



PERC POLICY REPORT | APRIL 2018

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HOW RESTORING THE ENDANGERED SPECIES ACT'S TWO-STEP  
PROCESS CAN PREVENT EXTINCTION AND PROMOTE RECOVERY

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Cover photo used for northern spotted owl illustration: © Kendra Knight / USFWS-Pacific SW Region

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Northern Sea Otters

# Summary

The Endangered Species Act has proven effective at preventing extinctions but not at promoting species recovery. Because we care about preventing extinction and recovering endangered species, the challenge is to find reforms that preserve what the Endangered Species Act does well while boosting incentives for recovering species.

The statute provides for the listing of two categories of species: “endangered” species, which are currently at risk of extinction, and “threatened” species, which are at risk of becoming endangered in the foreseeable future. When Congress passed the act in 1973, it envisioned states taking the lead to protect threatened species, with strict federal regulations against “take” reserved for endangered species. In 1975, however, the U.S. Fish and Wildlife Service issued a regulation extending the take regulation to threatened species too, eliminating the distinction between the two categories.

Take is defined so broadly that it can include activities intended to help species and can complicate state and private efforts to recover species. Under the current approach, landowners who provide habitat to listed species receive no benefit; instead, they are penalized through costly regulatory burdens such as restrictions on land use, reduced property values, and costly permitting requirements.

The Department of the Interior should restore the Endangered Species Act’s distinction between endangered and threatened species, reserving the take prohibition as a backstop to protect endangered species from extinction. If the statute’s distinction between the two categories was restored, states and landowners would be encouraged to recover threatened species before they reach endangered status. A threatened listing would serve as a signal that a species was at risk of becoming endangered, encouraging states, landowners, and other groups to recover the species.

Innovative and collaborative conservation programs would be easier to develop because landowners would have greater incentives to participate. Landowners who recover endangered species would be rewarded for their efforts by reduced regulatory burdens once a species’ status was changed to threatened, creating a powerful incentive to recover endangered species. Crucially, the Endangered Species Act’s take prohibition would continue to protect endangered species from extinction.



Gray Wolf

# Introduction

The Endangered Species Act is perhaps the United States' most popular environmental law. Despite that popularity, the statute is the subject of intense political conflicts, with supporters crediting it with saving 99 percent of listed species from extinction and critics responding that only 2 percent of those species have recovered.

What if both sides are right? In other words, what if the statute is effective at preventing extinction but not at promoting recovery efforts? Because we care about preventing extinction and recovering endangered species, the challenge is to find reforms that preserve what the Endangered Species Act does well while boosting incentives for recovering species. Fortunately, the Endangered Species Act already includes a mechanism to better accomplish both goals, if we'd only take better advantage of it.

The statute provides for the listing of two categories of species: endangered and threatened, distinguished by the seriousness of the threats they face. When Congress passed the act in 1973, it envisioned states taking the lead to develop innovative means to protect threatened species, with strict federal regulations serving as a backstop to protect endangered species from extinction. The statute would accomplish this division of labor by reserving the most burdensome federal regulations for species that are listed as endangered. By imposing heavier federal burdens when a species declines and, conversely, relaxing those burdens as a species recovers, the act would also help align landowners' incentives with the interests of species, encouraging private conservation and recovery efforts.

Unfortunately, in 1975, the U.S. Fish and Wildlife Service issued a regulation that eliminated the distinction between threatened and endangered species, blunting these incentives. However, there is good reason to think that restoring the Endangered Species Act's distinction between the two categories would provide substantial conservation benefits by encouraging states and landowners to recover threatened species. Doing so would avoid the artificial time constraint that makes it so difficult to develop collaborative conservation programs in the short window of time between a species' proposed listing and a final decision. With more time to develop innovative, market-based conservation programs, states, property owners, and environmentalists could make significant strides toward species recovery. At the same time, the act's take prohibition would continue to serve its intended function as a backstop to protect endangered species from extinction.

Consequently, a return to Congress's original design offers a means of achieving both goals: maintaining the Endangered Species Act's effectiveness at preventing extinction while boosting the incentives to recover listed species.

Restoring the Endangered Species Act's distinction between endangered and threatened species would provide substantial conservation benefits to species such as the wood stork.



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# Prevent Extinction or Promote Recovery: A False Choice

Forty-five years after its enactment, the Endangered Species Act enjoys broad popularity. Public opinion surveys routinely show overwhelming support for the law, regardless of political party.<sup>1</sup> Despite that popularity, the act remains politically controversial, with little reason to suspect that will change anytime soon. Congressman Rob Bishop, Chairman of the U.S. House Natural Resources Committee, has proclaimed that he “would love to invalidate [it].”<sup>2</sup> He’s not alone. Every year, legislation is proposed to fundamentally change the law.<sup>3</sup> Although broad reform legislation has not passed in decades, smaller reforms and species-specific exemptions have been routinely proposed and enacted.<sup>4</sup>

Political debate over the Endangered Species Act has focused on whether it is a success or a failure. To supporters, the Endangered Species Act is a success because it has saved 99 percent of listed species from extinction.<sup>5</sup> To critics, it is a failure because only 2 percent of those species have recovered and been taken off the list.<sup>6</sup> Armed with these talking points, the two sides of this political conflict have endlessly fought over which is the better metric, with little progress.

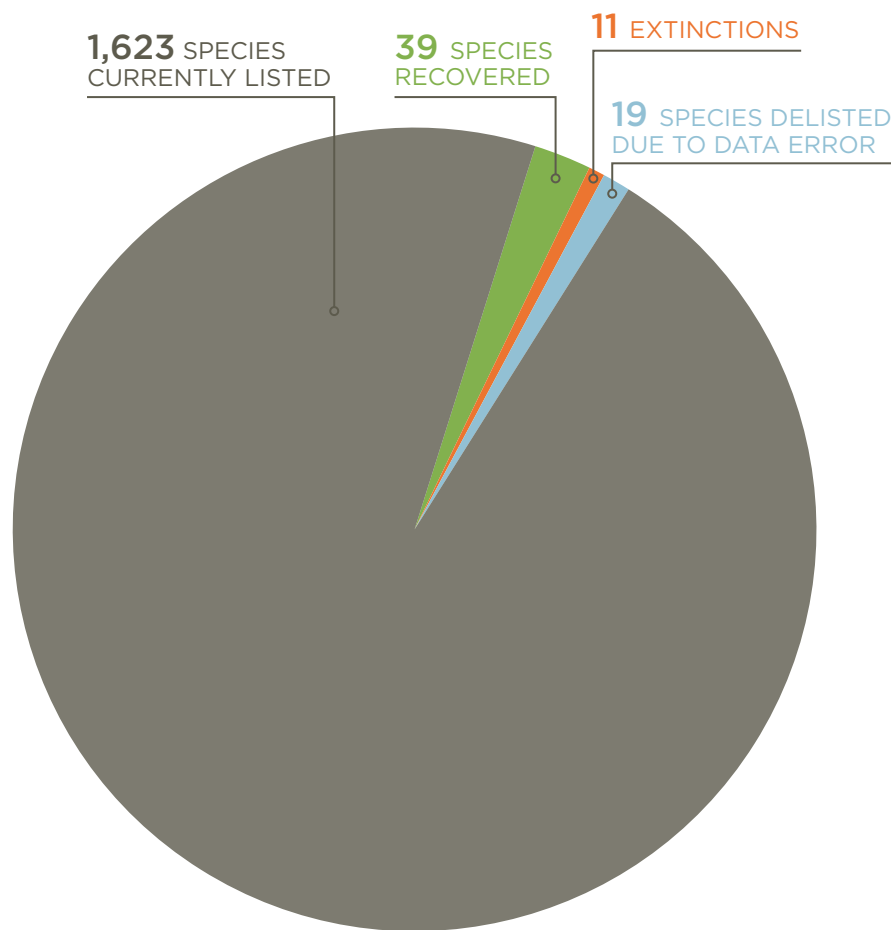
Do we have to pick one? Both statistics can be true. The Endangered Species Act can be effective at preventing extinction but ineffective at creating the necessary incentives to promote recovery efforts. Fighting over which is more important ignores that people care about achieving both goals. No one should be satisfied by species remaining at the precipice of extinction, even if they don’t fall over that cliff.

Rather than arguing about which is the better metric for judging the statute, we should look for reforms that preserve what the Endangered Species Act does well while strengthening it as a tool for promoting species recovery. Maintaining the critical protections that prevent endangered species from going extinct while looking for ways to encourage private landowners to conserve and recover species is the only way to begin achieving both goals. Fortunately, the statute provides an overlooked means of doing just that.



The Endangered Species Act is the subject of intense political conflicts, with supporters crediting it with saving 99 percent of listed species from extinction and critics responding that less than 2 percent of those species have recovered.\* What if both sides are right?

### Listings of Domestic Species under the Endangered Species Act



Source: U.S. Fish and Wildlife Service Environmental Conservation Online System

\* Crediting the Endangered Species Act with saving 99 percent of listed species from extinction assumes that all listed species would have gone extinct but for the statute's protections. According to a widely cited study, a more accurate estimate of the number of extinctions avoided by the statute (between 1973 and 1998) was 172. See Mark W. Schwartz, The Performance of the Endangered Species Act, Annual Rev. of Ecology, Evolution, and Systematics, Vol. 39: 279-299 (2008).

# The Endangered Species Act Two-Step

Prior to 1973, the federal government's role in protecting endangered species was limited to regulating federal lands and federal actions that jeopardized these species.<sup>7</sup> Channeling Benjamin Franklin's witticism that "an ounce of prevention is worth a pound of cure," President Nixon called for a new endangered species law that would allow for federal intervention earlier, before a species' status became too bleak, as well as regulation of private activities that affect endangered species.<sup>8</sup> Congressman Dingell, the Endangered Species Act's principal sponsor, similarly urged proactive protection of species that "are not yet on the brink of extinction."<sup>9</sup>

From this desire, the act's two-step process was born. The law provides for the listing of two categories of species: "Endangered" species are those currently at risk of extinction, and "threatened" species are those at risk of becoming endangered in the foreseeable future.<sup>10</sup> The latter category is far broader than the former, providing an added measure of protection against a species' decline. For example, species can be listed as threatened if their populations are currently healthy—or even growing—if they are anticipated to decline decades from now.<sup>11</sup>

These categories were intended to be more than an academic distinction. The statute provides different degrees of regulation for endangered and threatened species commensurate with the threats they face. Endangered and threatened species are both protected from federal actions that could adversely affect them or their habitat.<sup>12</sup> But, as an added measure of protection, the statute also prohibits private activities that affect endangered species—which the statute defines as "take"—unless authorized by

a federal permit.<sup>13</sup> Applying for a permit is a costly and time-consuming endeavor that can delay projects indefinitely and, if a permit is granted, substantially increase the project's costs. The take prohibition is backed up by substantial civil and criminal penalties.<sup>14</sup> Private parties, including environmental groups, can also enforce this prohibition through litigation to enjoin take.

When you hear the term "take," you probably think of activities that kill or harm wildlife. But the statute defines it far more broadly. Catching a protected species without a federal permit or getting too close to one is considered take. The statute has also been interpreted by the Fish and Wildlife Service to include "incidental take"—actions that unintentionally affect species—including land use activities that adversely modify habitat, such as building homes, farming, or harvesting timber.<sup>15</sup>

Take is defined so broadly that it can even include activities intended to help species. For instance, the Nigiri Project, a collaboration between U.C. Davis and conservation group California Trout, aims to recover California's salmon populations by encouraging rice farmers to allow salmon to use their flooded fields as habitat.<sup>16</sup> Those fields mimic the floodplain habitat that salmon relied upon before modern water infrastructure. Giving juvenile salmon access to insect-rich flooded fields allows them to grow bigger before migrating to the ocean, boosting survival rates.<sup>17</sup> Because catching salmon and moving them to these fields is considered a form of "take," the project required a federal permit. According to CalTrout senior scientist Jacob Katz, the biggest obstacle the project faced was convincing the federal and

state government to issue the required permits for them to move fish to the new habitat.<sup>18</sup>

The take prohibition can also complicate state efforts to recover species, as was recently shown in the conflict between the U.S. Fish and Wildlife Service and the state of Utah over the threatened Utah prairie dog.<sup>19</sup> To provide for the species' long-term recovery, as well as reduce landowner animosity, Utah developed a plan to move prairie dogs from residential areas to public lands where the state had improved habitat. After a lawsuit resulted in an injunction against enforcement of the federal take prohibition for this species, the state was free to implement its plan for two years. But the state's plan ground to a halt when the injunction was overturned on appeal. Now, resuming the conservation program will require changing the federal regulation or navigating the costly and time-consuming federal permitting process.<sup>20</sup>

Acknowledging that the broad take prohibition imposes significant burdens, Congress deemed it necessary as the last line of defense to protect endangered species from extinction. But Congress did not make the same judgment for threatened species. Instead, the Endangered Species Act explicitly excludes threatened species from the take prohibition.

Left: © USFWS\_John Ridilla  
Right: USFWS midwest / Al Hicks-NYDEC



Delta Smelt



Northern Long-Eared Bat

### BOX 1: Endangered or Threatened?

Endangered species may have only a few, small populations, whereas threatened species can be numerous and widely distributed. For example, recent surveys of the endangered delta smelt have found as few as six in the San Francisco Bay Delta, the only place where the species is found.<sup>21</sup> In contrast, there are millions of northern long-eared bats, a threatened species found in 37 states.<sup>22</sup>

The take prohibition can complicate state efforts to recover species, as shown in the conflict between the U.S. Fish and Wildlife Service and the state of Utah over the threatened Utah prairie dog.



© Donald Hobern

The Utah prairie dog is a threatened species.

Senator Tunney, the floor manager of the bill that became the act, explained this was intended to allow states to experiment with efforts to recover threatened species:

The two levels of classification facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions. Since most of our resources for restoring and propagating species lie with the States, they are encouraged to use their discretion to promote the recovery of threatened species and Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction.<sup>23</sup>

That description may sound foreign to anyone familiar with how the statute is implemented today.<sup>24</sup> Since 1975, the U.S. Fish and Wildlife has prohibited the take of all threatened species by regulation, unless it adopts another regulation relaxing that prohibition for a particular species.<sup>25</sup> Under this approach, threatened and endangered species are treated the same regardless of the degree of threats they face. That is, despite Congress's original distinction between the two categories of species, the Endangered Species Act's prohibition on take applies equally to both threatened and endangered species today. When announcing that the Florida manatee's status was being upgraded from endangered to threatened, Chuck Underwood,

of the U.S. Fish and Wildlife Service’s Florida Office, underscored this reality: “People have misperceptions that we have two lists. It’s one classification.”<sup>26</sup> For the manatee, like many other species, news that the species’ status had improved enough that it no longer needed to be classified as endangered did not come along with any regulatory relief for the affected parties. They would remain regulated just as they had been when the manatee was endangered.

Because the U.S. Fish and Wildlife Service regulation purports to overrule Congress’s decision to regulate endangered and threatened species differently, some have argued that it violates the statute.<sup>27</sup> But that question has not been scrutinized by courts. Legal infirmities aside, treating endangered and threatened species the same is an ineffective means of conserving and recovering species. As the next section explains, a return to Congress’s original two-step approach would provide better incentives for recovery efforts and could boost the recovery rate of endangered species. And, importantly, that improvement would not come at the expense of the statute’s effectiveness at preventing extinction of endangered species.

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Northern Spotted Owl

#### **BOX 2:** Threat of Conflict

Because threatened species are usually more numerous and widely distributed than endangered species, the application of the U.S. Fish and Wildlife Service’s regulation to threatened species has been the source of some of the biggest conflicts that have arisen under the Endangered Species Act. For instance, it was at the center of the conflict over the threatened listing of the northern spotted owl, which significantly reduced timber harvesting in the Pacific Northwest.<sup>28</sup>

# The Carrot and the Stick

Private landowners are essential to the conservation and recovery of endangered species because they provide habitat for the overwhelming majority of listed species.<sup>29</sup> Consequently, creating incentives for landowners to conserve and enhance habitat is critical to promoting species' recovery.

Unfortunately, the Endangered Species Act, as currently implemented, gets the incentives backward. Landowners who provide habitat to listed species receive no benefit; instead, the statute penalizes them by imposing costly regulatory burdens such as restrictions on land use, reduced property values, and costly permitting requirements. By making a threatened or endangered species a liability rather than an asset, the statute can encourage property owners to adopt a strategy of “shoot, shovel, and shut up”—which, as its name suggests, does not end well for the listed species.<sup>30</sup>

Fears about the impact of the statute's perverse incentives are well founded. In a study of timberland owners' responses to Endangered Species Act regulations, Dean Lueck and Jeffrey Michael found that owners accelerated timber harvesting to prevent their trees from becoming habitat for the red-cockaded woodpecker.<sup>31</sup> This is a rational response because, from an individual landowner's perspective, the costs of regulation exceed the benefits of conservation. Sam Hamilton, a former director of the U.S. Fish and Wildlife Service, has summed up the problem well: “If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears.”<sup>32</sup>

Treating endangered and threatened species the same confounds the problem by making property owners indifferent to how vulnerable a species is once it is listed. Under the U.S. Fish and Wildlife Service's regulation, a property owner has few incentives to help recover an endangered species because she will face the same regulatory burdens even if the species' prospects improve and its status is changed to threatened. There's no reward for the landowner, unless she can recover the species to the point that it can be completely delisted, a rare occurrence—only 39 out of 1,692 listed domestic species have ever recovered and been delisted.

Likewise, once a species is listed as threatened, the same intense regulatory burdens apply to landowners regardless of whether the species is imminently at risk of extinction or faces only remote threats decades in the future. More alarmingly, as a species' status worsens, the easiest means of escaping those regulatory burdens may be for the species to go extinct.

Returning to Congress's approach of regulating endangered and threatened species differently would improve incentives by aligning landowners' interests with those of species. Recovery efforts can be difficult, expensive, and time consuming. They also often require the participation of private landowners to supply critical habitat. For property owners to bear these costs there must be some upside when a species' prospects improve. If landowners knew that success would result in reduced regulatory burdens, that would be more likely to provide a significant “carrot” to entice recovery efforts.<sup>33</sup>

In a study of timberland owners' responses to Endangered Species Act regulations, owners accelerated timber harvesting to prevent their trees from becoming habitat for the red-cockaded woodpecker because the costs of federal regulation exceed the benefits of conservation.

© USFWS



The red-cockaded woodpecker was listed as an endangered species in 1970.

Similarly, returning to Congress's graduated approach to regulating listed species would likely encourage landowners to work with states and conservation groups to proactively conserve threatened species. Under Congress's original two-step approach, a threatened listing would serve as a signal that a species was at risk of becoming endangered, encouraging states, landowners, and other groups to recover the species. If recovery efforts did not occur, the

species could continue to slide, triggering increased regulatory burdens ("the stick"). Collaborations would be easier to develop because landowners would have greater incentives to participate, and no federal permit would be required if the conservation efforts require minor or incidental take. Together, these factors could dramatically reduce the costs for states and conservation groups to develop innovative partnerships with habitat owners.

# Building on Obama-Era Reform

This is not the first reform proposal aimed at improving incentives by adjusting regulatory burdens. To its credit, the U.S. Fish and Wildlife Service has several discretionary programs that permit take in exchange for conservation benefits.<sup>34</sup> For instance, through habitat conservation plans, the agency authorizes some amount of incidental take in exchange for conserving and improving habitat elsewhere.<sup>35</sup>

These discretionary options all have a common shortcoming: They require an uncertain, costly, and time-consuming federal pre-approval process. For instance, the Southern Edwards Plateau Habitat Conservation Plan, which was created for nine endangered species in Bexar County, Texas, took six years to negotiate and obtain federal approval.<sup>36</sup> For many projects, such a long delay is at best extremely costly and at worst a deal breaker.

The impacts of the costly and time-consuming approval process are not limited to economic development projects. Even efforts to conserve species can be discouraged or bogged down by the process. The Nigiri Project described previously, for instance, was fortunate to have the support of a premier research university, which helped navigate that process. This same problem frequently recurs for other projects. For instance, the costs and delays of federal take permits threatened to shut down hunting ranches responsible for growing large populations of three endangered antelope species until Congress passed a law exempting them from that process.<sup>37</sup>

As Ya-Wei Li of Defenders of Wildlife has explained, the need for pre-approval in each of these options necessarily introduces substantial delay and uncertainty.<sup>38</sup> For example, an applicant must submit extensive application materials

and undergo an environmental review by the agency. Preparing those materials is costly, and the time spent on them takes away from other productive endeavors. And all of this must be done with little or no certainty that the permit or plan will be approved.

Overall, Li observes, these options “impose substantial workload on applicants and [the federal government], thus hindering the agencies from carrying out other conservation activities.”<sup>39</sup> The same is true for property owners. By increasing the costs of private conservation, this burdensome process can hinder private efforts to recover species. It can especially discourage conservation by property owners who are not intrinsically motivated to consider species, who may abandon projects that could otherwise incorporate environmental benefits.

Restoring the statute’s distinction between endangered and threatened species would reduce these obstacles by removing barriers to projects involving threatened species, including habitat improvement projects. The result would be greater incentives for conservation and, ultimately, faster and more widespread recovery of listed species. For instance, habitat conservation projects that involve minor incidental take would no longer need to undergo the federal pre-approval process. And, even for endangered species, landowners would be more willing to navigate the permit process if they knew that they would be rewarded by reduced regulatory restrictions if the recovery effort succeeds.

This reform would expand upon actions by the Obama administration to promote state and private conservation programs as a means of avoiding the need to list species under the Endangered Species Act.<sup>40</sup> The Policy for Evaluating





### BOX 3: Greater Sage Grouse

The greater sage grouse, the largest species of grouse in North America, is known for courtship displays involving dozens of male birds puffing out their chests and strutting to attract females.<sup>41</sup> In 2010, the U.S. Fish and Wildlife Service determined that the greater sage grouse warranted listing under the Endangered Species Act but that the listing was precluded by higher priorities.<sup>42</sup> A listing would have been severely disruptive because the bird's range covers 165 million acres in 11 states and overlaps with key oil and renewable energy development sites.<sup>43</sup> Responding to these concerns, the U.S. Department of Agriculture launched the Sage Grouse

Initiative in 2010, with a goal of conserving the species through partnerships with states, property owners, and conservation groups.<sup>44</sup> The effort brought together such disparate groups as ranchers, Conoco-Phillips, and the National Audubon Society. Buy-in from private property owners was essential because 81 percent of the species' wetland habitat is on private land. Over the next five years, the initiative enrolled landowners owning 4.4 million acres of habitat and enhanced 400,000 acres by removing invasive plant species.<sup>45</sup> In 2015, the U.S. Fish and Wildlife Service announced that the species no longer warranted listing due in large part to this conservation effort.<sup>46</sup>



#### BOX 4: Gopher Tortoise

The gopher tortoise, native to the southeastern United States, digs long burrows that provide habitat for more than 300 other species. Construction has fragmented the species' habitat, which led the U.S. Fish and Wildlife Service to declare that the eastern population of the species warranted listing but that it was precluded by higher-priority species.<sup>47</sup> Recognizing the consequences of a listing, the states of Florida and Georgia developed plans to proactively preserve the species. Florida required developers whose projects would impact gopher tortoises to relocate the animals to suitable habitat.<sup>48</sup> Georgia partnered with the Department of Defense, state agencies, state industry groups, and the Nature Conservancy on a \$150 million project to conserve habitat.<sup>49</sup>

Conservation Efforts when Making Listing Decisions (PECE), a U.S. Fish and Wildlife Service policy issued in 2003 but used to great effect by the Obama administration, permits the agency to forego listing a species if state and private conservation efforts are likely to reduce threats to the species.<sup>50</sup> For several controversial species, the agency used this authority to work with states, industry, property owners, and environmentalists to proactively conserve species, avoiding the need to list them and the regulatory burdens that would result.

These conservation partnerships provide powerful evidence that the desire to avoid burdensome regulatory restrictions can motivate states, property owners, and conservation groups to work together to conserve and recover species. However, these partnerships still face significant obstacles that could be avoided by restoring the Endangered Species Act's original two-step approach.

Because pre-listing conservation efforts must be planned and agreed to between the time a species is proposed for listing and a final decision, they are subject to a significant and artificial time constraint. The Endangered Species Act requires listing decisions to be made in about one year.<sup>51</sup> Due to resource constraints, that deadline is routinely missed, but listing supporters can sue to force the agency to decide whether to list a species as quickly as practicable.<sup>52</sup>

Consequently, whoever is leading a pre-listing conservation effort must get everyone to the table, develop a conservation strategy, secure funding, and prove landowners' willingness to participate—all within the short span between



#### BOX 5: Lesser Prairie Chicken

The lesser prairie chicken is a small species of grouse found in Kansas, Colorado, Oklahoma, Texas, and New Mexico, including areas important to energy development and agriculture. In 2012, the U.S. Fish and Wildlife Service proposed to list the lesser prairie chicken as threatened. To avoid the economic and political consequences of a listing, the Western Association of Fish and Wildlife Agencies developed a range-wide conservation plan for the species, working with the affected states, property owners, and conservation groups.<sup>53</sup> Under the plan, the lesser prairie chicken population climbed from 19,000 in 2013 to nearly 29,000 in 2015. Drought reduced the population to 25,000 in 2016 but it has surged again to more than 33,000

today.<sup>54</sup> In 2014, the U.S. Fish and Wildlife Service proceeded to list the species anyway, arbitrarily assuming—contrary to the PECE and its actions on several other species—that this voluntary conservation would be abandoned if the agency declined to list the species.<sup>55</sup> That decision was overturned by a federal court.<sup>56</sup> But the saga continues. After a drought reduced the population in 2016, several groups petitioned to have the species listed again.<sup>57</sup> The agency is expected to consider those petitions in 2018.

Once a species is listed as threatened, states, industry, property owners, and conservationists would have the flexibility to develop and implement innovative conservation strategies and build the trust needed to make them effective.



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#### BOX 6: Dunes Sagebrush Lizard

The dunes sagebrush lizard lives in 650,000 acres of shinnery oak dune habitat in Texas and New Mexico, overlapping with the Permian Basin—a major source of fossil fuel and renewable energy development. Citing habitat fragmentation and invasive mesquite plants crowding out shinnery oak, the U.S. Fish and Wildlife Service proposed to list the species in 2010. To avoid economic disruption, Texas and New Mexico enlisted the help of landowners, industry, and conservation groups to develop a voluntary plan.<sup>58</sup> Under the Texas plan, for instance, energy developers paid fees to fund the removal of old infrastructure that fragmented habitat and mesquite plants that crowded out shinnery oak.<sup>59</sup> Ken Salazar, the secretary of the interior during the Obama administration, praised the effort as “a great

example of how states and landowners can take early, landscape-level action to protect wildlife habitat.”<sup>60</sup> Based on the plans, the U.S. Fish and Wildlife Service declined to list the species.

Because the plans had to be finalized in the mere two years between the proposed listing and final decision, the states focused on the most pressing existing threat—energy development. Five years later, sand mining has arisen as a new threat to the species.<sup>61</sup> Incorporating sand mining into the plan will require additional creativity. However, incorporating this new threat into the plan will have to be rushed because a petition to list the species will force the U.S. Fish and Wildlife Service to make a decision on the species prematurely or face more lawsuits.<sup>62</sup>

the federal agency initiating the listing process and making a final decision. If potential participants doubt that a pre-listing strategy can be completed in time—a likely concern for species that have generated conflict in the past—the effort may be abandoned in its infancy.<sup>63</sup>

The mad dash to finish a pre-listing conservation plan also makes it more difficult to anticipate potential issues that may arise in the future. Focusing on immediate and easily identified threats to species may work in the short term. But as markets, technology, and land uses change, new threats may arise and the potential listing may rear its head once again, as it has in the case of the dunes sagebrush lizard. At that point, it will be another race against time, as a new conservation plan will have to be completed before the listing process concludes.

This time constraint compounds the difficulty of overcoming the substantial cost of conservation efforts and uncertainty among landowners. Depending on a species' needs, conservation efforts may cost tens of millions of dollars, including foregone productive land-use activities. Additionally, landowners may be skeptical whether the species would be listed without their cooperation or whether their efforts will succeed in avoiding a listing.<sup>64</sup>

Returning to Congress's two-step approach would eliminate the artificial time constraint by bringing this conservation planning within the Endangered Species Act process, rather than operating outside of it. Once a species is listed as threatened, states, industry, property owners, and conservationists would have the flexibility to develop and implement innovative

conservation strategies and build the trust needed to make them effective. Participants would have the confidence that their efforts were necessary, because the species has already been declared as threatened. And conservation programs would have the time and flexibility to adapt to changing circumstances. As new threats arose, participants could incorporate measures to mitigate them, without having to rush to beat a listing decision.

The U.S. Fish and Wildlife Service would also have the benefit of watching these conservation efforts play out, rather than having to make a listing decision based on speculation. After a species is listed as threatened, the agency would not face a mandatory deadline to force premature analysis. So long as the species does not continue to slide to the point of becoming endangered, the agency could study the actual results of recovery efforts over time.

Similarly, this change would address environmentalists' concerns about the risk of backsliding under the PECE approach. According to that backsliding concern, the incentive for landowners to follow through on conservation efforts may be reduced once the decision not to list the species is announced.<sup>65</sup> A return to Congress's original design would solve this problem by allowing species to be listed as threatened without sacrificing state and private parties' flexibility to develop conservation plans. And because the species has been listed, the potential for species-specific regulations of take would serve as a continual incentive to follow through on these plans.

# Making the Endangered Species Act's Two-Step Work

The Obama administration's pre-listing conservation efforts show that avoiding regulatory restrictions can be a powerful incentive for conservation. Thus, they suggest that a return to the statute's original approach of regulating endangered and threatened species differently would promote conservation and recovery. And because this reform will not alter the regulatory restrictions for endangered species, it will not risk the statute's effectiveness at preventing extinctions.

Although environmentalists should embrace this opportunity to boost the Endangered Species Act's recovery rate without sacrificing its effectiveness at preventing extinction, there will inevitably be healthy skepticism about any such reform proposal. After all, changing the way the law treats threatened species involves a degree of deregulation. Won't the result simply be more takes of threatened species without any corresponding conservation benefit?

There are several reasons why this is unlikely. First, under this proposal, landowners would have strong incentives to recover threatened species, not harm them. In fact, landowners would be harming themselves if they did not work to recover threatened species. If the species continues to decline, it will be listed as endangered and landowners will face far greater regulatory burdens than they would have by cooperating to conserve the species.

Second, property owners whose activities require federal funding or permitting would continue to be subject to the Endangered Species Act's consultation requirement, even if the species in question is only listed as threatened. Only by recovering the species to the point that

it can be delisted entirely can property owners avoid this regulatory burden.

Third, the statute contains a mechanism to deal with bad actors without upending the incentives to conserve and recover species. The U.S. Fish and Wildlife Service is required to reassess listed species, including threatened species, every five years.<sup>66</sup> If during one of these five-year reviews the agency finds that some form of intentional take is significantly undermining a threatened species, it can adopt a regulation that narrowly targets that problem without criminalizing all forms of incidental take or otherwise undermining the incentives for voluntary conservation.<sup>67</sup> The mere threat that an agency may adopt such a regulation could be sufficient to motivate cooperation.<sup>68</sup> Because these reviews occur periodically after a threatened species has been listed, they will give states, conservationists, and property owners the necessary breathing room to develop and implement innovative conservation plans.

Finally, states can intervene to ensure that threatened species are adequately protected, just as Congress intended. The form of those interventions may vary from state to state, with some states focusing on regulation while others provide positive incentives for conservation. Increasing the role of federalism in recovering species would enhance accountability, innovation, and experimentation, as states' roles in pre-listing conservation has shown.<sup>69</sup>

States have already expressed an interest in serving this role. After a two-year initiative to study ways to improve the Endangered Species Act, the Western Governors' Association recently concluded that there should be "greater distinction

Under this proposal, landowners would have strong incentives to recover threatened species.

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U.C. Davis doctoral candidate Jacob Katz points to equipment used to hold and measure salmon fingerlings, as part of the Nigiri Project, a study of salmon growth in inundated rice fields in the Yolo Bypass.

between the management of threatened versus endangered species in ESA to allow for greater management flexibility, including increased authority for species listed as threatened.”<sup>70</sup> This interest is not limited to western states. Gordon Myers, the executive director of the North Carolina Wildlife Resources Commission and then-president of the Southeast Association of Fish and Wildlife Agencies, recently testified before a congressional subcommittee that the statute’s two-step process should

be restored to give states the flexibility needed to conserve and recover threatened species. “Congress intended that the states have the opportunity to lead the management of threatened species, including the provision of ‘take’ as a means of conservation of the species,” Myers noted. But by promulgating “a default rule” that applied the same restrictions for endangered and threatened species, the U.S. Fish and Wildlife Service “essentially eliminated the distinction between the two listing categories.”<sup>71</sup>

# Converting Endangered Species from Liabilities to Assets

Although a return to the statute's two-step approach will not immediately convert rare species from a liability into an asset, it would empower states and conservation groups to move in that direction. Rare species would remain a liability under federal law, with the extent of that liability varying based on whether the species is listed as endangered or threatened. But by improving landowners' incentives to participate in conservation efforts with states and conservation groups, the ultimate result could be increased importance of state- and environmentalist-led market-based conservation. Consequently, this reform would complement ongoing state efforts to promote more collaborative means of protecting species through positive incentives.

In 2014, for instance, the Association of Fish and Wildlife Agencies established a Blue Ribbon Panel consisting of business and conservation leaders to design a 21st-century model for conserving wildlife.<sup>72</sup> The panel's recommendations have been incorporated into the bipartisan American Wildlife Recovery Act, a bill that would provide increased funding for state-led innovative conservation efforts from oil and gas revenues.<sup>73</sup> Returning to the Endangered Species Act's two-step approach would make such funding more effective by clearing red tape and increasing landowners' willingness to cooperate.

For the same reason, this reform would also increase the effectiveness of private environmental groups' efforts to promote collaborative conservation. Cooperative efforts between landowners and environmentalists "are the only approaches that are likely to work going forward," according to the Environmental Defense Fund's Eric Holst.<sup>74</sup> Restoring the Endangered Species Act's two-step approach would expand the number of opportunities for environmental groups to partner with states, industry, and landowners to pursue innovative conservation programs. It would also lower the costs of securing landowner participation, by eliminating the federal pre-approval process for threatened species and increasing the willingness of industry and property owners to contribute to the effort.



The bald eagle is often touted as an Endangered Species Act success story. Today the national bird is considered fully recovered after spending decades on the endangered species list.



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# Conclusion

Since the Endangered Species Act was enacted, few species protected by it have gone extinct. That's reason for celebration. But we want the statute to do more. We want endangered species to recover as well. Achieving that goal, without sacrificing the law's success at preventing extinction, requires reform that aligns the incentives of private landowners with the interests of rare species while maintaining regulatory protections for endangered species.

Returning to Congress's original two-step approach of connecting the burdens of regulation to the degree of risks species face would accomplish that needed reform. By imposing more onerous burdens as species approach extinction, and relaxing those burdens as they recover, this reform will encourage landowners to conserve and recover species. And by maintaining the same protections for endangered species that exist today, that reform will not come at the expense of the statute's effectiveness at preventing extinction.

Recent voluntary conservation efforts provide powerful evidence that such reform would benefit species. If the incentive realignment created by this reform were reinforced by other public and private incentives to encourage proactive conservation, the benefits would be even greater.

The manatee is one species that has benefited from the Endangered Species Act's protected status. While that's reason for celebration, the statute can help achieve more.



# Endnotes

1. Tulchin, et al., *Poll Finds Overwhelming, Broad-Based Support for the Endangered Species Act Among Voters Nationwide*, Tulchin Research Memo (July 6, 2015), available at <https://earthjustice.org/sites/default/files/files/PollingMemoNationalESASurvey.pdf>.
2. Darryl Fears, *Powerful lawmaker wants to 'invalidate' the Endangered Species Act. He's getting close.*, Washington Post (Nov. 5, 2017).
3. See, e.g., House Committee on Natural Resources, Press Release, *Bills to Modernize Endangered Species Act Advance Through Committee* (Oct. 4, 2017), available at <https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=403024>.
4. See, e.g., Natural Resources Defense Council, *2017 Anti-Environmental Budget Riders*, NRDC.org (Nov. 28, 2017), available at <https://www.nrdc.org/resources/anti-environmental-budget-riders>.
5. See Lisa Feldkamp, *What has the Endangered Species Act ever done for us? More than you think.*, Nature.org (May 8, 2017), available at <https://blog.nature.org/science/2017/05/08/what-endangered-species-act-done-effective-extinction-conservation/>. The 99-percent talking point assumes that all listed species would have gone extinct but for the statute's protections. According to a widely cited study, a more accurate estimate of the number of extinctions avoided by the statute (between 1973 and 1998) was 172. See Mark W. Schwartz, *The Performance of the Endangered Species Act*, Annual Rev. of Ecology, Evolution, and Systematics, Vol. 39: 279-299 (2008).
6. See Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, Environs Envtl. L. & Pol'y J. (2014); Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* (2011) (noting the distressingly few number of successful recoveries, several of which cannot directly be attributed to the ESA). U.S. Fish and Wildlife Service has not reported to Congress on the status of species in nearly a decade. But, during the 20 years that the service did report whether species were improving, stable, or declining, the percentage of species "improving" ranged from 5 to 10 percent whereas the species declining ranged from 20 to 40 percent. See Langpap, et al., *The Economics of the U.S. Endangered Species Act: A Review of Recent Developments*, 12 Rev. of Enviro. Econ. & Pol'y 69, Fig. 3 (Dec. 2017), available at <https://academic.oup.com/reep/article/12/1/69/4757462>.
7. See George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. Rev. 315, 317 (1975).
8. Richard Nixon, State of the Union Message to the Congress on Natural Resources and the Environment (Feb. 15, 1973) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=4102>).
9. Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, at 72 (statement of Rep. Dingell) (henceforth "ESA Legislative History"); *id.* at 193 (describing the protection of threatened species as the Endangered Species Act's most important innovation). Congressman Dingell was not alone in stressing the expansion of protection to threatened species as the statute's core innovation. See, e.g., *id.* at 204 (statement of Rep. Clausen) ("The most important feature of the bill is the provision extending protection to animals and plants which may become endangered within the foreseeable future. In the past, little action was taken until the situation became critical and the species was dangerously close to total extinction.").
10. 16 U.S.C. § 1532(6) and 16 U.S.C. § 1532(20).
11. The polar bear, for instance, has been listed as threatened based on projected loss of sea ice due to climate change even though, at the time of listing, the Secretary of Interior estimated that the global population had doubled in the previous four decades. Rachel Weisel, *Polar Bear Population*, FactCheck.org (June 18, 2008), available at <https://www.factcheck.org/2008/06/polar-bear-population/>.
12. 16 U.S.C. §§ 1531(c)(1), 1533(a)(3), 1536.
13. 16 U.S.C. § 1538(a) (prohibiting take of "any endangered species").
14. 16 U.S.C. § 1540 (providing civil and criminal penalties for violations).
15. 16 U.S.C. § 1532(19); see *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703 (1995) (upholding the Fish and Wildlife Service's interpretation).

16. University of California, Davis, *Nigiri Project Mixes Salmon and Rice Fields for Fifth Year on Floodplain* (Feb. 23, 2016), available at <https://www.ucdavis.edu/news/nigiri-project-mixes-salmon-and-rice-fields-fifth-year-floodplain>; California Trout, *The Nigiri Concept: Salmon Habitat on Rice Fields*, available at <http://caltrout.org/regions/central-california-region/the-nigiri-concept/>.
17. CapRadio, *A 'Floating Fillet': Rice Farmers Grow Bugs to Help Restore California's Salmon* (Jan. 23, 2018), available at <https://www.youtube.com/watch?v=Lg4ycKF6dSQ>.
18. Personal correspondence with Jacob Katz.
19. See Jonathan Wood, *A Prairie Home Invasion*, PERC Reports 36 No. 2 (Winter 2017), available at <https://www.perc.org/articles/prairie-home-invasion>. I, along with my Pacific Legal Foundation colleagues represented landowners in a challenge to this federal regulation, a lawsuit that ultimately led to the state's conservation program.
20. See Lindsay Whitehurst, *Prairie dog endangered-species plan eases rules under Trump*, Chicago Tribune (Dec. 20, 2017), available at [www.chicagotribune.com/lifestyles/pets/sns-bc-ut--prairie-dogs-20171220-story.html](http://www.chicagotribune.com/lifestyles/pets/sns-bc-ut--prairie-dogs-20171220-story.html) (describing a proposed federal plan that would allow the state plan to resume).
21. Jane Kay, *Delta Smelt, Icon of California Water Wars Is Almost Extinct*, National Geographic (Apr. 3, 2015).
22. There is no single range-wide population estimate for the northern long eared bat. But the U.S. Fish and Wildlife Service acknowledges, based on several regional estimates, that the total population is at least several million. 80 Fed. Reg. 17,974 (Apr. 2, 2015).
23. ESA Legislative History at 358 (statement of Sen. Tunney).
24. The National Marine Fisheries Service, which implements the Endangered Species Act for marine species, still honors the distinction between endangered and threatened species. But that agency is responsible for less than one in ten listed species. See NOAA Fisheries, *Endangered and Threatened Marine Species*, available at [www.nmfs.noaa.gov/pr/species/esa/](http://www.nmfs.noaa.gov/pr/species/esa/).
25. Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44, 412, 44,414 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.31).
26. See Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, AL JAZEERA AM. (Aug. 8, 2014 5:00 AM) available at <http://america.aljazeera.com/articles/2014/8/8/reclassifyingfloridamanatees.html>. The decision to change the manatee's status to threatened was in response to a petition and several follow-up lawsuits filed by the Pacific Legal Foundation.
27. Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015); see Robert Gordon, *Take It Back: Extending the Endangered Species Act's "Take" Prohibition to All Threatened Animals is Bad for Conservation*, Heritage Foundation Backgrounder (Dec. 7, 2017), available at <https://www.heritage.org/sites/default/files/2017-12/BG3267.pdf>. I represent the National Federation of Independent Businesses and the Washington Cattlemen's Association on a pair of rulemaking petitions asking the U.S. Fish and Wildlife Service to withdraw this regulation.
28. See Scott Learn, *Northern spotted owl marks 20 years on endangered species list*, The Oregonian, June 25, 2010, available at [http://www.oregonlive.com/environment/index.ssf/2010/06/northern\\_spotted\\_owl\\_marks\\_20.html](http://www.oregonlive.com/environment/index.ssf/2010/06/northern_spotted_owl_marks_20.html).
29. See Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Reports (1995).
30. See Ronald Bailey, *"Shoot, Shovel, and Shut Up": Celebrating 30 years of failing to save endangered species*, Reason (Dec. 31, 2003), available at <http://reason.com/archives/2003/12/31/shoot-shovel-and-shut-up>.
31. See Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003). Lueck and Michael's findings have been supported by other studies. See List, et al., *Is the Endangered Species Act Endangering Species?*, NBER Working Paper 12777 (2006), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=953200](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=953200); Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 32 Econ. Inquiry 150 (2004).
32. Betsy Carpenter, "The Best Laid Plans," U.S. News and World Report, vol.115, no.13 (1993), p. 89.
33. In theory, this could happen under the status quo by the adoption of a special rule to relax those regulations for a particular species. But such rules require a costly and time-consuming rulemaking process, making them rare and thus their adoption unpredictable for landowners.

34. See U.S. Fish & Wildlife Service, *For Landowners: Safe Harbor Agreements*, <https://www.fws.gov/landowners/safe-harbor-agreements.html>; U.S. Fish & Wildlife Service, *For Landowners: Conservation Banking*, available at <https://www.fws.gov/landowners/conservation-banking.html>; and U.S. Fish & Wildlife Service, *Candidate Conservation: Candidate Conservation Agreements*, available at <https://www.fws.gov/landowners/what-we-do/cca.html>.
35. U.S. Fish & Wildlife Service, *Habitat Conservation Plans*, available at <https://www.fws.gov/landowners/what-we-do/hcp-overview.html>.
36. See Brendan Gibbons, *Habitat plan approved to protect nine endangered species*, San Antonio Express-News (Dec. 29, 2015), available at <https://www.expressnews.com/news/local/article/Habitat-plan-approved-to-protect-nine-endangered-6721825.php>.
37. See Terry L. Anderson, *When the Endangered Species Act Threatens Wildlife*, Wall Street Journal (Oct. 20, 2014), available at <https://www.wsj.com/articles/terry-l-anderson-when-the-endangered-species-act-threatens-wildlife-1413846579>.
38. See Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, Defenders of Wildlife ESA Policy White Paper Series (2017). Li's report recommends administrative changes to allow for expanded use of so-called "special 4(d) rules" which exempt individual threatened species from the take prohibition to varying extents. Although Li correctly diagnoses the obstacles landowners face in seeking permits or habitat conservation plans, his proposal does not avoid them. Special 4(d) rules require an extensive notice-and-comment process that can take years, can get mired in litigation, and have no clear standards that conservationists, landowners, and states can rely on to make their case for one.
39. See *id.*
40. In addition to these collaborative efforts, the Obama administration also adopted more Special 4(d) Rules than any prior administration. See *id.*
41. Audubon, *Greater Sage-Grouse*, available at [www.audubon.org/field-guide/bird/greater-sage-grouse](http://www.audubon.org/field-guide/bird/greater-sage-grouse).
42. The U.S. Fish and Wildlife Service issues a "warranted but precluded" decision if a species meets one of the definitions for listing but the agency's limited budget is better put to listing higher priority species. Once the agency clears its backlog of species waiting to be added to the list, it moves forward on listing those species deemed warranted but precluded.
43. U.S. Fish & Wildlife Service, *The Greater Sage-grouse; Facts, Figures and Discussion*, available at [http://fws.gov/greatersagegrouse/factsheets/GreaterSageGrouseCanon\\_FINAL.pdf](http://fws.gov/greatersagegrouse/factsheets/GreaterSageGrouseCanon_FINAL.pdf).
44. Sage Grouse Initiative, available at <https://www.sagegrouseinitiative.com/about/>.
45. Sec. Tom Vilsack, *New Sage Grouse Conservation Strategy Good for Cattle Ranches, Good for Birds*, usda.gov (Aug. 27, 2015), available at <https://www.usda.gov/media/blog/2015/08/27/new-sage-grouse-conservation-strategy-good-cattle-ranches-good-birds>.
46. Fish & Wildlife Service, *12-Month Finding on a Petition to List Greater Sage-Grouse as an Endangered or Threatened Species*, 80 Fed. Reg. 59,858 (Oct. 2, 2015). Coinciding with the decision not to list the species, the Bureau of Land Management and U.S. Forest Service also announced controversial land use plans to restrict federal land use to protect the sage grouse. See Department of Interior, Press Release, *Historic Conservation Campaign Protects Greater Sage-Grouse* (Sept. 22, 2015), available at <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>. Three years later, those plans remain divisive, with supporters claiming they are preferable to a listing and proof that the Sage Grouse Initiative worked and opponents criticizing them for inconsistency with state and private conservation efforts. Regardless of where you come down on that dispute, the state and private conservation efforts undertaken show that the desire to avoid federal regulation can be a powerful motivator for conservation.
47. 76 Fed. Reg. 45,130 (July 27, 2011).

48. Lisa Conley, *New project will require relocation of gopher tortoise*, Naples Daily News (July 1, 2016), available at <https://www.naplesnews.com/story/news/local/communities/marco-eagle/2016/07/01/new-project-will-require-relocation-of-gopher-tortoise/86632034/>.
49. Georgia Conservancy, *Gopher Tortoise Initiative*, available at <https://www.georgiaconservancy.org/gophertortoise/>; Jonathan Wood, *Voluntary Conservation to the Gopher Tortoise's Rescue*, PERC.org (Feb. 7, 2018), available at <https://www.perc.org/2018/02/07/voluntary-conservation-gopher-tortoises-rescue/>.
50. U.S. Fish & Wildlife Service and National Oceanic and Atmospheric Administration, *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, 68 Fed. Reg. 15100 (Mar. 28, 2003).
51. 16 U.S.C. § 1533(b)(3).
52. See Government Accountability Office, *Environmental Litigation: Information on Endangered Species Act Deadline Suits*, GAO-17-304 (Feb. 2017), available at <https://www.gao.gov/assets/690/683058.pdf>.
53. See Hannah Downey, PERC Case Study, *Easements for Endangered Species: A Collaborative Approach to Saving the Lesser Prairie Chicken* (Dec. 2017), available at <https://www.perc.org/wp-content/uploads/old/pdfs/lesser-prairie-chicken-case-study.pdf>.
54. See McDonald, et al., Western Association of Fish and Wildlife Agencies Report: Range Wide Population Size of the Lesser Prairie-Chicken 2012 to 2017 (Sept. 5, 2017), available at <http://lpcinitiative.org/wp-content/uploads/LEPCAerialSurvey2017Report.pdf>.
55. 79 Fed. Reg. 29,974 (Apr. 10, 2014).
56. Phil Taylor, *Prairie chicken ruling casts doubt on FWS listing policy*, E&E News (Sept. 3, 2015), available at <https://www.eenews.net/stories/1060024255>.
57. 81 Fed. Reg. 86,315 (Nov. 30, 2016).
58. Kate Galbraith, *Combs, Oil Groups Applaud Decision to Keep Lizard Off Endangered List*, Texas Trib. (June, 13, 2012), available at <https://www.texastribune.org/2012/06/13/texas-oil-groups-applaud-key-lizard-decision/>.
59. Terrence Henry, *How the Conservation Plan for the Dunes Sagebrush Lizard Works*, NPR (June 15, 2012), available at <https://stateimpact.npr.org/texas/2012/06/15/how-the-conservation-plan-for-the-dunes-sagebrush-lizard-works/>.
60. U.S. Dept. of Interior, News Release, *Landmark Conservation Agreements Keep Dunes Sagebrush Lizard off the Endangered Species List in NM, TX* (June 13, 2012), available at [https://www.fws.gov/southwest/es/Documents/R2ES/NR\\_for\\_DSL\\_Final\\_Determination\\_13June2012.pdf](https://www.fws.gov/southwest/es/Documents/R2ES/NR_for_DSL_Final_Determination_13June2012.pdf).
61. Shannon Najmabadi, *Report: Sand miners disturbing threatened West Texas lizard's habitat*, Texas Trib. (Sept. 25, 2017), available at <https://www.texastribune.org/2017/09/25/west-texas-lizard-threatened-sand-miners/>.
62. Mella McEwan, *Comptroller warns of new efforts to list lizard*, Midland Reporter Telegraph (Sept. 21, 2017), available at <https://www.mrt.com/business/oil/article/Comptroller-warns-of-new-efforts-to-list-lizard-12219010.php>.
63. Recognizing the difficulties of overcoming this time constraint, Congressman Gardner of Colorado proposed legislation to delay a listing decision on the greater sage grouse for five years. Bruce Finley, *Cory Gardner introduces act to delay endangered decision on grouse*, Denver Post (Apr. 22, 2015), available at <https://www.denverpost.com/2015/04/22/cory-gardner-introduces-act-to-delay-endangered-decision-on-grouse/>.
64. The Service could list a species as threatened and adopt a special rule to relax the take prohibitions impacts on property owners. But, like the Service's other discretionary options, that approach is difficult for landowners to rely on, costly, and time-consuming. To issue such a rule, the Service would have to navigate the notice-and-comment rule making process, which has historically limited these rules to a handful per year.
65. See, e.g., Emily Sohn, *A Grand Experiment on the Grasslands*, Biographic.com (Mar. 13, 2018), available at <http://www.biographic.com/posts/sto/a-grand-experiment-on-the-grasslands> (quoting Ya-Wei Li of Defenders of Wildlife as asking "What incentive is there to enroll if there isn't a threat of listing?").
66. 16 U.S.C. § 1533(c)(2).
67. 16 U.S.C. § 1533(d). Adopting tailored regulations for threatened species would require the U.S. Fish and Wildlife Service to show that some form of take is having a significant adverse effect on the species. Putting this burden on the agency would have the additional benefit of channeling regulation into the areas where it is most needed.

68. That may sound like a return to the status quo, but it isn't. Under current practice, all take of threatened species, even minor instances of incidental take, is presumptively forbidden. Those restrictions can only be reduced by convincing the Service to adopt a narrower regulation for a species—a discretionary, bureaucratic process that suffers the same costs, delays, and uncertainties that have limited the impact of prior reforms.
69. In enacting the Endangered Species Act, Congress wished to encourage this federalism approach to species. In addition to relying on state innovation to protect threatened species, the statute also provides for cooperation agreements allowing the states to take over implementation of the federal agency's responsibilities. 16 U.S.C. § 1535. More recently, the Service amended the regulations for listing petitions to provide for earlier information sharing between states and federal agencies and a greater state role in the process of deciding whether to list species. 81 Fed. Reg. 23,448 (Apr. 21, 2016).
70. Western Governors' Association, *Policy Resolution 2017-11: Species Conservation and the Endangered Species Act*, available at [http://westgov.org/images/editor/2017-11\\_Species\\_Conservation\\_and\\_the\\_ESA\\_for\\_web.pdf](http://westgov.org/images/editor/2017-11_Species_Conservation_and_the_ESA_for_web.pdf).
71. Testimony of Gordon Myers, Executive Director N.C. Wildlife Resources Commission, President Southeast Association of Fish and Wildlife Agencies, Before the Senate Committee on Environment and Public Works, *Oversight: Modernization of the Endangered Species Act* (Feb. 15, 2017), available at [https://www.epw.senate.gov/public/\\_cache/files/e/6/e6a208cc-6cc8-4503-98d2-8d9a97d9065e/F9D83BCB0EA63DA51B32038D993779E3.testimony-for-gordon-myers-before-senate-epw-15-feb-2017.pdf](https://www.epw.senate.gov/public/_cache/files/e/6/e6a208cc-6cc8-4503-98d2-8d9a97d9065e/F9D83BCB0EA63DA51B32038D993779E3.testimony-for-gordon-myers-before-senate-epw-15-feb-2017.pdf).
72. Blue Ribbon Panel on Sustaining America's Diverse Fish and Wildlife Resources, *Final Report and Recommendations* (Mar. 2016), available at [https://www.fishwildlife.org/application/files/8215/1382/2408/Blue\\_Ribbon\\_Panel\\_Report2.pdf](https://www.fishwildlife.org/application/files/8215/1382/2408/Blue_Ribbon_Panel_Report2.pdf).
73. H.R. 4647, Recovering America's Wildlife Act, 115th Congress (introduced Dec. 14, 2017); see also National Wildlife Foundation, *Recovering America's Wildlife Act*, available at <https://www.nwf.org/Our-Work/Wildlife-Conservation/Policy/Recovering-Americas-Wildlife-Act>.
74. Erica Good, *A Shifting Approach to Saving Endangered Species*, New York Times, (Oct. 5, 2015), available at <https://www.nytimes.com/2015/10/06/science/a-shifting-approach-to-saving-endangered-species.html>.



“Almost since its enactment in 1973, the Endangered Species Act has generated controversy and political conflict. Its supporters tout the many species saved from extinction, while its critics cite the high economic costs to landowners and business. This report proposes modest changes that will prevent extinctions and promote recovery of threatened species by enlisting the collaborative efforts of private landowners.”

—James L. Huffman

Dean Emeritus, Lewis & Clark Law School

“Jonathan Wood gets it exactly right: We could do a better job at providing incentives for species recovery. This report correctly and creatively looks at ways to use the flexibility provided by section 4(d) of the Endangered Species Act to give landowners the right incentives for threatened species conservation.”

—Timothy Male

Executive Director, Environmental Policy Innovation Center

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**Jonathan Wood** is an adjunct fellow at PERC and an attorney at Pacific Legal Foundation, where he litigates environmental, property-rights, and constitutional cases. Wood is the author of six law review articles on endangered species, federal lands, and other environmental issues, as well as dozens of articles for the popular press, including for *The Wall Street Journal*, *The Washington Post*, and *National Review*. His interest in free market environmentalism stems from studying Namibia’s conservancy program while pursuing a masters’ degree from the London School of Economics prior to attending the NYU School of Law.