

The Endangered Species Act and Landowner Incentives

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Key to fulfillment of the Endangered Species Act and its purposes is both public and private land stewardship. Over 80 percent of species listed as endangered or threatened are found, at least in part, on private lands. One third may be found only on private lands. Species conservation, as conservationist Aldo Leopold anticipated a half century ago, must be a matter for public and private action.

Many ESA observers have lamented the limited successes in species conservation under the Act. If removal of species from threatened and endangered lists is the metric of success, the record is not inspiring. But before turning to the matter of ESA incentives, I want to reflect on how we measure success. The simple listing and delisting metric conveys an incomplete picture.

Steven Yaffee at University of Michigan has pointed out that under the Act, land management decisions now take into much greater account effects of actions on species. The Act has motivated many large, landscape-scale conservation initiatives. Many of these partnerships link public and private actions. Consider the Platte River conservation plan, the Upper Colorado River restoration, or Missouri River restoration, or the High Plains Partnership. The list of these conservation partnerships is vast and varied. Many address multiple species on landscapes that encompass properties of many land owners in multiple jurisdictions.

That most listed species remain designated as threatened or endangered is a consequence of many, many factors. The Act's failure to set forth a context that motivates private stewardship is an important factor. But getting those incentives right will not likely get vast numbers of species off ESA lists. The effects of a changing climate, land fragmentation, persistent environmental contaminants, and scarce water will all continue to threaten species. These challenges transcend decision making incentives within the context of implementing the ESA. Still, clearly we can do better—and private lands are keys to future success.

Critics point to the Act's regulatory constructs that might reinforce a landowner "fortress mentality." Critics point to the Act's potential to discourage species protection on private lands as landowners feared the regulatory implications of supporting at-risk species on their lands. I concur that these were challenges in the first three decades after passage of the Act. To some extent, they remain challenges.

Nonetheless, over the past 15 years, many innovations in implementing the Act have softened these disincentives. My colleagues today have described some of those innovations. We now have Safe Harbor Agreements, a "No Surprises" rule, Candidate Conservation Agreements (CCAs) and Candidate Conservation Plans (HCPs) with Assurances (CCAAs), and Habitat Conservation Planning with incidental take permits.

Safe Harbor Agreements covered nearly 4 million acres at my last tally in 2006. The Agreements covered at least 36 species, including the much celebrated case of the red-cockaded woodpecker. Candidate Conservation Agreements of various types covered nearly 200 species. Through recent guidance, FWS has outlined a way to combine CCAs

and CCAAs where applicants have activities on both federal and non-federal lands. The guidance also sets forth a process to link CCA conference opinions to Section 7 consultations and biological opinions if a candidate species becomes listed.

These efforts are important steps in further reducing landowner disincentives to conserve species. Turning to HCPs, by 2005, nearly 500 Habitat Conservation Plans covering 39 million acres addressed some 590 species. All of these tools partly remedy the “uncertainty” problem in which landowners have been reluctant to undertake conservation measures out of fear that the presence of endangered species on their lands would invoke land use restrictions.

Two additional tools—conservation banking and recovery credits—now establish some value in species conservation. They not merely reduce disincentives; they motivate conservation.

All of these tools, though constructive, are imperfect. The imperfections cluster into several categories, including:

- Burdensome, time-consuming procedures;
- Performance requirements built upon sometimes inadequate information;
- Management prescriptions rather than performance based on species outcomes;
- Inadequate distinctions between practices intended solely for beneficial environmental restoration and conservation and those directed toward land development and land-transforming uses.

Some critics have pointed to requirements, in many ESA agreements, for permanence as a disincentive to participation. They also view these requirements as ill-suited to dynamic environmental conditions. Yet requirements for permanence are not inconsistent with dynamic circumstances and adaptive management. In the context of ESA, conservation banks (and recovery credits) are intended to sustain conditions that benefit targeted species. Through monitoring, management practices within a conservation bank can be adjusted to improve species benefits in an adaptive context.

As we think about conservation tools, we need to remind ourselves of two goals in the context of private lands. The first is the matter of performance. The goal—the ultimate test of success—should be species protection and recovery. The second goal is the matter of incentives—how to engage private landowners in conservation.

In considering incentives, let us turn to a bigger picture. I believe we need to broaden our framework as we think about private stewardship, conservation, and species protection. Across the nation, new formal and informal institutions and settings of cooperative conservation and collaborative problem solving are emerging. These efforts are relevant to conservation in general. They are also relevant to the ESA context specifically, for several reasons.

First, Nature knows no boundaries. Problems such as vegetative fuel build up in forests, water quality problems, and the spread of invasive species need actions that combine public and private efforts across jurisdictions and land ownership boundaries.

Second, as conservationist Aldo Leopold noted, we cannot rely only on “reserves” alone—whether parks or conservation banks—to achieve conservation goals. We need conservation on working landscapes and across boundaries. This requisite suggests we need decision contexts for bargaining, negotiating, and collaboration to accompany conservation incentives. We need mechanisms to coordinate action where problems

transcend landowner and jurisdictional boundaries, many rights intersect, and public resources and wildlife are involved.

I am intrigued by the work of University of Michigan scholar Steven Yaffee on collaboration and the ESA. Yaffee examines the Upper Colorado River management initiative that involves many agencies and many participants, both public and private. The management regime unfolds on an ecosystem scale, with a multi-species focus. In this setting, conservation actions occur on working landscapes in a context of both technical and financial incentives to enhance participation. These are features that set the foundations for 21st century environmental performance, the actual recovery of species, and enhancement of habitat health.

Some of the best prospects for stimulating private stewardship lie alongside rather than within the ESA context. Programs such as the Partners for Fish and Wildlife Program, Coastal Program, State Wildlife Action Plans, and Farm Bill conservation grants can inspire landowner stewardship through technical and financial assistance and rewards. These programs increasingly operate on a landscape scale. Many of these programs function through competitive awards. Some of the best opportunities to enhance species protection lie in strengthening the performance provisions of these programs to include species protections.

Some barriers to landscape-scale, public-private partnerships lie not within ESA. They reside in limitations on uses of cooperative agreements. They reside in the lack of clarity in distinguishing between federal procurement actions and public interest cooperative agreements. An October report by Interior's Inspector General offers a chilling note of caution regarding partnerships and the uses of cooperative agreements. Yet it is precisely the relationship building and partnering made possible by such agreements that offer a foundation from which agencies can work across landscapes and land ownerships to preserve species and their habitats.

Tax code changes through which conservation grants are not deemed income would be helpful. There is precedent for such tax treatment in many Farm Bill conservation grant programs.

Then there is the matter of funding. There simply is not enough current funding for FWS employees to do all that is required of them and all that is needed to enhance species protection.

I want to introduce another thought. In considering species conservation, we cannot write off our cities. Migratory species, in particular, face challenges as they travel across highly urbanized flyways—on the Atlantic Coast especially. Urban greening—re-introducing tree canopy, permeable surfaces, natural floodplains, and natural water flows—is important for cities as they strive to reduce stormwater runoff, absorb pollutants, lower summer temperatures, and enhance resilience to intense storm events. But urban greening is important for species, as well. Urban greening efforts also create opportunities to enhance incentives to invest in Nature's Capital—the ecosystem services of trees, wetlands, and floodplains.

Let me offer one example amid hundreds. The Tualatin Basin in Oregon clustered five wastewater and stormwater permits into a single bundle to meet water temperature goals. Using Clean Water Act tools, Basin authorities achieved EPA permitting approval by paying \$6 million to farmers to plant trees and establish riparian buffers instead of

paying \$60 million for refrigeration system. The result of cooler waters and more trees was good for fish and wildlife but also good for the community and farmers.

The ESA toolkit, with Safe Harbor Agreements, the “no surprises” rule, conservation banks, and recovery credits has significantly softened landowner disincentives to protect species. Extending safe harbor agreements to actions within other conservation programs could attract more participants. FWS might also further streamline incidental take permits for actions that achieve net conservation benefits.

I will conclude with several observations. The diagnosis in the 1990s of a key impediment to ESA success was the landowner incentive issue. We now have many new tools and resources. Yes, further streamlining of their implementation would strengthen incentives of landowners to participate. But today’s central challenge is not *per se* the incentive issue. A central challenge today is, rather, how to pivot from a species by species to a multi-species focus. Another challenge is how to strengthen landscape-scale efforts.

Nature is characterized by interconnections, synergies, and interdependence. Species often function interdependently across landscapes and what are sometimes called “ecosystems.” FWS pioneered in 2008 an ecosystem approach to listing 48 species and their critical habitat in Hawaii. But the Act, as structured, does not make such multi-species listings a straightforward proposition.

Another challenge is that of integrating science with management expertise in recovery planning. The nexus between Man and Nature is extensive, suggesting that recovery planning cannot be a matter solely for science experts. Recovery planning, as two authors once put it, is a human endeavor. Recovery planning must be a context for engaging multiple people with multiple intersections with lands and many “knowledges.”

In particular, I highlight the importance of tapping “local, experiential” knowledge to help pinpoint the possible and define the doable. Consider the example of the albatross in Alaska and fisheries practices. Biologists had identified possibly adverse effects of fishing practices on albatross. Rather than restricting fishing, the Service met with the fishers and described the problem. The fishing community, using this information and their experiential knowledge of fishing techniques, equipment, and boating, revised their practices to eliminate the threats to albatross.

The challenges of undertaking multi-species, landscape-scale conservation put a premium on developing tools for cross-jurisdictional, public-private, and private-private coordination and cooperation. Initiatives like the Blackfoot Challenge in Montana, the Duck Trap River collaboration in Maine, the Puget Sound Partnership, and others are the building blocks for this coordination and cooperation.

At the same time, on a more pessimistic note, recovery of many species may continue to elude us as we face water scarcities and heightened competition for water, land fragmentation, and the effects of a changing climate. Yes, enhancing stewardship incentives is important. But I believe we need an enhanced focus on landscape-scale and multi-species conservation. Incentive tools help provide building blocks for large-scale, cross-boundary conservation. But we need some altogether new tools, as well.

