Texas A&M Journal of Property Law

Volume 9
Number 1 *Student Articles Edition*

Article 6

4-5-2023

Species Survival or the "3S Method"? How the Endangered Species Act Disincentivizes Landowner Cooperation and Threatens the Species It Supposedly Saves

William Edward Mahaffy
Texas A&M University School of Law (Student), willmahaffy@tamu.edu

SPECIES SURVIVAL OR THE "3S METHOD"? HOW THE ENDANGERED SPECIES ACT DISINCENTIVIZES LANDOWNER COOPERATION AND THREATENS THE SPECIES IT SUPPOSEDLY SAVES

William Edward Mahaffy[†]

Abstract

The Endangered Species Act (ESA) places restrictions on landowners when their property harbors endangered species. Though well-intentioned as a method of promoting species recovery, these restrictions actually have the reverse effect. Instead of accepting ESA regulations, landowners secretly eliminate endangered species from their property in what is colloquially known as "shoot, shovel, and shut up." Collaboration between landowners and agencies is essential for species preservation. This Article illustrates the collaboration options, some within the limits of the ESA and others requiring its reform. The four options analyzed are (1) landowner peer review of species listing procedures, (2) congressional clarification of listing standards, (3) creation of a public trust for endangered species stewardship, and (4) formation of landowner-run regulatory entities with established standards reviewable by agencies.

DOI: https://doi.org/10.37419/JPL.V9.I1.6

[†]I am a J.D. Candidate at Texas A&M University School of Law with a graduation date of May 2023. I would like to thank Professor Vanessa Casado Perez, my faculty advisor, for her support and dedication to me as a student. I also would like to thank Dylan Campbell, my note-and-comment editor, for his help throughout the writing process. Lastly, I would like to Ana Moreno, the Executive Editor of the Texas A&M Journal of Property Law, for her organizational skills in making the writing process flow smoothly.

I. INTRODUCTION

"As the one person in Congress, the only one, that voted for the Endangered Species Act, please beat me with a whip."
–Representative Don Young, Alaska.[1]

Indeed, Representative Young's comment echoes the striking limitations of the Endangered Species Act ("ESA"). As it approaches its fiftieth anniversary in 2023, the ESA remains "one of the most contentious of our federal environmental laws."[2]

Though signed into law with charismatic species like bald eagles and grey wolves in mind, the ESA has since affected landowners' use of their property to protect obscure wildlife like the American burying beetle, Preble's meadow jumping mouse, and Hine's emerald dragonfly.[3] This, in and of itself, is not a bad thing: the more endangered species the ESA can shepherd into its flock, the better. That said, the ESA's intense restrictions on landowners have made enemies out of the very people needed for species recovery.[4]

For example, take the case of Edward Poitevant, a commercial timber farmer in St. Tammany Parish, Louisiana.[5] The U.S. Fish and Wildlife Service ("FWS") classified 1,500 acres of his land as critical habitat for the dusky gopher frog, discounting the frog's absence in the locale for over fifty years.[6] Poitevant stood to lose $34 million in property value, despite the virtual impossibility of the frog's recolonization of the region

1. Shawn Regan, *For the Survival of the Animals, It's Time to Update the Endangered Species Act*, THE DALLAS MORNING NEWS (Sept. 23, 2018), https://www.dallasnews.com/opinion/commentary/2018/09/23/for-the-survival-of-the-animals-it-s-time-to-update-the-endangered-species-act/ [https://perma.cc/SMT2-AXAL].

2. Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, 1162 ANNALS OF THE N.Y. ACAD. OF SCIS. 369 (2009).

3. Regan, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

since the amphibian cannot survive in a heavily forested habitat.[7] To highlight the absurdity of this situation, designating Poitevant's land as critical habitat for the dusky gopher frog is no different than restricting homeowners in Oklahoma City from using their land since grizzly bears once lived where the city now sits.[8]

ESA restrictions encourage landowners to "shoot, shovel, and shut up" ("3S method").[9] The premise of the 3S method is landowners have an incentive to kill endangered animals, bury them, and stay quiet, so authorities will not condemn their land for species conservation. The 3S method encompasses any action a landowner may take to kill, harm, interfere with, or dissuade an endangered species from occupying the landowner's property. For example, it encompasses destroying critical habitat for endangered species, as seen with the red-cockaded woodpecker, where landowners deliberately logged trees on their property as a preventative measure to keep the birds from nesting in the area and interfering with their operations.[10] Former FWS director Sam Hamilton said it best: "If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears."[11]

Reconciling the economic interests of landowners with the need for habitat preservation for endangered species is the optimal outcome to improve the effectiveness of the ESA.[12] To eradicate the 3S method, though, it is necessary to understand the way the ESA punishes landowners for having endangered species on their property.

First, this Article will examine the motivating factors behind the FWS Secretary's strict application of the ESA to landowners. As a side note, the Secretary of the National Marine Fisheries Service ("NMFS") is responsible for managing oceanic species and would have little influence on landowners unless oceanic species, such as salmon, swam upstream and entered their property.[13] Therefore, for the purposes of

7. *Id.*

8. Josh Burnham & Nick Mott, *Timeline: A History of Grizzly Bear Recovery In The Lower 48 States*, MONT. PUB. RADIO (Nov. 2, 2021, 11:17 AM), https://www.mtpr.org/montana-news/2021-04-02/timeline-a-history-of-grizzly-bear-recovery-in-the-lower-48-states [https://perma.cc/ZU9U-QGYS].

9. Regan, *supra* note 1.

10. Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J.L. & ECON. 27, 27–60 (2003).

11. Betsy Carpenter, *The Best-Laid Plans*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 89.

12. Deanne M. Barney, *The Supreme Court Gives an Endangered Act New Life: Bennett v. Spear and Its Effect on Endangered Species Act Reform*, 76 N.C. L. REV. 1889, 1890 (1998).

13. *NOAA Fisheries*, USA.GOV (Feb. 20, 2022), https://www.usa.gov/federal-agencies/noaa-fisheries [https://perma.cc/A9ZN-U8ZP].

this Article, the term "Secretary" will refer to the FWS Secretary. Second, this Article will identify how critical habitat designation influences landowners' adoption of the 3S method. Third, it will describe tools the Secretary may use to incentivize landowner cooperation. Finally, it will identify policy choices designed to bridge the gap between the Secretary and landowners, empowering the ESA to better accomplish its ultimate goal of species preservation.

II. THE SECRETARY'S PERSPECTIVE

Supporters of the ESA are reluctant to accommodate landowners, fearing compromises will negate their hard work for species recovery.[14] From the Secretary's perspective, giving landowners unlimited discretion on their property, regardless of the effect on endangered species, will imperil the last bastions of unperturbed habitat. Nowhere is the realization of the Secretary's fears more apparent than in failed species relocation efforts.[15]

To begin, a brief background on species relocation is in order. As urban sprawl increases, the nation's population encroaches on wilderness. As a society, Americans do not like the idea of losing endangered species. However, they find the prospect of losing shopping malls and restaurants equally distasteful. Accordingly, government agencies have responded to this dilemma by uprooting endangered species from their natural habitats and placing them in new ecosystems that often consist of less economically-desirable land.[16] In this way, the government can continue to develop desirable land while placating the concerns of Americans who fear losing wildlife. After all, for most Americans, as long as an endangered species is safe on land *somewhere*, it really does not matter if it is safe on land in its original range. And thus, the species relocation movement was born.[17]

This movement is problematic because administrators make value judgments regarding which species to relocate.[18] As a society, there are insufficient resources to move all species threatened by urbanization.[19] Accordingly, the government relocates charismatic species without considering their nexus to less-desirable ones.[20] In doing so, it fails to

14. Barney, *supra* note 12, at 1891.
15. Karen Bradshaw, *Expropriating Habitat*, 43 HARV. ENV'T. L. REV. 77, 91–92 (2019).
16. *Id.* at 78–79.
17. *Id.* at 81.
18. *Id.* at 84.
19. *Id.*
20. Jonathan H. Alder, *The Leaky Ark: The Failure of Endangered Species Regulation*

aid species recovery, as moving one without the other imperils both species.

To illustrate, the moose is a charismatic species and symbol of the American West, while the beaver is a less-popular rodent labeled a pest for its destructive engineering tendencies. Though neither moose nor beavers are endangered, their symbiotic relationship is perfect for a hypothetical. If the government relocated moose, placing them in a new region without beavers, the moose would struggle to adapt.[21] By damming running water, beavers create a riparian habitat for a plethora of species, including moose.[22] Moose stay near water sources to graze aquatic vegetation and remain cool during the summer months.[23] Accordingly, species relocation projects fail if they do not consider a charismatic species' relationship to other species.

Another issue with species relocation is habitat degradation in the new ecosystems where the government moves endangered species.[24] Today, a relocation effort may be brewing for the wolverine, the largest terrestrial member of the *mustelid* (weasel) family.[25] Wolverines are built for the deep snow: their wide feet act like snowshoes, enabling them to trek across the tundra with ease.[26] In spite of glacial recession and increased snowmelt, wolverines are not a protected species.[27] Today, should the government decide to relocate wolverines from Canada to the United States to bolster their numbers in the lower 48 states, the animals would not thrive in areas they historically occupied, such as the Colorado Rockies and the California Sierra Nevada mountain ranges, due to overall habitat degradation in those areas.[28]

Placing endangered species in suboptimal new habitats is careless and violative of the major premise of the ESA, since "shifting endangered species to lower-value lands . . . promot[es] long-term habitat

on Private Land, *in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SP ECIES ACT REFORM 6, 20 (Jonathan H. Adler ed., 2011) [hereinafter *The Leaky Ark*].

21. Carrie Chandler, *Where Beaver Lead, Moose Follow*, NORTHERN WOODLANDS (May 21, 2006), https://northernwoodlands.org/outside_story/article/where-beaver-lead-moose-follow [https://perma.cc/7KW4-LNWT].

22. *Id.*

23. *Id.*

24. Rachel Fritts, *'Heads in the Sand': Conservationists Condemn US Failure to Protect Wolverines*, THE GUARDIAN (Oct. 12, 2020 at 6:00 p.m. EDT), https://www.theguardian.com/environment/2020/oct/12/wolverines-endangered-species-act-us-fish-wildlife [https://perma.cc/W9DV-M84L].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

destruction that will slowly lead to increased species loss."[29] Given the failures of species relocation,[30] and that most endangered species today live on private property,[31] the Secretary understandably wants to increase ESA restrictions on landowners. Without preserving habitats on private land, the Secretary fears sole reliance on national parks and public lands will insufficiently curb species extinction.[32] As such, the Secretary feels compelled to strictly construe ESA provisions against any landowner action that may affect the viability of endangered species.

Such a reaction is logical. However, the Secretary's punishment is too severe on landowners, who may be entirely enjoined from carrying on their livelihoods. That being said, landowners should not have a complete mulligan to ignore the history of species relocation failures and obstinately dismiss the Secretary's valid concerns.

Before bridging the gap between landowners and the Secretary and reconciling the concerns of both parties, it is necessary to examine how critical habitat designation incentivizes landowner adoption of the 3S method.

III. CRITICAL HABITAT DESIGNATION

The overall goal of the ESA is to "protect endangered and threatened species, and then pursue their recovery and conserve candidate species and species-at-risk so that listing under the ESA is not necessary."[33] However, the number of listed species is increasing, and if the stated purpose of the ESA is indeed species recovery, then its effectiveness is dubious at best.[34]

Although admirable, the ESA's goal neglects to address the effect on landowners resulting from income and property value losses.[35] In his dissenting opinion for *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, Justice Antonin Scalia summed up the plight of the

29. Bradshaw, *supra* note 15, at 108.
30. *Id.* at 85.
31. Alder, *supra* note 20, at 6–7.
32. Bradshaw, *supra* note 15, at 87.
33. Megan E. Jenkins, Jennifer Morales, Rebekah Yeagley & Sarah Bennett, *Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species*, THE CTR. FOR GROWTH & OPPORTUNITY AT UTAH STATE UNIV. (Nov. 29, 2018), https://www.thecgo.org/research/cooperative-conservation-determinants-of-landowner-engagement-in-conserving-endangered-species/ [https://perma.cc/K8LH-BADY].
34. Alder, *supra* note 20, at 9–10.
35. Jenkins et al., *supra* note 33.

landowner succinctly: "The Court's holding . . . imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."[36] To analyze Justice Scalia's bold claim, the ESA's process for critical habitat designation, and its relationship to the ESA's Section 9 taking prohibition, merit discussion.[37]

As a hypothetical, assume a South Dakota landowner with hydraulic fracturing operations on his property discovers an endangered black-footed ferret near his drill and notifies the Secretary for critical habitat designation purposes.[38] Under the ESA, critical habitat is defined as "specific areas within the geographical area occupied by a species" deemed "essential to the conservation of the species" and "which may require special management considerations or protection."[39]

Such a broad definition of critical habitat makes its designation highly discretional, as the Secretary may choose to classify a landowner's entire property as critical habitat. Right now, if the Secretary concludes landowners (1) have endangered species, (2) might have endangered species, or (3) might *someday* have endangered species on their land, the Secretary may restrict landowners' economic use of their property without compensating them.[40] Unsurprisingly, given the arbitrary nature of the Secretary's decisions, critical habitat designations do not always aid species recovery.[41]

Similarly, without adequate funding, many critical habitat designations merely pay lip service to species recovery.[42] In a sense, funding tells landowners how "sharp" the Secretary plans to make the ESA's "teeth." The more funding allocated to a species, the more landowners may assume they will be restricted in the use of their property. In the absence of funding, landowners may not see the method the Secretary plans to use to enforce ESA provisions against them, which may result in their decision to kill endangered species on their property

36. *Id.*

37. Laurence Michael Bogert, *That's My Story and I'm Stickin' To It: Is the "Best Available" Science Any Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85, 89–90 (1994).

38. *Id.* at 94.

39. Sam Kalen, *Landscape Shifting Paradigm for the Endangered Species Act: An Integrated Critical Habitat Recovery Program*, 55 NAT. RES. J. 47, 58–59 (2014).

40. Randal O'Toole, *Save the Endangered Species Act with Common Sense*, WASH. EXAM'R (Aug. 20, 2019, 12:00 AM), https://www.washingtonexaminer.com/tag/donald-trump?source=%2Fopinion%2Fsave-the-endangered-species-act-with-common-sense [https://perma.cc/K3NY-6X8N].

41. Alder, *supra* note 20, at 11–12.

42. *Id.* at 13.

rather than face the uncertainty of potentially stringent ESA regulation.[43]

Furthermore, pursuant to ESA Section 9's take prohibition, severe habitat modification is a taking, which likely encompasses a landowner's operations at the time of the Secretary's critical habitat designation.[44] The Secretary has wide latitude in interpreting "severe," and without a list of actions constituting severe habitat modification, landowners are at the Secretary's mercy with nothing to gain by reporting endangered species on their property.

To make matters worse for landowners, opponents of their agricultural, ranching, mining, and industrial operations sometimes weaponize the highly-discretionary nature of critical habitat designation to accomplish non-species-related objectives.[45] As long as the Secretary relies on the "best scientific and commercial data" available, the Secretary may enjoin landowner activities.[46] This remains true even if the "best scientific and commercial data" available is susceptible to political influence and bears little connection to proven scientific fact or is, quite simply, conjecture.[47]

Since the ESA never defines what "best scientific and commercial data" available means, parties interested in weaponizing the ESA to hurt landowners use this information to their advantage when arguing before the Secretary about the need for a new critical habitat designation.[48] Opponents to landowner initiatives may have an incentive to be overly zealous in reporting actions that may harm endangered species, regardless of the factual basis for their assertions.[49] After all, the "best scientific and commercial data" available might be one piece of evidence showing a species may be jeopardized by land development, even if that evidence is largely unsubstantiated by other findings. For example, the decision to list the northern spotted owl was not predicated on fostering the bird's recovery but rather on preserving old-growth forests.[50] Given the ambiguity of "best scientific and commercial data" available, landowners who attempt to rebut

43. *Id.*

44. Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENV'T. L. 369, 378–79 (1994).

45. Bogert, *supra* note 37, at 142.

46. *Id.*

47. Alder, *supra* note 20, at 20–21.

48. Bogert, *supra* note 37, at 142.

49. *Id.*

50. Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 53 (1993).

Secretarial conclusions made under this vague criterion are rarely successful.[51]

Accordingly, the ESA's critical habitat designation scheme places the burden of species recovery squarely on landowners' shoulders.[52] This is troubling, considering many landowners actually would be willing to cooperate with conservation efforts if they did not bear the brunt of the costs.[53] Even if the Secretary is well-intentioned in designating critical habitat, the ESA's goal of species recovery is not furthered through the critical habitat designation process since it leaves landowners in an unwinnable situation. If they comply with ESA regulations and report a species to the Secretary, landowners must cease operations pursuant to the Secretary's whims. On the other hand, if they fail to report a species, landowners violate the law. As evidenced by the lower quality habitat for, and the worsening condition of, species existing solely on private lands,[54] many landowners have resorted to eliminating the source of the turmoil altogether through the 3S method.[55]

The reason landowners adopt the 3S method boils down to the following inquiry: If endangered species are public goods, why are landowners not compensated, instead of punished, for being stewards of the animals on their property?[56] After all, society benefits from a diverse array of species and habitat preservation at landowners' expense, as half of the listed species occupy private lands for eighty percent or more of their range.[57] Placing the burden on landowners minimizes their important role in species conservation, since they can report changing conditions on their property that affect species' survival.[58] In fact, private landowners may be the only ones aware of a species' existence in a region.[59] On the contrary, the Secretary, without close contact with an endangered species, is less likely to be aware of environmental conditions that may augment or impede its recovery.[60]

To remedy this ill, the Secretary should place greater weight on the required analysis of socioeconomic costs during critical habitat designation.[61] Specifically, a habitat that is no longer viable, as with

51. Bogert, *supra* note 37, at 144.
52. O'Toole, *supra* note 40.
53. Alder, *supra* note 20, at 18.
54. *Id.* at 13–15.
55. Jenkins et al., *supra* note 33.
56. *Id.*
57. *Id.*
58. *Id.*
59. Alder, *supra* note 20, at 20.
60. Jenkins et al., *supra* note 33.
61. Kalen, *supra* note 39, at 101.

Poitevant's land, should be excluded from critical habitat designation.[62] This would at least make the ESA's implementation more intuitive for landowners. After all, landowners subjected to adverse regulations are more likely to comply if those regulations seem logical. Accordingly, an easy way for the Secretary to garner more landowner support is to cease all critical habitat designations for non-viable ecosystems.

Also, the Secretary could subsidize landowners for allowing endangered species to live on their property.[63] Compensation might take the form of funds given to landowners in exchange for their protection of the public good.[64] To determine the appropriate amount of subsidy, the Secretary could use a *Penn Central* balancing test.[65] Such an analysis would examine the nature of the regulation itself, the economic burden placed on landowners, and landowners' investment-backed expectations all weighed against the need for critical habitat designation in the first place.[66]

To illustrate, assume an endangered raptor occupies a narrow ecological niche, and the Secretary is debating whether to fully or partially designate a landowner's property as critical habitat. The greater the economic burden on the landowner, the higher the probability the Secretary should designate only the part of the property where the raptor lives as critical habitat. Thus, a balancing test ensures landowners' economic interests are not marginalized and remain relevant in critical habitat designations.

To aid balancing efforts, the FWS should provide the Secretary with a list of identifiable, descriptive measures landowners have taken in the past that qualified as severe habitat modification. Armed with examples, the Secretary would be able to make informed decisions in future critical habitat designations.

Aside from improving the critical habitat designation process, the Secretary should also implement tools to specifically incentivize landowner compliance with the ESA.

62. Regan, *supra* note 1.
63. Alder, *supra* note 20, at 18–19.
64. *Id.* at 23.
65. Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118:3 PENN. STATE L. REV. 601, 604 (2013).
66. *Id.* at 604.

IV. THE SECRETARY'S TOOLBOX

In examining the Secretary's toolbox, it is important to remember that the majority of landowners support species recovery efforts.[67] In fact, absent ESA restrictions, many landowners would engage in active species conservation.[68] In two different surveys, one in Kansas and the other in the southeastern United States, one-third of landowners listed their reason for not participating in conservation programs as fear of governmental control.[69] Additionally, in another survey involving the threatened Utah prairie dog, many landowners were willing to let prairie dogs destroy part of their property if the landowners received compensation.[70]

However, compensation alone may prove inadequate encouragement for landowners without Secretarial assurances against future regulation.[71] Accordingly, resources for endangered species conservation should go to a myriad of incentive programs for landowners instead of toward punishing them for noncompliance.[72] As long as the ESA punishes landowners, they will resist species recovery efforts.[73]

The Secretary has four main tools to incentivize landowner responses that align with the ESA's goals: (1) safe harbor agreements, (2) candidate conservation agreements, (3) habitat conservation plans and exchange programs, and (4) the Conservation Reserve Board.[74]

A. *Safe Harbor Agreements*

First, the Secretary may encourage landowners to enter safe harbor agreements, which exist where landowners agree to conservation measures in exchange for Secretarial assurances that no further restrictions will be imposed upon them, even if the landowners' efforts are highly successful and lead to many endangered species occupying their land.[75] Though helpful, safe harbor agreements do not completely

67. Jenkins et al., *supra* note 33.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. Alder, *supra* note 20, at 14–15.
74. Jenkins et al., *supra* note 33.
75. *Id.*

alleviate the burden of extensive ESA regulations.[76] Unless coupled with other tools, safe harbor agreements will likely be insufficient.[77]

B. *Candidate Conservation Agreements*

Second, the Secretary may sanction candidate conservation agreements, which focus on the preemptive recovery of candidate species not yet, but likely to be, listed.[78] For instance, in 2010, the Secretary identified the greater sage-grouse as "warranted but precluded," meaning the bird merited listing if the Secretary did not have to list other more endangered species first.[79] Since the greater sage-grouse lives in 11 states across the American West, landowners in that region collaborated to form candidate conservation agreements called grouse management plans.[80] The landowners worked alongside the Sage-Grouse Initiative of the National Resources Conservation Service to voluntarily set aside 4.4 million acres.[81] Their efforts, combined with Secretarial support, resulted in the announcement that the greater sage-grouse no longer required listing as of 2015.[82]

However, opponents believe candidate conservation agreements allow the Secretary to delegate too much authority to landowners and consider politics instead of endangered species' best interests.[83] To opponents, candidate conservation agreements permit Secretarial overreliance on landowner plans, making the ESA susceptible to less rigorous standards and potentially imperiling species.[84]

For instance, opponents decry an FWS decision in 2004 where the Secretary refrained from listing the slickspot peppergrass plant, in spite of the plant's sixty-four percent chance of extinction, because of a landowners' candidate conservation agreement.[85] Ultimately, their concerns proved valid, as the court held that the "FWS should have erred on the side of caution, when the best available scientific data indicated that extinction of the slickspot peppergrass was likely."[86]

76. Alder, *supra* note 20, at 17.
77. *Id.*
78. Jenkins et al., *supra* note 33.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Daniel J. Rohlf, *The Endangered Species Act at Forty: The Good, The Bad, and The Ugly*, 20 LEWIS & CLARK ANIMAL L. REV. 251, 259–60 (2014).
84. *Id.*
85. *Id.* at 260.
86. *Id.*

C. *Habitat Conservation Plans*

Third, the Secretary may use habitat conservation plans ("HCPs") to incentivize landowners who mitigate harm to listed species. [87] With HCPs, landowners implement recovery strategies to compensate for actions they take that adversely affect species.[88]

In addition to identifying species recovery strategies in their HCPs, landowners must also list rejected alternatives deemed unsuitable for species conservation.[89] When seeking approval of their HCPs, landowners should rebut certain alternatives that are suboptimal.[90] Additionally, landowners may supply an environmental impact statement if their actions "significantly affect the quality of the human environment."[91] In return for their actions, landowners receive a Secretarial "no surprises assurance" promising they will not face additional regulations.[92]

For example, in *Defenders of Wildlife v. Jewell*, Texas landowners formed an HCP with New Mexico involving the dunes sagebrush lizard in the Permian Basin, attempting to show the lizard did not require listing.[93] After careful examination of the HCP, the Secretary altered course, reasoning the states' conservation efforts sufficiently protected the lizard.[94] The landowners' plan resulted in ninety-five percent preservation of the lizard's New Mexico habitat and twenty-eight new locations in Texas the lizard colonized.[95]

In deciding not to list the lizard, the Secretary relied "solely on the basis of the best scientific and commercial data available" and continually assessed the "progress of implementation and effectiveness of the conservation effort" to ensure the future success of the Texas-New Mexico HCP.[96] Without the HCP, the Secretary would have seen oil and gas development in the region as a greater threat to the lizard's survival than what was actually the case.[97]

87. Jenkins et al., *supra* note 33.
88. *Id.*
89. Bogert, *supra* note 37, at 114.
90. Jenkins et al., *supra* note 33.
91. Bogert, *supra* note 37, at 115.
92. Jenkins et al., *supra* note 33.
93. Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell, 815 F.3d 1, 3 (D.C. Cir. 2016).
94. *Id.*
95. *Id.* at 6.
96. *Id.* at 4.
97. *Id.* at 7.

Also, HCPs allow landowners to apply for incidental take permits.[98] Section 10 of the ESA identifies situations where non-governmental entities, like landowners, may take listed species during the commission of otherwise lawful activities.[99] However, these exemptions apply only after a landowner completes an HCP.[100] Should the Secretary deem a landowner's HCP sufficiently provides for a species and does not affect its overall viability, he or she will issue an incidental take permit, which grants the landowner permission to continue unfettered operations.[101]

Similar in function to HCPs are habitat exchange programs.[102] Habitat exchange programs allow landowners to mitigate the impact in one part of a species' habitat by improving another part of the species' habitat.[103] For example, the Monarch Butterfly Habitat Exchange encourages farmers and ranchers to plant milkweed, the butterfly's favorite food, on their property.[104] In doing so, the landowners receive credits through the habitat exchange program, which they, in turn, may sell to agribusinesses, food companies, or chemical companies that might not be able to meet their anti-pollution goals and need to acquire credits to comply with environmental regulations.[105] These credits financially compensate landowners with an "environmental currency" for allowing endangered species on their land, thus making landowners inclined to protect species.[106]

D. *Conservation Reserve Program*

Fourth, the Secretary may compensate landowners through the Conservation Reserve Program.[107] The Program is designed to decrease agricultural use of private lands susceptible to soil erosion.[108] In doing so, it also aids species recovery.[109] Landowners receive annual

98. Jenkins et al., *supra* note 33.
99. Bogert, *supra* note 37, at 114.
100. *Id.*
101. *Id.* at 113.
102. Megan Ingram, *The Endangered Species Act in Texas: A Survey and History*, TEX. PUB. POL'Y FOUND. (Feb. 2018), https://www.texaspolicy.com/the-endangered-species-act-in-texas-a-survey-and-history/ [https://perma.cc/X7L7-8DSW].
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. Jenkins et al., *supra* note 33, at 7.
108. Raymond J. Watson, Jr., *Conservation Reserve Program: What Happens to the Land After the Contracts End?*, 14 N. ILL. U. L. REV. 733, 734 (1994).
109. Jenkins et al., *supra* note 33, at 7.

compensation for their abstinence.[110] However, landowner agreements typically end after ten years, raising the issue of whether, after that time, landowners may resume activities that still might adversely affect species.[111] Additionally, since the Program does not specifically focus on endangered species, strengthening its focus in this area would yield greater conservation benefits than it currently provides for imperiled species.[112]

V. WHICH TOOL TO USE

The Secretary should choose among the above four tools based on past success stories, looking to defuse tense confrontations with landowners. One such success story is that of the grizzly bear.

In the past, many ranchers opposed grizzly bear conservation, as bear attacks often led to killed, overly stressed, or infertile livestock.[113] Furthermore, bear prevention measures, like electric fencing or guard dogs, cost thousands.[114] Landowners argued the Secretary's allowing bears to kill their livestock was a governmental taking.[115] According to them, reintroduced species in the species' former ranges become "instrumentalities of the government."[116]

Despite the tension between landowners and the Secretary, local conservation groups like the Blackfoot Challenge in Montana, independent of the FWS, largely remedied the situation by compensating ranchers for the construction of electric fencing and other preventative measures.[117] This led to a 75% reduction in rancher-bear conflicts from 2003 to 2012.[118]

Accordingly, when faced with similar future circumstances, the Secretary should examine the past successes of private conservation groups, like the Blackfoot Challenge, when deciding which tool to implement to incentivize landowners to participate in species recovery. If the Secretary faces a dilemma like the bear-rancher conflict, the

110. *Id.*
111. Watson, *supra* note 108, at 733–34.
112. Jenkins et al., *supra* note 33, at 7.
113. Aaron Bolton, *Montana Ranchers Learning to Live with Grizzly Bears*, GREAT FALLS TRIBUNE (Mar. 28, 2020 at 10:42 a.m.), https://www.greatfallstribune.com/story/outdoors/2020/03/28/montana-ranchers-learning-live-grizzly-bears/2933071001/ [https://perma.cc/R3XU-HQDB].
114. *Id.*
115. Meltz, *supra* note 44, at 393.
116. *Id.* at 396.
117. Bolton, *supra* note 113.
118. *Id.*

Secretary would be wise to compensate landowners through the Conservation Reserve Program. Additionally, the Blackfoot Challenge's success parallels the implementation of a habitat conservation plan, yet another tool worth Secretarial consideration.

VI. WHEN ACCOMMODATING LANDOWNERS BACKFIRES

However, when using the four tools to analyze economic concerns, the Secretary should be careful not to go too far in accommodating landowner desires. The state of Texas offers such an example.[119] Despite the ESA's instruction to protect imperiled species at whatever the cost, in Texas, economic concerns are a higher priority than species preservation.[120] Texas is unique as the only state in the country where its top financial officer and representor of landowner interests, the Comptroller, decides issues related to species protection.[121] This policy has emboldened landowner resistance and increased pushback to initial listings.[122]

For instance, David Frederick, the FWS's chief Texas agent from 1998 to 2002, claims he was "banished" to the Albuquerque office when he refused to agree to a Texas plan he found biologically insufficient to protect the Houston toad.[123] Concerned about the potential classification of large swaths of the Hill Country as critical habitat, landowners even sent death threats to one of Frederick's predecessors.[124] Likewise, in 2012, the Comptroller and the Secretary ceased collaboration altogether over the Secretary's attempt to list the dunes sagebrush lizard in the Permian Basin (see above),[125] one of Texas's most economically productive regions.[126]

Texas's hostility is not unwarranted, given the ESA's history of landowner restrictions. However, in-state resistance will exacerbate the state's problems. Although Texas landowners might applaud the Comptroller's efforts, such reactions are myopic. Ultimately, landowner

119. Asher Price & Eric Dexheimer, *How Texas Fights Endangered Species Protections, Critter by Critter*, THE STATESMAN (Sept. 25, 2018, 12:07 PM), https://www.statesman.com/news/20180409/how-texas-fights-endangered-species-protections-critter-by-critter [https://perma.cc/HDK8-HHPU].
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Defs. of Wildlife*, 815 F.3d at 1, 3.
126. Price et al., *supra* note 119.

resistance is likely to result in either congressional reform of the ESA or entirely new, less-favorable legislation to landowner interests.

Currently, those who favor stricter endangered species protection believe the ESA's potency has become diluted.[127] They find the FWS listing process problematic, since the agency does not have "identifiable standards for making listing determinations."[128] Consequentially, when finalizing listing decisions, the Secretary may listen to those without species' best interests at heart.[129]

As a result, a movement to expand ESA dominion to address critical habitat concerns in tandem with climate change is underfoot.[130] Under this new approach, the ESA in its current form is "necessary but not sufficient to protect biodiversity."[131] If adopted, such an expansion would devastate landowners, who would be wise to accept the current ESA-imposed restrictions on their land use, as distasteful as the restrictions may be, to avoid more constricting generalized legislation in the future.

To illustrate, right now, the ESA may require landowners to cede certain economic uses of their property. That is harmful enough. However, if landowners obstinately fight ESA encroachment on their property rights, they will embolden ESA advocates to try to get legislation passed that is generalized to all landowners instead of specific to individual landowners. This generalized legislation would not simply apply to landowners with endangered species on their land but also to landowners whose actions might detrimentally impact the endangered species living in the greater environmental community. The easiest way to enjoin landowners from operations that might affect endangered species is using climate change as a scapegoat to say that landowner agricultural and ranching practices increase emissions and, therefore, should be curtailed, regardless of whether endangered species live on their property.

Such generalized ESA regulation would have far-reaching repercussions. As a hypothetical, imagine a dairy farmer who allows manure to leak into a watercourse, harming an endangered species of mussel. Under a generalized approach, not only would the dairy farmer be responsible for the harm caused to the mussel, but he would also be

127. Rohlf, *supra* note 83, at 275.
128. *Id.* at 259–60.
129. *Id.*
130. J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENV. L. & POL'Y F. 275, 276–77 (2009).
131. Rohlf, *supra* note 83, at 274.

responsible for all of his cattle's emissions that might lead to climate change that could affect any and all endangered species in the greater environmental community. Generalized restrictions likely would bankrupt many agricultural and ranching operations across the nation. Likewise, a logger is hurt when he has to curtail activity on a portion of his land where an endangered bird lives. However, his injury pales in comparison to the injury he would suffer if the ESA expanded its reach to include the effect of logging on climate change or logging's detrimental effect on carbon sequestration in relation to species recovery.

Therefore, as the Secretary should not rigidly disregard landowner concerns, landowners should also respect the FWS's habitat conservation agenda. As such, any reform to the ESA must address both landowner interests and aid species recovery. The state of Texas offers a great petri dish to study the positive effects of cooperation between landowners and the Secretary going forward, as well as the previous negative interactions between the two parties. If the Secretary can reconcile differences with Texas landowners, who live in a state rife with past conflicts, then the Secretary will likely find collaborating with landowners in other states with less tumultuous histories much easier. Get Texas on board, and the Secretary will have an excellent insight into how to structure future cooperation efforts between the FWS and landowners nationwide.

VII. BRIDGING THE GAP BETWEEN THE SECRETARY AND LANDOWNERS

To remedy the existing conflict and bridge the gap between the Secretary and landowners, solutions must benefit both parties. The following analysis describes five policy solutions that would empower the Secretary to better accomplish the ESA's goal of species preservation and recovery, all the while giving landowners more say in the matter: (1) landowner peer review of species listing procedures, (2) congressional clarification of listing standards, (3) creation of a public trust for endangered species stewardship, and (4) formation of landowner-run regulatory entities with established standards reviewable by agencies.

A. *Landowner Peer Review of Species Listing Procedures*

Right now, prior to listing a species, the Secretary undergoes a peer review process of FWS data used to support the initial species

classification as endangered or threatened.[132] Subsequently, the Secretary fully discloses the data to the public and provides reasons for listing certain species.[133] Though this measure increases transparency and helps the public more clearly identify which animals need protection, it is still limiting, as it does not specifically incorporate landowners.[134]

Accordingly, the first policy solution to fully address the inadequacies of the ESA should be a landowner peer review process for species listing procedures. If a species is "on the fence" for listing, landowners could provide valuable insight into the actual peril the species faces. For example, if a landowner sees a species only occupying a particular region of the landowner's property, this information might be useful to the Secretary. Collaboratively, the landowner and Secretary could create an isolated conservation strategy for a particular area of the property without completely usurping the landowner's right to use the property as a whole. By working together, they might keep borderline species from ever being listed, and the ESA does not limit landowner actions for unlisted species.[135]

In turn, to ensure landowners do not falsify their reports regarding species present on their property, the Secretary could organize periodic, unannounced audits to examine the condition of endangered species populations and habitats on private lands. Landowners whose reports align with the figures that regulators collect could continue their operations. On the contrary, landowners whose reports do not align with regulators' figures would lose the ability to operate on their land if their land constituted critical habitat or pay fines if the species in question did not quite require ESA listing.

B. *Congressional Clarification of ESA Listing Standards*

A second policy solution is congressional clarification of the ESA's threshold for initially listing a species by providing more concrete prerequisites for listing other than simply the "best available information" regarding species welfare.[136] After all, "best" does not mean good: it only means better than the next best option, which might

132. Bogert, *supra* note 37, at 144.
133. *Id.* at 147.
134. *Id.*
135. Robert L. Fischman, Vicky J. Meretsky & Matthew P. Castelli, *Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations*, 38 YALE J. ON REG. 976, 979–80 (2021).
136. Bogert, *supra* note 37, at 147.

be non-existent or downright bad.[137] If Congress modifies the ESA language from "best" available data to a more concrete description, then the Secretary can better manage landowner expectations. In the past, the government has obscured the costs and benefits of listing species from the public.[138] If Congress clarified its listing standards, the government would have to relay the effects of its listing decisions to the public.[139] Public awareness of the costs and benefits of species listings would ensure a better understanding of the ESA as a whole and lead to better decision-making.[140]

As a hypothetical, assume Congress creates a three-tiered system for the appropriateness of ESA listings. Under such a system, the ESA might have low, medium, and high priorities for listing species based on population numbers and critical habitat fragmentation. When the Secretary takes a portion of a landowner's property, the landowner would likely be more compliant if given a concrete reason other than simply the "best" available science requires the landowner's land be confiscated. Such a concrete reason might be showing the landowner that the species on his property is high priority for listing.

Additionally, when clarifying the ESA's listing standards, Congress might consider the holistic costs of ESA regulation and reestablish the distinction between threatened and endangered species in terms of the protection allotted to each.[141] Such a designation gives the Secretary more managerial discretion and might even exempt species from Section 9's taking ban.[142]

When the FWS abolished the distinction between threatened and endangered species in 1975, its goal was to promote species recovery.[143] After all, if threatened species achieved status similar to endangered species, more species would achieve the highest possible protection under the ESA's umbrella.

However, that has not been the result. A lack of disparate treatment between threatened and endangered species has failed to account for the individualized needs of different species, provide customized

137. *Id.* at 149.
138. Daren Bakst, *3 Ways Trump's New Regulations Will Better Protect Endangered Species*, THE DAILY SIGNAL (Aug. 13, 2019), https://www.dailysignal.com/2019/08/13/3-ways-trumps-new-regulations-will-better-protect-endangered-species/ [https://perma.cc/ST2N-4ZVH].
139. *Id.*
140. *Id.*
141. O'Toole, *supra* note 40.
142. Meltz, *supra* note 44, at 383.
143. Regan, *supra* note 1.

support for animals with different conservation statuses, and garner sufficient public support.[144] Merging threatened and endangered species into one category has also limited critical habitat knowledge that might otherwise be a substantial boon for species recovery.[145] As it currently stands, there is little incentive for landowners to promote the welfare of endangered species without an endangered-threatened species dichotomy.[146]

Today, though, if Congress reinstated a distinct classification for threatened and endangered species, it would reduce the burden on landowners, as well as paint a more accurate picture of a species' well-being and critical habitat needs.[147] By reinstating different categories of species endangerment, Congress could augment the success of the ESA and give more people a stake in species' survival.

Congress might attempt to fix today's singular treatment of endangered and threatened species by reintroducing a two-tiered classification system that differentiates between threatened and endangered species in explicit terms, with the strictest possible protection applying to endangered species.[148] Additionally, Congress could provide the same measures for listing as delisting species.[149] After all, the premise behind delisting species in the first place is once the species has recovered, its care should be turned over to the states so that the federal government can concentrate its efforts on different species still in jeopardy.[150]

To illustrate a two-tiered classification system for endangered and threatened species, assume the Secretary learns of an endangered *mustelid* on private property and requires the landowner to set aside large swaths of land for the animal's preservation. If Congress reinstated the distinction between threatened and endangered species, the Secretary could use a two-tiered classification system to implement an incentive program for the landowner. Provided the landowner preserved the weasel's habitat and promoted its conservation, the Secretary could compensate the landowner if the animal's prospects

144. David L. Bernhardt & Wilbur Ross, *Why We're Changing the Rules on Endangered Species*, CNN (Aug. 17, 2019, 1:19 AM), https://www.cnn.com/2019/08/16/opinions/endangered-species-act-opinion-bernhardt-ross/index.html [https://perma.cc/Q6G8-UKTM].

145. *Id.*

146. Regan, *supra* note 1.

147. *Id.*

148. Bernhardt et al., *supra* note 144.

149. *Id.*

150. *Id.*

improved and its numbers increased to the point of being downgraded to merely threatened status.

Also, since FWS consultations are inefficient and sometimes take years to complete, a reintroduced two-tier classification system would improve the consultation process, clarify the standards used to evaluate actions that might affect a species, and encourage greater creativity and flexibility during consultations.[151] In sum, differentiating between threatened and endangered species improves the quality of the law.[152]

C. *Creation of a Public Trust for Endangered Species Stewardship*

A third policy solution would create a public trust for endangered species stewardship, funded by the implementation of public land recreation fees.[153] Today, most public lands are free-access.[154] It stands to reason that if someone is going to hunt, fish, hike, boat, or use an off-road vehicle on public lands where an endangered species lives, then he or she should pay an access fee, since the use of the land may affect the species' survival.[155]

As an addendum to a public trust for endangered species stewardship, for endangered species living on private lands, the principles of constructive possession and *ratione soli* could be invoked: landowners who own property that endangered species inhabit should have explicit ownership rights to those species, solely on the basis of those animals living on their land.[156] As such, with adequate skin in the game, landowners would be motivated to help protect endangered species.[157]

D. *Landowner-Run Regulatory Entities with Standards Reviewable by Agencies*

A fourth and final policy solution addresses the concerns of opponents of candidate conservation agreements. Their biggest concern is that the agreements do not provide as rigorous of standards as the ESA's traditional Section 4 listing process and, therefore, might further imperil endangered species. To resolve this issue, landowners who

151. *Id.*
152. Bakst, *supra* note 138.
153. O'Toole, *supra* note 40.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

enter candidate conservation agreements should create their own regulatory body and provide its criteria to the FWS and other interested agencies. That way, the agencies will be aware of the agreements' standards, all the while maintaining the authority to revamp those standards if necessary.

As a model, landowners should look to the nuclear sector, which is regulated by the Nuclear Regulatory Commission ("NRC").[158] In 1979, a nuclear plant adjacent to Middletown, Pennsylvania, partially melted down in what was the worst U.S. commercial nuclear power plant accident in the nation's history.[159] After this event, dubbed the Three-Mile Island incident, nuclear power operators collectively decided that the standards the NRC imposed on them were insufficient to ensure good practice among all operators.[160] In essence, all nuclear power operators determined they would sink or swim as a unit. Accordingly, nuclear power operators formed their own regulatory body called the Institute of Nuclear Power Operators and provided for self-regulation that exceeded the NRC's requirements.[161]

In the same vein, if landowners banded together and formed their own regulatory body to govern candidate conservation agreements, they could report their standards to the Secretary and show the FWS their strategies. A regulatory body over candidate conservation agreements would increase the chances of FWS approval, allowing landowners to continue their operations without impediment.

VIII. CONCLUSION

In 2018, all nine Supreme Court justices ruled unanimously that critical habitat must be suitable for endangered species to actually live there.[162] Two years later, the FWS adopted a definition of habitat that excluded areas where endangered species could not realistically

158. *Backgrounder on the Three Mile Island Accident*, U.S. NRC, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html (June 21, 2018) [https://perma.cc/5SJV-9MA3].

159. *Id.*

160. *IINPO – About Us*, INSTITUTE OF NUCLEAR POWER OPERATIONS, http://www.inpo.info/AboutUs.htm#history [https://perma.cc/D47U-GX7B].

161. *Id.*

162. Tate Watkins, *How Not to Protect Endangered Species*, PERC (Oct. 29, 2021), https://www.perc.org/2021/10/29/how-not-to-protect-endangered-species/ [https://perma.cc/WD98-BVFV].

thrive.[163] Despite recent advances, the government is now threatening to reverse these gains.[164]

The paradoxical nature of the ESA makes recent FWS policy reversals problematic. As such, reversals have once again marginalized landowners, disincentivizing them from taking actions to support species recovery. Though it may seem beneficial to increase the stringency of regulations on landowners, the reality is species recovery rests on the premise of on buy-in from all those who have contact with endangered species. Since landowners have significant contact with listed species, accommodating their needs and rewarding them for increased species recovery rates would ultimately improve the effectiveness of the ESA. Johnathan Wood, a researcher for the Property and Environment Research Center, aptly summarized the situation: "The law's punitive approach does little to encourage landowners to provide or restore habitat for imperiled species" and "too often makes rare species liabilities that landowners and states understandably want to avoid."[165]

This Article has analyzed both the motivation behind the Secretary's strict enforcement of the ESA on landowners and the underlying structural reasons why critical habitat designations have led many landowners to engage in undesirable self-help remedies, like the 3S method. To resolve this conflict, this Article identified potential Secretarial tools, as well as methods of bridging the gap between the Secretary and landowners that has expanded in recent years and thwarted the ESA's ultimate goal of species preservation.

163. *Id.*
164. *Id.*
165. Dino Grandoni & Darryl Fears, *Biden Administration Moves to Bring Back Endangered Species Protections Undone Under Trump*, THE WASHINGTON POST (June 4, 2021), https://www.washingtonpost.com/climate-environment/2021/06/04/biden-endangered-species/ [https://perma.cc/9KE6-V32Y].