

A R T I C L E S

PIT BULL OR PAPER TIGER? THE ENDANGERED SPECIES ACT ON PRIVATE LANDS

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SUMMARY

Executive Order No. 14156 directs federal agencies to treat certain energy development projects subject to the Endangered Species Act (ESA) as emergencies; Executive Order No. 14181 will likely eliminate the safety net for species in the San Francisco Bay-Delta ecosystem. These policies are the culmination of decades of erosion of protection that the ESA provided, which is especially apparent on private lands. This Article focuses on factors behind the Act's waning power on private lands: lack of enforcement and the high bar to prove "take" caused by habitat modification, the inconsistent use and uncertain impact of habitat conservation plans, and successful efforts by industry to defeat decisions to list certain rare species. It describes the cases of the lesser prairie-chicken and dunes sagebrush lizard, two species that illustrate the political, legal, and practical challenges of protecting species whose habitats overlap with powerful economic interests.

Among the dozens of executive orders President Donald Trump signed during the first few days of his second term were two that have potential to dramatically shift the regulatory landscape for endangered species. First, in Executive Order No. 14156, Declaring a National Energy Emergency, the president directed federal agencies to treat certain energy development projects subject to the Endangered Species Act (ESA)¹ as emergencies,² a class of federal actions that the applicable regulation describes as "acts of God, disasters, casualties, national defense or security emergencies, etc."³

Editor's Note: The author represented Common Ground Capital, a conservation banking firm, for many years in matters related to the lesser prairie-chicken. In that capacity, she drafted comments on the second proposed listing of the species and various other matters related to the Western Association of Fish and Wildlife Agencies' administration of the range-wide plan for the bird. She also drafted a motion to intervene in the federal case that challenged the second listing of the bird, which was denied by the court.

1. 16 U.S.C. §§1531-1544.
2. Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025). The Order defines "energy" or "energy resources" as "crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water, and critical minerals . . ." It does not include renewable energy sources, such as wind and solar power. *Id.* §8(a).
3. 50 C.F.R. §402.05(a) (2024).

Treating all fossil energy projects as emergencies means they will be subject to a streamlined, much less rigorous review process than other federal actions, with the likely result that fewer measures to mitigate project impacts will be required of developers.⁴

Second, the president took a sledgehammer to protections in place for endangered species in California that are imperiled because of diversions of water through the state's complex delivery system that transports water from the northern, water-rich part of the state to the dry Central Valley and Los Angeles.⁵ In Executive Order No. 14181, Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas, the president directed the Secretary of the Interior to "override existing activities that unduly burden efforts to maximize water deliveries" through the Central Valley Project and

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4. *Id.* §402.05 (2024). The regulation related to emergencies requires that formal consultation be initiated "as soon as practicable after the emergency is under control." *Id.* §402.05(b). It is unclear whether or how the Administration will comply with this provision, however.
 5. The Central Valley Project and State Water Project are huge water delivery systems operated by the federal Bureau of Reclamation that divert water from the Sacramento, San Joaquin, and Feather Rivers to farms in the Central Valley and municipal users in Los Angeles. For years, the projects have been required, because of the ESA, to ensure that several endangered species, including the Delta smelt and chinook salmon, receive a minimum amount of water to enable them to survive in the San Francisco Bay and Sacramento-San Joaquin Delta.

State Water Project.⁶ Assuming the U.S. Department of the Interior (DOI) follows through, this will upend decades of negotiations among various stakeholders in California about the appropriate allocation of water among competing users, and likely eliminate the already-frayed safety net that the law provides for a suite of endangered species in the San Francisco Bay-Delta ecosystem.

But that's not all. In addition to the executive orders, the Trump Administration has proposed to rescind a 45-year-old regulation that makes it illegal to destroy an endangered species' habitat, a move that would eviscerate the protection the ESA provides for species whose continued existence is at risk because of loss or destruction of their habitat.⁷ The Administration also has proposed to repeal other ESA regulations finalized during President Joseph Biden's term and to reinstate regulatory changes made during President Trump's term.⁸

Are these radical moves? Yes, but President Trump's actions are not coming out of the blue. His first Administration promulgated a range of regulations that restricted the reach of the ESA (though none went as far as these),⁹ and prior presidential administrations of both parties enacted policies that softened the impact of the law. In many respects, these new policies are simply the culmination of decades of erosion of the bulwark of biodiversity protection that the ESA originally provided. The erosion is especially apparent when it comes to protecting species that depend on private, rather than public, lands for their survival.

This Article focuses on several factors that illustrate the waning power of the ESA when it comes to protecting rare species on private lands. After some brief background on the Act (Part I) and an outline of the statutory framework (Part II), it delves into those factors: lack of enforcement and the high bar to prove "take" caused by habitat modification (Part III), the inconsistent use and uncertain impact of habitat conservation plans (Part IV), and successful efforts by industry to defeat the government's decisions to list certain rare species (Part V).

To illustrate the last factor, I describe legal battles that have been waged over the listings of the lesser prairie-chicken and dunes sagebrush lizard, two rare critters that have nothing in common except that their habitats occur primarily on private lands that happen to contain abundant oil and gas resources. Their stories illustrate the political, legal, and practical challenges of protecting species whose habitats overlap with powerful economic interests. They also underscore the importance of evaluating the effectiveness of the ESA's institutional design when it comes to protecting species on private lands.

I. Brief Background of the ESA

President Richard Nixon signed the ESA into law on December 28, 1973. Both chambers of the U.S. Congress had passed the bipartisan bill with little dissent: the U.S. House of Representatives vote on the final version of the law was 355-4 and the U.S. Senate was 92-0.¹⁰ When President Nixon signed the bill, he released a statement that read in part:

Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans.¹¹

Passage of an environmental bill with such strong bipartisan support, along with a Republican president's resounding endorsement of the conservation policy that the Act embodied, is difficult to imagine today, but reflected broad public support for the slew of environmental statutes passed by Congress during the 1970s.

It took just five years after passage for what had seemed to be rock-solid congressional support for the law to begin to crumble as the sweeping implications of the statute became clear. In 1978, the U.S. Supreme Court ruled that the Act's requirement that federal agencies avoid "jeopardizing" a listed species was absolute, even when the result was preventing an almost finished, \$100 million federal dam on the Little Tennessee River from going into use.¹² Chief Justice Warren Burger wrote that the operative language of the statute "admits of no exception" to the prohibition on jeopardy, though the dam project had been authorized and funded by Congress and was nearly complete.¹³ Only one month after the Court released its opinion, the Senate passed a bill that amended the ESA by providing for an exemption from the jeopardy prohibition under certain circumstances.¹⁴ The House passed its version of that bill in

6. Exec. Order No. 14181, 90 Fed. Reg. 8747 (Jan. 31, 2025).

7. Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16102 (Apr. 17, 2025). Habitat loss is considered the greatest threat to biodiversity. See Aaron S. Hogue & Kathryn Breon, *The Greatest Threats to Species*, 4 CONSERVATION SCI. & PRAC. e12670 (2022), <https://doi.org/10.1111/csp2.12670>.

8. The Administration proposed changes to the rules that apply to critical habitat, interagency consultations, and the blanket prohibition on "take" of listed threatened species in November. See Regulations for Designating Critical Habitat, 90 Fed. Reg. 52592 (Nov. 21, 2025); Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52587 (Nov. 21, 2025); Interagency Cooperation Regulations, 90 Fed. Reg. 52600 (Nov. 21, 2025); and Listing Endangered and Threatened Species and Designating Critical Habitat, 90 Fed. Reg. 52607 (Nov. 21, 2025).

9. The first Trump Administration revised the regulations related to listing species, interagency consultation, and the prohibition on "take" of listed species. See Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019); Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019); Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019); and Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81411 (Dec. 16, 2020). The Biden Administration reversed several of these rules.

10. S. 1983, 93d Cong. (1973), <https://www.congress.gov/bill/93rd-congress/senate-bill/1983/all-actions>.

11. Richard Nixon, Statement on Signing the Endangered Species Act of 1973 (Dec. 28, 1973), available at <https://www.presidency.ucsb.edu/node/255904>.

12. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

13. *Id.* at 173.

14. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978). The 1978 amendments created a committee that consisted

October and the final bill was signed into law by President Jimmy Carter on November 10, 1978.¹⁵

Tennessee Valley Authority v. Hill (TVA) remains one of the most-cited Supreme Court environmental law decisions, and is still considered one of the most significant.¹⁶ But it is increasingly clear that *TVA* represented the pinnacle of the ESA's legal reach and its strength has been ebbing ever since.¹⁷ Since *TVA*, every time the Supreme Court has ruled on an ESA-related question, it has issued an opinion that dilutes the power of the statute by constricting its reach or expanding the grounds on which economic interests can challenge decisions to protect species.¹⁸

The Supreme Court's decisions, coupled with regulatory actions under both Democratic and Republican administrations, and anemic enforcement by the U.S. Fish and Wildlife Service (FWS), National Oceanic and Atmospheric Administration (NOAA) Fisheries,¹⁹ and environmental organizations, have combined to produce a murky miasma of law and policy that falls short of the original congressional intent of the ESA: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ."²⁰ It turns out that the so-called pit bull of environmental statutes is actually a paper tiger when it comes to protecting those species against harm from various types of economic activities on private lands. Because two-thirds of listed endangered and threatened species have at least some of their habitats on private lands,²¹ this is a shortcoming that has serious implications for biodiversity protection.

II. Statutory Framework

The ESA has a deceptively simple structure. It includes a listing process that FWS and NOAA Fisheries (the Services) use to identify species that meet the statute's criteria to be designated as either "endangered" or "threatened"

through a rulemaking process.²² Until it has been listed, a species is entitled to no protection under the ESA, regardless of how rare or at risk it is. Once listed, a batch of regulatory requirements take effect, including the Services' duty to designate "critical habitat" and generate a "recovery plan" for the species.²³

A species may be listed (or delisted) by the Services of their own volition, or in response to a petition to list submitted by an "interested person."²⁴ Whether the listing process is initiated by the Services or in response to a petition, the law requires that the listing determination be based on the "best scientific and commercial data available."²⁵

The heart of the ESA, and the source of its reputation as a "pit bull," is §9, which prohibits the "take" of any listed species by any "person."²⁶ "Take" is defined broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."²⁷ "Person" is also defined broadly to include individuals, corporations, officers, employees, agents, or departments of the federal government or any state, municipality, or any other entity subject to the jurisdiction of the United States.²⁸ Finally, the term "harm" is defined in the Services' regulations to include harm to a species' habitat, when the harm results in actual death or injury to a protected species.²⁹

When these provisions are read together, the §9 take prohibition appears to impose liability on any person or entity that inflicts, directly or indirectly, any conceivable sort of harm on a listed species. The take prohibition can be enforced by the Services or a private litigant, such as an environmental organization, pursuant to the ESA's citizen suit enforcement provision.³⁰ The ESA provides for both civil and criminal liability for violations.³¹

Congress added a provision to the ESA in 1982 specifying that nonfederal actors may obtain a permit for take that occurs as a result of otherwise lawful activity.³² Section 10 authorizes the Services to issue an "incidental take permit," if an applicant submits a "habitat conservation plan" (HCP) that contains certain specified provisions that the Services find will minimize and mitigate the impacts of the taking "to the maximum extent practicable."³³ There is a separate permitting mechanism in the law to authorize

of several federal department heads empowered to exempt federal projects from the jeopardy prohibition under certain circumstances. The committee is known colloquially as the "God Squad."

15. Jimmy Carter, Endangered Species Act Amendments of 1978 Statement on Signing S. 2899 Into Law (Nov. 10, 1978), available at <https://www.presidency.ucsb.edu/node/244037>.

16. James Salzman & J.B. Ruhl, *Who's Number One? The Most Significant Cases in Environmental Law*, 26 ENV'T F. 36-40 (2009); Daniel A. Farber, *A Tale of Two Cases*, 20 VA. ENV'T L.J. 33, 34 (2001).

17. See, e.g., J.B. Ruhl, *The Endangered Species Act's Fall From Grace in the Supreme Court*, 36 HARV. ENV'T L. REV. 487 (2012).

18. The Supreme Court has considered questions arising under the ESA in six cases, including *TVA*. For a discussion of the Court's rulings and their effects to weaken the ESA, see Ruhl, *supra* note 17, and Joseph Schlotzhaer, *An Uncivil Action: The Supreme Court Dilutes the Endangered Species Act*, National Association of Homebuilders v. Defenders of Wildlife, 15 MO. ENV'T L. & POL'Y REV. 415 (2008).

19. The ESA is administered by two federal agencies: FWS, which is an agency of DOI, and NOAA Fisheries, an agency of the U.S. Department of Commerce (collectively, the Services). FWS has jurisdiction over terrestrial and freshwater species, and NOAA Fisheries has responsibility for marine species. See 50 C.F.R. §402.01(b) (2024).

20. 16 U.S.C. §1531(b).

21. FWS, *ESA Basics: 50 Years of Conserving Endangered Species* (2023), <https://www.fws.gov/sites/default/files/documents/endangered-species-act-basics-february-2023.pdf>.

22. 16 U.S.C. §1533(a)(1). As of November 5, 2025, there are 1,780 species that have been listed by FWS as threatened or endangered (742 animals and 938 plants). FWS Environmental Conservation Online System, *Threatened & Endangered Species*, <https://ecos.fws.gov/ecpl/> (last visited Nov. 5, 2025). In addition, NOAA Fisheries has jurisdiction over 165 threatened and endangered marine species. NOAA Fisheries, *Species Directory: ESA Threatened & Endangered*, <https://www.fisheries.noaa.gov/species-directory/threatened-endangered?page=4> (last visited Nov. 5, 2025).

23. 16 U.S.C. §1533(a)(3), (f).

24. *Id.* §1533(b)(3).

25. *Id.* §1533(b)(1)(A).

26. *Id.* §1538(a)(1)(B).

27. *Id.* §1532(19).

28. *Id.* §1532(13).

29. See 50 C.F.R. §§17.3, §222.102.

30. 16 U.S.C. §1540(g).

31. *Id.* §1540(a), (b).

32. Pub. L. No. 97-304, 96 Stat. 1411 (1982).

33. 16 U.S.C. §1539(a)(1)(B).

incidental take by federal agencies or private actors who require a federal permit other than an incidental take permit to authorize take caused by their action.³⁴

Both the §10 permitting process for nonfederal actors and §7 consultations for federal agencies generate permit conditions that are intended to reduce the detrimental impacts that the projects would otherwise have on listed species. The biological opinions that the Services generate through §7 consultations are technically “advisory,” but they have significant practical importance, because an agency that proceeds with a project despite a jeopardy finding, or without including Service-recommended measures to minimize the impacts of the project on listed species, runs the risk of a legal challenge by a private litigant. An incidental take permit issued to a nonfederal actor includes conditions that make adherence to the HCP mandatory. If the permittee fails to implement the HCP, the §10 permit could be revoked by the Service or enforced by a private litigant.

III. Limited Enforcement/ Negotiated Compliance

The ESA’s prohibition on take, while powerful in theory, turns out to be quite weak insofar as it applies to activities on private lands for several reasons. First and foremost, there is very little enforcement to address harm caused by activities on private lands by either the Services or private litigants.³⁵ A review of the FWS Office of Law Enforcement’s annual reports since 1999 reveals only a handful of enforcement actions related to harm caused by habitat modification on private lands between 1999 and 2015, and almost no mention of cases brought to prosecute illegal take on private lands from 2016 to 2019.³⁶

There are several explanations for the underenforcement of §9, including budgetary constraints, staff short-

ages, and political pressures that arise from the fact that enforcement on private lands tends to be controversial.³⁷ In addition, for over a decade the primary focus of FWS’ Office of Law Enforcement has shifted away from protecting American indigenous listed species to curtailing illegal international wildlife trafficking and other nefarious activities in foreign countries.³⁸

According to a former deputy chief of law enforcement for FWS, as many as 20% of the Service’s law enforcement agents were reassigned from domestic enforcement to enforcement against international wildlife smugglers over the last decade.³⁹ Given that the total number of law enforcement agents at FWS is only around 200 (excluding officers that work on national refuge lands),⁴⁰ even without other obstacles it would be challenging for the agency to carry out a comprehensive, robust enforcement program to protect the millions of acres of private lands that contain habitat for listed species.

Other than enforcement related to international wildlife trafficking, most FWS enforcement actions are against individuals who have inflicted direct harm on—usually shot—a listed animal, such as an endangered gray wolf, grizzly bear, or whooping crane.⁴¹ In such cases, the Service has a proverbial “dead body” and/or eyewitness to the crime, so the prosecution is relatively straightforward.⁴² In fact, a review of FWS’ enforcement reports from 1999 to 2019 reveals that it is significantly more common for the Service to report enforcement actions against individual poachers, hunters, or companies that were responsible for some sort of environmental contamination or pollutant that caused death to a listed species than private landowners or land developers responsible for habitat destruction. The habitat-related cases that were reported disproportionately occurred in FWS Region One, which includes California.

Even in cases in which the Service has an eyewitness and/or a dead animal as evidence, successful prosecution of a *criminal* violation of §9 is challenging and rare. Since 1999, the U.S. Department of Justice (DOJ) has taken the position that it will not prosecute a person accused of harming a listed species, unless the government can prove that the defendant had actual knowledge of the identity of the species at issue. In other words, if a defendant claims that he believed he was shooting a dog when in fact he shot

34. Federal agencies are required to ensure that any action “authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” of the species or “result in the destruction or adverse modification of [critical] habitat.” *Id.* §1536(a)(2). To comply with the jeopardy prohibition, federal agencies must consult with the Services when they propose to authorize, fund, or carry out an activity that “will likely affect” a listed species. *Id.* Part of the consultation process is the issuance of an incidental take statement that authorizes a specified level of take for the federal action and a biological opinion that describes the measures the agency will undertake to minimize the impacts of the project on the species. In addition to the take prohibition and consultation requirement, the ESA imposes on federal agencies an additional responsibility to “conserve” listed species; that is, to use methods and procedures necessary “to bring any endangered species or threatened species to the point at which the measures” are no longer necessary. *Id.* §§1536(a)(1), 1532(3).

35. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 *STAN. L. REV.* 137 (2023); Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, 1162 *YEAR ECOLOGY & CONSERVATION BIOLOGY* 369 (2009). Conversation with Gary Mowad, former Deputy Chief of Law Enforcement, FWS (Oct. 30, 2025).

36. FWS’ Office of Law Enforcement Annual Reports for 1999-2019 are available at <https://www.fws.gov/library/collections/ole-annual-reports>. No annual reports appear on the website for fiscal years 2020-2025. The annual reports are not an exhaustive account of the Service’s enforcement activities; rather, they contain an overview of what FWS considered to be the most significant activities of the year. According to FWS staff, they are an accurate indicator of the types of enforcement activities carried out by the agency during the fiscal year, if not a complete catalog of every action.

37. Bean, *supra* note 35.

38. Conversation with Gary Mowad, *supra* note 35. See also FWS OFFICE OF LAW ENFORCEMENT, ACCOMPLISHMENTS 2016: PROTECTING THE NATION’S WILDLIFE AND PLANT RESOURCES 4 (2017), <https://www.fws.gov/sites/default/files/documents/OLE%20Annual%20Report%20fy-2016.pdf>.

39. Conversation with Gary Mowad, *supra* note 35.

40. *Id.*

41. NOAA Fisheries’ enforcement priorities focus on enforcing the provisions of the applicable fisheries management plans in federal waters and specific measures that protect endangered species. See NOAA OFFICE OF LAW ENFORCEMENT, ENFORCEMENT PRIORITIES 2023-2027 (2023), <https://www.fisheries.noaa.gov/s3/2023-11/NOAA-OLE-2023-2027-Enforcement-Priorities-2-.pdf>.

42. Conversation with Justin Tade, former Attorney-Advisor, Office of the Solicitor, FWS (Feb. 12, 2024); Conversation with Adam Zerrener, former Field Supervisor, Austin Ecological Services Field Office, FWS (July 16, 2025).

an endangered gray wolf, FWS will not prosecute unless it can prove otherwise.⁴³ Needless to say, it is often difficult to prove that a defendant *knew* she was killing a listed species when the species bears even a passing resemblance to another, unprotected animal. Finally, according to FWS legal staff, it is extremely difficult to convince U.S. attorneys to prosecute either criminal or civil §9 cases.⁴⁴ The cases are resource-intensive, time-consuming, and difficult to prove, for the reasons discussed here.

There is also very little *citizen* enforcement of the take prohibition on private lands when the take is alleged to be the result of habitat destruction. The explanation for this is less clear, but it is almost certainly related to a lack of information about the occurrence of listed species on private lands,⁴⁵ and the difficulty of proving in any individual case that habitat modification was the proximate cause of harm to an identifiable member of a protected species.

The Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* erected a high bar for proving that a defendant caused the take of a listed species through habitat modification.⁴⁶ In *Sweet Home*, the Court upheld FWS' definition of "harm," which included "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential breeding, feeding, or sheltering."⁴⁷ But the Court held that the definition implicitly requires that the habitat modification be the proximate cause of an actual death or injury to an identifiable listed animal.⁴⁸ Satisfying that standard has proved to be difficult, as the small number of successful prosecutions since *Sweet Home* shows.

The concept of foreseeability, an element of proximate cause under tort law, does not fit easily in the ESA enforcement framework. Generally, an ordinary landowner lacks the knowledge necessary to be aware that any particular land management activity will affect the "essential breeding and behavioral patterns" of a listed species. In addition, it is often impossible to prove that an "individual, identified" animal was affected by a landowner's actions. For example, clearing a migratory bird's spring breeding habitat during the winter when the bird is not around would likely not constitute a "take," according to the Court's

reasoning in *Sweet Home*.⁴⁹ Even if the habitat destruction took place during the breeding season, a plaintiff would face the hurdle of convincing a court that an individual bird was harmed. Without evidence that, say, a particular bird's nest was destroyed when the trees were removed, or a carcass was found in the tracks of a bulldozer, it would be difficult to meet the elements of the "take" definition, as interpreted by the Court.

Sweet Home's requirement that an identifiable animal be harmed by an activity for it to be considered a take has been cited by a number of courts when holding that, without evidence that the listed species was *present* when the habitat modification took place, there can be no finding of take.⁵⁰ This means that the Service must document the existence of a listed species in its habitat when preparing a biological opinion under §7 for a proposed federal action, as well as enforcing an alleged violation of the take prohibition. It is not enough to show only that a species' habitat has been destroyed.⁵¹

IV. Encouraging Conservation With Regulatory Incentives

Given the challenges of bringing a successful take prosecution, and the fact that such enforcement actions are infrequent, it may be surprising that many companies and individual landowners nevertheless choose to seek incidental take authorization from FWS when they plan an activity that could result in take. After all, the enforcement data suggest that noncompliance results in little actual enforcement risk. Nonetheless, many proceed either through the §7 consultation process (if there is a federal "nexus" to their project, such as a required permit from the U.S. Environmental Protection Agency or U.S. Army Corps of Engineers), or §10.

There are at least three possible reasons that companies and individuals opt to comply with the ESA even though the risk of enforcement is small. First, compliance with the law obviously contributes to an entity's ethical reputation, which in turn attracts employees, partners, and investors. Second, a demonstration of compliance is often required for access to capital markets. Finally, current compliance may reflect the fact that in the past FWS asserted a more muscular enforcement posture than it does today.

For example, FWS staff reported that in the 1990s and 2000s, they were proactive about letting landowners know that their properties contained habitat for listed species, putting the landowner on notice that harming or modifying that habitat could result in a take.⁵² Currently, FWS takes the position that it is up to the landowner to determine whether she should seek a permit from the Service for

43. The so-called McKittrick Memo from Donna A. Bucella, Director, Executive Office for U.S. Attorneys, to All U.S. Attorneys, First Assistant U.S. Attorneys, All Criminal Chiefs, and All Civil Chiefs, Re: Knowing Instruction in Endangered Species Cases (Feb. 12, 1999), was challenged and thrown out in *WildEarth Guardians v. U.S. Dep't of Justice*, 283 F. Supp. 3d 783, 789 (D. Ariz. 2017). The U.S. Court of Appeals for the Ninth Circuit reversed and dismissed the case, however, holding that the plaintiffs lacked standing. *WildEarth Guardians v. U.S. Dep't of Justice*, Nos. 17-16677, 17-16678, 17-16679 (9th Cir. 2018). Consequently, the policy remains in place.

44. Conversation with Justin Tade, *supra* note 42.

45. Conversation with Noah Greenwald, Codirector, Endangered Species, Center for Biological Diversity (Feb. 26, 2024). Private landowners have no legal obligation to survey and document the existence of endangered species on their land, so environmental organizations usually have no specific information about the baseline status of species on private lands that would be relevant in demonstrating that a particular development has caused harm.

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

47. *Id.*

48. *Id.* at 696 n.9.

49. Conversation with Gary Mowad, *supra* note 35.

50. See, e.g., *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 63 F. Supp. 2d 1034 (D. Ariz. 1998), *aff'd*, 273 F.3d 1229 (9th Cir. 2001); *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 879-81 (E.D. Cal. 2004); *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999).

51. *Arizona Cattle Growers' Ass'n*, 63 F. Supp. 2d at 1044.

52. Conversation with Gary Mowad, *supra* note 35.

an activity that would modify habitat for a listed species.⁵³ Today, the mere *perception* that FWS has the capacity to police activities on private lands, a perception influenced by past actions, drives compliance with the ESA.

For landowners and companies who need no federal permit other than an ESA incidental take permit, §10 requires submission of an HCP that describes the steps the applicant will take to mitigate and minimize the impacts to the species and the funding that will be provided.⁵⁴ The details of the HCP's mitigation measures are hammered out during negotiations between FWS and the applicant, and often involve a commitment to offset the harm caused by the project by restoring or protecting habitat for the species elsewhere in its range.⁵⁵

During the William Clinton Administration, FWS developed several policies that were intended to make it easier and more attractive for landowners and others to develop HCPs and obtain incidental take permits.⁵⁶ As a result, after a slow start, the number of approved HCPs rose dramatically. From 1982 to 1992, only 10 HCPs were approved by the Service. But from 1992 to 1997, there were 225 HCPs approved, and today there are over 1,300 HCPs in effect that cover some 46 million acres of land.⁵⁷

The “No Surprises” policy was a particularly influential innovation. It provides that, once an HCP has been approved by the Service, the Service may not require additional conservation measures by the permittee, except under very limited circumstances.⁵⁸ The general idea is that “a deal is a deal,” the terms of which should not be reopened after the parties have signed on the dotted line.⁵⁹

Across the country, there are dozens of large-scale—covering millions of acres—and hundreds of small-scale HCPs in place. Large, regional HCPs provide incidental take authorization for local governments, private companies, and developers for activities within a specified geographic region that could cause harm to listed species.

There are large-scale HCPs in place that cover activities like timber harvesting, commercial and residential development, and wind energy.

California has more HCPs than any other state, but HCPs are also popular in Texas and Florida. In the Midwest, the number of HCPs has doubled in the last five years, largely covering take associated with wind farms. The existence of a regional HCP in many places streamlines compliance with the ESA, usually by providing that individuals and companies eligible for permit coverage are able to participate by simply paying a mitigation fee, and thereby avoiding the red tape associated with obtaining an individual incidental take permit.⁶⁰ The fees are used by the plan administrator to protect habitat and carry out other conservation measures.

It is not clear whether the growth in the number of HCPs over the last 30 years has translated to a higher level of protection for biodiversity. The data indicate that most of the endangered species habitat that has been lost was on private lands, including lands covered by HCPs, and unprotected land.⁶¹ In addition, the most recent peer-reviewed analysis of HCPs shows that in 2017, only 15% of listed species were covered by an HCP, a very low number considering that two-thirds of listed species rely on private lands for their survival.⁶² The study also found that there is a great deal of inconsistency among HCPs related to mitigation requirements and conservation outcomes, and many of the plans have limited monitoring plans that produce fragmented data, making it difficult to evaluate outcomes.⁶³ Because FWS maintains no central database with information about the status of species covered by HCPs, it is difficult to assess how individual species with HCPs are faring compared to those without.

Another policy developed by FWS to incentivize protection of endangered species habitat on private lands is the Conservation Banking Guidance, intended to encourage private landowners to protect habitat on their properties by creating a marketable credit that may be sold to entities that are required to mitigate for the harm they have caused to a listed species elsewhere.⁶⁴ The goal was to monetize the value of protecting species habitat for private landowners

53. Conversation with Adam Zerrenner, *supra* note 42.

54. 16 U.S.C. §1539(a)(1).

55. Owen, *supra* note 35, at 166-68.

56. Among other policies, the Clinton Administration released an HCP Handbook, which was intended to clarify the process the Service used to evaluate and process §10 permits, and the Safe Harbor and Candidate Conservation Agreement With Assurances (CCAA) policies, which were also intended to encourage conservation on private lands. Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32717 (June 17, 1999); Announcement of Final Policy for Candidate Conservation Agreements With Assurances, 64 Fed. Reg. 32726 (June 17, 1999).

57. FWS Environmental Conservation Online System, *Conservation Plans by Type and Region*, <https://ecos.fws.gov/ecp/report/conservation-plans-type-region> (last visited Jan. 7, 2026).

58. Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998).

59. While appealing in principle, the “No Surprises” policy makes it difficult for the Services to respond to new information or changed circumstances, including climate change, that affect listed species in particular geographic areas. Because the policy prevents the Services from imposing additional conservation responsibilities on the permittee, it is up to the government to take whatever steps might be necessary to conserve a species threatened by the permittee's actions that were not anticipated at the time the HCP was approved and the permit issued. It is extremely rare for the Services to take such action. See Melinda Taylor & Holly Doremus, *Habitat Conservation Plans and Climate Change: Recommendations for Policy*, 45 ELR 10863, 10872 (Sept. 2015), <https://www.elr.info/articles/elr-articles/habitat-conservation-plans-and-climate-change-recommendations-policy>.

60. The amount of the mitigation fee is determined by the terms of the individual HCP and linked to the cost of mitigating the projected impacts to the species covered by the plan. There are regional HCPs in place in several fast-growing communities in the United States, including Austin, Texas, and San Diego, California. The programs are run by local government agencies that oversee the collection of mitigation fees from developers and others who seek to develop property in areas that may harm a listed species. See, e.g., Travis County, *Balcones Canyonlands Conservation Plan*, <https://www.traviscountytx.gov/tnr/nr/bccp> (last visited Jan. 7, 2026), and County of San Diego, *Multiple Species Conservation Program*, <https://www.sdparks.org/content/sdparks/en/AboutUs/Plans/MSCP.html> (last visited Jan. 7, 2026).

61. Adam J. Eichenwald et al., *US Imperiled Species Are Most Vulnerable to Habitat Loss on Private Lands*, 18 FRONTIERS ECOLOGY & ENV'T 439 (2020), <https://esajournals.onlinelibrary.wiley.com/doi/10.1002/fee.2177>.

62. Heather Harl et al., *Habitat Conservation Plans Under the Endangered Species Act: A Comprehensive Three-Decade Analysis*, 7 CONSERVATION SCI. & PRAC. 7:e70061 (2025), <https://conbio.onlinelibrary.wiley.com/doi/epdf/10.1111/csp2.70061>.

63. *Id.*

64. Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24753 (May 8, 2003).

that are willing to forego development. Conservation banking for species habitat is based on the wetlands mitigation banking model, but it is not nearly as popular as wetlands banking. There are about 230 species banks in the United States today that cover more than 70 different listed species, but over 2,900 approved wetlands mitigation banks.⁶⁵ Among the species banks are several that were set up to protect rangeland habitat for the lesser prairie-chicken and provide a mitigation option for energy companies.⁶⁶

Finally, the Service's Candidate Conservation Agreement With Assurances (CCAA) policy was intended to encourage landowners to carry out conservation plans for species that were not yet listed, but in danger of being listed in the future.⁶⁷ With an approved CCAA, a private landowner who agrees to conserve or improve habitat on his property to benefit a rare, but unlisted, species enjoys regulatory certainty that, if the species ends up on the list in the future, he will already hold an incidental take permit and enjoy the assurance that no further conservation will be required of him (the CCAA policy includes the "no surprises" guarantee).

Another policy, the Candidate Conservation Agreement (CCA) policy, is similar to the CCAA policy, but does not include the "no surprises" assurance. FWS has negotiated CCAs with other federal agencies, Indian tribes, and several states, including a CCA that covers impacts on the dunes sagebrush lizard and lesser prairie-chicken from oil and gas activities on federal lands in New Mexico.⁶⁸

After a promising initial response from private landowners and the regulated community, the implementation of the Clinton-era regulatory incentive programs appears to have slowed. Over the last 10 years, only 157 new HCPs have been approved by FWS (compared to 918 approved between 1997 and 2014), indicating waning interest from private landowners and industry in HCPs.⁶⁹ There are also fewer CCAs being approved each year, compared to the first two decades of the program.⁷⁰

There are several explanations for declining interest, likely including the lack of a meaningful threat of enforcement of the take prohibition. In addition, industry and private landowners report frustration about the time required to obtain approval for an HCP, conservation bank, or

CCAA. The process can take years and cost millions of dollars. In contrast, FWS and NOAA Fisheries complete thousands of \$7 consultations with federal agencies every year, most in a matter of weeks.⁷¹

V. Controversies Over Listing Decisions: The Oil and Gas Industry Pushes Back

Despite FWS' efforts over the last 30 years to develop and promote regulatory "carrots" rather than "sticks" to conserve species on private lands, a high level of antipathy toward the ESA persists among some private landowners, land developers, and extractive industries, all of which are at least theoretically at risk of enforcement if their activities harm a listed species. In recent years, the oil and gas industry has been particularly active in resisting regulation under the ESA by focusing on and opposing the *listing* of species in the first place.⁷² The industry's campaigns to defeat the listings of the lesser prairie-chicken and dunes sagebrush lizard illustrate their approach.

The lesser prairie-chicken (*Tympanuchus pallidicinctus*) and dunes sagebrush lizard (*Sceloporus arenicolus*) are both found across large geographic areas that contain prolific oil and gas reserves and favorable conditions for wind and solar energy production.⁷³ Both species are at risk of extinction in large part due to habitat loss caused by energy production.⁷⁴ The oil and gas industry and its allies fought against federal efforts to list both of the species using a combination of lobbying and litigation, and some misinformation. The approach has been successful: the industry has twice beaten back the listing of the prairie-chicken and is poised to prevail in a lawsuit challenging the listing of the lizard.

65. U.S. Army Corps of Engineers, *Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS)*, <https://ribits.ops.usace.army.mil/ords/f?p=107:2> (last visited Jan. 7, 2026).

66. There are approved conservation banks for the lesser prairie-chicken in Kansas and the Texas Panhandle. *Id.*

67. 64 Fed. Reg. 32726 (amended by Safe Harbor Agreements and Candidate Conservation Agreements With Assurances; Revisions to the Regulations, 69 Fed. Reg. 24084 (May 2, 2004)).

68. FWS, U.S. BUREAU OF LAND MANAGEMENT, AND CENTER OF EXCELLENCE FOR HAZARDOUS MATERIALS MANAGEMENT, CANDIDATE CONSERVATION AGREEMENT FOR THE LESSER PRAIRIE-CHICKEN (*TYMPANUCHUS PALLIDICINCTUS*) AND SAND DUNE LIZARD (*SCELOPORUS ARENICOLUS*) IN NEW MEXICO (2008), https://www.fws.gov/sites/default/files/documents/LPC_SDL_NM_CCA_CCAA_2008_final_signed.pdf.

69. FWS Environmental Conservation Online System, *supra* note 57. The exception to the general slowdown in new HCPs is the number of new plans approved in the Upper Midwest, which cover incidental take of several endangered bat species caused by wind turbines. *Id.*

70. *Id.*

71. Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the US Endangered Species Act*, 112 PNAS 15844 (2015), <https://www.pnas.org/doi/epdf/10.1073/pnas.1516938112>. See also David E. Adelman, *Permitting Reform's False Choice*, 51 ECOLOGY L.Q. 129 (2024).

72. Historically, the timber industry was among the most vocal opponents of the ESA. It fought the listing of the northern spotted owl and proposed critical habitat designations for the owl and red-cockaded woodpecker in the 1980s and 1990s, because of the economic impact on its timber management activities. Today, there are several large-scale HCPs in place that cover the harvest of timber in regions with endangered species. See, e.g., FWS Environmental Conservation Online System, *Plum Creek Timber Central Cascades HCP*, https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=82 (last visited Jan. 8, 2026). Safe Harbor Agreements have been used to encourage private landowners to protect habitat for the red-cockaded woodpecker in the Southeast. Thanks in part to those agreements, now known as "conservation benefit agreements," the woodpecker was downlisted from endangered to threatened in 2024. *Reclassification of the Red-Cockaded Woodpecker From Endangered to Threatened With a Section 4(d) Rule*, 89 Fed. Reg. 85294 (Oct. 25, 2024).

73. The lesser prairie-chicken is a North American grouse found in the southern central high plains of Texas, New Mexico, Oklahoma, Colorado, and Kansas. The dunes sagebrush lizard is found in shinnery oak sand dune systems of southeast New Mexico and four adjacent counties of west Texas.

74. Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment, 87 Fed. Reg. 72674 (Nov. 25, 2022) (listing decision for the lesser prairie-chicken); Endangered Species Status for the Dunes Sagebrush Lizard, 89 Fed. Reg. 43748 (May 20, 2024) (listing decision for the dunes sagebrush lizard).

Listing decisions are required to be based on the “best scientific and commercial data available”⁷⁵ and the Services’ evaluation of five factors to determine whether a species is “in danger of extinction throughout all or a significant portion of its range.”⁷⁶ The five factors the Services consider do not include economic impacts. If the Services find that a species is “likely to become an endangered species within the foreseeable future,” it may be listed as threatened, rather than endangered, a classification that affords a bit less legal protection under the statute but gives the Services more flexibility with respect to regulating take.⁷⁷

Among the five factors the Services must consider in making listing decisions is “the inadequacy of existing regulatory mechanisms,”⁷⁸ and “those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation to protect such species.”⁷⁹ In 2003, FWS released a Policy for the Evaluation of Conservation Efforts (PECE), which describes the agency’s approach to evaluating the regulatory and voluntary mechanisms in place to conserve a species, to determine whether they are certain to be implemented and will be effective at reducing the threats.⁸⁰ The Service often works directly with states, local governments, private actors, and other federal agencies to develop and improve conservation programs to make them robust enough to abrogate the need for a federal listing altogether, or to justify a “threatened” listing.⁸¹

For both the lesser prairie-chicken and the dunes sagebrush lizard, FWS negotiated for years with stakeholders to develop conservation programs that would provide enough protection for the species to justify a decision to list as “threatened,” or not to list at all. In both cases, the efforts resulted in weak conservation plans that ultimately failed to protect the species. When FWS was compelled to list the species through litigation by environmentalists, the oil and gas industry responded with its own lawsuits that attacked the process and the facts used by the agency to make its decisions.

A. *The Plight of the Lesser Prairie-Chicken*

The lesser prairie-chicken’s condition is dire. Its population has plummeted since European settlers arrived in the Southern Plains in the 19th century from an estimated millions of birds to about 30,000 today.⁸² According to the

National Audubon Society, the population has declined by 97% since the 1960s, making the decline “one of the most precipitous among all bird species in the United States.”⁸³ Habitat loss and fragmentation are the most serious threats to the lesser prairie-chicken; FWS estimates that the bird’s range has shrunk by 80%-90% since the 1800s.⁸⁴ Wind farms, transmission lines, and oil and gas development are all significant causes of habitat fragmentation.

The lesser prairie-chicken has been on FWS’ radar for 30 years. It became a candidate for listing in 1998, after the Biodiversity Legal Foundation submitted a petition to the Service in 1995 to list the species as endangered and the Service found that listing was “warranted but precluded” by higher priorities.⁸⁵ For the next two decades, FWS declined to list the bird while state and federal agencies developed programs that were intended to reverse its decline and avoid the need for federal protection.⁸⁶

Eventually, the Western Association of Fish and Wildlife Agencies (WAFWA), led by representatives of the wildlife agencies of the five states with lesser prairie-chickens, developed a Lesser Prairie-Chicken Range-Wide Conservation Plan (RWP), a voluntary program through which oil and gas companies that intended to drill in the bird’s habitat on private lands could pay into a mitigation fund that would be used to compensate private landowners for short-term (10 years) and long-term (permanent) conservation easements.⁸⁷ The idea was to encourage the energy industry to avoid developing in the highest-quality habitat areas and use the revenue generated by the plan to pay for conservation. The fees were relatively low and the process to participate was relatively simple. FWS issued WAFWA a CCAA permit for the RWP, which meant that, should the lesser prairie-chicken eventually be listed, no additional conservation would be required by those companies that were participating in the RWP.⁸⁸

Unsatisfied by the voluntary conservation approach embodied by the RWP, an environmental organization,

75. 16 U.S.C. §1533(b)(1)(A).

76. *Id.* §1533(a)(1).

77. *Id.* §1532(20). For threatened species, the Services are required to develop a rule that is designed to provide for the conservation of the species and that has the option to allow for take associated with certain activities. *Id.* §1533(d).

78. *Id.* §1533(a)(1)(D).

79. *Id.* §1533(b)(1)(A).

80. Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15100 (Mar. 28, 2003).

81. Owen, *supra* note 35, at 161.

82. FWS, SPECIES STATUS ASSESSMENT REPORT FOR THE LESSER PRAIRIE-CHICKEN (*TYMPANUCHUS PALLIDICINCTUS*) vii (2022), https://www.fws.gov/sites/default/files/documents/LPC_SSA_Report_v2.3_March2022%20%282%29.pdf.

83. Press Release, National Audubon Society, Lesser Prairie-Chicken Now Listed Under the Endangered Species Act (Nov. 17, 2022), <https://www.audubon.org/news/lesser-prairie-chicken-now-listed-under-endangered-species-act>.

84. FWS, *supra* note 82, at v.

85. 12-Month Finding for a Petition to List the Lesser Prairie-Chicken as Threatened and Designate Critical Habitat, 63 Fed. Reg. 31400 (June 9, 1998).

86. Five federal agencies developed programs or initiatives that were designed to improve habitat for the lesser prairie-chicken: FWS, the Natural Resources Conservation Service, the Farm Service Agency, the U.S. Bureau of Land Management, and the U.S. Forest Service. Each of the five states where the prairie-chicken was found developed state-level programs as well. FWS, *supra* note 82, at 49-62 (description of the various conservation initiatives developed for the prairie-chicken).

87. SEAN KYLE ET AL., THE LESSER PRAIRIE-CHICKEN RANGE-WIDE CONSERVATION PLAN (2013), https://wafwa.org/wp-content/uploads/2013/10/Lesser-PrairieChicken_RangeWideConservationPlan_2013.pdf.

88. FWS & WAFWA, RANGE-WIDE OIL AND GAS CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES FOR THE LESSER PRAIRIE-CHICKEN (*TYMPANUCHUS PALLIDICINCTUS*) IN COLORADO, KANSAS, NEW MEXICO, OKLAHOMA, AND TEXAS (2014), <https://wafwa.org/wpdm-package/range-wide-oil-gas-candidate-conservation-agreement-with-assurances-for-the-lesser-prairie-chicken/>; Enhancement of Survival Permit Application; Draft Oil and Gas Candidate Conservation Agreement With Assurances for the Lesser Prairie-Chicken; Draft Environmental Assessment, 78 Fed. Reg. 76639 (Dec. 18, 2013).

WildEarth Guardians, continued to press FWS for a federal listing of the bird, eventually entering into a settlement agreement under which FWS agreed to propose a rule to list by a date certain.⁸⁹ The lesser prairie-chicken's listing rule was finalized in 2014.⁹⁰ Still reluctant to list the species as endangered, the Service put the bird on the list of threatened species and issued a "special rule" under ESA §4(d) that provided that landowners and companies that enrolled in the WAFWA RWP would not be liable for "take." The federal government's objective was to minimize the federal regulation of activities that would impact the lesser prairie-chicken and deputize WAFWA to execute the conservation strategy. This approach would formalize the states' leading role in the conservation efforts.⁹¹

Unfortunately, the "threatened" listing and §4(d) rule satisfied no one. Environmental groups sued FWS, arguing that the lesser prairie-chicken should be listed as endangered, not threatened, a designation that would have meant the energy companies would need an incidental take permit from FWS to cover their activities. The oil and gas industry and several counties in New Mexico also challenged the threatened listing rule, arguing that no listing was warranted and that the Service did not properly apply the PECE when it evaluated whether the WAFWA RWP would eliminate the need for listing altogether. In September 2015, a federal district court in Midland, Texas, agreed with the oil and gas plaintiffs and vacated the listing rule.⁹² The court held it was arbitrary and capricious for FWS to assume that oil and gas companies would be less likely to enroll in the voluntary RWP if the threat of listing disappeared.⁹³

The environmental groups did not give up, and submitted a new petition to list the bird a few months after the 2015 court decision. FWS eventually proposed to relist the lesser prairie-chicken, this time in two distinct population segments (DPSs).⁹⁴ The northern DPS was listed as threatened and the southern DPS as endangered.

The oil and gas industry sued again, this time joined by Texas and Kansas. Biden's FWS defended the listing decision, but after President Trump took office again in 2025, he made it clear that reducing the regulatory burden on

the oil and gas industry was a top priority.⁹⁵ FWS reversed its position and joined the oil and gas industry and the state plaintiffs in a motion to vacate the listing of the lesser prairie-chicken, claiming that it had identified a "serious foundational error" in the 2022 listing decision.⁹⁶ The same federal court in Midland that had invalidated the 2014 listing rule vacated the second listing in August 2025.⁹⁷

Where does this leave the lesser prairie-chicken? The population continues to decline, and its future is increasingly uncertain. It has no federal legal protection, notwithstanding clear evidence that it is highly imperiled. Despite the millions of dollars that have been spent by the federal government, state agencies, and private companies, the voluntary conservation programs in place have failed to reverse the species' decline and appear unlikely to do so in the future. There are several reasons for this, but fundamentally the blame rests with FWS for failing to ensure that WAFWA's plan would actually work. FWS' determination to avoid imposing its will on the states in this case led to wasted money and little progress toward the lesser prairie-chicken's recovery. The mere fact that the voluntary programs existed did not mean that they would be effective.

The RWP and associated CCAA were flawed from the outset. Early on, FWS identified the protection and restoration of "focal areas" of large blocks of high-quality habitat as the appropriate conservation strategy for the lesser prairie-chicken,⁹⁸ and that approach was reflected in the RWP. Within the focal areas, the idea was to focus on a subset of "strongholds" of at least 25,000 acres of high-quality habitat, which would be protected for a minimum of 30 years.⁹⁹

But WAFWA designed the program in a way that all but guaranteed the long-term conservation strategy would not succeed. The RWP's participation fees were too low to produce enough revenue to pay landowners for the long-term protection of the stronghold habitat.¹⁰⁰ With only modest funding available, WAFWA struggled to attract landowners willing to enter into long-term easement agreements to protect strongholds.

During the early years of implementation, when WAFWA failed to meet the deadlines in the RWP for protecting strongholds and focal areas, FWS declined to exert

89. In re Endangered Species Act Section 4 Deadline Litig., No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C. May 10, 2011). See also Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 75306, 75308 (Dec. 11, 2013).

90. Determination of Threatened Status for the Lesser Prairie-Chicken, 79 Fed. Reg. 19974 (Apr. 10, 2014).

91. *Id.*

92. Permian Basin Petroleum Ass'n v. Department of the Interior, 127 F. Supp. 3d 700, 725 (W.D. Tex. 2015).

93. *Id.* at 714. The court disagreed with the federal defendants that the threat of listing was an incentive for energy companies to participate in the RWP and, without the threat of listing, fewer companies would enroll. Unfortunately, the federal government's prediction about enrollment was correct and significantly fewer companies signed up after the court decision.

94. 87 Fed. Reg. 72674. By designating the northern DPS as "threatened," FWS had the ability to craft a special 4(d) rule that exempted ordinary ranching practices from the take prohibition, provided the rancher obtained approval from FWS for a ranch management plan. *Id.* at 72749. The special rule was vacated in March 2025. Kansas Nat. Res. Coal. v. U.S. Fish & Wildlife Serv., No. 7:23-cv-00159-DC (W.D. Tex. Mar. 29, 2025).

95. Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025).

96. The "error" related to FWS' use of an internal agency policy that applies to the designation of DPSs.

97. Texas v. U.S. Dep't of the Interior, No. 7:23-cv-00049-DC (W.D. Tex. Aug. 12, 2025).

98. Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20074, 20075 (Apr. 10, 2014). See also FWS, CONSERVATION NEEDS OF THE LESSER PRAIRIE-CHICKEN (2012).

99. KYLE ET AL., *supra* note 87, at 84-85.

100. There were a limited number of tracts of land in the lesser prairie-chicken's range that met the RWP's definition of "stronghold"; the tracts that met the criteria were identified in the RWP. See *id.* at 85. Those tracts should have been priorities for long-term protection, but WAFWA did not develop a strategy to acquire conservation easements on them, including raising enough money to convince the landowners to forgo other, more lucrative, development opportunities.

pressure on WAFWA to force compliance.¹⁰¹ The result of FWS’ “hands off” approach was that WAFWA spent conservation dollars it collected from participating companies on administrative overhead, short-term easements in less important habitat areas, and even acquisition of a building in Boise, Idaho, to house WAFWA staff. A 2019 audit of the RWP/CCAA revealed these issues and other significant problems with the plan’s implementation.¹⁰² The audit also noted that there was a general lack of transparency at WAFWA with respect to the expenditure of funds. Ten years after the program was launched, WAFWA’s own reports showed that it had failed to meet the goals laid out in the RWP to expand the bird’s population and restore key habitat areas.¹⁰³

The plan’s shortcomings were exacerbated by the fact that participation in the RWP dropped off after the first listing rule was vacated in 2015.¹⁰⁴ Unfortunately, oil and gas drilling continued in the bird’s habitat by companies who were not participating in the RWP, so their impacts were not mitigated at all. By 2024, WAFWA was receiving little funding from the energy industry. The most recent annual report indicates that only \$19,856 in new fees were received in 2024 and WAFWA received less than \$120,000 in new fees in total since 2018, a paltry sum.¹⁰⁵ FWS took no steps to reinitiate the listing of the lesser prairie-chicken, despite the ongoing threats, until forced to do so by another lawsuit brought by environmental groups.

FWS told the federal court last year that it would prepare a new species status assessment for the lesser prairie-chicken by November 30, 2026. Based on its 27-year history with the species, it seems unlikely that the Service’s reevaluation of the best available scientific and commercial information about the bird and the threats it faces will result in a finding that listing is not warranted.

The question is, so what? The voluntary RWP and state-level programs in place have not eliminated the threats the bird faces and there is no meaningful range-wide alternative under consideration. If FWS relists the

bird but produces no effective, overarching conservation strategy that will incentivize private landowners to conserve the highest-quality habitat, the listing by itself will not lead to the species’ recovery. And an energetic oil and gas industry, dug in in opposition to listing, will certainly challenge a listing decision again in court, or seek statutory relief from Congress.

B. Dunes Sagebrush Lizard

The dunes sagebrush lizard, like the lesser prairie-chicken, has the unfortunate luck of being found in a region that contains abundant oil and gas resources. The dunes sagebrush lizard is a small, light brown, spiny lizard found only in the shinnery oak sand dunes and shrublands of a specific ecosystem in southeastern New Mexico and western Texas. It is considered by biologists to be a “habitat specialist” that depends on unique habitat characteristics for nesting, providing cover for its young, and food resources.¹⁰⁶ Its habitat overlaps with the Permian Basin, the most prolific oil-producing region in the world since hydraulic fracturing, or “fracking,” reinvigorated the basin in the 2010s.

Like the prairie-chicken, the dunes sagebrush lizard needs large expanses of intact habitat and is threatened by habitat destruction and fragmentation associated with oil and gas drilling. Sand mining in the species’ habitat also causes harm. Sand mining involves heavy equipment to mechanically remove vegetation and sediments from sand deposits, some of which are habitat for the lizard.¹⁰⁷ The high-quality quartz sand mined in the Permian Basin is used during the fracking process as a “proppant” (solid material used to keep fissures beneath the surface of the ground open) to maximize production of unconventional oil and gas reservoirs.¹⁰⁸ Mining for frack sand in the basin is a recent occurrence; the first mine was developed in 2017 and at least 17 mines exist today.

The threats to the dunes sagebrush lizard have been known for years. The lizard first appeared on FWS’ list of candidate species in 1982.¹⁰⁹ Twenty years later, in 2002, the Center for Biological Diversity (CBD) filed a petition to list the species, and eight years after that, FWS proposed to list it as endangered.¹¹⁰ The agency withdrew the proposed rule to list two years later, however, because New Mexico and Texas had formulated conservation plans to reduce the threats the species faced.¹¹¹ According to former FWS regional staff, political appointees in the Barack Obama Administration indicated that they would not support listing the dunes sagebrush lizard during an election year,

101. See, e.g., Letter from Daniel M. Ashe, Director, FWS, to Ross Melinchuk, Deputy Executive Director, Natural Resources, Texas Parks and Wildlife Department (Mar. 31, 2015) (on file with author) (approving WAFWA’s request that it be given two extra years to obtain permanent conservation easements required by the RWP).

102. BEN GUILLON, AUDIT OF THE LESSER PRAIRIE CHICKEN MITIGATION FRAMEWORK (2019); Scott Streater, *Long-Buried Audit Finds Misused Protection Funds*, E&E NEWS (Apr. 29, 2020), <https://www.eenews.net/articles/long-buried-audit-finds-misused-protection-funds/>.

103. The RWP’s 10-year average population goal is 67,000 birds. See KYLE ET AL., *supra* note 87, at 71. The most recent bird survey data estimated that the 2022 population of birds was only 26,591, a decrease from the 2012 population of 37,170 and nowhere close to the RWP’s goal. KRISTEN NASMAN ET AL., WESTERN ECOSYSTEM TECHNOLOGY, INC., RANGE-WIDE POPULATION SIZE OF LESSER PRAIRIE-CHICKEN: 2012 TO 2022 (2022), https://wafwa.org/wp-content/uploads/2022/11/LPC_RangeWidePopSize2012-2022.pdf.

104. WAFWA’s records indicate that 83% of the participation fees it received were paid during the years the lesser prairie-chicken was listed (2014, 2015, 2023, and 2024), with the majority (71.7%) received in 2014 and 2015, before the court vacated the first listing rule. WAFWA, 2024 ANNUAL REPORT—RANGE-WIDE OIL AND GAS CANDIDATE CONSERVATION AGREEMENT WITH ASSURANCES (CCAA) FOR THE LESSER PRAIRIE-CHICKEN APP. B (2025).

105. *Id.*

106. FWS, SPECIES STATUS ASSESSMENT FOR THE DUNES SAGEBRUSH LIZARD 3 (2024), <https://iris.fws.gov/APPS/ServCat/DownloadFile/249111>.

107. 89 Fed. Reg. at 43762.

108. Endangered Species Status for the Dunes Sagebrush Lizard, 88 Fed. Reg. 42661, 42688 (July 3, 2023).

109. Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species, 47 Fed. Reg. 58454 (Dec. 30, 1982).

110. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77801 (Dec. 14, 2010).

111. Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36872 (June 19, 2012).

because of the likely political fallout from the oil and gas industry, so even a weak plan was better than nothing.¹¹²

In New Mexico, FWS estimates that 65% of the lizard's occupied range is on federal lands and the remainder on private and state-managed lands.¹¹³ The New Mexico conservation plan, which is embodied in a CCAA for participants on nonfederal lands and a CCA for those on federal lands, focuses on avoiding habitat that is suitable for the lizard. Years after it was launched, at least 85% of the lizard's habitat in New Mexico is enrolled in the CCAA or CCA. A 2018 analysis showed that drilling in the lizard's habitat in New Mexico has diminished substantially since the New Mexico plan was put in place, indicating that the goal of avoiding habitat is being met.¹¹⁴ The Service noted in the listing rule that drilling on private lands in New Mexico continues near the species' habitat, however, contributing to fragmentation.

In Texas, where almost all of the lizard's habitat is on private lands, the voluntary conservation effort did not work as well. In 2011, the Texas Comptroller of Public Accounts convened a group of stakeholders to develop the Texas Conservation Plan (TCP), a CCAA.¹¹⁵ The plan was to be overseen by a newly formed entity called the Texas Habitat Conservation Foundation, governed by a board of oil and gas lobbyists.¹¹⁶ The goal of the TCP was to eliminate the need to list the lizard by providing a purely voluntary conservation framework for oil and gas companies, farmers, and ranchers.¹¹⁷ Enrollees would receive incidental take coverage if the lizard were ever listed in the future.

In response to the TCP, FWS withdrew its proposal to list the species, despite several obvious shortcomings of the plan. Most significantly, the plan's participants and their locations were confidential; not even FWS had access to their names and specific locations.¹¹⁸ The TCP was also substantively weak. It did not require that participants avoid lizard habitat. Instead, the plan suggested that, "when feasible," participants should stay out of it.¹¹⁹ Finally, the plan contained no enforcement mechanism at all and only weak monitoring provisions.

The TCP's flaws became glaring within a few years. First, a newly elected Texas Comptroller learned that the Texas Habitat Conservation Foundation had failed to implement the TCP's basic monitoring and site restoration requirements. The Comptroller severed its contract with

the Foundation in 2016 and assumed direct responsibility for administering the TCP.¹²⁰ Next, the Comptroller determined that the habitat map upon which the plan was based was flawed and that the plan's conservation goals were not being met. The state agency approached FWS about revising the TCP and including sand mining. (The original plan had been written before sand mining commenced in the Permian Basin.)

Ultimately, FWS did not approve the Comptroller's revised plan, and the state relinquished the CCAA permit to FWS.¹²¹ The Service transferred a somewhat revised version of the permit to a nonprofit group called the American Conservation Foundation. Unfortunately, after the permit was transferred, enrollment in the TCP decreased from 29 participants to 8 and enrolled acreage dropped over 75%, from 297,004 acres to 70,397 acres.¹²² Meanwhile, a group of sand mining companies prepared a CCAA to cover their operations and other industrial activities in 2020, but that plan failed to attract *any* participants.¹²³

The CBD submitted a new petition to list the dunes sagebrush lizard in 2018, and filed a lawsuit against FWS four years later to force the issue. The agency finally listed the lizard as endangered in 2024,¹²⁴ writing that the species was "functionally extinct" across 47% of its range, due to extensive habitat loss and fragmentation.¹²⁵ Only 6% of the lizard's habitat could be classified as being in "high" (good) condition.¹²⁶ The voluntary conservation agreements in New Mexico and Texas had not reversed the decline of the lizard. The Service noted that "the accomplishments and level of success of the existing [programs] differ between Texas and New Mexico," and that the Texas program was less successful, citing the decline in enrollment in the TCP.¹²⁷ The Service wrote that the TCP's confidentiality provision made it difficult for the Service to assess its effectiveness.¹²⁸

The oil and gas industry and its allies in Texas were outraged by the listing decision. The Texas Railroad Commission, which regulates the oil and gas industry in the state, voted unanimously to request that the Texas Attorney General's office challenge the listing.¹²⁹ The president of the Texas Independent Producers & Royalty Owners charged that the ESA "has been manipulated and used as a political tool by environmental activist organizations . . .

112. Conversation with Gary Mowad, *supra* note 35.

113. 88 Fed. Reg. at 42672.

114. Jacob Malcolm & Matthew Moskwik, *The Texas Conservation Plan Has Not Slowed Oil and Gas Well Development in Dunes Sagebrush Lizard Habitat*, 7 F1000 Rsch. 824 (June 21, 2018), <https://f1000research.com/articles/7-824>.

115. TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD (*SCELOPORUS ARENICOLUS*) (2012), https://e7feaf98-4923-436b-a5cd-27d14ea66447.filesusr.com/ugd/0c5cfd_53b74f2682884ee0a0d56fd9d6d0255e.pdf.

116. Kiah Collier, *Faced With Failure, State to Propose New Plan to Protect West Texas Lizard*, TEXAS TRIB. (June 23, 2018), <https://www.houstonpublicmedia.org/articles/news/2018/06/23/292443/faced-with-failure-state-to-propose-new-plan-to-protect-west-texas-lizard/>.

117. *Id.*

118. TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD (*SCELOPORUS ARENICOLUS*), *supra* note 115, at 32-33.

119. *Id.* at 40.

120. CBS Texas, *Texas Terminates Foundation Formed to Manage Lizard Species*, CBS News (Mar. 25, 2016), <https://www.cbsnews.com/texas/news/texas-terminates-foundation-formed-to-manage-lizard-species/>.

121. Letter from Glenn Hegar, Texas Comptroller of Public Accounts, to Amy Lueders, Regional Director, Region 2, FWS (Nov. 8, 2018), https://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/DSL-plan-withdraw-letter.pdf.

122. 88 Fed. Reg. at 42672.

123. *Id.* at 42673.

124. 89 Fed. Reg. 43748.

125. *Id.* at 43766.

126. *Id.*

127. *Id.* at 43750.

128. *Id.*

129. Press Release, Railroad Commission of Texas, RRC Commissioners Request Endangered Species Listing Challenge (July 1, 2024), <https://www.rrc.texas.gov/news/070124-rrc-commissioners-request-texas-attorney-general-to-challenge-endangered-species-listing/>.

to disrupt oil and natural gas operators”¹³⁰ A state representative charged that listing the lizard “is another effort by the Biden Administration to shut down drilling in the Permian Basin.”¹³¹ Sen. Ted Cruz (R-Tex.) and Rep. August Pfluger (R-Tex.) introduced bills in Congress that would remove the dunes sagebrush lizard from the endangered species list.

Texas filed a lawsuit against FWS shortly after the listing became final. As of January 2026, the case is pending in the same federal court, before the same judge, that decided the fate of the lesser prairie-chicken.¹³² In arguments that echo those raised in the lesser prairie-chicken litigation, the state argues that FWS did not use the best available scientific information or adequately consider the conservation benefits of the voluntary programs in place when it decided to list the species. As it had done with the listing of the lesser prairie-chicken, the Biden Administration defended the listing in court, but shortly after President Trump took office in January 2025, DOJ backed off. In December 2025, the judge granted the parties’ joint request that the litigation be stayed until February 17, 2026, to facilitate settlement discussions.¹³³

The outcome of the listing litigation is not yet known, but it seems likely that the Trump Administration will agree to remand and vacate the listing, as it did in the prairie-chicken litigation, which would leave the dunes sagebrush lizard’s fate in a similar state of limbo. The president has made it clear in numerous public statements and executive orders that his Administration will reduce the regulatory “burden” that the oil and gas industry operates under, including restrictions that come from the ESA. If the listing is vacated, the dunes sagebrush lizard will be in the same position as the lesser prairie-chicken: a species that the evidence shows to be clearly at risk of extinction without any federal protection under the ESA.

Ten generations of dunes sagebrush lizards have lived and died since FWS first found that its listing was “warranted but precluded” by higher priorities in 1982. Over the past 40-plus years, the oil and gas industry and its state allies have fought relentlessly to keep the species off the endangered species list, arguing that industry, private landowners, and state agencies are better equipped to protect the animal than the federal government and claiming, without evidence, that federal regulatory protection would hurt national security and dramatically curtail domestic oil production.

FWS has been reluctant to impose its regulatory authority on the industry directly, as evidenced by its willingness to bless the highly flawed TCP in Texas, which the Texas

Comptroller eventually abandoned, and its refusal to list the species until forced to do so through litigation. Meanwhile, oil and gas drilling and sand mining continue in the Permian Basin without meaningful mitigation of the impacts on the lizard, posing a continuing threat to the habitat that remains.¹³⁴ The fate of the listing, and the species itself, is highly uncertain.

VI. Conclusion

When Congress enacted the ESA in 1973, there was strong support across party lines for the very lofty policy goals contained in the statute. Committee reports made it clear that Congress’ goal for the legislation was broad and ambitious: to protect and restore biodiversity. Polls show that the American public continues to strongly support the goals of the statute.¹³⁵ But FWS’ implementation of the Act, especially on private lands, does not mirror that commitment. In recent years, the agency has been reluctant to make decisions that would be unpopular with private landowners and industry, and willing to go to great lengths to avoid imposing federal regulations that could affect the use of private lands, even when the species at issue depend on private lands and clearly need strong conservation measures to survive and recover.

The listing sagas of the lesser prairie-chicken and dunes sagebrush lizard illustrate the political and economic power of the oil and gas industry and its allies, but FWS could have been more proactive years ago and insisted on improvements to the lesser prairie-chicken’s range-wide plan and the dunes sagebrush lizard’s CCAAs, improvements that might have led to better results for the species. Instead, the agency acquiesced to weak plans that were destined for failure and, when eventually forced to list both species by litigation brought by environmentalists, lost the ensuing challenges by the oil and gas industry and its state allies. The species ended up high and dry.

For years, the conventional wisdom has been that the ESA acts as a disincentive for conservation on private lands, because it contains only “sticks”—draconian penalties for noncompliance—and no “carrots” to encourage good stewardship. There is certainly truth to that perception, and multiple examples of landowners destroying potential habitat for listed species rather than going through the regulatory maze associated with obtaining an incidental take permit. One of the most famous examples was a landowner in North Carolina named Ben Cone Jr., who cut down most of the trees on his land to prevent them from growing old enough to serve as nesting habitat for the endangered

130. Press Release, Texans for Natural Gas, Texas Oil and Gas Industry Continues Commitment to Protecting Dune[s] Sagebrush Lizard Amid Weaponization of Endangered Species Act (July 3, 2024), https://www.texansfornaturalgas.com/texas_oil_and_gas_industry_continues_commitment_to_protecting_dune_sagebrush_lizard_amid_weaponization_of_endangered_species_act.

131. *Id.*

132. Texas v. U.S. Dep’t of the Interior, No. 7:24-cv-233 (Sept. 23, 2024).

133. Order Continuing Stay of Litigation, Texas v. U.S. Dep’t of the Interior, No. 7:24-cv-00233-DC-RCG (W.D. Tex. Dec. 22, 2025).

134. Interestingly, at least one energy company that provides energy transmission services has chosen to seek an incidental take permit from FWS rather than fight the species’ listing. See NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC, DUNES SAGEBRUSH LIZARD HABITAT CONSERVATION PLAN (2025), <https://downloads.regulations.gov/FWS-R2-ES-2025-0053-0003/content.pdf>.

135. John A. Vucetich et al., *Support for the U.S. Endangered Species Act Is High and Steady Over the Past Three Decades*, 18 CONSERVATION LETTERS e13111 (2025), <https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/conl.13111>.

red-cockaded woodpecker.¹³⁶ A former director of FWS, Sam Hamilton, summed up the problem this way: “If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears.”¹³⁷ After years of policy discussions about the problem, and earnest efforts to address it within the confines of the Act, it is time to develop a new paradigm.

The programs that FWS created during the Clinton Administration, discussed above, were somewhat helpful, but interest and participation appear to be waning. More recently, as with the lesser prairie-chicken and the dunes sagebrush lizard, the Service has used a different approach and tried to avoid listing altogether by encouraging the private sector to work with states and local governments, and sometimes federal agencies, to design conservation plans that would be robust enough to justify not listing the species.¹³⁸

But that approach will be effective only if the conservation plan is carefully designed to yield benefits for the species. Too often, FWS relents to political pressure and approves a plan that is too weak to succeed. And despite the Service’s efforts to make regulation of listed species more palatable and less onerous, and willingness to bless less-than-adequate conservation efforts to avoid federal regulation, many landowners and industries remain flat-out opposed to the ESA and determined to fight any regulations at all.

The ESA needs to be revised. The law has not been significantly amended since the 1980s, despite advances in conservation biology and much better understanding of the threats posed by climate change to individual species and ecosystems. Implementation of the statute has become incredibly complex with multiple policies and regulations developed over successive presidential administrations, because the statute itself is silent on many modern biodiversity challenges. The surveys indicate that the American

public supports the ESA, but opposition from industry, especially the oil and gas sector, and some landowners is stronger than ever. Meanwhile, environmental groups fight to protect the law as it is written, reluctant to open a potential Pandora’s box by acknowledging the need for substantial reform.

For the Act to effectively provide a safety net for the two-thirds of listed species that rely on private lands, a bold new approach is needed. That approach should include meaningful financial incentives for private landowners to protect habitat. Owning habitat for a rare species should be an asset, not a liability. A new approach should also include compensating landowners when ESA-driven land restrictions affect their property values and working more closely with industry when a listing would affect its bottom line, to develop mitigation and minimization measures that are clear, practical, and easy to implement.

To improve its effectiveness for rare species, an updated law would focus more on protecting the nation’s disappearing natural ecosystems—short grass prairies, coastal wetlands, and freshwater springs—and less on individual, sometimes obscure, species. Finally, FWS and NOAA Fisheries need additional funding for research, public education, and outreach. They also need financial and political support to investigate violations of the ESA, to ensure that there is a meaningful deterrent to disregarding the law. The Services need the staff and funding to be an effective counterweight to regulated entities that aim to weaken the law.

The lesser prairie-chicken and dunes sagebrush lizard are victims of the ESA’s ineffectiveness when it comes to protecting species on private lands. For both species, FWS tried to accommodate the oil and gas industry and ultimately failed. It also failed to generate a robust conservation plan for either species. It is time to rewrite the ground rules and give other species a fighting chance when their survival clashes with economic activity.

136. Jane S. Stroup, *Ben Cone, Jr., and the Endangered Species Act*, NORTH CAROLINA HIST. PROJECT, <https://northcarolinahistory.org/encyclopedia/ben-cone-jr-and-the-endangered-species-act/> (last visited Jan. 9, 2026).

137. Jonathan H. Adler, *Regulation vs. Conservation*, COMPETITIVE ENTER. INST. (May 1, 1996), <https://cei.org/publication/regulation-vs-conservation/>.

138. FWS also adopted such an approach for the greater sage-grouse (*Centrocercus urophasianus*), deciding not to list the highly imperiled bird in 2015 after the federal government entered into management agreements with the states that contain grouse habitat. The conservation plan was weakened significantly during the first Trump Administration, but the bird remains unlisted.