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IMPROVING COOPERATIVE STATE AND FEDERAL SPECIES CONSERVATION EFFORTS

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I. FOREWORD[†]

Some twenty-four years ago, the University of Wyoming's Institute for Environment and Natural Resources convened a forum on the Endangered Species Act (ESA) and Private Property. A collection of the papers prepared by the forum participants—from academia, private law practice, industry, conservation groups, and government agency backgrounds—was published in the *Land and Water Law Review*, Volume XXXII, No. 2.¹ That collection included a foreword by the late William D. Ruckelshaus, the first Administrator of the United States Environmental Protection Agency from 1970 to 1973 (and Administrator again from 1983 to 1984), and the founding chair of that Institute which now bears his name, the University of Wyoming Ruckelshaus Institute.²

In May 2019, the University of Wyoming's Haub School of Environment and Natural Resources (home of the Ruckelshaus Institute) and the College of Law, and Texas A&M University, through its Natural Resources Institute and School of Law, convened a workshop on options and opportunities for states to engage more meaningfully in species conservation efforts under the ESA and beyond. Consistent with what is also a goal of the Ruckelshaus Institute, this state roles workshop sought to identify and support stakeholder-driven solutions to species conservation challenges by highlighting relevant research and information and promoting collaborative decision-making processes. The workshop's goal was to seek agreements in principle for concepts and recommendations for states to engage in ESA and other species conservation efforts. One key result of the workshop is the Workshop Report, reprinted in full here.

While much has changed in the environmental and natural resources field, ESA implementation, and species conservation since that 1996 forum, the foundational themes Bill Ruckelshaus sounded in his foreword still resonate today, perhaps with even greater force as they echo across the decades. The themes and opportunities identified then included “laying the groundwork for more open and honest discussion among affected parties,” “[e]ngaging citizens, industry, and government at all levels in meaningful collaborative discussion regarding how to achieve the desired result,” “collaborate decision-making processes,” “cooperative efforts [to] supplement and amplify the democratic processes,” and “locally driven effort[s]” with examples given from certain state programs.³

[†] This Foreword was authored by Murray Feldman, a participant in both the University of Wyoming's ESA forum in 1996 and the state roles workshop in 2019.

¹ 32 LAND AND WATER L. REV. 339 (1997).

² William D. Ruckelshaus, *Foreword*, 32 LAND AND WATER L. REV. 339, 480 (1997).

³ *Id.* at 480–83.

Congress envisioned a strong, or at least healthy, federal-state relationship for species conservation under the ESA and noted the important role of state fish and wildlife agencies. In the 1982 ESA amendments legislative history, Congress stated that a successful endangered species program depended on a “good working arrangement” between federal and state agencies.⁴ Similarly in those ESA amendments on species listing, delisting, and critical habitat designation, the Senate Report stated that “[t]he involvement and advice of such State agencies in the Federal regulatory process is crucial and must not be ignored.”⁵ But the reality has not necessarily played out as Congress originally envisioned. Still, the recent decade-plus has seen a resurgence in state roles and activities in ESA actions and species conservation as states seek to both assert and protect their and their citizens’ interests—and the interests of the wildlife species held in trust by the states—for all of the people.

This current Workshop Report is an important contribution toward both documenting this evolving state role and mapping out how it may be further enhanced for collaborative solutions to ESA and species conservation issues. The hope of the workshop participants, consistent with Bill Ruckelshaus’s original foreword, is that this may occur with an engaged citizenry, honest discussions, collaborative decision-making, cooperative efforts, democratic processes, and locally driven outcomes facilitated by the federal ESA framework.

II. INTRODUCTION

In May of 2019, the University of Wyoming, through the Haub School of Environment and Natural Resources’ Ruckelshaus Institute and College of Law, and Texas A&M University, through the Natural Resource Institute and School of Law, convened a workshop on the ESA in Laramie, Wyoming.

Amid the national conversation on ESA reform, we convened this workshop to develop a list of tangible action items to improve species conservation in the United States at the state and federal level. Carrying out the legacy of William D. Ruckelshaus, our intent was to bring together a diverse group of stakeholders to participate in a civil discourse about desired outcomes for natural resource challenges.

During the workshop, we asked the participating experts to engage in a discussion on the opportunities to improve species conservation, particularly by improving the coordination and support between state wildlife agencies and the U.S. Fish and Wildlife Service. The discussion was facilitated by Dr. Steve Smuko, a Haub School faculty member and national collaborative solutions expert.

⁴ H.R. REP. NO. 93-740, at 26 (1973) (Conf. Rep.), *as reprinted in* 1973 U.S.C.C.A.N. 3001, 3005.

⁵ S. REP. NO. 97-418, at 12 (1982).

An incredible discussion transpired during the workshop. The participants challenged existing norms of species conservation and developed innovative ideas for improvement. The result of this remarkable conversation was the development of a series of agreements in principle that we hope will inform the national debate on improving species conservation and ESA reform.

Speaking on behalf of the workshop organizers, we are very appreciative of the participants for lending their time and their expertise and for engaging in what was a reassuring and inspiring conversation about the future of wildlife conservation in the United States.

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III. BACKGROUND

Species conservation efforts by state wildlife managers⁶ are an essential component for accomplishing the ESA's national goals to prevent species

⁶ Tribal governments play a significant role in accomplishing the national goals set forth in the ESA. The scope of this report, and the workshop that preceded it, focuses on the specific role of states in conserving species in light of their specific authorities in the ESA.

extinction and to recover species.⁷ Through their constitutional power, historical knowledge and expertise, on-the-ground personnel, and ability to catalyze collaborative conservation efforts, states are well positioned to help promote species conservation.⁸ As a result, states play an important and complementary role alongside the federal agencies tasked with implementing the ESA.⁹

In the forty-seven years since the passage of the ESA, there has been an ongoing discussion about the role of states in the conservation of threatened and endangered species.¹⁰ The topic surfaced during the congressional debates leading up to the ESA's passage in 1973 and re-surfaced during the 1982 amendments to the ESA.¹¹

Prior to 1973, states exercised jurisdiction over all fish and wildlife within their borders, with limited exception. State wildlife conservation programs uniformly arose from concerns over the loss or decline of wildlife populations, specifically focusing on “game” species and fish, with varying levels of concern over the loss of enigmatic and culturally or economically important species.¹² State wildlife conservation programs in the United States generally follow the North American Model of Wildlife Conservation, under which the “users” of game species (i.e. the hunters and anglers) pay for wildlife conservation and management primarily through license fees.¹³ Because hunting and fishing license fees are the primary funding mechanism for state wildlife conservation, hunters and anglers have historically borne the costs associated with wildlife management and habitat enhancement efforts for both game and non-game species.¹⁴ While nearly all state wildlife agencies have assumed a far greater role in the management of non-game and other species since the passage of the ESA, they often remain solely dependent on hunting and fishing license fees to operate.¹⁵

Traditionally, state wildlife managers received training primarily to manage populations of game or other commercially valuable species of wildlife, with an eye to providing greater opportunities for sustained harvest.¹⁶ Habitat managers

⁷ Robert L. Fischman et al., *State Imperiled Species Legislation*, 48 ENVTL. L. 81, 81 (2018).

⁸ *Id.*

⁹ *Id.* at 82.

¹⁰ Temple Stoellinger, *Wildlife Issues are Local – So Why Isn't ESA Implementation?*, 44 ECOLOGY L.Q. 681, 682 (2017).

¹¹ *Id.* at 683, 704–05.

¹² David Willms & Anne Alexander, *The North American Model of Wildlife Conservation in Wyoming: Understanding It, Preserving It, and Funding Its Future*, 14 WYO. L. REV. 659, 665 (2014).

¹³ *Id.*

¹⁴ *Id.* at 660.

¹⁵ *See id.* at 702.

¹⁶ *See* Iruv Braverman, *Conservation and Hunting: Till Death Do They Part? A Legal Ethnography of Deer Management*, 30 J. LAND USE & ENVTL. L. 143, 147–48 (2015).

were traditionally encouraged to maintain and enhance environments in a manner that would do the same.¹⁷ By 1972, however, ecology and wildlife management science had advanced to a point where scientists and wildlife managers recognized that the traditional approaches to wildlife conservation were not adequate to conserve all species, especially those species vulnerable to the loss or alteration of unique habitats.

In the early 1970s, state wildlife agencies did not have the breadth of resources or expertise to manage the number of species in decline.¹⁸ While most agencies began to add capacity to meet that challenge, they were under extreme pressure to maintain the mission supported by their funders, including state lawmakers, sportsmen, landowners, and others, most of whom had absolutely no interest in whelks, but a massive commitment to elk.¹⁹

To address the continued decline and loss of species, Congress passed the ESA in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.”²⁰ The ESA authorized the federal government to assure that species would not become extinct, and to create recovery plans to bring listed species back from the brink.²¹ Congress intended the ESA to be the last line of defense for species in danger of extinction.

During the ESA’s drafting, Congress wrestled with addressing the need for a national wildlife conservation strategy to reverse the species extinction trend while also accounting for the states’ important role in species conservation generally.²² Section 6 of the ESA, titled “Cooperation with the States,” represented Congress’ initial resolution of the roles of federal and state government in threatened and endangered species conservation.²³ ESA section 6(a) requires the Secretary to

¹⁷ *Id.* at 149.

¹⁸ See MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 61 (3d ed. 1997).

¹⁹ See Martin Nie, *State Wildlife Policy and Management: The Scope and Bias of Political Conflict*, 64 PUB. ADMIN. REV. 221, 223 (2004).

²⁰ Endangered Species Act § 6, 16 U.S.C. § 1531 (2019).

²¹ See *id.* § 1533(d), (f).

²² Stoellinger, *supra* note 10, at 697 (summarizing the state authority/cooperation sections of the two major ESA bills in 1973). When the Congressional Joint Conference Committee assigned with reconciling the House and Senate versions of the ESA issued its reconciled bill, it stated in its Committee Report that: “the successful development of an endangered species program will ultimately depend upon a good working arrangement between the federal agencies, which have broad policy perspective and authority, and the state agencies, which have the physical facilities and the personnel to see that state and federal endangered species policies are properly executed.” H.R. REP. NO. 93–740, at 26 (1973) (Conf. Rep.).

²³ 16 U.S.C. § 1535 (2019).

“cooperate to the maximum extent practicable with the States,” section 6(c) provides for federal-state cooperative agreements under which federal funding could be granted, and subsection 6(g) arguably allows states to preclude federal preemption if a cooperative agreement is in place.²⁴ However, for a variety of reasons, including lack of state interest and lack of funding, the original congressional intent of fostering a considerable state role in threatened and endangered species conservation was never fully realized.²⁵

In the 1982 ESA amendments, Congress again recognized the important role of states and state agencies in implementing an effective species and habitat conservation program. The Senate Report accompanying the 1982 ESA amendments, when addressing revisions to the section 4 rulemaking processes for species listing, delisting, and critical habitat designation, stated that “[t]he involvement and advice of such State agencies in the Federal regulatory process is crucial and must not be ignored.”²⁶ Additionally, the Conference Report on these amendments recognized that a successful endangered species program depends on a “good working arrangement” between federal and state agencies.²⁷

Congress also explicitly recognized the importance of state agency review and commenting, and the value of a state-federal dialog in responding to state agency input, in ESA section 4(i).²⁸ This section explicitly requires the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively “the Services”) to accord special treatment to comments and information received from affected states relative to those received from the general public. If the Services decide to list or delist a species or designate critical habitat over state objections, they must provide a written justification to

²⁴ *Id.* § 1535(a), (c), (g); *see* Stoellinger, *supra* note 10, at 693 (discussing the original intent of Congress to provide states with authority to oversee the implementation of the ESA with federal approval).

²⁵ *See* Stoellinger, *supra* note 10, at 683; *see also* John Copeland Nagle, *The Original Role of the States in the Endangered Species Act*, 53 IDAHO L. REV. 385, 404 (2017); Robert P. Davison, *The Evolution of Federalism Under Section 6 of the Endangered Species Act*, in *THE ENDANGERED SPECIES ACT AND FEDERALISM: EFFECTIVE CONSERVATION THROUGH GREATER STATE COMMITMENT* 89, 90 (Kaush Arha & Barton H. Thompson, Jr. eds., 2011).

²⁶ S. REP. NO. 97-418, at 12 (1982) (Conf. Rep.).

²⁷ H.R. REP. NO. 93-740, at 26, *as reprinted in* 1973 U.S.C.C.A.N. 3001, 3005.

²⁸ 16 U.S.C. § 1533(i) (2019); *see also* Safari Club Int'l v. Salazar (*In re* Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation), 709 F.3d 1, 17, 19 (D.C. Cir. 2013) (stating Section 4(i) provides states with a judicially reviewable claim and “is designed to allow states to advance their particular sovereign concerns to ensure that the agency has fully considered the applicable state interests.” The FWS must show that it “clearly thought about [a state’s] objections and provided reasoned replies”) (citation omitted).

the state agency for doing so despite the state agency's disagreement with the proposed action.²⁹

Consistent with ESA section 4(i) and other ESA sections, as well as Congress' broad recognition of the important role of the states and state agencies in ESA processes, in 1994 the Services adopted, and in 2016 revised, a policy on the "Role of State Agencies in Endangered Species Act Activities."³⁰ Under that policy, the Services recognize that:

State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act.³¹

In the wake of these developments, state wildlife agencies have taken an increasingly greater role in the conservation of all species residing in their state despite significant funding challenges. Beyond regulating hunting and fishing, state wildlife agencies now manage non-game species, conduct habitat improvement projects, protect and increase populations of at-risk species (including threatened and endangered species), manage invasive species introduction and spread, coordinate with other local, state, and federal land managers regarding habitat and animal impacts, and provide educational programs.³² Additionally, state wildlife agencies work with landowners to secure recreational access, manage wildlife damage programs, and manage to prevent wildlife disease introduction and spread.³³ State agencies also conduct important inventory and survey work for non-game species that is used to inform the development of conservation actions like habitat improvements and species-specific protections.

Conservation efforts as a whole have expanded in most states. State-funded habitat programs like the Wyoming Wildlife and Natural Resource Trust, Great Outdoors Colorado, and Nebraska Environmental Trust have

²⁹ While both the FWS and the NMFS have responsibility to implement the ESA and work with states, the current debate about state-federal authorities has focused almost exclusively on the FWS. As a result, and in an effort to reduce confusion, the authors of this report have decided simply to reference the FWS when speaking about the agency tasked with implementing the ESA and working with state partners, even though in many instances it may be more technically correct to refer to both agencies. 16 U.S.C. § 1533(i).

³⁰ Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8663 (Feb. 22, 2016) (to be codified at 50 C.F.R. ch. IV).

³¹ *Id.* at 8663.

³² Willms, *supra* note 12, at 660.

³³ *Id.*

focused millions of dollars into on-the-ground enhancements. More notably, cooperative management strategies that include multiple governmental agencies and private sector representation, including private landowners, have added to the capacity and ability of state wildlife agencies to meet greater challenges. As one state representative at the workshop noted, “we have the people to get the job done—but we need the cash to make it happen.” As a result of these types of efforts, states now have extensive on-the-ground personnel, knowledge and understanding of local ecosystems, and relationships with private landowners and other stakeholders.³⁴

While demonstrating greater commitment and ability to perform their essential role in wildlife conservation, many states exhibit frustration with what they perceive to be a lack of meaningful opportunities under the ESA to work with federal wildlife agencies in species management and conservation efforts.³⁵ States’ frustration with what they view as heavy-handed federal mandates and requirements has the potential to compromise efforts to successfully conserve at-risk species. And, despite both state and federal efforts, species decline continues to occur. Public concerns and perceptions regarding the adequacy of state conservation programs have likewise led to a national focus on broadening the ESA’s reach, in lieu of strengthening state conservation programs and abilities which has compounded the problem.

Many states have been vocal in their frustration. This has led to a number of efforts to reform or “improve and modernize” the ESA to address theirs and others’ concerns. Examples of these recent efforts include: The Western Governors’ Association ESA Initiative; the Western Caucus ESA Modernization Package; the Obama Administration revision of the Role of States policy; ESA reform proposals considered by Wyoming Senator John Barrasso; and Trump Administration deregulatory efforts.³⁶ Common to these recent efforts is the goal of providing more opportunities to states to participate in species conservation and, in some cases, in the implementation of the ESA.

³⁴ Stoellinger, *supra* note 10, at 714.

³⁵ ASS’N OF FISH & WILDLIFE AGENCIES, WILDLIFE MANAGEMENT AUTHORITY: THE STATE AGENCIES’ PERSPECTIVE 2 (2014).

³⁶ Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019); 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); Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8663, *supra* note 30; WESTERN GOVERNORS’ ASS’N, SPECIAL REPORT: SPECIES CONSERVATION AND ENDANGERED SPECIES ACT INITIATIVE: YEAR THREE UPDATE (2018); *Endangered Species Act and Wildlife: Modernizing the Endangered Species Act*, CONGRESSIONAL WESTERN CAUCUS, westerncaucus.house.gov/issues/issue/?IssueID=14890 [<https://perma.cc/RV3X-SSSA>] (last visited Nov. 26, 2019); Press Release: Barasso Releases Draft Legislation to Strengthen the Endangered Species Act, (July 2, 2018), www.epw.senate.gov/public/index.cfm/2018/7/barrasso-releases-draft-legislation-to-strengthen-the-endangered-species-act [<https://perma.cc/4VSE-4MM5>].

A growing group of experts believe this issue warrants a robust discussion, and that more focus on providing greater opportunities for states to better engage in threatened and endangered species conservation efforts is both timely and consistent with traditional concepts of wildlife conservation in the United States. To be sure, some are concerned that providing states with more opportunity to engage in ESA species management is a subterfuge for relaxing requirements to conserve and recover threatened and endangered species. Others believe that if the ESA is to accomplish its objectives, and if the nation is going to meet its goals of wildlife conservation in years to come, an increased state role is essential. With the major changes in approaches to wildlife conservation since the ESA's enactment (cooperative management, expansion of partnerships and collaborative processes, greater public involvement, more robust science, advanced land management), a more proactive approach to encourage, promote, and assist states in implementing conservation actions is overdue. Adequate funding and partnerships are important to enhancing the recovery of species currently listed and in decline.

Reimagining the state-federal relationship in implementation of the ESA is a critical first step. Regardless of perspective, the state-federal relationship must be well thought out and grounded in the goals of ensuring species protection by restoring imperiled species and conserving our broader wildlife heritage.

IV. THE WORKSHOP

Against this backdrop, the University of Wyoming, through its Haub School of Environment and Natural Resources and College of Law, and Texas A&M University, through its Natural Resource Institute and School of Law, convened a workshop with the following objectives:

- ▶ To convene a group of nationally-recognized ESA experts and practitioners with broad perspectives and expertise in the structure and implementation of the ESA;
- ▶ To identify issues and concerns and discuss potential options and opportunities for states to engage more meaningfully in species conservation efforts; and
- ▶ To seek support for expert-based agreements in principle suggestions for state and federal actions that can be taken to improve implementation of species conservation on the ground both under the authority of the ESA and beyond.

Importantly, the workshop's objective was to seek agreements in principle, not consensus. Accordingly, the agreements in principle in this report should not be interpreted as binding on any individual workshop participant or the

organization he or she represents. Rather, they should be interpreted as concepts or recommendations that were generally acceptable to the participants. Note also that in a workshop with many participants from a variety of backgrounds, it would be impossible to fully capture everyone's nuanced position on any particular point. This report does not attempt to do so.

Further, the group collectively agreed that the focus of the conversation and ultimately the group's agreements in principle should not include delegating existing federal ESA authority to states. The group acknowledged that not all states would welcome the additional duties and costs associated with implementing the ESA, nor do all states have existing imperiled species legislation that would enable them to take on additional ESA delegated duties. Furthermore, the group agreed that its agreements in principle need not involve substantive amendment of the ESA itself. Instead, the conversation flowed from the premise that existing state laws and the current ESA can accomplish more effective state conservation of species and fuller participation in the ESA process.

The workshop was structured to allow participants an opportunity to discuss the following topics:

- ▶ State Capacity and ESA Section 6;
- ▶ Pre-Listing Conservation Efforts and the ESA Listing Process;
- ▶ Implementation of the ESA; and
- ▶ Conservation Actions Leading to Recovery, Delisting, and On-Going Post-Recovery Conservation.

At the end of the structured discussion session, the participants engaged in a summary discussion, focusing on areas of agreement. The report drafting team was then tasked with introducing the general topics discussed by the group and summarizing the points of agreement. All workshop participants have reviewed the final report. The report below is divided into five sections tracking the five overarching points and areas of agreement developed by the workshop participants.

Section 1: State-Led Conservation

In the past three decades, state wildlife agencies and their federal partners have moved into a new era of ecosystem management, cooperative conservation, and habitat-focused management plans that encompass multiple species, including species considered crucial for the future vitality of the systematic whole.

In light of their authority over wildlife, states continue to maintain the lead role for habitat and species conservation prior to an ESA listing and after a species

is recovered and delisted. The workshop participants discussed the significant opportunity that exists for states to do more to meet this need. States are well-positioned to execute on-the-ground management activities for both pre- and post-list species and should be encouraged to innovate.

During the workshop, the participants discussed the many advancements made with regard to state species management. For example, State Wildlife Action Plans (SWAP) identify species of greatest conservation need and set forth a strategy as to how to maintain those species so as to prevent a future ESA listing. The FWS supports the implementation of SWAPs with grant funding available through the State and Tribal Wildlife Grant Program. Programmatic Candidate Conservation Agreements with Assurances (CCAA) are another example. Through a Programmatic CCAA, a state wildlife agency or other entity works with the FWS to develop an agreement and associated permit that will be held by the entity and under which landowners can elect to enroll. This approach is an efficient mechanism to encourage multiple landowners to voluntarily take management actions to remove threats to candidate, and potential candidate, species.

Despite these and other advances, there remain challenges. There is a discouraging lack of funding for research, inventory, and monitoring of individual species, and while there is seemingly universal understanding of the need to manage for habitats that address suites of species, the funding to do so is equally limited. State resources and capacity remain a fundamental barrier to more comprehensive, collaborative, and proactive conservation. There is also an unmet need to promote collaborative efforts to conserve habitats that provide for multiple species of concern, and to recover species by addressing multiple issues that face multiple species.

Agreement in Principle:

1. There is a need to develop better inventories of state wildlife conservation capacity and authorities in addition to simply budget numbers.

While there have been previous attempts to survey state capacity for wildlife conservation, participants agreed that a more comprehensive look is warranted.³⁷

Existing surveys of state funding tend to focus on state resources dedicated to federally listed threatened and endangered species using, for example, the number reported to the FWS for threatened and endangered species management, which

³⁷ See, e.g., Fischman et al., *supra* note 7, at 104; STEPHANIE KUROSE ET AL., UNREADY AND ILL-EQUIPPED: HOW STATE LAWS AND STATE FUNDING ARE INADEQUATE TO RECOVER AMERICA'S ENDANGERED SPECIES (2019); Alejandro E. Camacho et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10837 (2017).

indicates that states spend about a quarter as much as the FWS.³⁸ These surveys do not include state resources allocated to unlisted species—or species primarily under the management of the states. They also do not include the significant state dollars dedicated more generally to land conservation (e.g., state match for Land and Water Conservation Fund grants; Colorado’s Conservation Trust Fund; and Wyoming’s Wildlife and Natural Resource Trust, which also benefit wildlife and habitat conservation).³⁹

In addition, existing surveys of state authorities have tended to focus on whether the state has a state ESA law that mirrors the structure of the federal ESA. While an important indicator, this type of survey will not capture less obvious authorities. For example, authorities delegated to state wildlife agencies within the authorizing statutes for those agencies and through executive orders will not be identified by this type of survey. As a case in point, Wyoming is one of the few states that does not have any form of state ESA. However, the State has delegated broad authorities for wildlife, habitat and resource management to the Wyoming Game and Fish Commission and Wyoming Department of Environmental Quality, and more recently specific authorities for the management of sage grouse through executive orders and statute.⁴⁰ In Florida, state legislation is silent on whether the Florida Fish and Wildlife Conservation Commission may prohibit incidental take of state-listed species. The Florida Constitution, however, authorizes the Commission to “exercise the regulatory and executive powers of the state” over fish and wildlife.⁴¹ Through this constitutional authority, the Commission has adopted a regulatory definition of take that mirrors the ESA definition.⁴²

Ultimately, what really matters is how species and their habitats are faring under state management. Florida has recovered and delisted several species under its state ESA, while many other states have not seen the same success under their state programs. Looking at state legal authorities and funding is important, but it does not measure the ultimate metric, which is whether species are secure enough to not warrant an ESA listing or to be delisted.

³⁸ See Michael Evans, *The Importance of Properly Funding the ESA*, DEFENDERS-CCI (Feb. 20, 2019), defenders-cci.org/analysis/ESA_funding/ [https://perma.cc/YT82-Z94Y].

³⁹ JOHN FELDMANN ET AL., ENVIRONMENTAL DEFENSE FUND, NASDA, INNOVATIVE STATE-LED EFFORTS TO FINANCE AGRICULTURAL CONSERVATION 11–12 (2019).

⁴⁰ WYO. STAT. ANN. § 23-1-301 to -304 (Wyoming Game And Fish Commission); see, e.g., WYO. STAT. ANN. §§ 35-11-101 to -1904 (Wyoming Department of Environmental Quality); 161 Wyo. Gov’t Reg. 4 (LexisNexis Sept. 2018); 244 Wyo. Gov’t Reg. 1 (LexisNexis Aug. 2015); Wyoming Executive Order 2017-2, *Greater Sage-Grouse Core Area Protection*; Wyoming Executive Order 2019-3-2, *Greater Sage-Grouse Core Area Protection*; WYO. STAT. ANN. § 9-19-101; *id.* § 23-5-111.

⁴¹ FLA. CONST. art. IV, § 9.

⁴² FLA. ADMIN. CODE ANN. r. 68A-27.001(4) (2010).

As a result of reaching this understanding, participants agreed that a more extensive look at state resources and authorities for species conservation could provide useful insight into the status of state wildlife management and opportunities for cross-state learning and capacity enhancement. Ideally, this extensive look should consider both federally listed and unlisted species as well as ecosystem conservation that provides necessary habitat for multiple species (and often across political jurisdictions in the West).

Section 2: Pre-Listing Conservation

Workshop participants discussed opportunities at both the state and federal level to promote the conservation of species before decline triggers a listing under the ESA. The FWS can provide assurances to private landowners that undertake proactive conservation in the form of CCAAs. Regulatory assurances like those provided for in CCAAs can help to avoid the “shoot, shovel, and shut up” issue by offering protection from future regulation to landowners that undertake conservation activities.⁴³

States have the opportunity to take a leadership role here too. In the Southeast, states have administered programmatic CCAAs as an efficient way to engage large numbers of landowners in conservation.⁴⁴ For example, the Louisiana Department of Wildlife and Fisheries worked with the FWS to develop a programmatic CCAA for the Louisiana Pine Snake to address the conservation needs of the species on private lands and in an effort to preclude the need to list the species under the ESA.⁴⁵

States have administered programmatic CCAAs using state funding and section 6 funding; however, these tools receive limited funding from either states or the federal government. In fact, the Trump Administration recently proposed that states should be solely responsible for providing technical assistance for CCAAs and Candidate Conservation Agreements (CCA).⁴⁶ However, for these types of programs to truly be successful, the FWS must play a supportive role—through oversight and technical assistance, and also ideally through funding provided by Congress—to facilitate states participating in the development and

⁴³ JAMES SALZMAN AND BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 309 (5th ed. 2019).

⁴⁴ MICHAEL J. BEAN, LANDOWNER ASSURANCES UNDER THE ESA WORKING PAPER 4, 6 (2017), sandcountyfoundation.org/uploads/Landowner-Assurances-Under-the-ESA-FINAL.pdf [<https://perma.cc/8QYT-A7WU>].

⁴⁵ Programmatic Candidate Conservation Agreement with Assurances for the Louisiana Pinesnake in Louisiana, 82 Fed. Reg. 29,914-01 (proposed June 30, 2017).

⁴⁶ U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2020: FISH AND WILDLIFE SERVICE ES-9 (2019).

administration of programmatic CCAAs and other mechanisms that incentivize proactive conservation.

In addition to providing oversight and technical assistance, the FWS should use its other regulatory authorities to create additional incentives to support voluntary, proactive conservation work. For example, regulatory assurances for proactive conservation—an important incentive—can also be encouraged through ESA section 7 consultations, such as those undertaken between the FWS and the U.S. Department of Agriculture that covers the Working Lands for Wildlife Program (which has supported programs such as the Sage Grouse Initiative and the Monarch Butterfly Program). Creative section 7 consultations offer a relatively new, and so far under-utilized, avenue to provide assurances and encourage enrollment in conservation programs for at-risk or candidate species.

The role of the federal government—and the federal funding available—for collaborative efforts is an area of uncertainty. The federal government has a limited role in the conservation of species before listing under the ESA, and the extent to which the FWS engages on candidate and at-risk species can vary. Given that states have jurisdiction over species *before* they are listed under the ESA, the FWS can be reluctant to get involved, especially for species that are not a candidate for listing, while in other circumstances the FWS is perceived as dictating conservation goals and management requirements for non-listed species. Even the potential involvement on the part of the FWS can have a chilling effect on state funding and desire to conserve at-risk species. These circumstances, and the absence of clear policy goals and funding for collaborative involvement of state wildlife agencies and the FWS in pre-listing conservation, greatly hinder effective conservation.

Agreements in Principle:

1. Enhance incentives and opportunities for proactive conservation, within and beyond the ESA.

If wildlife conservation is to be truly effective, there need to be more mechanisms at all levels of government to incentivize proactive actions that conserve and enhance habitats essential to both listed species and those at risk of listing. This challenge is only more acute for non-listed species, unless an upcoming ESA listing decision prompts states and others to prioritize conserving the species. Beyond species, we are at a point where we must proactively and collaboratively create opportunities to maintain ecosystems and the species that define them.

2. Develop mechanisms that promote habitat and landscape-scale conservation as a means of furthering conservation of unlisted species generally.

States and the FWS should work together to develop mechanisms to promote habitat and landscape-scale conservation efforts. While the ESA was conceived to conserve “species and the ecosystems on which they depend,” the ESA’s provisions mainly function to protect individual species and their habitats. While the ESA works effectively as a backstop for individual species in danger of extinction, more work can and should be done to explore ways to proactively promote the conservation of healthy ecosystems as a way to prevent the decline of more than one species at a time. Given projected future species declines, it will be increasingly critical to put in place mechanisms that efficiently protect multiple species at once, which, for many species, can best be done by addressing habitat declines. This should also include consideration of keystone species on which other species in an ecosystem largely depend, and if removed, the ecosystem would change drastically; and umbrella species for which its conservation actions provide benefit for other species, natural resources, or ecosystems.

Recent examples of this type of proactive conservation include greater sage grouse and big game migration corridor efforts in multiple states.⁴⁷ In these cases, scientific findings led to efforts to implement measures to manage impacts and to reclaim, rehabilitate, and restore habitats that benefitted both the species of concern and others.

Mechanisms to incentivize these types of broader proactive conservation efforts could be provided under the ESA, in the form of regulatory assurances offered in exchange for conservation actions in the model of a CCAA, or outside of the ESA through entirely voluntary means. The cost to achieve this type of conservation by habitat type or landscape is a fundamental issue; however, incentive mechanisms present an opportunity for proactive funding that could enhance habitats of particular importance.

⁴⁷ See, e.g., Wyoming Executive Order 2019-3, *Greater Sage-Grouse Core Area Protection*, (Aug. 21, 2019), wgf.d.wyo.gov/WGFD/media/content/PDF/Habitat/Sage%20Grouse/Governor-Gordon-Greater-Sage-Grouse-EO-2019-3_August-21-2019_Final-Signed_2.pdf [https://perma.cc/L77N-VXYE]; Colorado Executive Order D 2015-004, *Conserving Greater Sage-Grouse Habitat* (May 15, 2015), www.colorado.gov/pacific/sites/default/files/atoms/files/EO-D-2015-002.pdf [https://perma.cc/R9NM-6UPD]; Colorado Executive Order D 2019-011, *Conserving Colorado’s Big Game Winter Range and Migration Corridors* (Aug. 21, 2019), wgf.d.wyo.gov/WGFD/media/content/PDF/Habitat/Sage%20Grouse/Governor-Gordon-Greater-Sage-Grouse-EO-2019-3_August-21-2019_Final-Signed_2.pdf [https://perma.cc/496S-L6TH]; Montana Fish, Wildlife and Parks, *Montana Action Plan for Implementation of Department of the Interior Secretarial Order 3362: “Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors* (Oct. 2019), fwp.mt.gov/fishAndWildlife/habitat/wildlife/programs/ [https://perma.cc/7P6Q-7AVV]; Wyoming Game and Fish Department, *Ungulate Conservation Strategy* (revised Jan. 28, 2019), wgf.d.wyo.gov/WGFD/media/content/PDF/Habitat/Habitat%20Information/Ungulate-Migration-Corridor-Strategy_Final_012819.pdf [https://perma.cc/ZN2L-6KTB].

3. It is important that states engage in species conservation early enough to be able to turn around species declines before more expensive and extensive intervention is needed.

States, with support from the federal government, must engage in conservation early enough to be able to reverse species declines, ideally making a listing under the ESA unnecessary. Funding and assurances under the ESA are primarily focused on listed species. Safe Harbor Agreement (SHA) funding under section 6 and other funding sources are not available when a species or suite of species can best be conserved—before the crisis exists.

4. State and federal roles for pre-list species efforts should be clearly articulated.

There is little question that the authority to manage unlisted species rests with the states, and yet there are numerous examples where the FWS's expertise can be extremely helpful in designing conservation strategies. States should take a proactive role in seeking the FWS's assistance, particularly for species that are largely unknown. The FWS's cooperative role should be to engage when asked, and even to encourage a collaborative effort to understand species' status that are generally not well researched. The difficulty here lies in the FWS embracing a biological research and management approach in the absence of any actual authority over the species prior to an ESA listing. But for many states, developing partnerships with the FWS prior to the need for listing under the ESA and species recovery is preferred.

Section 3: Enhancing Opportunities for State Science and State Participation in Species Status Assessment Preparation

A principal theme voiced during the workshop was that states should have a more significant role in the FWS processes to decide whether species should be listed. Similar observations were made with respect to engagement in FWS decision-making regarding changing a species listing status (referred to as species “downlisting” or “uplisting”) and in decision-making regarding removal of species from listing altogether (“delisting”). State participants clarified that they were not seeking a substantive role in the decision to list, reclassify, or delist species. Rather, their interest was in having greater input and involvement in the development of the scientific information upon which such decisions are made.

A related and frequent complaint over the years has been that the FWS listing decision-making lacks transparency, often described as “black box” decision-making. To address these and other concerns, the FWS has recently developed the “Species Status Assessment” (SSA).⁴⁸ The SSA framework is an analytical

⁴⁸ U.S. FISH AND WILDLIFE SERV., USFWS SPECIES STATUS ASSESSMENT FRAMEWORK VERSION 3.4 (2016).

approach intended to deliver foundational science for informing all ESA listing decisions.⁴⁹ SSAs are intended to be focused, repeatable, and rigorous scientific assessments, providing better assessments, improved and more transparent and defensible decision-making, and clearer and more concise documents.⁵⁰

SSA preparation begins with a compilation of the best available information on the species' life history, habitat, and taxonomy. It includes a description of the current condition of the species' habitat and demographics, and the probable explanations for past and ongoing changes in abundance and distribution within the species' range. Lastly, an SSA forecasts the species' response to probable future scenarios of environmental conditions and conservation efforts. Using the conservation biology principles of resiliency, redundancy, and representation to evaluate the current and future condition of the species, the SSA characterizes a species' ability to sustain populations in the wild over time based on the best scientific understanding of current and future abundance and distribution within the species' ecological settings.

In essence, SSAs are biological risk assessments to support policy decisions, such as species listing decisions. They provide decision makers with a scientifically rigorous characterization of a species' status and the likelihood that the species will sustain populations and other observations of key uncertainties in that characterization. SSAs do not themselves directly provide or represent a listing or other decision; rather, they are intended to synthesize and reflect the best available scientific information relevant to an ESA decision.

The FWS has addressed the question of state participation in SSAs in internal guidance documents:

[T]he Service's policy regarding the role of state fish and wildlife agencies in ESA activities requires the agency to coordinate, collaborate, and use the expertise of state agencies in developing the scientific foundation upon which the Service bases its determinations for listing actions. The input of states should include (but is not limited to) a solicitation of state data and research in addition to state personnel involvement in the development of SSAs.

To better implement these requirements, the Service will formally request at least two representatives from the state government on all SSA teams, subject to the affected states' willingness to

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 4, 9.

participate. Each SSA Team will request one member from the respective state fish and wildlife management agency(s) and one as designated by the respective Governor's office(s).⁵¹

Input from state agency participants suggested that their experience regarding FWS outreach pursuant to this policy is inconsistent. State agency participants did endorse parallel outreach to both state conservation agencies and to their governors' offices, noting that state governmental structures and responsibilities did not necessarily mean that appropriate expertise and ability to engage in SSA development was situated solely in a wildlife agency, and that the governors' offices had a crucial role to play in ensuring appropriate state representation.

In discussion, state participants noted that the level and quality of engagement and involvement in SSA development can vary widely. As in many intergovernmental collaborative efforts, parties can feel welcome and substantially engaged, or that their presence is due solely to policy requirements to which other participants simply give "lip service." The range of behaviors could be addressed through both training and policy requirements aimed at meaningful state and other SSA team member engagement.

As noted above, the FWS memorandum regarding state involvement in SSAs by its terms focuses on SSAs developed in the context of a potential species listing. The same logic encouraging state involvement suggests that states should be involved in the preparation of all SSAs, including those for uplisting, downlisting, and delisting. Engagement in delisting SSA development is particularly appropriate given the likely need for post-delisting monitoring and management; state involvement throughout the SSA life-cycle would likely support the development of more effective post-delisting conservation efforts which may themselves be critical to a delisting decision.

Lastly, it is by no means clear that the FWS is necessarily in the best position to manage SSA development and preparation. SSAs are an FWS tool developed to support the agency in making informed decisions on listing and delisting decisions. However, state agencies have jurisdiction and responsibility for management of unlisted species and may possess much greater knowledge and information regarding the status and conservation requirements of a species for which an SSA is being developed. This is often the case for species that have not been listed, and may in some cases be true for listed species for which there is significant state agency conservation involvement. Greater state involvement in SSA development is appropriate where it improves expertise and technical

⁵¹ Memorandum from the Principal Deputy Dir. of the U.S. Fish and Wildlife Serv. to the Assistant Dir. of Ecological Servs. (Oct. 13, 2017), www.biologicaldiversity.org/news/press_releases/2017/MemoOnSpeciesStatusAssesments.pdf [<https://perma.cc/M22P-ZJEH>].

capacity. Importantly, SSAs are apolitical science documents, and should be informed by the best technical expertise, whether state or federal.

Agreements in Principle:

1. Develop further FWS SSA policy to encourage effective state collaborative involvement and engagement in SSA development, and training to encourage effective team behavior and management in support of this objective.

Current FWS guidance regarding state involvement in SSAs is limited. Moreover, when the FWS does seek state involvement, it is by no means certain that such efforts will be exercised in a manner that focuses on team-building and the forging of an effective intergovernmental collaboration. Training efforts, including those efforts focused on training state participants in SSA development, and training for both FWS and state participants in communication and collaborative development skills, would be beneficial.

2. Broaden the scope of FWS SSA policy to explicitly include state involvement in development of SSAs for uplisting, downlisting and delisting, as well as listing.

Current FWS guidance regarding state involvement specifically references SSA involvement in the context of SSA listing efforts. That guidance should be revised, or new guidance issued, to direct state involvement in SSAs intended to serve all of the purposes for which an SSA might be performed—including uplisting, downlisting and delisting activities.

3. Develop FWS SSA policy to recognize the circumstances in which state-led SSA efforts would be appropriate.

The FWS should issue policy that articulates the set of skills, knowledge, and resources required to properly manage development of SSAs. Such policy should identify criteria and information that would inform and support the determination whether an interested state has the capacity to lead an SSA effort. Note that by “lead an SSA effort,” this agreement in principle does not anticipate that a state-lead SSA would not include the FWS and other participants on the SSA team, or that an SSA should be staffed and performed purely at a state level.

Section 4: Expand Opportunities for States to Help Develop and Implement 4(d) Rules for Threatened Species.

In general, the FWS should be able to manage threatened species more flexibly than endangered species. Much of this flexibility comes from section 4(d) rules, which can include any protections that are “necessary and advisable” to

conserving a threatened species.⁵² Using this flexibility, the FWS could engage states more often and meaningfully on opportunities to improve how 4(d) rules are written and implemented. At the workshop, participants identified both existing and novel opportunities for greater state engagement in 4(d) rules.

The exploration of 4(d) rules is particularly timely. In August 2019, the FWS rescinded its general 4(d) rule approach that automatically extended to threatened species the same protections that endangered species receive.⁵³ This change, which aligns the FWS's practice with the NMFS's, will cause the FWS to more frequently consider how best to tailor protections for threatened species, including through consulting with states and the public. Nothing about this policy change would affect the obligation of federal agencies to consult with the FWS or the NMFS under section 7.

Each of those opportunities is described below.

Agreements in Principle:

1. Consider state conservation programs and laws as the basis for 4(d) exemptions.

If state laws are providing adequate conservation for a species, then little to no additional conservation will result from regulating that activity separately under ESA section 9. To date, 4(d) rules for twenty-one species have exempted conservation or scientific research activities regulated by state law.⁵⁴ For example, the 4(d) rule for the Gila trout exempts educational, scientific, zoological, or conservation activities regulated by New Mexico or Arizona state law.⁵⁵ Further, some 4(d) rules exempt activities covered by a conservation plan implemented by one or more states.⁵⁶ For example, the coastal California gnatcatcher rule exempts incidental take covered by the California Natural Community Conservation Planning Act.⁵⁷ The NMFS salmonid 4(d) rule creates an even more active role for states to help conserve the covered species.⁵⁸ To qualify for coverage under the

⁵² 16 U.S.C. § 1533(d).

⁵³ Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants. 84 Fed. Reg. 44,753, 44,760 (Aug. 27, 2019) (to be codified at 50 C.F.R. §§ 17.31, 17.71). The change is prospective only. Threatened species of wildlife listed on or prior to September 26, 2019 are still subject to the section 9 take prohibition applicable to endangered species unless a species specific rule has been promulgated.

⁵⁴ YA-WEI LI, DEFENDERS OF WILDLIFE ESA POLICY WHITE PAPER SERIES, SECTION 4(D) RULES: THE PERIL AND THE PROMISE (2017).

⁵⁵ 50 C.F.R. § 17.44(z) (2019).

⁵⁶ Li, *supra* note 53, at 15.

⁵⁷ 50 C.F.R. § 17.41(b).

⁵⁸ 50 CFR § 223.203 (2019).

salmonid rule, a state must submit a Fishery Management and Evaluation Plan, monitor and report on the amount of take occurring in its fisheries, and confer with the NMFS on any changes in its fishing regulations that affect the listed species. Participating states thus play a major role in managing a listed species—and all of this is enabled through a 4(d) rule. If the FWS adopts this agreement in principle in future 4(d) rules, the agencies should ensure that the rules include monitoring and reporting provisions.

2. Use 4(d) rules, accompanied by a management plan, to support the delisting of threatened species.

Many delisting decisions are controversial because of uncertainty about how states would manage those species after delisting. The FWS can reduce some of this controversy by providing states with an opportunity to demonstrate the outcomes of state management while a threatened species is still listed. For example, a 4(d) rule could reduce or eliminate section 9 protections at least five years before the FWS anticipates delisting a threatened species, so that the agency has enough time to track the outcomes of a state-led approach to conserving the covered species. If the outcomes undercut recovery progress, then the FWS can modify the rule to restore adequate protection for the species, which is far easier and less controversial than relisting the species. If the outcomes promote recovery, then the FWS has a far stronger evidence-based standard to support its delisting decision and legal challenges to that decision then may be less likely to prevail. This approach would work particularly well for species found mostly on non-federal lands, where changes in 4(d) rules could affect species conservation outcomes considerably.

To ensure this approach is applied effectively, a state should work with the FWS to develop a management plan for the threatened species for the period during which the 4(d) rule would apply. At a minimum, the plan should describe how the state will assume greater responsibility for conserving the species when the section 9 protections are relaxed or suspended through the 4(d) rule, in addition to how the FWS will evaluate the success of the state-led approach.

3. Use the process of engaging states in SSAs as a foundation for developing 4(d) rules.

When the FWS develops a 4(d) rule concurrent with a listing decision, the best information available on the threats to the species will likely be found in the listing rule and any accompanying species status assessment. Under FWS policy, state representatives are given an opportunity to participate on the team that drafts an SSA.⁵⁹ The FWS could expand this state engagement to include the

⁵⁹ U.S. DEP'T OF THE INTERIOR, *supra* note 47, at 4.

process of drafting a proposed 4(d) rule. In particular, the FWS could seek state input on how a 4(d) rule could incentivize voluntary conservation on the part of private landowners and could alter protections based on the strength of existing state conservation laws and programs.

4. Tailor protections in a 4(d) rule based on population-specific conservation needs.

The FWS could draft 4(d) rules to tailor protections across a threatened species' range. For example, a particularly vulnerable population should have more protections than a secure population. Through geographically tailored 4(d) rules, the FWS can create incentives for states and local jurisdictions to meet any population-specific recovery targets. Some species, such as the Utah prairie dog, have recovery units, which are a special unit of the listed entity that are geographically or otherwise identifiable and are essential to the recovery of the entire listed entity.⁶⁰ A 4(d) rule could reduce or remove section 9 prohibitions for units that have met their recovery targets. To date, very few FWS 4(d) rules alter protections based on geography. The best example of such a rule is the one for the Gila trout, which allows take of the species by state-regulated recreational fishing except in four creeks inhabited by relict populations of the trout.⁶¹ The FWS deemed these populations especially important to recovery and inappropriate for fishing.⁶² All other bodies of water, however, contained reintroduced specimens that the FWS thought could be managed for fishing consistent with recovery.⁶³

5. Develop national guidance or a handbook on implementation of 4(d) rules.

The FWS has not published a national guidance document or handbook that describes when and how 4(d) rules should be written and implemented. As a result, rules can vary considerably without a clear rationale. Further, many FWS staff are likely unaware of all the best practices for drafting rules. For example, a staff person might not consider the potential to use a geographically tailored rule or to incorporate take minimization measures into a rule. Similarly, staff might not be aware of best practices for handling complex situations, such as multispecies 4(d) rules that address common threats among listed species in an ecosystem. Capturing these and similar considerations in a guidance document or handbook would help improve consistency among rules and ensure that FWS staff seek and consider best practices for developing rules.

⁶⁰ UTAH ECOLOGICAL SERVS. OFFICE, U.S. FISH AND WILDLIFE SERV., UTAH PRAIRIE DOG (*CYNOMYS PARVIDENS*): FINAL REVISED RECOVERY PLAN 1.3–7 (2012).

⁶¹ 50 C.F.R. § 17.44(z).

⁶² Endangered and Threatened Wildlife and Plants; Reclassification of the Gila Trout (*Oncorhynchus gilae*) From Endangered to Threatened; Special Rule for Gila Trout in New Mexico and Arizona, 71 Fed. Reg. 40,657-01 (July 18, 2006) (to be codified at 50 C.F.R. pt. 17).

⁶³ *Id.*

Section 5: Communication Principles for States and the FWS

During forty-seven years of practical ESA implementation, experience has revealed a number of opportunities for improving state and FWS communications, information flow, and state interest in greater input in the FWS's ESA decision-making. While the FWS has guidance in the State Role policy, last updated in 2016, the issues faced by states in communicating with the FWS, and by the FWS in soliciting, receiving, and incorporating state input, exceed the scope and direction of that guidance and would benefit from the additional principles described here.

Communication between states and the FWS could be improved on both their substance and the FWS's process of gathering and including state input. In several instances, the FWS appears to treat states or state interests as equivalent to other members of the public, with the related assumption that general methods and techniques for soliciting and addressing public comment and input are appropriate and adequate for state agency engagement. But that is not the case and proceeding in that fashion does not honor either the state's expertise and knowledge of species, habitats, and conservation needs and approaches, or the special and unique role of the states recognized by Congress in the ESA's structure and provisions.

It is not always clear to the states what type of information, and in what form, would be required by or most helpful to the FWS. Are general habitat descriptions and references to websites where maps may be located sufficient, or does the FWS need specific GIS layers, coordinates, or mapping files?

The expansion in scope of considering state interests (not being limited to just the ESA-defined "state agency") is important. The "states" include more than just the state agency responsible for fish and wildlife matters. State actors and interests may include governor's offices, species-specific offices and programs, and other state departments (commerce, natural resources, water, lands, agriculture, and more). Implementing and institutionalizing this communication flow should help facilitate these communications and bring about the benefits that experience has shown, and Congress indicated, would flow from the involvement and advice of, and a good working relationship with, state interests in ESA processes. Again, workshop participants agreed on an interest in having greater state input and involvement in the development of the information on which decisions are made, while recognizing that formal decision-making is ultimately the FWS's role.

Agreements in Principle:

1. The FWS should develop procedures for engagement with state governors and responsible state agencies.

The FWS, in cooperation with the various state interests and agencies, should develop regular procedures for engaging with state governors and responsible agencies for various ESA processes. The Service's State Role policy provides a foundational starting point, but those procedures should be expanded to include the broader scope of state interests now recognized and established as valid and contributing stakeholders in ESA issues. That policy also should be expanded to include the full panoply of ESA actions that the FWS and states might undertake, including species status assessments and an increased state role in recovery planning and implementation.

The scope of the communications must extend beyond the state agencies to include the governors, special state offices or entities for ESA issues or species conservation where located outside the state agency, and other state agencies, beyond a department of fish and wildlife, that may have direct interest, knowledge, and experience with ESA issues and their implications, including state departments of commerce, lands, agriculture, natural resources, and more.

At the same time, the FWS should not be tasked with coordinating or communicating with all concerned state agencies and offices with a potential interest in ESA matters. To the extent possible, a state governor's office—or a specific species-issues office within a state wherever located—may act as a coordinator and facilitator to collect and forward to the FWS the appropriate state agency input beyond that of just the state fish and wildlife agency. If the FWS knows of other state agencies with data, information, or interest in a particular ESA issue, the FWS should also be able to communicate directly with those agencies or offices, copying in the appropriate state governor's or species-issues office as well. In sum, the FWS should have clear policies or procedures to solicit, engage, and consider state agency data, knowledge, input, and expertise beyond the current State Role policy statement and guidance.

2. The FWS should engage with interested or affected state interests early in the process (i.e., before formal federal decision-making processes commence).

Current FWS ESA procedures and policies provide formalized comment procedures for state agencies on ESA section 4 rulemaking, and information updating opportunities on the section 7 consultation context. More robust and preliminary communications between the state interests and the FWS in these areas could facilitate the exchange of information early in the process, leading to improved conservation decision-making and more readily facilitating state input and expertise, consistent with Congress' original goals in these areas. For instance, prior engagement could provide a timely conduit for a state or state agency to provide science-based and other data to the FWS in considering a petition response or listing action under ESA section 4.

For the states' part, improving the way information is submitted to the FWS, and utilizing a format and timeframe more helpful to FWS decision-making, can help improve and increase the role and relevance of states to the ESA decision-making processes. States can provide information, too, about state programs in place to conserve species or habitat. These formal communications policies might address how information is submitted and coordinated between the state interests and the FWS. Mapping information, GIS data, species status, and other information might have specific formats or content. This may vary by region or locale, but addressing these data and information protocols and facilitating an open process for doing so could do much to improve the consideration of state input into the ESA processes.

3. States should engage with the FWS and submit information, comments, and data in a way that is readily documentable and useable to the FWS and other stakeholders.

As noted, effectively communicating and improving on existing opportunities is a two-way street. States should be prepared to engage with the FWS and to provide information and comments at times and in ways most useful to the FWS and the FWS's ESA processes. This could include designating a state employee to coordinate data and information flow to the FWS from a range of state agencies, offices, or other state stakeholders (such as a local species working group, et cetera). States should also ensure that they have adequate resources, personnel, and time to effectively engage with the FWS to take advantage of and utilize the communications opportunities provided.

Section 6: Recovery Planning and Implementation and Delisting

The ESA's ultimate purpose is to recover species to the point where they no longer need the protections of the statute. Recovery plans are the roadmap for achieving this goal and inform many other ESA decisions for a species, such as revisions to critical habitat and mitigation strategies. To be effective, recovery plans need to reflect input from all recovery partners, particularly state wildlife agencies. Indeed, many species are not recoverable without the cooperation and significant involvement of states. Fortunately, the ESA gives the FWS considerable latitude to engage states in recovery planning.⁶⁴ For example, state representatives served on the teams that drafted plans for the polar bear, Florida panther, yellowcheek darter, Oahu plants, and many others.

Beyond recovery planning, the opportunities for state engagement in recovery plan implementation are even greater. The ESA is entirely silent on who can take the lead in plan implementation. For many species, particularly those that occur primarily on nonfederal lands, states have led or co-led recovery implemen-

⁶⁴ Fischman et al., *supra* note 7, at 104.

tation. For example, the 2018 recovery and delisting of the Hidden Lake bluecurls was attributable largely to management carried out by the California Department of Parks and Recreation, all of which occurred without an ESA recovery plan and instead relied on a state developed conservation strategy.⁶⁵ The desert milkvetch took a similar path to recovery in 2018 based on conservation carried out by Utah state agencies.⁶⁶ These and other situations demonstrate that an ESA listing should not necessarily reflect an abrupt and wholesale transfer of management from states to the federal government. For many species, the opposite should be true: the recognition of their imperiled status under the ESA underscores the need for greater state and private landowner engagement in conservation. Thus, the key question is how to expand opportunities to engage states in recovery plan development and implementation. The agreements in principle below identify specific challenges and opportunities to advance this goal.

A related goal is how to ensure adequate state involvement in delisting decisions and post-delisting species management. This involvement is important because delistings require the FWS to consider whether states and other land managers can adequately conserve a species after the protections, federal funding, and other benefits of an ESA listing end. Without this assurance, courts may prevent the FWS from delisting a species even if its biological recovery criteria have been met. Post-delisting assurances will likely play an increasingly important role in determining how many species are recoverable, as studies have suggested that over eighty percent of ESA-listed species are “conservation reliant,” meaning they will require some form of conservation management for the foreseeable future.⁶⁷ Better state engagement during the delisting process should translate to stronger assurances of post-delisting management and, hence, a more defensible delisting decision. The agreements in principle below also identify opportunities to expand this engagement.

Agreements in Principle:

1. The FWS should develop a formalized process for states to lead recovery plan development.

There are many examples of states playing a major role in developing recovery plans, but to expand and institutionalize those opportunities will require the

⁶⁵ Endangered and Threatened Wildlife and Plants; Removing *Trichostema austromontanum* ssp. *compactum* (Hidden Lake Bluecurls) From the Federal List of Endangered and Threatened Plants, 83 Fed. Reg. 25,392-01 (June 1, 2018) (to be codified at 50 C.F.R. pt. 17).

⁶⁶ Endangered and Threatened Wildlife and Plants; Removing Desert Milkvetch (*Astragalus desereticus*) From the Federal List of Endangered and Threatened Plants, 83 Fed. Reg. 52,775-01 (Oct. 18, 2018) (to be codified at 50 C.F.R. pt. 17).

⁶⁷ J. Michael Scott et al., *Conservation-Reliant Species and the Future of Conservation*, 3 CONSERVATION LETTERS 91, 92 (2010).

FWS and states to address several obstacles. First is the absence of comprehensive FWS guidance that formalizes a process for states to lead recovery plan development, which could include writing a first draft of a recovery plan for the FWS and allowing for others to review and edit. In particular, the Service's 2016 State Role policy is silent on this process.⁶⁸ Formal guidance on the process should increase the opportunities for states to lead recovery plan development. Guidance could identify appropriate ways to formalize the state-federal partnership and accountability for recovery planning while retaining FWS oversight authority consistent with the ESA. This would reduce the need for ad hoc decisions about whether a particular state could play a leadership role in plan development.

FWS guidance would also help distinguish between those aspects of a recovery plan that are most amenable to state leadership and other aspects that must rely more on FWS biologists' judgment. For example, states often have a better understanding of their private landowners, which means that states are well-suited to identifying recovery actions involving the private sector and strategies to implement those actions. Further, recovery actions and strategies present a great opportunity for state leadership because, for many species, there are multiple paths to recovery. For illustration, assume that a species requires 12 populations, each with 150 to 200 individuals, to recover. There may be multiple ways to achieve that outcome. Some of those configurations might be far easier to achieve than others because they are more amenable to landowner support. In many situations, states will have the best knowledge of the different options, which options are most likely to succeed, and what tools and resources are needed to achieve that success.

By contrast, states are not positioned to draft downlisting and delisting criteria on their own for several reasons. One is that the FWS has yet to describe clear and objective standards for when a species is considered endangered, threatened, or recovered.⁶⁹ Unless and until the FWS drafts those standards—which reflect

⁶⁸ Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8663. The policy's reference to state engagement in recovery planning and implementation is limited to the following passages:

1. Use the expertise and solicit the information and participation of State agencies in all aspects of the recovery planning process for all species under their jurisdiction.
2. Use the expertise and solicit the information and participation of State agencies in implementing recovery plans for listed species. State agencies have the capabilities to carry out many of the actions identified in recovery plans and are in an excellent position to do so because of their close working relationships with local governments and landowners.

Id. at 8664.

⁶⁹ See, e.g., Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U.L.Q. 1029 (1997); T.J. Regan et al., *Testing Decision Rules for Categorizing Species' Extinction Risk to Help Develop Quantitative Listing Criteria for the U.S. Endangered Species Act*, 27 CONSERVATION BIOLOGY 821 (2013).

not only a science judgment but also a policy judgment about the acceptable level of extinction risk that corresponds to each of the three classifications—there is limited value for states to draft recovery criteria as part of a state-led recovery planning effort. In addition, FWS biologists' involvement in and oversight of the development of downlisting and delisting criteria are necessary to maintain the legitimacy of the criteria.

State leadership in recovery plan development likely requires fewer resources today than a decade ago. A key reason is that FWS currently strives to write an SSA to accompany every listing decision. As detailed above, an SSA explains the best available science as to a species' biological status and current threats.⁷⁰ Because this information is already described in an SSA, a recovery plan under the FWS's current policy does not need to repeat it.⁷¹ As a result, major portions of a recovery plan are already drafted via the SSA by the time a species is listed, lessening the workload for a state that wants to draft a plan. Nonetheless, states do need more funding if they are to lead recovery plan development for significantly more species. As discussed in the funding section of this report, state-level funding for non-game conservation is limited in many instances. States should take the lead in seeking funding for their staff to engage in plan development. Another option to explore is whether the FWS could contract with a state to develop a draft recovery plan, as the FWS sometimes uses this approach with academic institutions to develop draft recovery plans and SSAs.

2. The FWS should develop and offer training and outreach to states about data needs, standards, and coordination.

A major barrier to recovery is inadequate data on the biology of and threats to many listed species, particularly data that are quantitative and empirically derived. One reason is that federal and state wildlife agencies lack the resources to carry out surveys and other research on those species, especially when the work requires securing an ESA permit. Other reasons, however, are largely attributable to poor communication and coordination, which is remediable without relying on the uncertain prospects of substantial funding increases from legislatures. At the workshop, participants identified two specific opportunities to address these issues.

One opportunity would be for the FWS to provide training or outreach to states and local partners about what are the most important data gaps to fill, how states could help fill those gaps, and what standards the data must meet for

⁷⁰ U.S. DEP'T OF THE INTERIOR, *supra* note 47, at 4.

⁷¹ See U.S. FISH AND WILDLIFE SERV., RECOVERY PLANNING AND IMPLEMENTATION (2019).

the FWS to consider them the “best available.”⁷² For example, if a state seeks to augment the FWS’s records of where a species occurs, what are the survey protocols to use and in what format should the data be submitted? By providing guidance on these types of questions, the FWS can encourage states to contribute data needed to inform species recovery, downlisting, and delisting decisions.

A second opportunity would be to improve data sharing and coordination among the FWS, states, and other conservation partners. States have important data that are not always shared with the FWS, and vice versa. Workshop participants suggested that the FWS and states develop and standardize protocols for data sharing so that it can occur seamlessly. Protocols for listing, downlisting, and delisting decisions, and for five-year reviews, would be particularly useful. Further, the internet and other technologies offer low-cost, easy, and proven methods to share data.

3. The FWS should clarify and strengthen the process for delisting of conservation-reliant species based on state conservation assurances.

The large percentage of listed species that are conservation reliant poses a major challenge for recovering and delisting those species, but also presents an opportunity for states to help address the challenge. A species that has met all of its population goals for recovery may still be prevented from being delisted because the FWS lacks the assurance that states and other land managers will continue carrying out conservation measures to address the ongoing threats to the species after it is delisted. A species may require invasive species control in perpetuity. Without an assurance that the control will continue after delisting, the threats to the species may be too high to delist the species. As human activity continues to alter more ecosystems, species are becoming increasingly dependent on ongoing management to address threats such as invasive species control, habitat succession, genetic isolation due to habitat fragmentation, and others. To facilitate a delisting in these situations, states and other land managers can provide the necessary conservation assurances to the FWS, such as through a memorandum of agreement. The FWS however, lacks clear protocols and standards describing how states can provide those assurances and how the FWS will consider the assurances as part of a delisting decision.

To address these gaps, the FWS should adopt two approaches. First is to describe the process and standards for land managers to enter into conservation management agreements to control threats post-delisting. In the same way that

⁷² Recognizing that the FWS has adopted a 1994 policy on ESA information standards to “ensure that [its] decisions . . . represent the best scientific and commercial data available.” *See* Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34,271-01 (July 1, 1994). That policy and guidance needs to be expanded as noted above.

the FWS has policies for developing agreements to manage threats to avoid an ESA listing (e.g., the CCAA policy), similar guidance is needed for agreements that enable delistings. To date, the FWS has developed these agreements on an ad hoc basis to support the delisting of several species including the black-capped vireo and Kirtland's warbler. A standardized approach is needed if the FWS wants to develop the agreements efficiently and uniformly for the many conservation-reliant species that will approach recovery in the coming years.

The second approach is for the FWS to describe how it will evaluate the regulatory assurances in a conservation management agreement as part of its delisting decision. This issue is similar to the FWS's need to evaluate voluntary management commitments when deciding whether to list a species. When those commitments have not yet been implemented or have been implemented but have not yet demonstrated whether they are effective at the time of a listing decision, the FWS uses its Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE).⁷³ Under the PECE, the FWS evaluates fifteen non-exclusive criteria, including whether "the staffing, funding level, funding source, and other resources necessary to implement the effort are identified."⁷⁴ In the delisting context, the identical questions can arise with post-delisting commitments that have yet to be implemented or demonstrated to be effective. For example, what funds have been secured to carry out those commitments, and are the funds enough to cover the conservation needs for the foreseeable future? By providing clarity on these and other similar questions, the FWS will improve the legal defensibility of its future delisting decisions that rely on voluntary commitments and will offer states a clearer roadmap for making those commitments.

Section 7: Funding Needs for Conservation of All Species

More than 1,600 animal and plant species in the United States are currently identified as threatened or endangered under the ESA.⁷⁵ States have further characterized over 13,000 species as those in greatest conservation need.⁷⁶ Globally, scientists warn that up to one million species could face extinction in

⁷³ See, e.g., Hadassah M. Reimer & Murray D. Feldman, *Give PECE A Chance: Evaluating Conservation Programs to Avoid Endangered Species Act Listings*, 56 ROCKY MTN. MIN. L. INST. 21-1 (2010).

⁷⁴ Policy for the Evaluation of Conservation Efforts (PECE), 68 Fed. Reg. 15, 100 (Mar. 28, 2003).

⁷⁵ *Listed Species Summary*, U.S. FISH AND WILDLIFE SERV., ecos.fws.gov/ecp0/reports/box-score-report [<https://perma.cc/4N5J-YRAM>] (last visited Dec. 9, 2019).

⁷⁶ *Compiled National List of Species of Greatest Conservation Need*, U.S. GEOLOGICAL SERV., www1.usgs.gov/csas/swap/national_list.html [<https://perma.cc/GL7K-ECBF>] (last visited Nov. 26, 2019).

the near future due to human influence.⁷⁷ There is an urgent need to invest in conservation and ecosystem resilience to prevent further species declines and to promote recovery.

States are at the front lines of species conservation. Yet state funding for species conservation makes up less than five percent of all funding under the ESA.⁷⁸ States currently receive over a billion dollars per year in dedicated funding for game and sport fish conservation.⁷⁹ This funding is financed by hunters through the Pittman-Robertson Act and fisherman through the Dingell-Johnson Act.⁸⁰ This funding, along with hunting and fishing license fees, serves as the primary source of revenue for most state fish and wildlife agencies.

However, there is no similar source of dedicated federal or state funding for the thousands of species that are not hunted or fished. As a result, an increasing number of species are becoming rare and imperiled and it is difficult for states to aid in the recovery of species already identified as threatened or endangered under the ESA.

Concurrently, the FWS is underfunded for its responsibilities and duties which include prelisting and listing, downlisting and delisting, consultation, conservation, and other ESA activities. As an example, the funds committed for species recovery are currently insufficient to create and maintain recovery plans for all listed species, much less implement conservation activities in support of recovery. A recent report found that less than 25 percent of the \$1.21 billion per year needed for implementing recovery plans for 1,125 species is actually available for recovery.⁸¹ Meanwhile, the federal budget has not kept pace with species listings as the average expenditure per species has been declining since 2010.⁸² The FWS and other implementing federal agencies need substantially higher funding levels with far greater certainty in order to meet their ESA obligations.

Establishing dedicated funding to support state and federal conservation of species is an essential step to prevent further ESA listings, declines, and extinctions. Current proposals include the possible expansion of partnerships

⁷⁷ INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVS. GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES (2019).

⁷⁸ Camacho et al., *supra* note 37, at 10842.

⁷⁹ Press Release, U.S. Dep't of the Interior, Secretary Zinke Announces Distribution of \$1.1 Billion to State Wildlife Agencies (June 13, 2017), www.doi.gov/pressreleases/secretary-zinke-announces-distribution-11-billion-state-wildlife-agencies [<https://perma.cc/A4HG-Z8RD>].

⁸⁰ Pittman-Robertson Act, 16 U.S.C. § 669 (2019); Dingell-Johnson Act, 16 U.S.C. § 777 (2019).

⁸¹ LEAH R. GERBER, CONSERVATION TRIAGE OR INJURIOUS NEGLECT IN ENDANGERED SPECIES RECOVERY (James A. Estes ed., 2016).

⁸² Evans, *supra* note 38.

through mandatory-funding amendments to the Federal aid in Pittman-Robertson Act (such as the proposed Recovering America's Wildlife Act), funding increases through the federal appropriations process, and other ideas. Creativity and commitment are necessary to identify and implement robust, dependable funding sources.

Agreement in Principle:

1. Significantly expand funding for wildlife conservation.

While federal funding for conservation is significant, reductions in direct allocations through federal programs, such as the National Fish and Wildlife Foundation and the Land and Water Conservation Fund, as well as continued erosion of funding for collaborative programs, such as the FWS Partners for Fish and Wildlife Program, limit the ability of states and partners to conserve habitats. Consider also that large numbers in a federal budget are quickly diluted by allocation to multiple states. For example, \$50 million when shared equally among the states would generate less than 10 percent of the annual funding for conservation through the Wyoming Wildlife and Natural Resource Trust. Simply put, states and partners such as conservation districts and conservation groups often bear costs of conservation, including on federal lands. Both federal and state funding allocations for conservation need to be elevated, a topic explored further under section 7 of the ESA.

To reverse species declines, it is essential to secure dedicated funding for state conservation of non-game species. In addition, robust and predictable funding is needed to support essential ESA activities through the FWS. Federal funding for these purposes is necessary and could be complemented by creative state funding sources, such as state wildlife trust funds and leveraged private sources. As one example, Florida allocates funding from license plates to species conservation, which has generated millions of dollars for conservation.⁸³

More emphasis should be placed on building state capacity to meet ESA and non-ESA responsibilities and opportunities. State Wildlife Action Plans establish state priorities in the form of species of greatest conservation need. With increased funding and emphasis on robust and effective SWAPs, these plans could serve as the bedrock for more state conservation and recovery of species and habitat.

⁸³ Kimberly C. Moore, *State Cashing in on Specialty License Plates*, THE LEDGER (June 29, 2018, 4:39 PM), www.theledger.com/news/20180629/state-cashing-in-on-specialty-license-plates [<https://perma.cc/QPF6-YWR9>].

V. CONCLUSION

This Workshop Report sets out the series of agreements in principle developed by national experts representing a broad range of stakeholders in ESA and species conservation matters. The workshop participants were asked to engage in a discussion on the opportunities to improve species conservation, particularly by improving the coordination and support between state wildlife agencies and the U.S. Fish and Wildlife Service. This report includes the tangible actions items, summarized above, that are intended to inform the ongoing national conversation on improving species conservation and ESA implementation.