-use control” provision, something that Congress could not have intended.<sup>19</sup>

Ultimately, both sides make legitimate points. The protection of species is important, and the government should ensure that species are protected from human activity. But the ESA also disproportionately affects private landowners. According to the FWS, approximately “half of listed species have at least 80 percent of their habitat on private lands.”<sup>20</sup> Therefore, the dichotomy of how to allow private

13. See *Wolf Reintroduction Changes Ecosystem*, MY YELLOWSTONE PARK (June 21, 2011), <https://www.yellowstonepark.com/things-to-do/wolf-reintroduction-changes-ecosystem> [<https://perma.cc/LRL4-4PVS>].

14. Roddy Scheer & Doug Moss, *Is the Endangered Species Act a Success or Failure?*, SCI. AM., <https://www.scientificamerican.com/article/endangered-species-act-success-failure/> (last visited Mar. 5, 2018) [<https://perma.cc/7BHE-Q4FE>].

15. See Ari N. Sommer, Note, *Taking the Pit Bull Off the Leash: Sicking the Endangered Species Act on Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 273, 284 (2009).

16. *Id.*

17. *Endangered Species Depend on Private Land for Habitat, So Why Treat Landowners as the Enemy?*, FREECOLOGY (July 31, 2017), <https://libertarianenvironmentalism.com/2017/07/31/inhabitable-habitat/> [<https://perma.cc/HX9W-FD8U>].

18. Caitlin Troyer Busch, *Ethical Convergence and the Endangered Species Act*, GEO. ENVTL. L. REV. (Apr. 25, 2016), <https://gei.org/2016/04/25/ethical-convergence-and-the-endangered-species-act/> [<https://perma.cc/99R8-TXL9>].

19. Brian Seasholes, *Bad for Species, Bad for People: What's Wrong with the Endangered Species Act and How to Fix It*, NAT'L CTR. FOR POL'Y ANALYSIS (Sept. 1, 2007), <http://www.ncpathinktank.org/pub/st303> [<https://perma.cc/6QT4-KGNC>].

20. *Our Endangered Species Program and How It Works with Landowners*, U.S. FISH & WILDLIFE SERV. (July 2009), <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf> [<https://perma.cc/A2XR-ZFXE>].

landowners to use their land while ensuring that endangered or threatened species can recover occurs in most situations in which ESA regulations are triggered.

The resulting tension is not only detrimental to private landowners whose use of their own land is reduced, but it is also detrimental to the recovery of a species. For example, some landowners will take steps to actually rid their land of the endangered or threatened species before the FWS discovers the endangered species on their land. These steps to eliminate the endangered species from their property include directly killing the species—known colloquially as “shoot, shove[,] and shut-up”—or indirectly destroying the species’s habitat through a “scorched earth” policy that “makes actual or potential habitat unsuitable through such activities as plowing, prematurely cutting trees or clearing brush.”<sup>21</sup>

Therefore, to more adequately protect species and preserve the rights of private individuals, agency cooperation with private landowners is essential. As J.B. Ruhl stated, “the fact that the ESA is morally *good* does not mean we cannot make it morally *better*, and we can do so by focusing on its inherent unfairness to landowners.”<sup>22</sup> One way that the ESA can become morally better is for its regulations to be enforced through a collaborative-management model that is inclusive of all stakeholders instead of the conventional top-down legislative model. A collaborative-management model would allow private landowners to provide input on how to best allow landowners to use their own land while allowing an endangered or threatened species to also thrive on their land. In this way, the collaborative-management

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21. Seasholes, *supra* note 19. Ultimately, this “scorched earth” policy not only rids the land of the endangered or threatened species but can threaten the more common species that rely on the same habitat. Brain Seasholes, *The Importance of Property Rights for Successful Endangered Species Conservation*, REASON FOUND. 3 (July 9, 2015), <https://judiciary.house.gov/wp-content/uploads/2016/02/Seasholes-07092015.pdf> [<https://perma.cc/YAM4-SF2C>]. An example of this type of reaction in attempting to avoid ESA regulation can be found in how landowners reacted to the listing of the red-cockaded woodpecker. When the red-cockaded woodpecker was listed, its recovery plan “required private landowners to protect between 60 and 300 acres per colony” of woodpeckers. Estimates showed that forgoing timber harvests for a single red-cockaded woodpecker colony would cause private landowners to lose anywhere from \$30,000 to \$200,000. Upon realizing the economic effect of having red-cockaded woodpeckers on their land, landowners proceeded to cut timber to eliminate suitable habitat before the birds migrated onto their land. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 30, 33 (2003). In this way, landowners were able to “protect or enhance to existing value of their property” to the detriment of the red-cockaded woodpecker. Additionally, private landowners were actually incentivized “to urge their neighbors to do the same, because the [red-cockaded woodpecker] on neighboring land increase[d] the vulnerability of them and other neighbors as well.” Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 42 ECON. INQUIRY 150, 162 (2004).

22. J.B. Ruhl, *Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL’Y 37, 43 (1998).

model has the capacity to create a more sustainable approach to wildlife conservation.

In fact, the implementation of collaborative policies and regulations is not as radical a thought as it might have been a decade ago. Currently, the FWS has programs such as Safe Harbor Agreements, Habitat Conservation Plans, Conservation Banks, and Section 6 grants that allow some input and flexibility for private landowners who have endangered or threatened species on their land.<sup>23</sup> Additionally, programs such as the Candidate Conservation Program allow private landowners to create plans with the FWS to conserve species who are candidates for the listing process so that, in theory, the private landowner never has to fall under ESA regulations.<sup>24</sup> But, despite these programs, more can be done, and the ESA could provide the opportunity for various stakeholders to come together and create a system that works to protect species and has the buy-in from private landowners that is necessary for adequately protecting endangered and threatened species and helping them thrive.

This Article is divided into four parts. Part I discusses the ESA, specifically its purpose, Section 4, Section 9, and Section 10. Part II provides an overview of the interaction between the ESA and private landowners. Part III provides an overview of collaborative management, focusing on collaborative management as a better alternative than litigation and how parties can practically apply it in various scenarios. Finally, Part IV discusses the ways in which collaborative management can be used to enforce the ESA, particularly what programs it can be used with and how it can improve the imposition of stringent ESA regulations on private landowners.

## II. AN OVERVIEW OF THE ENDANGERED SPECIES ACT

In 1973, Congress learned three things: (1) the United States was losing approximately one species per year; (2) the pace of this loss appeared to be accelerating; and (3) this loss was not related to the process of natural selection.<sup>25</sup> In light of this dire prognosis, a “wide range of stakeholders with differing environmental values came together to craft a far-reaching and unprecedented environmental law”—the ESA.<sup>26</sup>

### A. Purpose

As the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” the ESA’s purpose is to

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23. U.S. FISH & WILDLIFE SERV., WORKING TOGETHER: TOOLS FOR HELPING IMPERILED WILDLIFE ON PRIVATE LANDS 5 (2005), <https://www.fws.gov/endangered/esa-library/pdf/ImperiledWildlifeFinalDec2005.pdf> [<https://perma.cc/FQN2-57T8>].

24. *Id.* at 14.

25. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176 (1978).

26. *Busch*, *supra* note 18.

protect species with little consideration of cost or consequences.<sup>27</sup> In fact, when Congress discussed the proposed ESA, “the dominant theme pervading all Congressional discussion . . . was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.”<sup>28</sup>

Case law supports upholding the ESA in its current, absolutist form despite critics who argue that it is too intrusive upon a private individual’s rights. In *Tennessee Valley Authority v. Hill*, the Supreme Court explained why the absolutist form is important, reasoning that “the ESA was not meant to be a hollow law collecting dust with scant enforcement. Despite subsequent controversy over this decision and numerous amendments to the ESA, the fundamental tenants for species and habitat protection remain intact”—endangered and threatened species must be protected despite the cost.<sup>29</sup>

#### B. Section 4

Section 4 of the ESA gives the FWS and the National Marine Fisheries Service (“NMFS”) the power to list endangered and threatened species.<sup>30</sup> An “endangered species” is one that is “in danger of extinction throughout all or a significant portion of its range.”<sup>31</sup> Alternatively, a “threatened species” refers to a “species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>32</sup> According to statute, endangered species receive all of the protections under the ESA, whereas threatened species receive protections determined on a case-by-case basis by the FWS or the NMFS.<sup>33</sup> In practice, however, the FWS provides threatened species with all of the same protections that

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27. *Tenn. Valley Auth.*, 437 U.S. at 189. However, the Trump Administration’s rollback of some rules for endangered species may affect this analysis. The Trump Administration’s rollback would allow the economic consequences of protecting candidate species to be considered during the listing process. Even though the decision regarding whether to list a species would be based on the “best available science,” the cost of protecting the proposed species would also be considered. Endangered and Threatened Wildlife and Plants, 83 Fed. Reg. 143 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 17); Nathan Rott, *What the Trump Administration Has Proposed to Change in the Endangered Species Act*, NPR (July 26, 2018, 4:15 PM), <https://www.npr.org/2018/07/26/632771911/what-the-trump-administration-has-proposed-to-change-in-the-endangered-species-a> [<https://perma.cc/U4JZ-5AFL>].

28. *Tenn. Valley Auth.*, 437 U.S. at 177.

29. Gabriel Eckstein & Jesse Snyder, *Endangered Species in the Oil Patch: Challenges and Opportunities for the Oil and Gas Industry*, 1 TEX. A&M L. REV. 379, 383 (2013).

30. 16 U.S.C. § 1533(a)(1) (2012).

31. *Id.* § 1532(6).

32. *Id.* § 1532(20).

33. See *Listing a Species as a Threatened or Endangered Species: Section 4 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (Aug. 2016), <https://www.fws.gov/endangered/esa-library/pdf/listing.pdf> [<https://perma.cc/X69W-G8LQ>].

endangered species receive. Therefore, at this time, there is little difference between the distinctions “threatened” or “endangered.”<sup>34</sup>

The listing process is a mandate<sup>35</sup> that requires the listing agency to decide whether to list a proposed species “solely on the basis of the best scientific and commercial data available,” with no consideration of cost or consequences.<sup>36</sup> To determine whether to list a proposed species as endangered or threatened, the FWS considers the following factors: (1) “the present or threatened destruction, modification, or curtailment of its habitat or range”; (2) “overutilization for commercial, recreational, scientific, or educational purposes”; (3) “disease or predation”; (4) “the inadequacy of existing regulatory mechanisms”; or (5) “other natural or manmade factors affecting its continued existence.”<sup>37</sup> In accordance with these factors, the FWS may find that the (1) listing petition for the proposed species is not warranted;<sup>38</sup> (2) listing petition for the proposed species is warranted;<sup>39</sup> or (3) listing petition for the proposed species “is warranted, but precluded by higher listing activities.”<sup>40</sup>

If the listing is warranted, the agency must propose a listing rule which eventually leads to the official listing of the species as either endangered or threatened.<sup>41</sup> After listing the species, the FWS must then designate the species’s critical habitat “to the maximum extent prudent and determinable”<sup>42</sup> and create a recovery plan “for the conservation and survival of endangered and threatened species.”<sup>43</sup> If the listing is not warranted, then agency consideration of the listing of the proposed species comes to an end.

Alternatively, if a listing petition is found to be warranted, but precluded, the proposed species may be listed as a candidate species by

34. *Id.* But see Endangered and Threatened Wildlife and Plants 83 Fed. Reg. 143 (proposed July 25, 2018) (to be codified at 50 C.F.R. pt. 17); Rott, *supra* note 27 (stating the policy of allowing threatened species to receive the same protections as endangered species has been threatened by the Trump Administration’s proposed rollback of ESA regulations; however, the FWS proposal would revert the FWS’s practice back to determining protection for threatened species on a case-by-case basis rather than allowing threatened species to automatically receive the same protections as endangered species).

35. Maggie Kuhn, Note, *Climate Change and the Polar Bear: Is the Endangered Species Act Up to the Task?*, 27 ALASKA L. REV. 125, 129 (2010).

36. 16 U.S.C. § 1533(b).

37. *Id.* § 1533(a)(1)–(2) (concerning the species over which the NMFS has jurisdiction, the NMFS decides that a species should be endangered or threatened and subsequently informs the FWS, who ultimately lists the species in accordance with the listing factors).

38. *Id.* § 1533(b)(3)(B)(i) (stating what action must be taken when the petitioned action is not warranted). In this case, the FWS must publish the “not warranted” finding in the Federal Register.

39. *Id.* § 1533(b)(3)(B)(ii).

40. *Id.* § 1533(b)(3)(B)(iii); Eckstein & Snyder, *supra* note 29, at 385.

41. *Id.* § 1533(b)(3)(B)(ii).

42. *Id.* § 1533(a)(2)(3)(A).

43. *Id.* § 1533(f)(1).

the FWS or the NMFS.<sup>44</sup> A candidate species under FWS jurisdiction is a “species for which the [FWS] possesses sufficient information on vulnerability and threats to support a proposal to list as endangered or threatened, but for which no proposed rule has yet been published by the [FWS].”<sup>45</sup> A candidate species under NMFS jurisdiction is a species that is “[t]he subject of a petition to list and for which the [NMFS] has determined that listing may be warranted.”<sup>46</sup> Designation as a candidate species under either agency’s jurisdiction allows a species to receive some protection before the species is officially classified as endangered or threatened. Additionally, certain programs such as Candidate Conservation Agreements (“CCAs”) and Candidate Conservation Agreements with Assurances<sup>47</sup> (“CCAAs”) are available to private landowners who have candidate species on their land for the purpose of encouraging “cooperative conservation efforts for these species because, they are, by definition, species that may warrant future protection under the ESA.”<sup>48</sup>

### C. Section 9

Once the FWS lists a species as endangered or threatened, the species receives protection under Sections 7 and 9 of the ESA.<sup>49</sup>

Section 7 prohibits federal agencies from taking any actions that would jeopardize an endangered species by requiring the federal agency to consult with the FWS.<sup>50</sup> Federal agencies are required to request “an advanced expert opinion [from the FWS] to determine whether an action is likely to jeopardize a listed species or adversely modify its critical habitat.”<sup>51</sup> If the agency action is likely to do so, then the agency must consult with the expert from the FWS to “identify reasonable and prudent alternatives that [would] avoid unfavorable consequences” to the species.<sup>52</sup> This requirement reflects a “conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”<sup>53</sup>

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44. *Candidate Conservation: The Candidate Conservation Process*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/what-we-do/candidate-conservation-process.html> (last updated Dec. 11, 2017) [<https://perma.cc/9KSN-EMT8>].

45. 36 C.F.R. § 219.19(1) (2017).

46. *Id.* § 219.19(2).

47. *Candidate Conservation Agreements*, U.S. FISH & WILDLIFE SERV., (Oct. 2017), <https://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf> [<https://perma.cc/7J34-R72N>]; *Candidate Conservation Agreements with Assurances (CCAA)*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/midwest/endangered/permits/enhancement/ccaa/index.html> (last updated Oct. 4, 2016) [<https://perma.cc/HZH6-RA69>].

48. *Candidate Species: Section 4 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV., (Oct. 2017), [https://www.fws.gov/endangered/esa-library/pdf/candidate\\_species.pdf](https://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf) [<https://perma.cc/3ZUJ-THCV>].

49. 16 U.S.C. § 1536(a) (2012); *Id.* § 1538(a).

50. *Id.* § 1536(a)(2).

51. Eckstein & Snyder, *supra* note 29, at 387.

52. *Id.*

53. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

Alternatively, Section 9 is much broader and is essentially designed to operate as a catch-all to ensure complete protection of an endangered or threatened species. Section 9 prohibits any person from “taking” an endangered species “within the United States or the territorial sea of the United States.”<sup>54</sup> For purposes of the ESA, a person is defined as:

an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.<sup>55</sup>

Each of these entities are prohibited from “taking” an endangered species,<sup>56</sup> meaning that these entities cannot “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered or threatened species.<sup>57</sup> In fact, these entities are prohibited from even attempting to “take” an endangered or threatened species.<sup>58</sup>

Furthermore, the FWS has promulgated a regulation that defines “harm” as “an act which actually kills or injures fish or wildlife,” including “significant habitat modification or degradation where [the action] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>59</sup> Because the concept of “significant habitat modification” is unclear, most of the litigation has focused on “how far to stretch” that concept,<sup>60</sup> with most courts finding and reaffirming the policy that any action that affects an endangered or threatened species by impacting its critical habitat amounts to a taking.

For example, in *Palila v. Hawaii Department of Land and Natural Resources* (“*Palila I*”), the Ninth Circuit considered whether the introduction and maintenance of feral sheep and goats in the Palila bird’s critical habitat “amounted to a taking.”<sup>61</sup> The court held that the maintaining of feral sheep and goats in the Palila’s bird’s critical habitat violated the ESA because the Palila bird was endangered by the activity.<sup>62</sup> Additionally, the court emphasized that its decision was “consistent with the Act’s legislative history showing that Congress

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54. 16 U.S.C. § 1538(a)(1)(B); *id.* § 1538(a)(1)(C)–(D) (prohibiting persons from importing or exporting an endangered or threatened species, taking any endangered or threatened species “upon the high seas,” or engaging in any commerce or transportation of such species).

55. *Id.* § 1532(13).

56. *Id.* § 1538(a)(1)(B).

57. *Id.* § 1532(19).

58. *Id.*

59. 50 C.F.R. § 17.3 (2017).

60. Kuhn, *supra* note 35, at 136.

61. *Palila v. Haw. Dep’t of Land & Nat. Res.*, 639 F.2d 495, 497 (9th Cir. 1981).

62. *Id.* at 498.

was informed that the greatest threat to endangered species is the destruction of their natural habitat.”<sup>63</sup> Therefore, *Palila I* affirmed that any action that affects an endangered or threatened species by impacting its critical habitat amounts to a taking under the ESA.

A few years later, petitioners brought another action on behalf of the Palila bird to add “mouflon sheep as destructive animals to be removed from the Palila’s habitat.”<sup>64</sup> In *Palila v. Hawaii Department of Natural Resources* (“*Palila II*”), the Hawaii Department of Natural Resources contended that “no taking exist[ed] because the evidence show[ed] that (1) a huntable number of sheep . . . could co-exist with the Palila; and (2) the Palila [were] doing poorly because of the recently removed feral sheep and goats, not the mouflon sheep.”<sup>65</sup> The Ninth Circuit rejected these arguments, concluding that the district court properly included “habitat destruction that could result in the extinction of the Palila” bird within the definition of “harm.”<sup>66</sup> Therefore, *Palila II* again reaffirmed that harm includes any action which affects a species’s critical habitat.

Finally, the Supreme Court, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, further affirmed the broad definition of harm by reversing the Fourth Circuit’s ruling that “take” must be “read as applying only to the perpetrator’s direct application of force against the animal taken.”<sup>67</sup> In *Babbitt*, “small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast” challenged the “application of the ‘harm’ regulation” because they had suffered economic losses due to the breadth of the harm regulation’s application.<sup>68</sup> The Court reasoned that the appellate court’s ruling that “take” must apply only when there is a “direct application of force” directly conflicted with the Ninth Circuit’s decisions in *Palila I* and *Palila II*.<sup>69</sup> Additionally, the Court reasoned that some of the words in the definition of “take” “do not require direct application of force” because there is no intent requirement for a taking to occur.<sup>70</sup> Therefore, harm should be read as having its own independent meaning.<sup>71</sup> Thus, the Court affirmed the FWS’s broad discretion to make policy choices, and, as a result, concluded that the FWS had “reasonably construed the intent of Congress when they defined ‘harm’ to include ‘significant

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63. *Id.* (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978)).

64. *Palila*, 852 F.2d at 1107.

65. *Id.* at 1109.

66. *Id.* at 1108.

67. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 687 (1995).

68. *Id.* at 692.

69. *Id.* at 694–95.

70. *Id.* at 701–02.

71. *Id.* at 702.

habitat modification or degradation that actually kills or injures wildlife.’”<sup>72</sup>

These cases—*Palila I*, *Palila II*, and *Babbitt*—have upheld the FWS’s broad definition of “take” as including any action that impacts a threatened or endangered species’s critical habitat. Furthermore, “case law suggests that the government need only prove a general intent when prosecuting ESA takings violations; knowledge that a particular species is protected is not dispositive.”<sup>73</sup> The breadth of the definition of “take” is slightly concerning, especially for small, private landowners, because it has the capacity to cover a range of innocent activity as well as intentional, harmful activity. The broad definition becomes even more concerning when considered with the penalties that one may face for violating Section 9. Penalties range from as high as \$25,000 per violation for civil penalties to “\$50,000 with up to one year in prison per violation” for criminal penalties.<sup>74</sup> However, Section 10 provides some mitigation for people to avoid violating the broad takings clause, allowing, in some instances, a person to “take” an endangered or threatened species for a specific purpose.

#### D. Section 10

Section 10 provides some exceptions to Section 9, specifically through the incidental take permit which allows “an entity to incidentally kill an endangered species or to modify its habitat in the course of business activity.”<sup>75</sup>

An incidental take permit allows “persons” to “take” an endangered species if that “taking is incidental to . . . the carrying out of an otherwise lawful activity.”<sup>76</sup> To receive an incidental take permit, the applicant must submit a habitat conservation plan (“HCP”) that specifies (1) “the impact which will likely result from such taking”; (2) “what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps”; (3) “what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized”; and (4) “other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.”<sup>77</sup> The purpose of these HCPs is “to minimize and mitigate harmful effects” of human activity on endangered or threatened species.<sup>78</sup>

After public comment, the FWS must issue the incidental take permit if the agency finds that (1) “the taking will be incidental”; (2) the

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72. *Id.* at 708.

73. Eckstein & Snyder, *supra* note 29, at 382.

74. *Id.*

75. 16 U.S.C. § 1539(a)(1)(B) (2012); *Babbitt*, 515 U.S. at 389.

76. 16 U.S.C. § 1539(a)(1)(B).

77. *Id.* § 1539(a)(2)(A).

78. Eckstein & Snyder, *supra* note 29, at 389.

applicant will “minimize and mitigate the impacts” of the taking to the “maximum extent practicable”; (3) “the applicant will ensure that adequate funding for the plan will be provided”; (4) “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild”; and (5) the measures required by the FWS as “necessary or appropriate for the purposes of the plan” will be met.<sup>79</sup>

If the FWS does issue an incidental take permit, the permit holder is then entitled to “no surprises.”<sup>80</sup> Under the “No Surprises” policy, the FWS promises that, if a “landowner invests money and land into saving endangered, threatened, or unlisted species covered in an HCP, the government will not later require that the landowner pay more or provide additional land even if the needs of species change over time.”<sup>81</sup> In this way, the No Surprises policy “strengthen[s] the effectiveness of HCPs” and encourages “developers and private landowners to participate in the creation of an HCP in return for the government’s guarantee of exclusion from any future demands of financial or land contributions.”<sup>82</sup>

### III. THE INTERACTION BETWEEN ENDANGERED SPECIES AND PRIVATE LANDOWNERS

According to the FWS, “[a]pproximately half of listed species have at least 80 percent of their habitat on private lands.”<sup>83</sup> Therefore, private landowners are instrumental to the recovery of a protected species. However, the overall population of endangered or threatened species often struggles to recover if a majority of their habitat is on private lands, as evidenced by the differences found in the recovery of species on federal lands versus species on private lands. On federal lands, about 18% of protected species appear to be improving, and approximately 39% of these species have stable populations.<sup>84</sup> In contrast, on exclusively private lands, only 3% of protected species seem to be improving and “only sixteen percent are thought to be stable.”<sup>85</sup>

The Attwater’s prairie chicken is a perfect example of how a species has struggled to recover on private land. The Attwater’s prairie chicken is a grouse whose habitat is found along the coast of Louisiana and Texas.<sup>86</sup> One hundred years ago, approximately one million

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79. 16 U.S.C. § 1539(a)(2).

80. Eckstein & Snyder, *supra* note 29, at 390.

81. Fisher, *supra* note 11, at 386.

82. *Id.* at 374.

83. *Our Endangered Species Program and How It Works with Landowners*, *supra* note 20.

84. John F. Turner & Jason C. Rylander, *Conserving Endangered Species on Private Lands*, 32 LAND & WATER L. REV. 571, 573 (1997).

85. *Id.*

86. *Attwater’s Prairie Chicken*, NAT’L FISH & WILDLIFE FOUND., <http://www.nfwf.org/attwater/Pages/home.aspx> (last visited Mar. 6, 2018) [<https://perma.cc/RJM2-WL7Y>].

of these prairie chickens inhabited their range, but by the time the Attwater's prairie chicken was listed as endangered in 1967, only 1,000 of these birds remained.<sup>87</sup> Today, the greatest threat to the Attwater's prairie chicken is habitat loss—there is less than 1% of what used to be the Attwater's prairie chicken's original habitat remaining in “relatively pristine condition,” primarily within areas such as the Attwater's Prairie Chicken National Wildlife Refuge.<sup>88</sup> As a result of this habitat loss, the species's population has dwindled, not increased.<sup>89</sup> Therefore, as efforts are made to further increase the population for the Attwater's prairie chicken by expanding the available habitat, there must be private landowner support for this species to recover.

This is because many species have habitat ranges across wide swaths of land—something they need for genetic sustainability.<sup>90</sup> The Attwater's prairie chicken's habitat is across two states—Texas and Louisiana—and the gray wolf's historic habitat ranged across almost the entire northern, western, and southern areas of the United States. Therefore, if protected species are only receiving protection in certain areas, such as national parks or wildlife reserves, then these species will take longer to recover because their habitat is fractured. These species, once they leave protected areas, face threats such as city development, ranches, hunters, and lack of resources, which will likely make the recovery of the protected species much longer, if not impossible.

This situation creates a difficult predicament for private landowners. By the time a species comes under ESA protection, it is almost too late to save the species.<sup>91</sup> In fact, the species is probably on the brink of extinction even before the listing process begins. As a result, the efforts to save what few species remain “inevitably impact disproportionately the lands where the species still exists,”<sup>92</sup> lands which are very likely private lands. More often than not, private landowners have good intentions, but these private landowners also bear “too

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87. *Id.*

88. *Attwater's Prairie-chicken Recovery Program: Questions and Answers*, U.S. FISH & WILDLIFE SERV., <https://nctc.fws.gov/Pubs9/apcrecov.pdf> (last visited Mar. 6, 2018) [<https://perma.cc/H7EX-6XUH>]. The Attwater's Prairie Chicken National Wildlife Refuge was created in 1972 and contains almost 10,000 acres of protected habitat. The land for this wildlife reserve was donated by a private landowner who found one of the last remaining wild populations of the Attwater's Prairie Chicken on her property. *Attwater's Prairie Chicken*, TEX. PARKS & WILDLIFE (2009), [https://tpwd.texas.gov/publications/pwdpubs/media/pwd\\_br\\_w7000\\_0018e.pdf](https://tpwd.texas.gov/publications/pwdpubs/media/pwd_br_w7000_0018e.pdf) [<https://perma.cc/ZV6P-SFCX>].

89. Turner & Rylander, *supra* note 84.

90. *America's Gray Wolves: A Long Road to Recovery*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/campaigns/gray\\_wolves/index.html](http://www.biologicaldiversity.org/campaigns/gray_wolves/index.html) (last visited Mar. 5, 2017) [<https://perma.cc/HQH6-3HVM>].

91. Turner & Rylander, *supra* note 84, at 572.

92. *Id.* at 573–74.

much of the burden of protection simply because they happen to own the majority of . . . endangered species habitats.”<sup>93</sup> The ESA does provide some flexibility for private landowners through programs such as Candidate Conservation Programs (“CCPs”), CCAs, and CCAAs, incidental take permits, and the No Surprises policy. But these programs often have little effect on listed species and still leave private landowners feeling as if they are punished for the sins of society rather than something they did on their own.

The FWS provides flexibility for landowners in at least three ways. The CCP is a voluntary program that can provide a way for landowners to avoid falling under ESA regulations altogether by helping species designated as candidate species avoid the listing process. The agreements under this program allow a landowner, who is aware that a candidate species is on her land, to help the species recover before it is listed as endangered or threatened. Alternatively, the two other programs—incidental take permits and the No Surprises policy—provide some flexibility and assurances to private landowners who already have endangered or threatened species on their land.

The FWS’s CCP offers conservation benefits to candidate species by providing “technical and financial support to landowners who wish to develop voluntary conservation strategies for candidate species in order to address threats to the species while also avoiding the need to list the species as threatened or endangered.”<sup>94</sup> The FWS designates candidate species in one of two ways—biological assessment of a declining species with results finding that the species meets the definition of a candidate species or public petition to list a species and a FWS finding that the species’s listing is warranted but precluded.<sup>95</sup> Once a species is designated as a candidate species, it is moved into the CCP, where it should receive further evaluations and assessments to determine its recovery or whether it should be listed.<sup>96</sup>

Landowners may make two types of agreements with the FWS through the CCP—a CCA or a CCAA.<sup>97</sup> These agreements are based on the FWS’s recognition that “[e]arly conservation efforts for declining species can be greatly expanded through collaborative approaches that foster cooperation and exchange of ideas among multiple parties.”<sup>98</sup>

According to the FWS, “CCAs are formal, voluntary agreements between the [FWS] and one or more parties to address the conservation needs of one or more candidate species or species likely to become candidates in the near future” based off of the FWS’s

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93. *Id.* at 573.

94. Eckstein & Snyder, *supra* note 29, at 391.

95. *Candidate Conservation: The Candidate Conservation Process*, *supra* note 44.

96. *Id.*

97. *Candidate Conservation Agreements*, *supra* note 47.

98. *Id.*

recognition that “[e]arly conservation efforts for declining species can be greatly expanded through collaborative approaches that foster cooperation and exchange of ideas among multiple parties.”<sup>99</sup> Those who participate in the program do so voluntarily and “commit to implement specific actions designed to remove or reduce threats to the covered species, so that listing may not be necessary.”<sup>100</sup> CCAs are primarily agreements between the FWS and federal agencies and states, however, private property owners may still enter into a CCA with the FWS.<sup>101</sup> Under this agreement, “no Enhancement of Survival Permit is issued,” meaning that “there is no permit that authorizes incidental take of the covered species in the event listing occurs, and no assurances are provided by the [FWS].”<sup>102</sup>

Alternatively, a CCAA is exclusively an agreement between the FWS and non-federal property owners.<sup>103</sup> This program was instituted because of the FWS’s recognition that “[c]onservation of animal and plant resources on non-federal lands is important because many species rely heavily—or even entirely—on such lands,” but because of “potential land use restrictions,” “some property owners have been reluctant to engage in conservation activities that encourage use of their land or water by such species.”<sup>104</sup> Due to this concern, CCAAs provide “incentives for non-federal property owners to engage in voluntary conservation activities that provide a net conservation benefit to the species.”<sup>105</sup> These incentives include assurances that, if the non-federal land owner “engage[s] in certain conservation actions for species included in the agreement, [the non-federal land owner] will not be required to implement additional conservation measures beyond those in the CCAA,” even if the species is eventually listed as threatened or endangered.<sup>106</sup> Therefore, unlike CCAs, CCAAs will issue an Enhancement of Survival Permit with the CCAA which “provides assurances that, if the species is subsequently listed and no other changes have occurred, the [FWS] will not require the permittee to conduct any additional conservation measures without consent.”<sup>107</sup> Furthermore, the Enhancement of Survival Permit “authorizes a specific level of incidental take of the covered species should listing occur.”<sup>108</sup>

After a species is listed, the agreements under the CCP are no longer available to landowners, but a landowner may apply for an in-

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

cidental take permit and take advantage of the FWS's No Surprises policy.<sup>109</sup> Before 1982, landowners were struggling with inflexible ESA regulations because the ESA prohibited any taking of a species.<sup>110</sup> As a result, Congress authorized the FWS to issue permits for incidental takings of a protected species, thus allowing incidental take permit holders to "proceed with an activity that is legal in all other respects, but that results in the 'incidental' taking of a listed species."<sup>111</sup> If any of their actions may affect a protected species, private landowners may apply for an incidental take permit by submitting a HCP that states the following:

- (1) the impact which will likely result from the taking contemplated;
- (2) the steps the applicant will take to minimize or mitigate the impacts identified, as well as funding available for implementation of these mitigation measures;
- (3) a discussion of alternates to the contemplated action and an explanation why those alternatives are not being utilized; [and]
- (4) such other measures required by the Secretary as necessary or appropriate to fulfill the purpose of the HCP.<sup>112</sup>

Additionally, the "applicant's HCP must list and explain all proposed activities which may cause an incidental taking."<sup>113</sup> If the FWS accepts the applicant's HCP, the FWS issues an incidental take permit, which allows the landowner to "take" an endangered species pursuant to the incidental take permit so long as the harm to the species is incidental to otherwise lawful activity.<sup>114</sup>

Additionally, the FWS follows a No Surprises policy to incentivize private landowners and developers to create HCPs "in return for the government's guarantee of exclusion from any future demands of financial or land contributions."<sup>115</sup> The purpose of the No Surprises policy is that, "if, in the course of development or land use, a landowner invests money and land into saving endangered, threatened, or unlisted species covered in an HCP, the government will not later require that the landowner pay more or provide additional land," regardless of whether the needs of the species change.<sup>116</sup> Therefore, if

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109. Patrick Duggan, *Incidental Extinction: How the Endangered Species Act's Incidental Take Permits Fail to Account for Population Loss*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10628, 10629 (2011).

110. *Id.*

111. *Endangered Species Permits: Habitat Conservation Plans (HCPs) and Incidental Take Permits*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/midwest/endangered/permits/hcp/index.html> [<https://perma.cc/U8YH-3QRF>] (last updated Aug. 29, 2018).

112. See 16 U.S.C. § 1539(a)(2)(A) (2012); *Endangered Species Permits: Habitat Conservation Plans (HCPs) and Incidental Take Permits*, *supra* note 111.

113. Donald L. Soderberg & Paul E. Larsen, *Triggering Section 7: Federal Land Sales and "Incidental Take" Permits*, 6 J. LAND USE & ENVTL. L. 169, 179 (1991) (citing U.S. FISH & WILDLIFE SERV., DRAFT CONSERVATION PLANNING GUIDELINES, REGION 1 (June 19, 1989)).

114. Duggan, *supra* note 109, at 10628.

115. Fisher, *supra* note 11, at 375.

116. *Id.* at 386.

the landowner completes an HCP, obtains an incidental take permit, and complies with the HCP, any development that the private landowner pursues may continue with “minimal interruption, even if an unlisted species covered by the plan is later listed as endangered or threatened.”<sup>117</sup> Therefore, the No Surprises policy is unique in that it provides private landowners protections for both known and potentially unknown species so long as the species are addressed in the HCP.

Each of these programs have provided landowners with much-needed flexibility under the ESA, but they are not doing enough to ease the burden of ESA regulations on private landowners. The agreements under the CCP are arguably the most flexible; however, they are not available to private landowners who have listed species on their land. These are programs that are employed in an attempt to avoid listing a species altogether, not help a species recover from the brink of extinction. Additionally, these programs only provide piecemeal protection for a candidate species; there is no guarantee that the candidate species will receive protection throughout its entire habitat. Therefore, even if the landowner fully complies with these programs, it is still very likely that the FWS will eventually need to list the species.

Furthermore, there is debate about whether incidental take permits and the No Surprises policy are adequate to protect endangered species. For example, the incidental take permit may only take one threat into account, usually man-made threats, and fail to take natural threats to the species into account as well.<sup>118</sup> Thus, when a natural threat to the species is combined with the now-legal taking authorized by the incidental take permit, the species is again at risk even though the ESA technically still protects the species.<sup>119</sup> Similarly, the No Surprises policy places “enormous pressure on the limited resources of the FWS” to meet statutory time limits and ensure that the scientific data supports the decision to issue the HCP that will be in effect over a lengthy period of time, discourages landowners from taking the proper precautions at the beginning so that they can save money and time by applying for an HCP later, and does not provide certainty for private landowners regarding “any unaddressed species that are listed as endangered or threatened subsequent to implementation of the HCP.”<sup>120</sup> Additionally, the incidental take permit application process is a significant burden on landowners—especially small landowners—as they must obtain an incidental take permit for any activity on their land that will affect a protected species and will likely have to hire

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117. *Id.*

118. *See* Duggan, *supra* note 109.

119. *Id.*

120. Fisher, *supra* note 11, at 404–05.

environmental consultants and incur other major expenses to create the HCP for the application.

Therefore, these programs are either too limited or too difficult to implement in a way that ensures certainty for private landowners and the protection of endangered, threatened, or candidate species. As a result, the FWS should consider a more comprehensive approach to providing flexibility for private landowners that will ensure the recovery of species through an interconnected habitat.

#### IV. AN OVERVIEW OF COLLABORATIVE MANAGEMENT

Environmental governance is rapidly experiencing a shift away from the “traditional command-style legal regulatory model” because, even though this model may be effective at regulating large industries, it does not fully address many of the environmental issues facing the world.<sup>121</sup> As policymakers and regulatory agencies have studied alternatives to this top-down model, one of “the most plausible and increasingly prevalent alternatives to emerge embraces a more collaborative, multiparty and multilevel approach to environmental and natural resources governance.”<sup>122</sup> This collaborative-management model promises to solve problems associated with the “traditional command-style legal regulatory model” by providing a system that is less “adversarial, expensive, unwieldy, and insensitive to local contexts.”<sup>123</sup>

Collaborative management goes by many names,<sup>124</sup> but they all share several unifying themes such as “a focus on the virtues of collaboration, participation, contextual and ‘bottom-up’ governance, learning and adaptation, flexibility, and ‘new’ forms of accountability.” At its core, collaborative management is a shift away from top-down governance where a “single public manager engaged in a linear series of contractual and partnership arrangements” makes decisions to a broader approach where all participants “co-labor” together using a “new structure, shared resources, defined relationships, and communication.”<sup>125</sup>

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121. Cameron Holley, *Removing the Thorn from New Governance's Side: Examining the Emergence of Collaboration in Practice and the Roles for Law, Nested Institutions, and Trust*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10656, 10656 (2010).

122. *Id.* at 10657.

123. *Id.* at 10656–57.

124. The concept of collaborative management has also been described as “multilevel governance, collaborative governance, experimentalism, collaborative ecosystem governance, the new regional paradigm, modular regulation, empowered participatory governance, civic environmentalism, and reflexive environmental law.” *Id.* at 10657–58 (internal quotation marks omitted).

125. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 278–79 (2009).

This type of management is extraordinarily flexible and can be molded to fit various situations on a case-by-case basis. For example, collaborative management can occur “within and across organizations,” such as how federal agencies often coordinate with each other regarding environmental conflict resolution.<sup>126</sup> It can also occur between “both homogenous and diverse partners,” such as how environmental groups may collaborate amongst themselves or “work with putative private sector polluters; conflicting local, regional, state, and federal government agencies; and concerned citizens groups.”<sup>127</sup> Furthermore, professional facilitators are not necessarily required, with the decision regarding whether to include them depending upon whether the issue is contentious or not. For instance, it is likely that a professional facilitator would be required when parties are trying to come to an agreement regarding a highly polluted site involving many different stakeholders such as “local, regional, state, and federal government; Native American tribes; nonprofit organizations; environmental advocacy groups; and groups of local residents.”<sup>128</sup> Alternatively, “[i]n lower conflict settings, regional voluntary service coordination and collaboration may emerge voluntarily among local governments,” such as when one county collaborates with another to determine the best way to deliver services to residents.<sup>129</sup> Finally, collaborative management can occur with or without public participation,<sup>130</sup> although a system with public participation is the preferred method of implementation because it ensures the consideration of as many stakeholder opinions as possible.

Laws may either facilitate or constrain the implementation of collaborative management.<sup>131</sup> For example, statutes can lower barriers to collaboration “by authorizing public agencies to do anything together that they have power to do apart.”<sup>132</sup> Alternatively, laws may inhibit collaboration by making legislation too restrictive, thereby making effective cooperation between different stakeholders impossible. Ultimately scholars have suggested that there are “eight key design principles for effective and enduring collaborative institutions”: (1) clear boundary rules; (2) current local rules that ensure costs are proportional to the benefits of collaboration; (3) active member participation in making and modifying rules regarding collaboration; (4) members select their own monitors who are held accountable to the group; (5) graduated sanctions; (6) participants have “‘access to rapid, low-cost, local arenas to resolve conflict among users or between users and officials’”; (7) the government—whether national, state, or local—

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126. *Id.* at 279.

127. *Id.*

128. *Id.* at 280.

129. *Id.*

130. *Id.* at 281.

131. *Id.*

132. *Id.*

recognizes the right to organization; and (8) “[g]overnance activities are nestled in multiple layers of an enterprise.”<sup>133</sup>

Furthermore, collaborative management can help parties avoid problems created by litigation. Even though there are other methods of mediation, litigation is often one of the only solutions for parties when issues arise. However, litigation is extraordinarily expensive and can become a huge burden, especially for private citizens. There are social costs associated with litigation as well, as litigation “tends to breed conflict and division within the communities affected by the outcomes of the decisions.”<sup>134</sup> As a result, litigation puts parties in “unyielding, extreme positions [which] result in a ‘rigid rulemaking and implementation process,’” often “restrict[ing] the free-flow of information essential to providing a viable solution to underlying land management conflicts.”<sup>135</sup> Thus, litigation is detrimental to both parties and is often a catalyst for conflict instead of a method for resolving it.

However, collaborative management can help parties avoid the problems associated with litigation. In fact, studies have shown that a system of collaborative management “might decrease the number of administrative appeals and lawsuits, . . . or in Washington talk, create more ‘pre-decisional dialogue’ than ‘post-decisional’ challenge.”<sup>136</sup> This is one of the major benefits of collaborative management—even though it is possible for conflict to develop after an agreement is reached, it is much more likely that any potential conflicts will be resolved at the beginning of the process, rather than at the end. In the context of the ESA, this pre-decisional dialogue is not only good for the parties involved but is also good for protected species. Litigation is a lengthy process and species can suffer while parties are involved in determining how to best protect the species at issue. Therefore, avoiding the litigation process is not only good for agencies and private citizens, but may be the best solution for protecting species as well.

There are ways in which the federal government has already begun using collaborative management as a mechanism for environmental conservation. In 1998, Congress began requiring the U.S. Forest Service to establish “a multiparty monitoring and evaluation process” regarding stewardship contracts.<sup>137</sup> Pursuant to this authority, the U.S. Forest Service “may enter into stewardship contracting projects with

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133. Lisa Blomgren Amsler, *Collaborative Governance: Integrating Management, Politics, and Law*, 76 PUB. ADMIN. REV. 700, 703–04 (2016).

134. Matthew Schuckman, Note, *Making the Hard Choices: A Collaborative Governance Model of the Biodiversity Context*, 79 WASH. U. L. Q. 343, 360 (2001).

135. *Id.* at 357–58.

136. Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 472 (2006).

137. 16 U.S.C.A. § 6591c(h)(1) (West Supp. 2018); Martin Nie & Peter Metcalf, *National Forest Management: The Contested Use of Collaboration and Litigation*, 46 ENVTL. L. REP. 10208, 10210 (2016).

private persons or other public or private entities to perform services to achieve land management goals for the national forests and the public lands that meet local and rural community needs.”<sup>138</sup> This creates a system where the U.S. Forest Service can enlist the help of private citizens in managing forest area, saving the U.S. Forest Service costs and allowing for more involvement from private citizens. Additionally, Congress has confirmed their support for systems that use collaborative management. In 2009, Congress passed the Collaborative Forest Landscape Restoration Act which “funds landscape-level forest restoration projects that are screened and recommended by a federal advisory committee.”<sup>139</sup>

Additionally, not only have these programs been implemented, but they have received support from within the government agencies running the programs. In 2016, the Chief of the Collaborative Workshop within the U.S. Forest Service expressed his support for these programs, stating:

[Collaborative] conversations are incredibly important, because our future depends on them. To achieve ‘the greatest good of the greatest number in the long run,’ we need strong connections to our local communities so we can work collaboratively to restore our landscapes, build public trust, and forge lasting partnerships to take us into the future.<sup>140</sup>

Therefore, even though it is still too early to tell how effective these collaborative programs have been, the reasons the Chief cited for the importance of collaboration make the case for implementing these programs—strong connections with local communities, the building of public trust, and the laying of foundations for partnerships that will ensure effective environmental conservation in the future.

## V. COLLABORATIVE MANAGEMENT AS A METHOD OF ENFORCING THE ENDANGERED SPECIES ACT

Although collaborative management is a newer model of regulatory enforcement, collaborative management is uniquely suited to address environmental issues because of its ability to work in various situations, especially situations where there is no single right answer that will solve the issues that Congress created the law to address.<sup>141</sup> In these types of cases where there is no “silver policy bullet,” “a portfolio of policy strategies and instruments working on many different

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138. 16 U.S.C.A. § 6591c(b).

139. Nie, *supra* note 136.

140. Tom Tidwell, *Moving Forward with Collaborative Restoration*, U.S. FOREST SERV. (Apr. 26, 2016), <https://www.fs.fed.us/speeches/moving-forward-collaborative-restoration> [<https://perma.cc/29JK-YPEA>].

141. Carly P. Wolfrom, *Navigating Climate Change Policy: The Opportunities of Federalism*, 27 SYRACUSE J. SCI. & TECH. L. 162, 170 (2012).

fronts and at different scales is needed.”<sup>142</sup> With so many factors to consider to ensure the recovery of protected species, collaborative management is suited to work through issues that arise between agencies such as the FWS and other entities, such as private landowners. In the end, the issue is no longer whether agencies and private landowners should collaborate, but how agencies and private landowners can most effectively collaborate to create plans to protect endangered or threatened species.

Collaborative management has the capacity to (1) allow parties to solve complex problems created by the ESA by “harnessing the unique information, resources, and capacities of diverse public and private actors”; (2) fostering creative and adaptive approaches to the planning and implementation of the ESA by “bringing together agencies and stakeholders who are close to the problem”; (3) “reduc[ing] existing conflict, enhance[ing] ownership, and thus increas[ing] cooperation in implementation by contributing to the formation of some form of consensus among parties”; and (4) “enhance[ing] democracy by allowing citizens and other nongovernment actors to interact, deliberate and work together cooperatively, build social capital, and promote civil behavior.”<sup>143</sup> Therefore, it is time for the FWS to consider implementing collaborative strategies as it enforces ESA regulations.

There are two things that are necessary for collaborative management to work as a way to enforce ESA regulations: (1) case-by-case implementation; and (2) a strong, neutral entity that has the capacity to manage stakeholder interests.

First, for collaborative management to be most effective, collaborative programs should be implemented on a case-by-case basis. One model of collaborative management does not have the capacity to address every situation for which a collaborative program can apply because the ESA protects a variety of species, and its regulations affect a variety of landscapes, private landowners, and communities. This means that there must be a process in place in which the FWS looks at the specific case so that it can tailor a collaborative program to the specific situation. Clearly, it would be impossible for the FWS to examine every situation in which a regulation could possibly affect a private landowner because this would take too much time, money, and personnel. Therefore, the first step of the process should be a way in which a private landowner can contact the FWS to ask for their participation in a collaborative process. This could be something similar to how citizens petition agencies to begin an agency action or how a private landowner or other entity can submit an HCP for an incidental take permit. In this way, the FWS does not have to hunt down private landowners to see if they want to participate in collaboration, saving

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142. *Id.*

143. Holley, *supra* note 121, at 10659.

time and resources for the FWS. Additionally, this allows the FWS to tailor the collaborative process to the individual petitioner, ensuring that the collaborative-management model is the best one for the situation. Finally, this ensures that those participating in the collaborative-management program are fully invested in the project.

However, some landowners may be reluctant to voluntarily participate in the collaborative process due to suspicions concerning government interference. But implementing a program like the CCAA that offers incentives for private landowner participation after a species is listed could solve this problem. Generally, private landowners are aware if they have or have the potential to have a listed species on their land. These private landowners can either take steps to eliminate the species from their property, ensuring that the species never comes on their property, or cooperate with the FWS's regulations regarding protected species. If the FWS were to implement a program like the CCAA for protected species, not just candidate species, then private landowners would likely be more willing to work with the FWS in creating a plan to protect the endangered or threatened species that will also allow them to use their land more than if they were under traditional ESA regulations. Additionally, the incentives associated with a program modeled after the CCAA would give private landowners more regulatory certainty regarding the protected species currently on their land and establish a strong, working relationship with the FWS for situations in which additional protected species are found.

Second, there must be a strong, preferably neutral, entity to manage the collaborative process and organize the stakeholders involved. For collaborative management to work effectively, there must be a quality and balance of representation from every stakeholder. Additionally, there must be a balance between conservation principles and the priorities and needs of the people living in the area. However, because collaborative management involves considering the input of varying stakeholders, there is the potential for powerful groups to influence the collaborative process for their own benefit. For example, the FWS has vast resources and federal power at its disposal, so there is a risk that it could influence the process in such a way as to manipulate the collaborative process to the detriment of private landowners. Similarly, large companies or influential landowners may also disproportionately influence the collaborative process through their economic and political clout. Therefore, there must be something in place to ensure that stakeholder interests are balanced in such a way to ensure true collaboration.

The FWS is arguably strong enough to manage the implementation of collaborative management, but it lacks funding and has its own interests at stake. Therefore, it would be best to have some other entity manage the collaboration. The selection of these moderators could be

somewhat modeled after how arbitrators are selected during the arbitration process. For example, in the agreement between the FWS and a private landowner, the agreement could require that the FWS and any other involved agency choose a moderator, the private landowner chooses an additional moderator, and then those two moderators choose a third moderator to help with the process. In this way, neither party should have an undue influence on the proceedings because the moderators can balance each stakeholder's interests.

Once these two things—case-by-case implementation and a strong, neutral entity to manage collaborative projects—are in place, the experimental populations clause can provide an avenue for the FWS to begin implementing collaborative management.

The experimental populations clause is probably the best way for the FWS to begin implementing collaborative management. The experimental populations clause is a portion of Section 10 of the ESA that “offers an avenue to authorize activities that would otherwise be prohibited.”<sup>144</sup> Pursuant to this authority, the FWS can reintroduce “populations established outside the species' current range, but within its historical range, as ‘experimental’” populations.<sup>145</sup> Additionally, if the species is determined to be nonessential—meaning that the experimental population would not be essential for the continued existence of the species—the FWS may test new ideas that would normally violate the ESA because there is no risk of destroying the species.<sup>146</sup> This gives the FWS flexibility to try out new strategies, like collaborative management. Therefore, the FWS could use this clause as an avenue to implement collaborative-management agreements with private landowners and see what processes work best in different environments. The only downside to using this clause is that it is a long process, probably requiring a concerted effort over decades. However, despite the lengthy process, this is arguably the best way for the FWS to begin collaboratively working with private landowners with little risk of violating the ESA or the regulations already in place.

Additionally, the FWS can use collaborative management as a type of “half-way” house for recovering species, like the gray wolf. Just because a species has recovered per FWS standards does not mean that the species will not end up back on the endangered species list. In fact, legislation in Idaho has the potential to possibly reduce the gray wolf population to a level where the species could end up listed as endangered or threatened again. Therefore, the FWS could use collaborative management to ensure that private landowners and species

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144. *Endangered Species Act: Experimental Populations*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/verobeach/FloridaPantherRIT/20150819%2010j%20Experimental%20Population%20Fact%20Sheet.pdf> (last visited Mar. 10, 2018) [<https://perma.cc/BG9S-H84G>].

145. *Id.*

146. *Id.*

interact in such a way that, once a species is removed from the endangered or threatened species list, the species does not get listed again. Like environmental groups who are already working with ranchers to develop alternative ways to deal with wolves interfering with livestock, the FWS could work with private landowners through agreements to develop ways that would allow private landowners to use their land while ensuring that the species stays off the endangered species list for good.

## VI. CONCLUSION

Without the ESA, the United States would probably have lost hundreds of species—if not more—over the past few decades. Therefore, the ESA is necessary to protect the nation's biodiversity. However, just because something is good, does not mean it cannot become better. The ESA's stringent standards are important to ensuring the protection and recovery of species; however, they disproportionately affect private landowners. The FWS can implement the ESA in a way that works for private landowners and species by moving away from a top-down regulatory model that agencies have traditionally used, to a more collaborative model that takes the interests of various stakeholders into account. By implementing collaborative management through programs such as the experimental populations clause or even by creating a half-way house for recovering species, the FWS can more effectively protect species while simultaneously incentivizing private landowners and allowing them to have more control over their land.