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CONSERVING ENDANGERED SPECIES ON PRIVATE LANDS

*John F. Turner & Jason C. Rylander**

INTRODUCTION

A soft Wyoming wind sent waves out across the rolling grasslands of Shirley Basin. A small crowd had gathered on that day in 1992 to witness the reintroduction of the world's rarest mammal—the elusive and beautiful black-footed ferret—to its historic range. The isolated area chosen for the release of the first "nonessential experimental population"[1] of ferrets was on private land in the heart of cattle country, where livestock pastures maintained an enviable habitat of prairie dog towns and grazed grass communities.

At the time, I was Director of the U.S. Fish and Wildlife Service (FWS) and thus responsible for the administration of the endangered species program. I thanked one of the young ranchers for being a willing partner in this risky but exciting experiment. Looking out across the lush rolling hills of his ranch, he grinned and said, "John, please don't brag on this to my friends at the next Wyoming Stock Growers Convention, but the family and I are really enjoying this project. We're excited about bringing this critter back to our ranch country and proud to have our place part of the project."

For several months, Wyoming had been the center of controversy over the Endangered Species Act (ESA).[2] Livestock groups were blasting the FWS, the Act, and me as Director, for our plan to return wolves to the Yellowstone region. The prevailing sentiment was that neither the act nor the federal bureaucrats could be trusted. Yet for weeks, this rancher and his neighbors had tolerated a parade of state and federal biologists tramping over their property surveying the land, setting up observation

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1. Establishment of a Nonessential Experimental Population of Black-Footed Ferrets, 56 Fed. Reg. 41,473 (1991) (to be codified at 50 C.F.R. pt. 17).

2. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994).

posts, laying transects, plotting release and management areas, and coordinating the actual release. The Act gave us no authority to be there, but these folks had agreed to be our partners strictly on a voluntary basis.

At first there were many questions. What if, in the future, a rancher accidentally baled a ferret while putting up his winter hay? Or what if his cow dog killed one of the rare animals while working cattle? Would a federal agent arrive and shut down his operation to protect the ferrets? These folks lived in the heart of "wise use" country and were justifiably cautious. Yet, once they realized that the ESA was flexible enough to provide binding assurances that they would be exempt from liability for any incidental harm to the ferrets or their habitat, these landowners were willing to participate in the recovery effort.

If such a partnership could be forged on the plains of central Wyoming, why is there such a storm raging across America over the ESA and its impact on private property? In my tenure with the FWS, we forged thousands of voluntary partnerships with farmers, ranchers, developers and timber companies to protect listed species, wetlands and other habitat. Yet property rights concerns have erupted in recent years, dominating discussions of the act. The debate is characterized by a swirl of accusations, misconceptions and a litany of alleged horror stories of private landowners suffering impacts because of the "long arm" of this law. Critics of the act have raised valid issues that should be addressed in the reauthorization of this statute. On the other hand, the havoc wreaked across communities in the name of species protection is overstated. Many of the "horror stories" simply can't be substantiated.

The land ethic is strong in this country. So is our commitment to private property rights. As De Tocqueville noted more than one hundred years ago, "In no country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property."[3] Attempts to ride wildlife conservation roughshod over the legitimate rights of property can only serve to undermine both principles.

In part, the conflict arises because the Act is being asked to do too much. Our living resource legacy is eroding because federal, state, local and even private stewardship initiatives have failed to keep pace with the loss of suitable habitat in this country. By the time the ESA comes into play, it is almost too late. The species is already on the brink of extinc-

3. NATIONAL RESEARCH COUNCIL, SETTING PRIORITIES FOR LAND CONSERVATION 45 (1993).

tion, and efforts to save what few individuals remain inevitably impact disproportionately the lands where the species still exists. Most landowners want to do the right thing, but they feel they are bearing too much of the burden of protection simply because they happen to own the majority of the nation's remaining wetlands, riparian corridors, and endangered species habitat.

Landowners have every right to be proud of their general stewardship across the United States. However, preliminary information presented by Michael Bean, endangered species expert for the Environmental Defense Fund, would seem to show that declining wildlife populations are not doing well on private property.[4] For listed species that are found entirely on federal lands, about eighteen percent seem to be improving and some thirty-nine percent are stable in status.[5] However, notes Bean, for those that are found on private property, only three percent are improving and only sixteen percent are thought to be stable.[6] He uses as an example the serious decline of the Attwater's prairie chicken (*Tympanuchus cupido*) which depends upon private lands for its existence. "Its wild population has fallen from over 2,250 in 1975 to only 42 in 1996. Indeed, its population has declined by over 90 percent in the three years since 1993."[7] These observations boldly illustrate that we need better strategies for protecting rarer species on private property.

We must all work to find positive and proactive mechanisms to encourage the nation's landowners to embrace the protection and enhancement of wildlife resources. At the same time, reasonable standards must be kept in place to protect the nation's water, land productivity, and living resources to thwart those who would disregard such responsibilities. We must also respect the communities and lifestyles that have helped shape the land. This is our wildlife conservation challenge for this decade and the next century. As Rene Dubos noted: "Ecology becomes a more complex but far more interesting science when human aspirations are regarded as an integral part of the landscape."[8]

This article will discuss the implementation of approaches under the current Act that are proving successful in establishing positive partner-

4. Michael J. Bean, Perspective on Endangered Species and Private Lands (draft). Presentation to the National Education and Training Center's Forum on the Endangered Species Act: Private Land Strategies for Working Together 2, 5 (Nov. 14, 1996).

5. MICHAEL J. BEAN, ENVIRONMENTAL DEFENSE FUND, CREATING AN INCENTIVE FOR ENDANGERED SPECIES CONSERVATION THROUGH ESTATE TAX REFORM 2 (1996).

6. *Id.*

7. *Id.*

8. RENE DUBOS, THE WOOING OF THE EARTH 5 (1980).

ships between property owners and species conservation. Many of these approaches, such as the increased use of Habitat Conservation Plans (HCP) with incidental take permits, increased involvement of private landowners in the recovery of species, conservation agreements, prelisting activities, and "safe harbor" rules, were conceived or more broadly applied during the Bush Administration. These and other approaches have been embraced and expanded by Secretary Babbitt and the Clinton Administration. Several bills have been introduced in Congress to reauthorize the Act since it came due in 1992, but none of these efforts has been successful. The relationship of private property owners to conserving endangered species has been central to the reauthorization debate.

If species conservation on private land is to be successful, programs outside the ESA also must be supported. In addition to examining key provisions of the Act, this article will highlight a number of model programs that are already providing assistance and incentives to landowners who embrace the protection of species and habitat.

All levels of government have a role to play in the conservation of the nation's natural resource heritage. Partnerships between public, private, and non-profit interests represent the future of conservation. Yaffee writes:

> Endangered species management is as much about organizing and dealing with humans and human institutions as it is about dealing with plants and animals. The success of future efforts to protect biological diversity will depend in large part on how well agencies and professionals understand and Act within this sociopolitical context.[9]

Working together, it is possible not only to reduce the level of acrimony that now pervades the endangered species debate, but to establish a conservation legacy of which we and our descendants can be justly proud.

EXISTING PROVISIONS THAT AFFECT PROPERTY OWNERS

Prelisting Activities

Having a species targeted with special concerns—either under a state category, as a candidate species for listing under the ESA, or even a species proposed for a threatened or endangered designation—can prompt

9. Steven L. Yaffee, *The Northern Spotted Owl: An Indicator of the Importance of Sociopolitical Context*, *in* ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS 70-71 (Tim W. Clark et al. eds., 1994).

collaborative actions which can modify or even preempt possible regulatory actions. Actual ESA listings can be avoided, postponed, or special allowances can be built into a designation, in cases where collective actions to conserve or restore habitat can be agreed upon prior to actual listing. Such mitigating actions must be determined to substantially remove impacts that threaten species survival. Current ESA provisions allow such flexibility, and models demonstrate that prelisting efforts can accommodate species protection and landowner concerns.

Prelisting Case Study—Louisiana Black Bear[10]

In June 1990, the FWS received a petition to list the Louisiana black bear (*Ursus americanus luteolus*) as threatened, based on extensive loss of habitat and human exploitation. The bear ranged throughout Louisiana, in two thirds of Mississippi, and in east Texas, with nearly 90 percent of its habitat found on private lands.

Landowners and the forest products industry immediately feared that a potential listing would severely limit and even curtail timber harvesting which contributed greatly to the economies of local communities. On July 14, 1990, the Louisiana Forestry Association hosted a meeting of concerned individuals from the tri-state region. An international authority on black bears, Dr. Michael Pelton, suggested to the gathering that the survival of the bear would depend on the concerted and coordinated effort of a diversity of public and private interests.

A group of individuals representing a variety of interests quickly came together and formed what became known as the Black Bear Conservation Committee (BBCC). Eighteen individuals from timber companies, landowners, conservation groups, and state and federal agencies agreed to check their individual agendas at the door, respect each stakeholder's role and objectives, treat one another as equal partners, and try to work together on behalf of the bears.

The BBCC agreed to two overriding goals. They would work together as public/private partners to stabilize the existing bear population, and attempt to restore the bear to suitable habitat within the tri-state region where it could eventually be delisted. Biologists from the FWS looked at the best available science and determined that the long term habitat needs of the bear were compatible with the normal forest management practices of the region.

10. *See* James F. Bullock & William A. Wall, Proactive Endangered Species Management: A Partnership Paradigm 3-15 (unpublished manuscript, on file with the authors).

The efforts of the BBCC reduced the imminent threat to the bear's survival, allowing the FWS to delay listing to give the group time to work out a solution. When listing became necessary, the rule included a provision exempting any incidental take of the species resulting from normal harvesting activities.

An expanded BBCC continued to operate as members understood that the interests of private property could be reconciled in harmony with long-term plans to benefit the threatened species. In sorting out issues and opportunities, the BBCC focuses on habitat, management, education, research and funding. They have agreed that science will be the final arbiter for their proceedings. The group has produced a management handbook to assist landowners, as well as a protocol for handling problem bears. A public awareness campaign has been launched to promote the black bear as an asset, especially for private property owners. The group is finalizing a comprehensive restoration plan which will provide the ingredients of the FWS's draft recovery plan.

All participants in the BBCC agree that a worthwhile balance between economic goals and the stewardship responsibility of private lands has been achieved. The resource has benefitted and private sector activities have continued. Some basic elements of the BBCC experience are worth noting:

•The Louisiana black bear was an indicator species in a broad hardwood bottomland complex, and its conservation benefits multiple species.

•Diverse local and regional stakeholders, including the affected landowners, led the initiative.

•Organizational agendas were put aside.

•All participants were received with mutual respect and treated as equal partners.

•Everyone signed an agreement recognizing that the well-being of the targeted species was paramount and that all decisions must be based on sound science.

•Incentives were found to make the species compatible with affected landowners.

•The FWS provided the committee with initial coordination and research resources.

The BBCC efforts with the Louisiana black bear is an early model of the type of efforts to protect species from endangerment that can be encouraged and even enhanced in the ESA process. Under current law, the

Act has no authority over species which are not threatened or endangered, but actions to prevent species decline, entered into voluntarily with private property owners, are clearly within the scope and intent of the Act. A more concerted effort in funding, information, and administrative resources could be made available by the FWS to encourage such collaborative initiatives and local efforts. Listing timetables could be suspended if such groups are observed to be making measurable progress.

The FWS is currently exploring ways to fashion more official prelisting agreements that would protect the interests of species and offer long-term certainty to landowners. Under this approach, landowners concerned about the future impacts of potential listings could sit down with the FWS, develop a conservation strategy and sign an agreement that would protect their operations from regulation in the event that a species is listed. Species would benefit from the proactive measures landowners agreed to perform to increase their numbers before a listing crisis occurs. Landowners would likewise benefit from the certainty that regulatory sanctions would not come into play if the species ultimately is listed.

Specific incentives for landowners should be developed and made available for such cooperative approaches. The maintenance and restoration of defined habitat on private lands could be further encouraged through expanded incentives like the Conservation Reserve Program (CRP) and Wetland Reserve Program (WRP) found in the reauthorized Farm Bill.

Habitat Conservation Plans (HCPs)

Section 10 of the ESA provides for the issuance of an Incidental Take Permit (ITP) allowing the "take" of a federally listed species if the taking will be incidental to, and not the purpose of, otherwise legal activities. This flexible provision of the ESA is intended to reduce conflicts and promote creative conservation partnerships between the private sector and government agencies. These partnerships are usually established at the local level to allow specific development activities that might harm a listed species in return for voluntary conservation efforts that a permittee will implement to benefit a species or multiple species.

The FWS has only recently begun to explore the full potential of habitat conservation planning. In 1989, at the start of the Bush Administration only about a half-dozen HCPs were underway across the country. Most of these had been initiated by private parties, and the FWS was only a passive player. Determined to make the process more widespread and the FWS a proactive partner in initiating these partnerships, the administration directed considerably more attention to this provision of the Act.

Given that much of the remaining habitat for listed species was on private lands, more proactive and voluntary collaboration would have a positive net effect on protection and recovery.

The agency convened diverse interests involved with ESA issues at the local level, explained HCP opportunities, offered technical and biological assistance, and then reviewed plans. Approximately 100 HCP projects were in some stage of development by June 1993. The Clinton Administration has continued this emphasis with the commitment of additional resources and the number of HCP projects underway continues to expand. As of April 1996, there were 131 HCPs in place and another 200 in development.[11]

HCP projects can vary greatly in scope. In Florida's Brevard County, 0.5-acre to 9-acre incidental take permits have been issued for HCPs to conserve habitat for the Florida scrub jay (*Aphelocoma coerulescens coerulus*).[12] A much larger, 450,000-acre plan is being developed with International Paper Company in Alabama and Mississippi to protect the gopher tortoise (*Gopherus polyphemus*).[13] As Director, I signed the first HCP effort for the northern spotted owl (*Strix occidentalis caurina*) in 1992 with Simpson Lumber Co., to provide an increased flow of timber and the conservation of owls on 380,000 acres in northern California.[14] Another 30,000-acre HCP with International Paper was permitted in 1993 to allow sustainable timber harvests and also protect critical habitat for the red-hills salamander (*Phaeognathus hubrichti*) in Alabama. This agreement also addressed watershed quality goals by protecting habitat on slopes of more than 30 percent where clear-cutting was expensive and likely to cause increased sedimentation.

CALIFORNIA-Although most HCPs are designed to address the decline of a single species, many target and render multi-species benefits. Certainly one of the most challenging HCP efforts involves the 6,000-square-mile conservation-planning area between Los Angeles and Mexico in southern California.

This region of California hosts nearly half of the state's residents, some of the most expensive real estate in the country, and a once biologically-rich landscape under siege. Development and agriculture had already

11. U.S. Fish and Wildlife Service, Personal Communication, (1996).

12. U.S. FISH AND WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING EFFORTS OF THE SOUTHEAST REGIONS 1 (1996).

13. *Id.* at 3.

14. U.S. FISH AND WILDLIFE SERVICE, REPORT TO CONGRESS: ENDANGERED AND THREATENED SPECIES RECOVERY PROGRAM 23 (1995) [hereinafter ENDANGERED AND THREATENED SPECIES REVCOVERY PROGRAM].

consumed 70 to 90 percent of the region's coastal sage scrub habitat.[15] Nearly 100 individual species were already classified as rare or in some degree of peril by federal and state resource agencies.[16] These included the coastal cactus wren, California Mastiff bat, Hermes copper butterfly, orange-throated whiptail, black sage, prickly pear cactus, and the California buckwheat.

Political values in this contentious California atmosphere included resistance to new taxes, high regard for property rights, and a deep appreciation for natural areas and wildlife. Developers, county officials, and environmental interests had been engaged in a piecemeal approach that was costly and bitter, with little benefit to dwindling populations of natural resources. Governor Pete Wilson, Natural Resource Secretary Doug Wheeler, and leaders of the FWS were determined to attempt a bold scheme of compromise that could induce landowners and local officials to protect blocks of remaining habitat and corridors for multiple species while in turn releasing other areas needed for development. Launched in 1992, what emerged was the ambitious Natural Community Conservation Planning (NCCP) effort.[17]

With the listing of the California gnatcatcher (*Polioptila californica californica*), the FWS became a partner in the NCCP process. This high risk and bold effort was an attempt to begin a multi-species, multi-interest partnership to get beyond the tract-by-tract, species by species, "white hat black-hat" warfare that had characterized species protection efforts in the area.[18]

Advisory panels and scientists have struggled with negotiations to reach compromises in Orange, San Diego, and Riverside counties. Megalandowners like the Irvine Company have signed on as willing partners.[19] A 39,000-acre preserve in central and coastal Orange County is currently under consideration, and agreement on a 150,000-acre preserve in the greater San Diego area is expected soon.[20] Mainstream environmental groups, reasonable developers and government agencies have made progress while radical environmental groups and extreme property rights advocates have been marginalized. Some developers have realized that the

15. William K. Stevens, *Salvation at Hand for California Landscape*, N.Y. TIMES, Feb. 27, 1996, at C8.

16. *Id.*

17. *Id.* at C1; *see also* U.S. Fish and Wildlife Service and California Department of Fish and Game, Memorandum of Understanding Regarding Coastal Sage Scrub Natural Community Conservation Planning (1991).

18. Stevens, *supra* note 15, at C1.

19. *Id.* at C8.

20. *Id.*

pre-NCCP times resulted in costly impasses and that the set-aside conservation areas can greatly enhance real estate values where development is permitted.[21]

Efforts Underway

The use of the HCP and ITP provisions has increased dramatically around the United States in recent years. HCP's efforts currently underway include:

Georgia-1,000,000 acres	Florida-10,000 acres
S. Car.-3,000,000 acres	Texas-633,000 acres
Mississippi-500,000 acres	Washington-3,000,000 acres
Oregon-300,000 acres	Utah-135,000 acres[22]

Case Study-"Safe Harbors" and Red-cockaded Woodpeckers

One recent example of the flexibility and innovative potential that already exists in the Act is the so-called "Safe Harbors" program announced by the FWS in March 1995.[23] Only a year old, the plan is already considered a model for proactive species management in other parts of the country. The idea was simple. If landowners would permit threatened and endangered species to nest on their property and agree to manage to their lands to promote habitat enhancement, the FWS would assure them that they would not be penalized or restricted from converting their land to other uses at a later date.

The model for the now nation-wide "safe harbors" plan is officially known as the North Carolina Sandhills Habitat Conservation Plan, which was developed to encourage voluntary restoration and enhancement of red-cockaded woodpecker (*Picoides borealis*) habitat by private landowners.[24] Currently, 4,694 pairs of red-cockaded woodpeckers (RCW) are known to exist in thirteen southeastern states. The bird's preferred habitat, longleaf pine forests, once covered 92 million acres of the south but now totals less than 4 million acres. The bird was declared an endangered

21. *Id.*

22. *See* ENDANGERED AND THREATENED SPECIES RECOVERY PROGRAM, *supra* note 14.

23. Diana Hawkins, *Safe Harbors*, ENDANGERED SPECIES BULL., May/June 1995, at 11. *See also* U.S. FISH AND WILDLIFE SERVICE, WOODPECKERS, PRIVATE LANDOWNERS SHARE HOMES UNDER NEW 'SAFE HARBORS' CONSERVATION PLAN 4 (Mar. 1, 1995) [hereinafter WOODPECKERS, PRIVATE LANDOWNERS SHARE HOMES].

24. Hawkins, *supra* note 23, at 11.

species in 1970.[25] The North Carolina Sandhills population is one of fifteen populations considered critical to the recovery of the species. Although much of the bird's remaining habitat is found on public lands, roughly 21 percent of the birds reside on private property.[26]

The groundwork for the plan was laid in September 1992, when the FWS and the U.S. Army co-hosted a meeting of various agencies and organizations at Fort Bragg, North Carolina, to develop an overall conservation strategy for the woodpecker.[27] Subsequent working groups, involving agency biologists, Army representatives, state and local officials, academics and conservation groups, continued work on the plan. Under section 7 of the ESA, which requires that all federal agencies consult with the FWS before engaging in any activities that may affect species or their habitat, the U.S. Army would have to make sure its activities at Fort Bragg were not detrimental to the woodpecker. In response to the Army's concerns, and with their assistance and cooperation, all efforts were made to ensure that RCW protection efforts would be compatible with military training and readiness activities.

The overriding challenge in fashioning a management strategy was to conserve older longleaf pine habitat in the Sandhills region, not only for RCW populations but also for a dozen other listed species and some forty candidate species including the bald eagle (*Haliaeetus leucocephalus*) and peregrine falcon (*Falco pergrinus*). As of 1990, only 7 percent of pine plantations in North Carolina had stands more than thirty years old. Only a fraction of 1 percent were over forty years old.[28] The forest products industry, the third largest component of the state's economy, employing over 100,000 workers, promoted harvest rotation cycles too short to allow the growth of older trees adequate for woodpecker nests and cavities.[29] Forest composition changed as well, as growers turned away from longleaf to loblolly pine (*Pinus taeda*) and slash pine (*Pinus ellotii*) forests, which have a shorter rotation cycle. Fire suppression permitted the encroachment of hardwood understory that was detrimental to RCW's longleaf habitat. Forests were being fragmented by agriculture and urban growth.

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25. *Id.*

26. *Id. See also* U. S. FISH AND WILDLIFE SERVICE, FINAL HABITAT CONSERVATION PLAN TO ENCOURAGE VOLUNTARY RESTORATION AND ENHANCEMENT OF HABITAT FOR RED-COCKADED WOODPECKERS ON PRIVATE AND CERTAIN OTHER LAND IN THE SANDHILL REGION OF NORTH CAROLINA BY PROVIDING "SAFE HARBOR" TO PARTICIPATING LANDOWNERS (1995) [hereinafter HABITAT RESTORATION PLAN].

27. Hawkins, *supra* note 23, at 11.

28. *See* U.S. FISH AND WILDLIFE SERVICE, FINAL ENVIRONMENTAL ASSESSMENT ON ISSUANCE OF AN INCIDENTAL TAKE PERMIT UNDER § 10(A)(1)(B) OF THE ENDANGERED SPECIES ACT TO RALPH COSTA (1995). *See also* HABITAT RESTORATION PLAN, *supra* note 26, at 11.

29. HABITAT RESTORATION PLAN, *supra* note 26, at 11.

Developed in response to widespread fears that the presence of RCWs on private lands would lead to sweeping land use restrictions, "safe harbors" offers land owners favorable alternatives. Reports of landowners clearing habitat out of fear of RCWs were growing more common (though actual incidents were probably overstated), so the first step was to remove the disincentives for woodpecker protection.

The plan was the first of its kind in a number of ways. First, while Habitat Conservation Plans are generally developed to mitigate or offset planned development impacts, the "safe harbor" initiative was designed to encourage proactive, voluntary habitat improvements in advance of specific threats to the species. Second, this was the first time the FWS applied for and received its own Section 10(a)(1) incidental take permit to implement the plan.[30]

The name "safe harbors" is credited to Marsh Smith, a member of the Sandhills Area Land Trust, a grassroots organization devoted to woodland conservation.[31] Endangered species expert Michael Bean of the Environmental Defense Fund, who was already looking at incentive-based ways to protect species, analyzed a variety of approaches to implement "safe harbors" on private lands across the region. Bean, and FWS biologists Janice Nichols and Mark Cantrell drafted the HCP, and it was formally proposed in February 1995.[32]

Since its inception, the "safe harbors" plan has been touted as a model for species conservation around the country. Landowner interest has been significant. As of November 1995, fourteen landowners had signed agreements to participate in the program.[33] The first to sign up was the Pinehurst Resort and Country Club, which like many of the other landowners participating in the program, have taken great pride in working with the FWS to protect birds.[34] Landowners also receive a certificate of participation from the FWS and community in recognition of their work for species.

In fiscal year 1995, the FWS also provided $16,000 in funding assistance under the Partners for Wildlife program to enhance approximately 2,000 aces of habitat for twenty-three RCW groups on four pri-

30. Incidental Take Permit to Implement the Red-cockaded Woodpecker "Safe Harbor" Program, 60 Fed. Reg. 10,400 (1995).

31. Hawkins, *supra* note 23, at 11.

32. *Id.*

33. U.S. FISH AND WILDLIFE SERVICE, RED COCKADED WOODPECKER RECOVERY INITIATIVE IN THE NORTH CAROLINA SANDHILLS 1 (1995) [hereinafter RCW RECOVERY INITIATIVE].

34. *See* WOODPECKERS, PRIVATE LANDOWNERS SHARE HOMES, *supra* note 23, at 4.

vately-owned properties in the Sandhills.[35] "[Safe Harbors] is opening eyes to how living with an endangered species is not difficult and in fact is pretty neat," said Mark Cantrell. "More people are becoming proud that they do provide habitat for endangered species. It's something that they can take ownership in. Landowners are much more open to listen if it's a suggestion rather than a demand. Now I've got people calling and asking if I can come and drill [woodpecker] cavities on their land."[36]

Safe harbors is a relatively easy way for smaller landowners to participate in woodpecker recovery, and gain economic certainty, without having to negotiate individual HCPs as larger industrial landowners have done. When safe harbors was announced, the FWS had already approved memoranduma of understanding with Georgia-Pacific Corp., Hancock Timber Resource Group, and Champion International, with additional plans under negotiation.[37]

"It is very important that folks realize that this may not work for every species; it's just one of the creative ideas that you can come up with under the present Act," Nichols said. "The HCP process is wide open, and it takes creative minds, especially from the private sector, to say, 'Hey, why don't we try this?'"[38]

"No Surprises"

In addition, the woodpecker HCP contained a "no surprises" policy, signed by Interior Secretary Bruce Babbitt on August 11, 1994, which assured participating landowners that the FWS would not place additional restrictions on them unless they agree or breach the agreement.[39] The benefits to the timber products industry and other landowners are obvious. In addition, landscapers are becoming attracted to the availability of hardwood plants in understory communities. Greenhouses are finding new outlets for longleaf pine seedlings. Even the Sandhills Chamber of Commerce has created a task force to promote conserving and growing natural vegetation like longleaf in areas facing economic and urban development.

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35. *See* RCW RECOVERY INITIATIVE, *supra* note 33, at 1.

36. Mark A. Cantrell, U.S. Fish and Wildlife Service, Personal Communication, 1996

37. U.S. FISH AND WILDLIFE SERVICE, RED COCKADED WOODPECKER FACT SHEET CONSERVATION STRATEGIES AND PROGRAMS ON PRIVATE LANDS 1-2 (1995) [hereinafter RCW FACT SHEET].

38. Janice Nicholls, USFWS, Personal Communication, 1996

39. U.S. FISH AND WILDLIFE SERVICE, ADMINSTRATION'S NEW ASSURANCE POLICY TELLS LANDOWNERS "NO SURPRISES" IN ENDANGERED SPECIES PLANNING 1 (1994). *See also* U.S. FISH AND WILDLIFE SERVICE, NO SURPRISE: ASSURING CERTAINTY FOR PRIVATE LANDOWNERS IN ENDANGERED SPECIES ACT HABITAT CONSERVATION PLANNING 1 (1994).

The experience of safe harbors and habitat conservation planning in North Carolina and the southeastern region offers many examples of how the ESA can work with landowners to achieve economic and environmental goals. Of course, the process can be improved. In an attempt to minimize costs, paperwork and administrative delay and oversight of small landowners with woodpecker populations, the FWS is proposing the development of statewide HCPs. Such a plan would include all qualified landowners under a statewide incidental take permit held by the state wildlife or forestry agency. Instead of negotiating fifty HCPs for as many landowners with similar management needs, one would suffice. The FWS is working with the states of Georgia, South Carolina and Alabama to develop state-wide plans.[40]

Conservation Agreements

A "conservation agreement" is another tool to protect species while offering flexibility to private landowners. Similar to prelisting agreements, conservation agreements are voluntary commitments between the FWS and individuals or organizations designed to protect species that are listed as threatened or endangered, proposed for listing, or candidates for listing. The agreements often take the form of management plans. Frequently, they document the specific actions and responsibilities that each party agrees to in attempting to conserve the targeted species and its habitat.

Unlike HCPs, conservation agreements do not provide for the incidental take of a listed species. If proposed activities are deemed likely to result in incidental take, the property owner must still apply for a permit and may choose to enter into a formal HCP. Also, conservation agreements are usually targeted to address the needs of a single species. As a result, the process can be faster and more flexible than HCP planning. The process is dynamic in that private and public parties usually agree to continue working together on actual management plans, research, and changing stipulations. Overall, conservation agreements are excellent mechanisms for public/private partnerships in reaching a balance between sustainable economic activities and the protection and enhancement of species.

Case Studies — Conservation Agreements

SWAN VALLEY, MONTANA—Plum Creek timber company is the nation's largest private landowner of habitat for the threatened silvertip grizzly bear (*Ursus arctos*). Aside from its holdings in Washington and

40. *See* RCW FACT SHEET, *supra* note 37.

Idaho, the integrated timber products company owns 200,000 acres in western Montana's Swan Valley. These lands are intermingled in a checker-board fashion with adjacent lands under the control of the Flathead National Forest, Montana's Division of State Lands, and smaller landowners.[41]

Plum Creek's ability to access its private timber was often dependent upon the approval of government agencies to allow road construction and access across public lands. Approval often was delayed for years because of concerns about impacts on the area's remaining grizzlies. The bear requires large areas of habitat where road densities and use are low enough to minimize human-caused mortalities. In addition, biologists were concerned that further habitat degradation in the Swan Valley could isolate the Mission Mountain grizzlies from important habitat in the Bob Marshall Wilderness Area nearby.[42]

New road-building on national forest lands to meet Plum Creek's needs likely would have exceeded density guidelines established by the Interagency Grizzly Bear Committee (IGBC). If such fears were valid, any national forest plans for new roads across public lands to allow the company to access their private lands would have constituted a federal action subject to a section 7 review by the FWS.

All federal actions that potentially threaten the survival of listed species must be reviewed under section 7 of the ESA. Such proposed actions are subject to "consultation" between the action agency and the FWS or the National Marine Fisheries Service. If a "jeopardy" opinion is issued, the potential action must be revised. On rare occasions, the proposed actions are rescinded or delayed indefinitely. A landowner, whose activities depend on federal actions, such as roadbuilding, can be seriously impacted. To avoid the need for a section 7 ruling or minimize the likelihood that their activities may harm species, landowners can sometimes enter into conservation agreements to protect their interests. By participating in a proactive consensus building process Plum Creek fashioned a "win-win" solution for the company and the bears.

A conservation agreement was signed by all the principal parties and announced on December 18, 1995.[43] Covering nearly 370,000 acres of Swan Valley, the agreement will (1) mitigate impacts of existing and new roads for timber access, (2) allow Plum Creek to proceed with timbering

41. U.S. FISH AND WILDLIFE SERVICE, PLUM CREEK, FEDERAL AND STATE AGENCIES ANNOUNCE GRIZZLY BEAR CONSERVATION AGREEMENT 1-2 (1995).

42. *Id.*

43. *Id.*

activities, (3) provide conservation measures which will enhance grizzly bear recovery in Swan Valley, (4) comply with ESA, (5) establish "best management practices" for future harvesting, and (6) give some assurance of future relief from ESA restrictions.

Low-elevation riparian areas are critical to grizzlies in the spring. Yet in Swan Valley, these areas are already heavily roaded. Under the plan, spring use of the roads will be severely restricted. Road densities will be higher than IGBC standards but uses and closures will be agreed upon to benefit the bears. Eleven bear management "subunits" have been designated for the entire conservation plan area. The company has agreed to rotate harvest schedules among the units in a manner that leaves seven of the eleven subunits inactive at any given time for periods of at least three consecutive years. Visual screen-cover will be maintained throughout all the subunits. Four "linkage zones" providing migratory corridors across the valley are also established to prevent isolation of the Mission Mountains population. In addition, biologists from Plum Creek and the government agencies are working cooperatively on research and monitoring to ensure that the plan is consistent with species' needs.[44]

Properly conducted logging is usually not a problem for grizzly recovery as long as roading is managed to balance the needs of the threatened species with the needs of commercial operations and the public. The Plum Creek agreement seems to strike this balance. Since no harm is expected to befall grizzly populations under agreement provisions Plum Creek and the Forest Service did not have to apply for an incidental take permit. Charlie Grenier, Executive Vice-President of Plum Creek states, "In return for additional protections for the grizzly bear, Plum Creek gains the operational flexibility and regulatory predictability we need to continue to manage our lands." Joel Holtrop, Supervisor of the Flathead National Forest agreed, "This is a win-win situation for all parties . . . We believe this process can be held up as an excellent example of neighbors working together."[45]

CAMERON COUNTY, TEXAS—Areas rich in agricultural production are often ripe for ESA clashes. Cameron County's lifeblood is the production and processing of cotton, but the county also hosts six endangered species, including the endangered northern aplomado falcon (*Falco femoralis septentrionalis*).

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44. PLUM CREEK TIMBER COMPANY ET AL., SWAN VALLEY GRIZZLY BEAR CONSERVATION AGREEMENT, FACT SHEET. 1-8 (1995); *see also* U. S. FISH AND WILDLIFE SERVICE, FLATHEAD NATIONAL FOREST, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, PLUM CREEK NEWS RELEASE 1-2 (1995).

45. *Id.* at 2.

Following an initial FWS recommendation, the Environmental Protection Agency (EPA) issued a draft proposal in October 1987 to ban the use of seventeen pesticides in an effort to protect the aplomado falcon.[46] The ban was to be implemented on February 1, 1988, just before the annual cotton planting season. Agricultural interests predicted that the ban would cost the county's economy $125 million to $350 million per year.[47] Nearly 1,000 growers rallied, applied political pressure and were successful in getting the proposed ban temporarily shelved.[48]

Agricultural leaders were worried about their ability to succeed in a prolonged battle with environmental groups and regulators. A few of them gathered to discuss the possibilities of diverse interests working together toward a successful compromise. Determined to attempt such a collaborative process, this small luncheon group literally drafted a mission statement on a table napkin. They agreed on a goal, "to address problems and conflicts related to implementing the ESA in Cameron County and to develop and offer functional solutions to the regulatory agencies that will promote compliance with the law and allow the coexistence of endangered species and the agricultural interest in Cameron County to the greatest possible extent."[49]

In March 1988, a nine-member Coexistence Committee was formed, comprised of three growers, the agricultural county extension agent, an agrochemical dealer, a representative each from the Texas Department of Agriculture, Texas Parks and Wildlife Department, the FWS, and an environmentalist from a county environmental review board.[50] The group sought and received official status as an *ad hoc* group of county government.

The committee began their deliberations by redefining the problem, building levels of mutual trust, and trying to learn as much as possible about each other's concerns and needs. They pooled all available information and science about farming practices, cotton, atmospheric conditions, and the biology of the northern aplomado falcon. The committee focused on locally-based solutions and found that their views were not mutually exclusive. Surprisingly, they reached an early consensus; no one fully supported banning all seventeen pesticides in the county, because it was inappropriate for local conditions.[51]

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46. Duane Dale et al., Collaborative Problem-solving in Cameron County, TX: The Coexistence Committee 2 (1995) (unpublished manuscript on file with the authors).

47. *Id.* at 2.

48. *Id.*

49. *Id.* at 3.

50. *Id.*

51. *Id.* at 4.

After several months of work, the growers and environmental groups agreed to a compromise: five chemicals should be banned; another seven could be used; soil applications changed for three; and before using two other chemicals farmers would give the FWS notice. Also, they felt their approach should be applied only in portions of the county that provide suitable habitat for the falcon.

The committee submitted its recommendations to the EPA. For several months, they heard nothing. Believing that the EPA was ignoring their compromise, environmental leaders and the FWS called upon EPA to adopt the solution formulated at the local level. Both regulators and Texas agricultural interests were impressed that the group was able to reach agreement where none had been thought possible. The EPA's original position was reversed and the FWS issued a "no jeopardy" ruling. The local group later received a stewardship award from the FWS for their innovative and collaborative community problem solving under the ESA.[52]

While this example is not a conservation agreement per se, it is a good example of the kind of proactive local initiatives that the ESA allows. Through local, diverse interests working together, an agreement was reached that provided for both species protection and viable farming activities. With such a management framework in place, the need for further regulation was avoided.

A REVIEW OF PENDING LEGISLATION

Since 1992, Congress has been grappling with ways to amend and reauthorize the ESA. Although a variety of bills were introduced in both the 103rd and 104th Congresses, some of which would have dramatically rewritten the Act, none garnered enough support to win approval in either house of Congress.

A survey of the legislation that has been proposed suggests the emergence of at least two very different approaches to dealing with the Act and with landowners' concerns. One approach considers the Act basically sound and strives to address complaints by fine-tuning existing provisions and offering incentives for species protection.[53] The other approach would overhaul the Act's regulatory structure and address landowners' concerns primarily by limiting the reach of the Act on pri-

52. *Id.* at 5.

53. *See generally* H.R. 2374, 104th Cong. (1995); H.R. 2444 104th Cong. (1995).

vate lands and providing compensation when problems arise.[54] Which approach, or combination of approaches, ultimately is chosen remains to be seen. House and Senate leaders face the daunting task of fashioning a bill with bipartisan support that the President will sign. Congress must walk an even tighter rope to balance the often opposing concerns of environmental and industry groups. In the current polarized atmosphere, such a compromise has proven elusive.

It is illustrative to note the different approaches that have been suggested to reform the Act. Many of the bills have contained thoughtful provisions that may well be included in final legislation. If recent history is a guide, however, it may yet be a long road to consensus on the ESA. The following is a brief analysis of some of the issues before Congress and the provisions in proposed legislation that relate directly to private landowners.

Habitat Protection

The Issue

Much has been written about the extent to which Congress intended to protect species habitat when it passed the Act in 1973, but it is clear that its authors understood the link between species and habitat. Section states that one of the purposes of the Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." The linkage is critical, because research continues to demonstrate that species survival depends on the availability of suitable habitat.[55] The Supreme Court, in the *Sweet Home* case, upheld the FWS's position that the definition of "harm" in the Act includes habitat destruction.[56] The decision is very controversial in that this provision essentially gives the federal government land use authority over private lands.

Legislative Approaches

In the 104th Congress, bills were introduced that would essentially overturn *Sweet Home* by limiting the definition of "harm" to direct actions against a species that kill or injure individual members of the species.[57] Most environmental groups strongly oppose this provision, which

54. *See* H.R. 2275, 104th Cong. (1995).

55. NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 72 (1995)

56. Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 115 S. Ct. 2407, 2417 (1995).

57. *See* S. 768, 104th Cong. (1995); S. 1364, 104th Cong. (1995); H.R. 2275, 104th Cong. (1995).

they believe would strip the Act of its ability to prevent habitat destruction—the primary cause of endangerment. They favor approaches that would codify or expand on the FWS's rules on the definition of "harm" to protect habitat.

One bill proposed an additional change to the Section 9 enforcement provisions by allowing the Secretary to issue general permits on a county, state, regional or nationwide basis, which would exempt specific categories of activities from "take" liability for a period of five years.[58] This is similar to the nationwide general permit program for wetland development currently employed in the Clean Water Act. Permits would be approved only for activities that have minimal individual and cumulative adverse effects on the species. This idea, if implemented carefully, may have merit. The FWS is exploring a similar concept through the promulgation of state-wide Habitat Conservation Plans.

Critical Habitat

The Issue

The designation of critical habitat—lands deemed essential to the survival of a species—can limit federal actions within the affected area. Such designations have become controversial of late because of concerns that they could result in restrictions on private lands as well. Prior to the 1994 elections, efforts to preserve the golden-cheeked warbler led to a public outcry when news reports suggested that the FWS was planning to designate millions of acres in thirty-three Texas counties as "critical habitat" for the endangered bird.[59] Fearing land-use restrictions, landowners and politicians seized on the issue. Senator Kay Bailey Hutchison (R-Texas) drafted language barring new designations of threatened or endangered species and critical habitat nationwide. The moratorium passed in 1995 as a rider to a Defense Department supplemental appropriations bill and remained in effect for one year.[60]

The FWS maintains the panic was unjustified, and the subsequent moratorium created significant delays in the listing process for other species. According to agency sources, less than 800,000 acres of potential warbler habitat even exist, much of which would not be designated critical. To date, the FWS has never formally proposed critical habitat for the bird.

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58. *See* S. 768, 104th Cong. (1995).

59. Jason Rylander, *ESA Opponents Fight Warbler Habitat Designation*, LAND LETTER, Sept. 1, 1994, at 2-3.

60. *See* H.R. 889, 104th Cong. (1995) (calling for "Emergency supplemental appropriations and recissions for the Department of Defense to preserve and enhance military readiness.").

The role of critical habitat is often misunderstood. It only affects federal agencies which propose to fund, authorize or carry out activities that may have an adverse effect on listed species in the area. Federal agencies, under section 7 of the Act, must consult with the FWS before undertaking any activities that affect critical habitat. Although critical habitat may be designated on state or private lands, activities in those areas are not reviewed under the Act unless there is some federal involvement. Designation of critical habitat can be an important educational and planning tool which alerts federal, state and local interests that an area is important to endangered species. Technically, the designation could increase the chance that future regulations may affect property within the denoted area; however, the designation itself imposes no land-use restrictions whatsoever on private lands.

Legislative Approaches

Proposals for addressing critical habitat concerns, both real and perceived, range from eliminating the designation to spelling out clearly the agency's responsibility to landowners when habitat is selected. Some lawmakers have tried to stipulate that critical habitat can only be designated on private land with the owner's consent and with payment of compensation. Habitat would be designated during the conservation planning process, not at the time of listing. One bill proposed a system of National Biological Diversity Reserve lands, drawn mainly from existing federal lands.[61] The bulk of critical habitat would be required to be drawn from these designated lands.

A more moderate approach responded to concerns about critical habitat by linking habitat designation with the development of a recovery plan for the species. Economic factors, which are currently considered in the drafting of critical habitat, would be considered during recovery planning. In order to provide some certainty for private landowners prior to development of a recovery plan, Representative Wayne Gilchrest (R-Md.) proposed requiring the Secretary to publish in the Federal Register and local newspapers a list of those specific acts which would be included under the "take" prohibitions for that species.[62]

Other approaches would require designation of critical habitat with the designation of a conservation or recovery plan to allow more time for data collection prior to designation. One bill attempted to limit critical habitat designations to areas occupied by the species at the time of listing

61. *See* H.R. 2275, 104th Cong. (1995).
62. *See* H.R. 2374, 104th Cong. (1995).

and which are deemed essential to the persistence of the species over a fifty-year period. Other ideas included providing incentives for critical habitat protection through the issuance of habitat reserve grants administered by the Interior Department.

State Involvement

The Issue

Many stakeholders agree that state and local governments need to play a larger role in implementing the Act, and their assistance in recovering species is critical. A recent report of the Western Governors' Association spells out a number of ways to increase state involvement in species conservation.[63] The governors believe states with species protection programs approved by the Secretary should have the option to assume the primary role in implementing certain aspects of the Act, so long as the goals of the Act are met. State assumption of wetlands programs under section 404 of the Clean Water Act provides one precedent for this action, though it should be noted that very few states have thus far developed approved plans for implementing wetlands programs.

The governors also call for increased collaboration and partnerships between states and the federal government in rulemaking and implementation. Incidental take permitting, in areas where HCPs are in effect, could also be delegated to the states.

Legislative Approaches

Many lawmakers appear eager to increase the role of the states in endangered species protection. Some would require the Interior Secretary to consult to varying degrees with affected state and local governments on listing decisions and conservation planning.[64] Although the notion of increased state involvement is widely supported, some have proposed giving state governors the final say on listing decisions in their states. This would be a serious blow to the authority of the Interior Department in managing the Act and could lead to disparate enforcement of the Act from state to state. More moderate proposals would encourage state and local governments to enter into cooperative management agreements with the Secretary to protect species or a group of species.[65]

63. WESTERN GOVERNORS' ASS'N, ESSENTIAL ELEMENTS OF AMENDMENTS TO THE ENDANGERED SPECIES ACT (1995).

64. *See* S. 768, 104th Cong. (1995).

65. *See* H.R. 2275, 104th Cong. (1995).

Protection for Subspecies

The Issue

Critics of the Act argue that protection should not be provided for "subspecies" or distinct populations of species that may be rare in one region but remain abundant elsewhere. Environmentalists maintain that would eliminate protection for such high-profile species as the bald eagle, gray wolf, and grizzly bear. The National Research Council recently endorsed the protection of distinct population segments to maintain maximum genetic diversity.[66]

Legislative Approaches

Since the publication of the Council's report, efforts in Congress to eliminate protection for subspecies have lost ground. In the 104th Congress, most bills introduced did not change current section 9 protections for subspecies and distinct populations.[67] Still, some limitations have been proposed. In one bill, for example, prohibitions on the "take" of such species would be automatic, but in order to implement additional protection efforts for distinct populations the Secretary would have to make a specific finding that the recommended actions were in the national interest.[68] Another bill would have provided for continued protection for subspecies and distinct populations if they could be shown to be genetically isolated.[69]

Recovery Planning

The Issue

The ESA requires that all possible efforts be undertaken to "recover" species from the brink of extinction. Critics argue that this requirement is unrealistic, and it may not be possible to save all species. Some maintain that we should not even try, and that a "triage" system would permit a more reasonable allocation of scarce resources. While putting all species into the listing "ark" may be scientifically sound and perhaps ethically preferable, it may eventually weaken public support for the Act.[70] Granted the "charismatic megafauna" are likely to get more atten-

66. *See* NATIONAL RESEARCH COUNCIL, *supra* note 55, at 6.

67. *See* S. 768, 104th Cong. (1995).

68. *Id.*

69. S. 1364, 104th Cong. (1995).

70. CHARLES C. MANN AND MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 1 (1995).

tion and resources, but it is debatable whether the law itself should be changed to acknowledge explicitly such political choices.

Legislative Proposals

The recovery planning process is one area that is sure to be scrutinized in the reauthorization debate. Three bills proposed eliminating the Act's goal of species recovery in favor of a "conservation objective" to be established by the Secretary.[71] Allowing for some variation in language, each adopted a similar approach: in preparing a recovery plan, the administration would be free to choose among a range of options from full recovery to merely a prohibition on direct "take" of the species. Once the objective is selected, the Secretary would develop a conservation plan and must assess the economic and social impacts of the proposed alternatives. The Secretary also would be required to hold at least two public hearings in the affected region. Other approaches would maintain the goal of recovery for all species and instead require the agency to prioritize actions that will have the greatest potential to recover the species. Some bills would set deadlines to speed up the recovery planning process to address both landowner and species needs.

Private Property Rights

The Issue

Landowners are increasingly claiming that federal regulations under the ESA cause them considerable financial hardship. Relieving that burden, either through incentives or direct payments to landowners is a priority of most reform proposals. A number of lawmakers, seeking a way to protect private property values, have proposed takings compensation measures that would require the government to pay landowners whenever regulations or federal actions diminish the value of any or all portions of a property. This approach would considerably broaden the scope of takings law, which the courts have traditionally held to require compensation only if a landowner loses all economic interest in his property.[72] Compensating "partial" or "regulatory" takings raises a number of serious questions, including the difficulty of establishing a reliable threshold for compensation and a process for assessing when that threshold has

71. *See* S. 768, 104th Cong. (1995); S. 1364, 104th Cong. (1995); H.R. 2275, 104th Cong. (1995).

72. R.G. Converse, *Property Rights Legislation: Some Questions*, *in* TAKINGS 8 (David L. Callies, ed., 1996).

been breached.[73] Critics maintain that a statutory compensation schedule would spawn an endless stream of litigation and bureaucratic involvement.

Property values can, of course, be positively affected by government actions. The building of a highway, construction of schools and parks, and maintenance of water and sewer systems all affect the value of property. Thompson argues that agricultural subsidies, for example, have increased the value of farmland by $250 billion. Similarly, he estimates that the income tax deduction for home mortgages boosts residential property values by $730 billion nationwide.[74] Some argue that these so-called "givings" should also be considered and weighed against any compensation for negative actions.

Legislative Approaches

Proposed ESA reauthorization bills each address the need to protect private property interests, but their approaches tend to vary dramatically. One House bill introduced in the 104th Congress provided for direct compensation to landowners who have suffered losses of more than 20 percent of their property value due to ESA requirements.[75] If the property value is diminished by 50 percent or more, landowners could require the agency to purchase the property.

Environmental organizations and the Clinton Administration vehemently oppose compensation schemes, and it appears that providing direct financial compensation to affected landowners will remain highly controversial in Congress as well. Most reauthorization bills have not included a takings compensation provision. Some, however, have attempted to establish as a matter of policy that the Act should not deny individuals the right to use their property nor should administrative decisions reduce property values substantially. Congress may be expected to codify a Clinton administration program exempting residential properties from the Act. That directive also gave the Secretary the authority to exempt five acres or less of contiguous property from the provisions of the Act if the proposed development does not imminently threaten the existence of species.

Endangered species protection also could be affected by congressional approval of property rights legislation outside the context of the ESA

73. *Id.*; JOHN ECHEVERRIA, LET THE PEOPLE JUDGE 148-49 (1995).

74. Edward Thompson Jr., *The Government Giveth*, Environmental Forum, March/April 1994, at 22-23; *see also* DANA CLARK & DAVID DOWNES, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, WHAT PRICE BIODIVERSITY? ECONOMIC INCENTIVES AND BIODIVERSITY CONSERVATION IN THE UNITED STATES 39 (1995).

75. *See* H.R. 2275, 104th Cong. (1995).

reauthorization. Freestanding property rights protection bills have been introduced in each of the most recent Congresses. Although a sweeping compensation bill cleared the House in 1995, the full Senate has never taken up the issue.[76] Many observers believe that property rights advocates will find less support for their cause in the 105th Congress. At this writing, no omnibus property rights compensation bills have been introduced in this session of Congress.

Incentives Programs

The Issue

A growing number of stakeholders agree that incentive programs offer the best hope for achieving conservation goals on private lands. Collaborative programs that invite local participation are most likely to win support and have a positive effect on species protection efforts. A variety of incentive and market-based approaches to species conservation are discussed at length in the next section. Some of these are included in proposed legislation.

Legislative Approaches

Incentives represent the common ground for ESA reform legislation. Virtually every bill proposed over the past few years has attempted to provide at least a few incentives for species conservation on private land. Many proposals encourage early collaboration among stakeholders for private conservation initiatives with federal assistance. In one plan, for example, after a species is listed and a conservation objective is chosen, the Interior Secretary would be required to seek out voluntary partnerships with individuals and with local and state governments through cooperative management agreements or habitat conservation plans.[77] Only after that could the department develop a federal conservation plan.

Another bill would have required the Secretary to work cooperatively with private landowners and minimize economic impacts of conservation activities.[78] It also established a system prioritizing actions to protect species based on land ownership. Efforts should target first federal lands, then state and local lands. Next the agency would be required to ensure

76. H.R. 925, 104th Cong. (1995) (entitled Private Property Protection Act of 1995, passed in House on Mar. 3, 1995 and referred to Senate on Mar. 7, 1995 whereupon no further action was taken).

77. *See* S. 768, 104th Cong. (1995).

78. *See* H.R. 2374, 104th Cong. (1995).

that federally subsidized activities are consistent with recovery plans. Only after pursuing economic incentive solutions, could the government directly regulate activities on private lands.

Other ideas include establishing a Community Assistance Program in each field office of the FWS to answer questions and assist local governments in developing habitat conservation plans. It also codifies the "safe harbors" program.[79]

Estate tax relief has been proposed for lands under conservation agreements, as has the codification of the "safe harbors" and "no surprises" policies developed administratively by the Interior Department.[80] A number of proposals would have increased technical assistance to landowners, and would either establish a new Conservation Reserve Program for wildlife habitat or would expand the existing farm bill program to enroll wildlife habitat. One bill would have provided an enhanced tax deduction for the donation of land to a conservation easement or for conservation purposes.[81]

Another bill proposed the establishment of a Theodore Roosevelt Commemorative Coin Act, which would call for the minting of commemorative coins to raise money for a new Endangered Species Habitat Trust Fund.[82] The fund would be used for habitat acquisition, easements, grants, and compensation to property owners. The authors expect the coins to generate $50 million over two years. A similar program, a commemorative coin established by Congress in 1995 to raise funds to protect Civil War Battlefields, yielded just $5 million of the $21 million it had been projected to raise.

INCENTIVES PROGRAMS FOR SPECIES CONSERVATION

No strategy to preserve the nation's overall biodiversity can hope to succeed without the willing participation of private landowners. Most species routinely cross political and ownership boundaries, and 37 percent of threatened and endangered species are found only on private lands.[83] While a regulatory component is important to species protection, much more may ultimately be achieved for wildlife and for conservation through the use of voluntary,

79. *Id.*

80. *See* S. 1364, 104th Cong. (1995); H.R. 2275, 104th Cong. (1995).

81. *Id.*

82. *Id.*

83. *See* GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS (1994).

proactive measures. A growing body of literature is emerging concerning the use of economic incentives to achieve environmental aims. As we have seen, current legislative approaches are beginning to incorporate market incentives among their provisions. Such efforts are laudable, but the range of innovative ideas available to policymakers is far greater than current bills employ. While some of these ideas may need further analysis, the work that has already been done by such groups as the Keystone Center and Defenders of Wildlife provides a useful starting point for a discussion of incentive-based policies.[84] Such dialogues suggest incentives offer the best hope for finding common ground in this fractious debate.

A number of characteristics have been identified on which an incentive program could be based. Specifically, such programs should be voluntary, financially feasible for all participants, have a positive ecological impact, embrace partnerships, provide certainty for landowners, be implemented at the management level most suited to achieve its aims, and balance the goals of consistency and flexibility.[85]

Many incentive proposals center on changes to the federal tax code. Tax policies affect behavior in a variety of ways; therefore, it is logical to assume that shifts in tax liability to encourage conservation merit consideration. Examples include income tax credits or deductions for conservation expenses and property tax credits for lands under permanent conservation easements.

Proposals Affecting Developers

Other credit-based systems, some more theoretical than applied, could have a significant impact on species conservation. Various proposals for tradable development rights (TDR), perhaps based on the pollution trading system in the Clean Air Act Amendments of 1990, could allow for preservation of ecologically-significant lands while permitting development to occur in other areas. Such a proposal would establish a market for development rights and foster a greater appreciation for the use and value of land, with consequential benefits for local and regional planning.[86]

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84. *See generally* THE KEYSTONE CENTER, THE KEYSTONE DIALOGUE ON INCENTIVES FOR PRIVATE LANDOWNERS TO PROTECT ENDANGERED SPECIES (1995)[hereinafter KEYSTONE]; *see also* ROBERT M. FERRIS, DEFENDERS OF WILDLIFE, ECONOMIC INCENTIVES AND PRIVATE LANDS: POLICY OPTIONS FOR THE ENDANGERED SPECIES ACT, DRAFT REPORT (1996); HANK FISCHER & WENDY HUDSON EDS., & DEFENDERS OF WILDLIFE, BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT (1994).

85. KEYSTONE, *supra* note 84, at v.

86. Todd G. Olson, et al., Defenders of Wildlife, *Habitat Transaction Methods: A Proposal for Creating Tradable Credits in Endangered Species Habitat, in* BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT 28 (Hank Fischer & Wendy Hudson eds. 1994).

Proposals Affecting Agricultural Lands

Voluntary incentive programs, such as Partners for Wildlife and the North American Wetlands Conservation Plan, also could be expanded with great benefits for landowners and wildlife. Administered by the Department of Agriculture under the Farm Bill program, the Conservation Reserve Program (CRP)[87] and the Wetlands Reserve Program (WRP)[88] have had a positive effect in restoring native vegetation complexes and increasing migratory bird populations. These programs allow landowners to enroll acres of highly erodible cropland and wetlands into a restoration program under temporary or permanent easements in exchange for cash payments. Participation is strictly voluntary. The CRP has enrolled more than 36 million acres in ten year easements.[89] The Wetlands Reserve Program has enrolled 250,000 acres under permanent easements.

Ironically, neither program was designed with species conservation in mind, but both have become critically important for preserving wildlife habitat. With minor statutory adjustments, they could provide even greater benefits for threatened wildlife by allowing landowners to enroll acreage on the basis of its habitat values.

A variety of federal programs already offer financial assistance to landowners to implement certain management activities on their land. Direct cash payments can be offered as in the CRP, or other forms of financial support, as in the Forest Service's Stewardship Incentive Program, Forestry Incentive Program, and Agricultural Conservation Program, can be employed. There is a long and successful precedent for these kinds of assistance programs.[90] The high number of applicants for programs like the Conservation Reserve Program attest to their popularity with landowners. These USDA conservation programs should be examined as model landjoining partnerships which would be revised to ensure species or ecosystem protection are targeted purposes.

Congress could establish an additional reserve program under the ESA that would specifically target wildlife habitat. The program could be set up very much like the CRP or the WRP, but it would be run by the Interior Department. Additional revolving funds could be established to encourage landowner participation in habitat conservation

87. 7 U.S.C. §§ 1231-1254 (1994).

88. 7 U.S.C. §§ 1237-1437(F) (1994).

89. KENNETH A. COOK, ENVIRONMENTAL WORKING GROUP, SO LONG CRP 3 (1994).

90. JOHN H. GOLDSTEIN & H. THEODORE HEINTZ, JR., DEFENDERS OF WILDLIFE, INCENTIVES FOR PRIVATE CONSERVATION OF SPECIES AND HABITAT: AN ECONOMIC PERSPECTIVE 54 (1993).

planning, natural communities conservation planning, or other regional approaches.[91]

The Role of Private Organizations

Private organizations can offer incentives and awards programs on their own that encourage landowners to embrace conservation. An early example is the Wolf Compensation Fund established in 1987 by Defenders of Wildlife to compensate ranchers for cattle losses incurred as a result of wolf predation. Initially viewed with skepticism by the livestock community, the program has, since its inception, paid out more than $20,000 to ranchers who have documented wolf claims. Originally targeted for Montana, where wolves had begun migrating from Canada, the program has been expanded to cover the Yellowstone National Park and central Idaho regions in which the FWS began reintroducing gray wolves in 1995. The program also pays landowners $5,000 for permitting wolves that den on private property to remain there. A number of landowners are working willingly with the FWS and Defenders in cases where wolves now reside on their property.

Other organizations have been working collaboratively with diverse interests on the local level. Groups like Ducks Unlimited, The Conservation Fund, Trout Unlimited, the Rocky Mountain Elk Foundation, American Farmland Trust, The Nature Conservancy, Trust for Public Land, Wildlife Habitat Council, and the hundreds of area land trusts are finding non-governmental, cost-effective ways to save millions of acres of land in partnership with local people.

Estate Tax Relief

The burden of federal estate taxes often forces landowners with open space and wildlife habitat such as farmers, ranchers, or woodland owners, who are "land rich and cash poor," to subdivide their property for development or harvest resources in order to pay inheritance tax.[92]

Estate taxes are imposed when a decedent's property value exceeds $600,000. The rate begins at 37 percent and can go as high as 55 percent for estates greater than $3 million. Furthermore, land is generally appraised at its "highest and best use," which, economically speaking, is most often its development potential. Changing the law to allow valuation

91. FERRIS, *supra* note 84, at 22.
92. KEYSTONE, *supra* note 84, at 26.

based on current use would better reflect the ecological value and benefits of other uses.[93]

Landowners frequently identify the estate tax as a significant concern, and the environmental effects of the tax are increasingly recognized. The Northern Forest Lands Council's recent report on managing private forest resources in the Northeast called for estate tax reform as a key component of forest preservation efforts in the region.[94]

This proposal would permit land to stay in family hands without significant tax liability, provided that the land was being managed under a conservation agreement. Under an estate tax deferral plan, should the heirs decide to withdraw from the conservation agreement or dispose of the property without assuring compliance of the buyer with regard to the agreement, then they would be responsible for paying the tax. Heirs can thus defer taxes for as long as they wish or escape the tax altogether by continuing to honor the conservation agreement.[95]

The goal of any estate tax reform should be to keep large tracts of species habitat intact and managed for maximum benefit of species.

Tax Deductions for Conservation Expenses

Currently, the tax code discourages long-term management of woodlots by prohibiting non-industrial landowners from deducting forest management expenses until the wood is harvested. Allowing landowners to deduct conservation expenses in the same year they are incurred would encourage conservation planning.[96]

Another proposal would establish an "Endangered Species Habitat Tax Credit," which would work like the existing Reforestation Tax Credit to make conservation activities more cost-effective for landowners.[97]

Land Exchanges

The vast federal estate—lands managed by the Department of Interior, the Department of Agriculture and the Department of Defense—includes many lands that provide important habitat for wildlife. The value of these

93. FERRIS & DOWNES, supra note 84, at 17; CLARK, *supra* note 74, at 10.

94. *Id.* at 36.

95. KEYSTONE, *supra* note 84, at 27.

96. FERRIS, *supra* note 84, at 18; NORTHERN FORESTS LANDS COUNCIL, FINDING COMMON GROUND: CONSERVING THE NORTHERN FOREST: THE RECOMMENDATIONS OF THE NORTHERN FOREST LANDS COUNCIL 38, app. 54 (1994).

97. KEYSTONE, *supra* note 84, at 33.

lands as endangered species habitat varies, of course, as does the commercial value of the timber, minerals or agricultural activities on a given property. Likewise, private lands offer a variety of economic and ecological values. Where these values pose irreconcilable conflicts, opportunities may exist to adjust ownership patterns to enhance endangered species recovery and permit reasonable economic development.

The Keystone Center proposes a multi-agency "Federal Land Resource and Assessment Team" to identify federal lands of limited ecological significance, but which may have commodity or real estate values. These lands could then be exchanged on a voluntary basis with landowners.[98] Such a program should encourage local exchanges; major shifts in land asset patterns may not be a desirable outcome and would need to be examined. Opportunities for exchanges may be limited, but in individual instances could prove beneficial to all parties.

Establishment of an Endangered Species Habitat Trust Fund could complement the current Department of Interior land exchange system. Once lands are identified for exchange, a Habitat Trust, with nonprofit corporation status under the authority of the Interior Secretary could bring market forces to bear on land exchanges and help to maximize the return on the disposition of surplus lands that lack appreciable habitat value.[99]

Conservation Banking and Development Rights

Tax incentives are important and demonstrable methods of encouraging behavior on private lands that furthers conservation goals. In this tight fiscal climate, lawmakers will be increasingly pressed to find programs that are revenue neutral or impose little cost to the federal treasury. A number of the above suggestions could meet that test, but there is another class of incentives based on market principles that do not directly affect the revenue stream and deserve further consideration.

Such market-based approaches are designed to assign economic value to environmental concerns, thereby ensuring a more thoughtful weighing of costs and benefits in personal economic decisions. They also are notable in that they avoid the perception that landowners must be paid to do the right thing on their property—one of the major concerns with the various takings compensation schemes.

A system of tradable development rights (TDR), for example, would protect private property while enabling communities to manage growth

98. *Id.* at 37.
99. *Id.* at 38.

and preserve ecologically significant lands. The Supreme Court has famously referred to property rights as a "bundle of sticks."[100] The system allocates development rights to landowners whose property lies in conservation zones. Such rights could be traded or sold to permit higher than normal development densities in other zones. Developers benefit from the certainty and predictability that designated conservation and development zones afford, and planning can proceed accordingly. TDRs can be employed to address a variety of social goals from species protection, to urban sprawl, to affordable housing. One community where TDR systems are being employed is the New Jersey Pinelands, a 1.1 million acre area of pine and oak forests, rivers and streams, and towns in southern New Jersey.[101] The region includes the Cohansey aquifer (which provides 17 million gallons of drinking water) and habitat for 580 native plant species (including 54 threatened or endangered species), 299 bird species, 91 fish, 59 reptiles, and 39 mammals—all sandwiched between such major metropolitan areas as New York City and Philadelphia .[102]

A similar program, the Habitat Transaction Method (HTM), is an innovative approach currently being developed for the Kern County, California, Habitat Conservation Plan.[103] Like TDR, this method would enable communities to undertake advanced planning through the use of development rights. HTM is different in that it assigns a particular value to a property based on scientific assessments of its habitat.[104] Development would not be prohibited anywhere, but varying levels of mitigation would be required depending on the quality of habitat being affected. Developers wishing to impact habitat in the "red zone," the highest valued area, would be required to create, say, nine conservation credits per acre, while development in less sensitive areas might require only three mitigation credits to proceed.[105] HTMs afford greater flexibility for communities and avoid the possible controversy that encouraging higher than normal density development might breed in a given neighborhood. While there is no guarantee in this system that the most valuable lands will be preserved, some safeguards are built in and, if coupled with a land acquisition mechanism, that concern could be addressed easily.[106] In the short run, mitigation banking is expected to play a greater role than habitat

100. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

101. CLARK & DOWNES, *supra* note 74, at 26.

102. *Id.*; *see also* N.J. PINELANDS COMMISSION, A BRIEF HISTORY OF THE NEW JERSEY PINELANDS AND THE PINELANDS COMPREHENSIVE MANAGEMENT PLAN (1989).

103. CLARK & DOWNES, *supra* note 74, at 26.

104. *Id.* at 28.

105. *Id.* at 26

106. *Id.* at 25-27.

transaction models in the region.

Zoning is primarily a local issue, and state and county governments are increasingly turning to such tools as transferable development rights, real estate transfer taxes, exaction fees and other programs to achieve growth management objectives. The federal role in such issues may by nature be limited, but technical assistance and guidelines, such as the federal standards for wetland mitigation banking could be employed on a local or regional basis. Federal incentive grants to participating states might also be available.

Conservation banking is another idea that is gaining credence as a tool for species protection. The Bank of America, in partnership with the California Resource Agency, for example, recently established a conservation habitat bank for gnatcatcher habitat in Southern California. Under this plan, a public or private entity acquires land deemed valuable for habitat conservation and manages the land to enhance those values. These lands are then used to mitigate the impacts of future development in the region. In the context of a regional plan, mitigation banking can have broad conservation benefits, while increasing the economic value of preserved habitat.[107] In addition, the Gatlin Development, Co. is putting together an 1,800-acre mitigation bank near El Cajon that could expand to 2,400 acres. The most unusual players in the mitigation bank are the Boys and Girls Clubs of San Diego, which are raising money by creating a 300-acre mitigation bank from donated land that could grow to 1,100 acres.

Market mechanisms and economic incentives are innovative and potentially beneficial conservation tools. Such strategies, however, would best supplement rather than supplant the existing regulatory framework. As Clark and Downes note, "regulatory standards . . . are vitally important for defining the context within which important market mechanisms operate, and to provide a baseline of protection in situations where market incentives are not strong enough to provide environmental protection."[108] Market-based incentives have the advantage of increasing flexibility for planners or developers of Habitat Conservation Plans, while recognizing private sector initiatives. Such opportunities should be fully explored.

107. FERRIS, *supra* note 84, at 21.
108. CLARK & DOWNES, *supra* note 74, at 45.

OTHER MODEL PROGRAMS

The North American Plans

In an attempt to protect biodiversity and build positive relations with private property owners, it is important to look beyond the ESA and examine other models which are proving successful. To counter 200 years of wetland degradation and related declines in waterfowl populations throughout the North American continent, a most ambitious cooperative habitat conservation effort was launched during the Reagan Administration and given a major funding boost during the Bush Administration.

Signed in 1986, the North American Waterfowl Management Plan (NAWMA) (Plan) establishes public and private partnerships to reverse waterfowl declines by conserving, restoring, and enhancing wetland habitat. Scientists estimate that less than 100 million acres of wetlands remain across the country out of an estimated 220 million acres that existed 200 years ago.[109] With three quarters of the nation's remaining wetlands on private lands, the success of the plan clearly depends on non-regulatory and completely voluntary mechanisms adopted by property owners. Its international mission is four-fold: (1) to recover waterfowl to levels observed in the 1970s by the year 2001 by restoring wetlands and associated upland habitat, (2) to conserve biological diversity, (3) to integrate conservation with sustainable economic development, and (4) to promote partnerships between federal and state government, nonprofits, and the private sector.[110] The plan implemented a first-of-its-kind system of partnerships called "joint ventures" to carry out long term habitat restoration.

Passed by the 101st Congress and signed into law by President Bush on December 13, 1989, the related North American Wetlands Conservation Act (NAWCA)[111] provided substantial funding through a new matching grants program to encourage these partnerships and provide substantial resources for cooperative work on the ground. As of March 1996, $164.7 million in NAWCA funds have been expended, an average of about $25 million per year over the seven years.[112] The overall results have been overwhelming. During the 10 years since the initiation of the

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109. THOMAS DAHL, U.S. FISH AND WILDLIFE SERVICE, WETLAND LOSSES IN THE UNITED STATES, 1780s-1980s 3 (1990).

110. *See* U.S. FISH AND WILDLIFE SERVICE, A SUMMARY OF THE NORTH AMERICAN WETLANDS CONSERVATION ACT (1995).

111. North American Wetlands Conservation Act of 1989, Pub. L. No. 101-233 103 Stat. 1968 (1989) (codified at 16 U.S.C. §§ 4401-4414 (1994)).

112. *See* U.S. FISH AND WILDLIFE SERVICE, NORTH AMERICAN WETLANDS CONSERVATION ACT FACT SHEET (1996).

plan, some 3 million acres of habitat has been preserved or restored in the United States and Canada through more than 2,000 partnerships using about $700 million in sponsor contributions.[113]

In addition, over 20 million acres of wetlands in Mexico has benefitted from the North American Plan through enhancement, management reserves and education. Land conservation expenditures in the United States have averaged only about $230 per acre.[114] The focus of the North American initiative has been wetlands and waterfowl, but the program has reaped substantial benefits for non-game fish and wildlife, including endangered species. Waterfowl are superb indicators of the biological integrity of certain productive ecosystems. Wetlands include swamps, bogs, marshes, habitats along streams and rivers (riparian) and coastal estuaries, yet cover only 5 percent of the landscape of the lower forty-eight states. But it is estimated that up to one third of threatened plants and two thirds of endangered animals are wetland-dependent. More than 40 percent of all listed threatened and endangered species utilize wetlands sometime during their life cycles.[115]

The North American Plan's approach is a successful model for forming voluntary partnerships to enact positive change across the landscape to conserve and enhance living resources. It draws upon the land ethic many property owners share, and targets their efforts to protect one of the nation's most important and diverse habitats. All species benefit from the effort.

Case Studies

ACE BASIN, SOUTH CAROLINA—In the 22,000-acre Cheehaw-Combahee Reserve of the ACE Basin complex, private landowners joined the Corp of Engineers, the FWS, the South Carolina Wildlife and Marine Resource Department, and nonprofits to implement a 3,200-acre water impoundment system and estuarine wetland habitat restoration to benefit such listed species as the American alligator, shortnose sturgeon, southern bald eagle, and wood stork.[116]

MAD ISLAND MARSH, TEXAS—Dow Chemical, Ducks Unlimited, the Nature Conservancy and other non-profit organizations joined

113. BYRON K. WILLIAMS, U.S. FISH AND WILDLIFE SERVICE, THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN TEN YEARS LATER: ACCOMPLISHMENTS AND PROSPECTS FOR THE FUTURE 1 (1996).

114. *Id.* at 9.

115. *Id.* at 2.

116. *Id.* at app. 1.

landowners and state and federal agencies in a 5,800-acre effort to protect freshwater wetlands, upland coastal prairie, and enhance rice fields to benefit five federally listed, five federal candidate, and one state threatened species, including the peregrine falcon, brown pelican, piping plover, reddish egret, Texas horned lizard, white-tailed hawk and the long-billed curlew.[117]

LLANO SECO RANCH, CALIFORNIA—With a large livestock operation, Llano Seco Ranch represented the largest unprotected block of riparian forest and wetlands remaining in the Sacramento Valley. Ranch owners entered into a cooperative plan with FWS, California's Department of Fish and Game, and several nonprofit groups in 1991 to conserve and restore 14,000 acres of wetland and riparian habitat, native grasslands, and oak savannahs. Improved livestock management practices were voluntarily adopted to benefit a host of wildlife species that were listed or of special concern under state and federal laws. Wintering bald eagles, peregrine falcons, Swainson's hawks, and tricolor blackbirds have used the wetland habitat. The valley elderberry longhorn beetle and the state's last remaining spring run of Chinook salmon are dependent on the ranch's riparian habitat.[118]

CENTRAL VALLEY, CALIFORNIA—California had suffered a 91 percent reduction in wetlands by the mid-1980s and more than 90 percent of the Central Valley's once vast expanse of riparian forests, oak woodlands, emergent wetland, and native grasslands have been converted or severely degraded by agriculture and urban development.[119] Yet the Central Valley is essential as a wintering area for migratory waterfowl supporting 60 percent of the total Pacific Flyway population. During the past eight years under the North American Plan and the Wetlands Conservation Act, the Central Valley Habitat Joint Venture has been successful in protecting over 67,000 acres of wetlands and restoring over 34,000 acres.

Partners for Wildlife

As landowners face complex choices on how best to manage their property, a growing number are voluntarily incorporating wildlife habitat restoration techniques into their management strategies with the help of outside partners, and realizing associated benefits. In 1987, the FWS initiated a program to rehabilitate wetlands. The program was broadened

117. *Id.*
118. *Id.*
119. DAHL, *supra* note 109, at 2.

and renamed "Partners for Wildlife" during the Bush administration. With a budget of $10 million in FY 1995, the Partners program now offers technical assistance and some restoration funding to willing landowners. More than one third of the total nationwide cost of the program has come from other participants such as the U. S. Department of Agriculture, state wildlife agencies, and groups like the National Fish and Wildlife Foundation, Ducks Unlimited, and the Audubon Society.[120]

This modest program has achieved impressive results—13,000 ranchers, farmers, and other property owners have willingly joined Partners to restore over 300,000 acres of previously degraded wetlands, and 30,000 acres of native uplands and prairies. In addition, 350 miles of riparian habitat and forty miles of in-stream habitat have been rehabilitated.[121] Since the program focuses on some of the more productive inland habitat types, benefits are provided to a broad complex of federal trust species, migratory birds, fisheries, and at-risk resources. Although listed species have not been specifically targeted by Partners, approximately 15 percent of projects implemented around the nation in 1995 improved habitat for listed and candidate species. In western regions of the country, a majority of the 1995 projects benefitted such species.[122] Project costs range from $104 per acre in the Southeast to $40 per acre in the Intermountain West.[123]

Ironically, although Partners is recognized as one of the most successful private property programs administered by a federal agency, Secretary Bruce Babbitt at one time urged its termination as a part of the administration's reinventing government efforts. More recently, a "safe harbor" policy was adopted for Partners to encourage even greater participation in the program. Landowners who agree to undertake cooperative habitat conservation agreements to restore habitat can later chose to return their lands to pre-restoration conditions even if listed species become established on their property.

Case Studies

OKLAHOMA—The Oklahoma Private Lands Initiative (OPL) has been an ambitious cooperative involving landowners, the National Fish and Wildlife Foundation and the Oklahoma Ecological Services Office of

120. U.S. FISH AND WILDLIFE SERVICE, DIVISION OF HABITAT CONSERVATION, PARTNERS FOR WILDLIFE: THREATENED AND ENDANGERED SPECIES HABITAT RESTORATION ON PRIVATE LANDS (1995) [hereinafter PARTNERS FOR WILDLIFE]..

121. Don MacLean, U.S. Department of Interior, *Partners for Wildlife*, ENDANGERED SPECIES BULL., Jan./Feb 1996, at 4.

122. *Id.*

123. PARTNERS FOR WILDLIFE, *supra* note 120, at 1-2.

FWS with such partners as the Oklahoma Department of Wildlife Conservation, The Nature Conservancy, and the George M. Sutton Avian Research Center. OPL has focused on educational outreach and habitat restoration. To date, 300 landowners have joined in the enhancement and protection of more than 10,000 acres. Nearly 500,000 citizens, the majority of them youngsters, have been exposed to the value of wetlands through the "Wetlands=Wonderlands" program. Tourism professionals have been contacted to demonstrate the monetary value of marketing the state's wildlife. Wildlife-specific events and exhibits have been conducted, attracting thousands of participants.[124]

VIRGINIA—The cooperation of landowners is the key to restoring a diverse aquatic complex of at-risk species in the Upper Tennessee River Basin in southwest Virginia. Nearly 90 percent of the Clinch and Powell River watershed region is in private ownership. Voluntary activities for riparian zone protection included fencing livestock, bank stabilization, and replantings to buffer streams from runoff from surrounding agricultural areas. The Basin contains twenty-six listed species including fourteen endangered freshwater mussels (one of North America's most imperiled fauna groups) and six fish species.[125]

CALIFORNIA—In partnership with a landowner, the Casa de Patos project took 450 acres of leveled rice fields and recontoured them to natural topography, hydrology, and vegetation. Tens of thousands of ducks, geese, swans, shorebirds and cranes now use the habitat, while the threatened giant garter snake (*Thamnophis gigas*) and state-listed species of concern like the Swainson's hawk (*Buteo swainsoni*) have also benefitted.[126]

KANSAS—The state's only outcropping of the Ozarkian Plateau and its unique cave system will be protected and restored by willing landowners who have agreed to restrict vehicular access. The endangered gray bat (*Myotis grisescens*), along with four state-listed species, three mammals, two amphibians, a neotropical migratory bird, and forty-three other plant species will benefit from the project.[127]

ARIZONA—At Cottonwood Springs, a landowner has agreed to restore a declining cottonwood-willow riparian corridor and wetland with exclusion fencing and the installation of a solar powered water pump to supply his livestock. Return of vegetative components of the sensitive

124. U.S. FISH AND WILDLIFE SERVICE, FINAL REPORT FOR THE NATIONAL FISH AND WILDLIFE FOUNDATION 1 (1995).

125. PARTNERS FOR WILDLIFE, *supra* note 120, at 4.

126. *Id.* at 3.

127. MacLean, *supra* note 121, at 4.

spring and wetland corridor are benefiting the endangered Gila top minnow, the proposed southwestern willow flycatcher, and a candidate species, the Huachuca water umbel.[128]

WYOMING—Near Centennial in the southern part of the state, landowners have cooperated in the restoration of wetlands on their property to return the historic habitat of the endangered Wyoming toad (*Bufo hemiophrys baxteri*) and the boreal toad (*Bufo boreas boreas*).[129]

MICHIGAN—Habitat is being restored for the endangered Kirtland's warbler (*Dendroica kirtlandii*) by returning 300 acres of private lands to younger successional jack pine forests. Several other species, including the nashville warbler, chickadee, brown thrasher, rufous sided towhee, and the hermit thrush, will also benefit from this partner's cooperative project.[130]

Partners in Flight

Launched in 1990 by the Bush Administration in partnership with the National Fish and Wildlife Foundation and other public/private allies, Partners in Flight is a consortium of hundreds of private businesses, landowners, industry associations, nonprofit organizations, and natural resource agency partners dedicated to nonregulatory and cooperative efforts to maintain healthy avian populations in the United States and across the Western Hemisphere.[131] The effort was prompted by the alarming decline in neotropical migrant birds in the Atlantic states, Midwest grassland, and West coast regions of the country.

With a primary motto of "Keeping Common Birds Common," the program focuses on wildlife resources that are growing in popularity with millions of Americans and also producing millions of dollars for local communities in nonconsumptive activities such as photography and bird watching. Partners in Flight is based on the idea that the most economically and scientifically efficient approach to avian conservation is to take actions to keep species from becoming rare or endangered.[132] Some of the program projects, however, do involve already listed species.

During its five years of operation, more than 1,000 different projects have been undertaken, ranging from habitat restoration and regional

128. PARTNERS FOR WILDLIFE, *supra* note 120, at 3.

129. MacLean, *supra* note 121, at 4.

130. PARTNERS FOR WILDLIFE, *supra* note 120, at 3.

131. DANIEL R. PETIT, U. S. FISH AND WILDLIFE SERVICE OFFICE OF MIGRATORY BIRD MANAGEMENT, PARTNERS IN FLIGHT: WORKING WITH LANDOWNERS TO PROTECT ENDANGERED SPECIES AND ECONOMIC OPPORTUNITIES 1 (1995) (unpublished report, on file with the authors).

132. *Id.*

monitoring to environmental outreach and public school education. A California Riparian Habitat Joint Venture has been established by citizen groups, landowners, and governmental agencies to initiate research and educational efforts and to rehabilitate thousands of acres of riparian woodlots to benefit avian diversity, including the endangered least Bell's vireo (*Vireo bellii pusillus*) and the Southwest willow flycatcher (*Empidonax traillii*).[133] Under Partners in Flight agreements, fourteen timber companies, including Champion, International Paper, and Hancock, are making strong commitments to develop mechanisms to protect the endangered red-cockaded woodpeckers inhabiting longleaf pine forests on their private lands while also maintaining the production of timber and jobs in the Southeast. Landowners in Texas have agreed to habitat enhancement and the promotion of stewardship practices to benefit a variety of migratory birds including the endangered black-capped vireo (*Vireo atricapillus*) and golden-cheeked warbler (*Dendroica chrysoparia*).[134]

Supplementary to the Partners in Flight program, the Western Governors' Conference initiated the Great Plains Project in 1992 under the leadership of Wyoming Governor Mike Sullivan (D-Wyo.) and Mike Hayden, the former Department of Interior Assistant Secretary for Parks and Wildlife and Governor of Kansas, and myself. This is a proactive and multi-state approach by the Intermountain West states to research and implement habitat conservation of declining non-game species in order to prevent them from becoming endangered.

Teaming With Wildlife

Polls indicate the vast majority of Americans support wildlife conservation as a core value. The last national survey of wildlife-dependent recreation in 1991 revealed that 57 percent of our nation's citizens spend part of their time in wildlife-related pursuits. In the process, these enthusiasts spent $59 billion on wildlife-related activities.[135]

Under the public trust doctrine, states have jurisdiction over most wildlife species. The federal government only has jurisdiction over such groups as migratory birds, anadromous fisheries, and species listed under the ESA. Yet, for decades, most states have had a self-imposed mission to conserve and manage all fish and wildlife resources. Although states have been responsible for hundreds of wildlife types, professional management and scientific resources have been targeted mostly at three major groups

133. *Id.*
134. *Id.* at 2.
135. Chris Madson, *Chipping In*, WYOMING WILDLIFE, Feb. 1996, at 12, 13.

(1) game animals; (2) predators and pests ("varmints" defined as having negative impact on specific economic activities), and (3) threatened and endangered species (since 1973).[136] In Wyoming, for example, there are 112 varieties of fish, bird, and mammal "game" species out of a total species count of 634 of fish, bird, mammal, reptile, and amphibian types.[137]

More attention to the multitude of species outside of the traditional three categories would do much to stem declines in the nation's biodiversity. Most state wildlife agencies do the best they can in conserving multi-species systems, but resources are limited throughout the country. For decades, the consumptive user or sportsman has paid for most funding of wildlife conservation. In 1991, license fee revenues from hunters and anglers amounted to $898 million and provided the backbone for state wildlife resource programs. In addition, sportsmen and gun and tackle manufacturers agreed decades ago to a 10 percent user fee on firearms, ammunition, fishing tackle, and certain small engine fuels. These revenues went to two Sport Fisheries and Wildlife Restoration accounts. In 1995, these accounts provided another $411 million to states for wildlife conservation with much of it dedicated to habitat conservation.[138] Over $5 billion in federal use fees have been generated from the hunting and fishing public through these two programs and matched with state resources.

In an effort to provide additional funding for the multitude of species which are not pursued by hunters or anglers, and are not covered under the ESA, diverse groups have been working under the umbrella of The International Association of Fish and Wildlife Agencies (IAFWA) to explore new approaches.[139] A new proposal, the "Fish and Wildlife Diversity Funding Initiative," was outlined, broadening the concept of "user pays" beyond just the consumptive user. Now called "Teaming with Wildlife," this proposal would call for a smaller user fee, between one-quarter of 1 percent and 5 percent, on the manufacturer's price of such equipment as binoculars, cameras, bird feed, canoes, hiking boots, camping equipment and other gear used by outdoor enthusiasts who enjoy wild critters and wild places.[140] The actual amount to be raised would depend on the specifics of enacted legislation but estimates are in the $350 million per year range. Under the proposed legislation, "The Fish and Wild-

136. *Id.* at 12.
137. *Id.* at 12-15.
138. *Id.* at 13.
139. *Id.* at 14.
140. *Id.*

life Conservation Enhancement Act of 1996," these new revenues would mostly be redistributed back to the states (using the same formula as with the existing user fee accounts) and such revenues could be used for "non-game" research, education, management and for innovative state models of cooperative stewardship projects on private lands.[141]

OPTIONS FOR IMPROVING THE ESA

The ESA is an extraordinarily complex and innovative statute. As the preceding case studies illustrate, the Act already provides a means for establishing dialogue and creating partnerships among stakeholders in local communities. From experimental population designations, to expanded use of section 4(d) rules, to "safe harbors" and habitat conservation planning—the Act clearly possesses the capacity to address species decline while respecting the needs of landowners and their communities. Unfortunately, it has not always been enough.

In particular instances, implementation of the ESA has been surrounded by controversy and misunderstanding. Although the Act itself contains much of the flexibility needed to address species-development conflicts fairly and equitably, there is room for improvement. The Act cannot hope to succeed if stakeholders view it with fear and contempt. It is imperative that landowners become willing partners in our efforts to conserve biodiversity. As Yaffee writes, "Laws are only as good as their underlying political support, since they can be undermined in implementation or by the lawmaking body that created them."[142]

Increasing public support is critical to the success of any conservation program. With that in mind, the authors of this study offer the following suggestions for improving the ESA to address landowners concerns and improve species protection in this country:

Improving Existing Provisions

Prelisting and Candidate Conservation

The ESA is essentially a safety net for species that have fallen through the cracks of federal, state, and local land use polices which have been inadequate, or undermined and neglected the conservation of biodiversity. As a result the Act is often likened to an emergency room that treats the most critical cases.[143] While the Act has been

141. *Id.*
142. YAFFEE, *supra* note 9, at 68.
143. *See* William R. Irvin, Wildlife Management Institute, *The Endangered Species Act: Pros-*

fairly successful in stabilizing species populations that have fallen precipitously low, that alone may not be sufficient to recover the species. Certainly, crisis care is the most costly form of medicine to provide. If, as Benjamin Franklin said, "an ounce of prevention is worth a pound of cure," then it is imperative that we focus our efforts on ways to conserve and enhance species before listing is necessary. Strengthening general wildlife conservation efforts and such specific approaches as prelisting or candidate conservation provisions are perhaps the best way to do that.

The Act should be amended to provide greater support for cooperative, proactive approaches to species preservation with a focus on ecosystem or multi-species protection. Legislation could be written to streamline and encourage such approaches in prelisting and create a framework for future applications. Bullock and Wall suggest the following format: (1) identify species of concern and the reasons for decline; (2) establish committees of local stakeholders who control habitat for the species; (3) develop a plan of action and a memorandum of agreement; (4) secure funds or personnel from the FWS to administer the committee's efforts; and (5) if any stakeholder fails to live up to their commitment to the process agreed upon, the FWS could trigger the listing of the species.[144] Listing decisions could be delayed, as was done in the case of the Louisiana black bear, thereby providing an incentive for local participation in a conservation agreement, but the FWS should retain authority to list species as warranted. The advantages of this approach include increased flexibility, decreased regulatory burdens, less litigation, and greater participation at the local level, all the while ensuring a given level of species protection that is supported by the community.

Habitat Conservation Plans

As with prelisting agreements, Habitat Conservation Plans are among the most promising innovations we have seen thus far in the administration of the ESA. Only now are policy-makers and landowners beginning to understand the sweeping power and flexibility of this provision. HCPs are being promulgated all across the country, benefiting species, businesses, and communities. The multi-species nature of many HCPs means more efficiency and certainty for expenditure of conserva-

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pects for Reauthorization, in TRANSACTIONS OF THE FIFTY-SEVENTH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE (R. E. McCabe ed. 1992).

144. Bullock & Wall, *supra* note 10, at 13.

tion efforts. In short, HCPs are an important tool that should be promoted in any legislative reform of the Act.

There are ways, however, to make the HCP process more "user-friendly" and to reduce the burdens on participants. The planning process must be made more expedient and less costly. The earliest attempts at fashioning HCPs often took a number of years and were budgeted with costly biological and feasibility studies before implementation could even begin. A number of analysts consider the environmental review process under the National Environmental Policy Act (NEPA) to be a duplicative and costly impediment to conservation planning. The Weyerhaeuser Corp., for example, estimates that more than half the cost and time to develop the company's Coos Bay HCP were directly related to environmental impact statement requirements under NEPA.[145] In addition , the Federal Advisory Commission Act (FACA) often prohibits nongovernmental participation in official agency group proceedings, and diverse stakeholders have sometimes been discouraged from joining HCP proceedings. To the extent that the requirements of NEPA and the FACA hinder progress or lead to overlapping or unnecessary barriers to the development of HCPs, exemptions from these statutes should be considered.

The private sector must have a reason to participate in an HCP, and they must have greater certainty that the time and effort they spend working on a plan will not be cast aside at the agency's whim. Codification of the "safe harbors" and "no surprises" policies would alleviate these legitimate concerns. Marsh writes: "'Unforeseen circumstances' is a component of risk that the developer cannot shoulder (after being expected to maximize the mitigation provided) and that the public sector should."[146]

Finally, a funding source for the development of HCPs should be developed. The FWS cannot be expected to take on the complete financial liability for HCP planning, but some federal role seems both appropriate and necessary. Establishment of a stable funding source from which communities can seek assistance would go a long way toward promoting HCP development. A federal cost share or matching fund program, or a state revolving loan fund similar to the Clean Water Act program that supports water and sewer enhancement could be set up to meet this need.

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145. Hearings on Reauthorization of the Endangered Species Act, Before the Subcomm. on Drinking Water, Fisheries, and Wildlife of the Senate Comm. on Env't and Pub. Works, 103d Cong. (1995) (statement of Jack Larsen, Weyerhaeuser Company).

146. Hearings on Reauthorization of the Endangered Species Act, *supra* note 145 (statement of Lindell Marsh).

Other Legislative Initiatives

A number of proposed reauthorization bills would make sweeping changes to the Act's provisions designating critical habitat. The critical habitat controversy is rooted more in fear than reality, but it should be addressed.

Any attempt to save species must begin with an understanding of where the species lives and its habitat needs. These are basic scientific questions which must be answered before recovery plans can be developed. Many landowners do not understand that the designation of critical habitat does not automatically mean land-use restrictions are forthcoming. It is not a zoning provision. This should be made explicit in the statute. There may be merit in requiring the FWS to issue critical habitat during development of the recovery plan, rather than at listing, when information about the species may be scarce. The issuance of guidelines and technical information for landowners when critical habitat is designated could provide additional certainty for landowners and serve to dispel fears of what the designation might mean.

Many groups believe there must be a greater role in species conservation for state and local governments. State agencies often have knowledge and expertise that could be useful in solving land use issues. Being closer to the land and its people, state agents are generally less likely to encounter resistance in working with landowners. Any plan for state assumption of species recovery or permitting should take into account the varying ability of states to effectively implement or cooperate with such programs. Some may lack the capability or the political will to run species protection programs. States should be better integrated into the process, and they should be key participants in HCP development and recovery team work. Authority to list species under the ESA should remain with the Interior Secretary. Section 6 technical assistance should be improved to ensure that states have the resources to engage in long-term planning. "Teaming for Wildlife" or a similar program could supply a means of funding species conservation planning at the state level.

Recovery Planning

The ESA currently requires that all listed species be subject to a recovery plan to restore the species to levels where listing is no longer necessary. While landowner input in recovery planning should be enhanced and encouraged, proposals to eliminate recovery planning altogether could compromise the Act's ability to restore species populations. Recovering a species would become a political question, subject to the

whims of the sitting administration. The Interior Secretary should not have the authority to decide unilaterally what species are worth saving. The goal of recovery is important, even though ultimately it may not be possible for all species.

Increased involvement of private property owners in recovery planning and implementation is critical to the success of the program. This also represents the biggest possible source of untapped recovery action. As the preceding examples have shown, many landowners are willing to work for species recovery if given assistance or assured that their efforts will not lead to future regulation.

Incentives

This paper discusses some of the many incentive-based programs that could be employed to encourage species conservation on private lands. From tax credits to tradable development rights, these approaches deserve further study and consideration by policy-makers. A number of the incentive programs outlined above already have widespread support and could be included in any legislative reform of the Act. The tax code is a powerful tool for shaping private behavior. As Endicott writes, "Our tax policy should encourage the preservation of resources important to public health and the environment. To do this, Congress should enact introduced legislation to reduce the federal tax burden of private property owners who dedicate their property for conservation purposes."[147]

Economic incentives can reduce the conflict between environmental and economic interests and foster new ways of thinking and valuing the land and its resources. Such measures should be employed to the fullest extent.

Takings

The many approaches outlined above, it seems, could reduce the need for takings compensation proposals by addressing most of the substantive issues that landowners have raised with respect to the Act. Payment of compensation for property taken by government regulation seems only fair, and the Constitution has long provided for such relief when it is warranted. Recently the courts have shown an increasing willingness to consider compensating landowners for partial takings related to environmental regulation, though this is an emerging area of the law. It should be

147. EVE ENDICOTT, LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS XVII (1993).

recalled, however, that never in the history of the ESA has a landowner successfully leveled a takings claim against the law. Few if any claims have ever been filed.

None of the direct compensation schemes outlined in proposed legislation appear to be workable solutions. Each would seem to create additional administrative burdens while leaving unanswered such questions as how a 20 percent or 50 percent threshold for diminution of value can be assessed. The possibilities for unnecessary litigation and bureaucracy are legion. Such proposals also ignore the legitimate responsibilities that land ownership entails.

Lawmakers should be very cautious in their attempts to redefine takings jurisprudence. Simply offering landowners a quick fix solution could be detrimental to conservation efforts in this country and unworkable in its application. It also neglects the larger questions—what are the rights and responsibilities of private land holders with respect to conservation and what can the public reasonably expect from private lands. This conflict of public and private values seems to be a false one.

> Conservation is not the enemy of private property if owners of private property are appropriately rewarded for conservation just as they are for other land uses. Private property is not the enemy of conservation if the profit motive behind property ownership is enlisted to protect biodiversity, rather than to destroy it.[148]

If we can find ways to make the presence of endangered species an asset instead of a liability, we will achieve far more for conservation than we can hope from regulations alone.

There are approaches in other arenas that protect property rights while recognizing the role that government plays in promoting or discouraging development. The Coastal Barrier Resource Act denies federal benefits, including flood insurance, for development projects on barrier islands.[149] The Act does not prohibit development. It simply says that if a developer wants to build a house on a fragile and potentially dangerous location, the government is not about to subsidize the use of property. A similar approach could be developed for sensitive endangered species habitat.

148. Olson et al., *supra* note 86, at 28.

149. Coastal Barrier Resource Act, Pub. L. No. 97-348, 96 Stat. 1653 (1982) (codified at 16 U.S.C. §§ 3501-3510 (1994)).

Recommendations Outside the Act

This report has also highlighted a number of extremely successful programs for wildlife that are not a part of the ESA. One must not forget what the ESA is meant to do; it is the final bulwark between a species and extinction. It is not currently designed to address all of the present and future habitat needs of threatened and endangered species and wildlife in general. Other non-ESA programs at the state, local, and federal level are critically important to protecting biodiversity. Yaffee writes:

> It is a mistake to view endangered species management solely through the lens of the ESA. Other public and private laws and policy instruments will have as much or even more impact on the endangered species problem in the future. How national forests, national parks, and BLM lands are managed, and how water is allocated, will have a major effect on the state of biological diversity in the western United States. How federal and state agricultural policy, farming practices, and wetlands conversion guidelines are carried out will be a major determinant of the status of sensitive species in the rest of the country. Moreover, state wildlife statues and local land use ordinances have as much impact on wildlife habitat as federal endangered species or public lands. The ESA is an important law, providing a necessary last-resort safety net, but other elements of policy and on the ground behavior will have a more significant effect on the broader biodiversity problem.[150]

Of the programs reviewed in these pages, Partners for Wildlife is among the most successful and important. A number of observers have called for an entity within the FWS to provide technical expertise to landowners as does the Natural Resource Conservation Service in the Department of Agriculture.[151] In essence, Partners for Wildlife is already doing that, making partners of willing landowners across the country who have potentially valuable habitat on their lands. FWS agents provide the know-how and much of the funds to restore the habitat to a pristine condition with no obligations imposed on the landowner. This program should be expanded. Partners in Flight, the North American Waterfowl Plan—these and other model programs could be expanded or replicated with concurrent benefits to wildlife populations.

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150. Yaffee, *supra* note 9, at 64.

151. FERRIS, *supra* note 84, at 17; KEYSTONE, *supra* note 84, at 9.

The Farm Bill reauthorization offers another significant opportunity to protect wildlife. With some 36 million acres enrolled, the Conservation Reserve Program is one of the largest conservation programs in the nation. It has already, and largely inadvertently, aided in the protection of dozens of threatened and endangered species and provided habitat for countless fish and wildlife species, especially migratory birds. Congress should consider amending the program to allow specifically for habitat values to be considered in subsequent enrollment of acreage. Likewise the Wetland Reserve Program is an example of a program that purchases permanent easements for wetlands protection. Similar easements could be purchased for endangered species habitat. Establishment of an Endangered Species Habitat Reserve Program based on that model would be a wonderful tool for species conservation.

CONCLUSION

In 1992, when the black-footed ferret reintroduction began, a number of landowners took a leap of faith to participate in an effort that was uncertain at best, intrusive at worst. Not everything worked perfectly; the ferret is still in danger of extinction, though its chance of survival has improved. The real success story, however, is not the number of ferrets on the ground but the change in attitudes that a flexible cooperative management approach under the ESA helped bring about.

Jack Turnell's magnificent Pitchfork Ranch was the place where the ferret was rediscovered, after it had been presumed extinct. Turnell could have refused to participate in its recovery. He could have adopted the "shoot, shovel, and shut up" mentality that some have suggested to avoid dealing with the ESA. Instead, Turnell got involved with the species and, in the process, became a believer in the power and promise of collaboration. "The ferret forced me to cooperate with people who I'd traditionally been an adversary of," he says. "I realized then I could work with them and not feel threatened."[152]

This article has attempted to illustrate the importance of proactive, collaborative programs to achieve conservation goals. Examples abound of existing programs that are successfully saving biodiversity while making partners of America's landowners. The ESA already provides for a variety of cooperative approaches, but additional models need to be developed and incorporated into the Act. Reauthorization of the ESA is an

152. DAN DAGGETT, BEYOND THE RANGELAND CONFLICT: TOWARD A WEST THAT WORKS 76 (1995) (quoting Jack Turnell).

opportunity to promote partnerships, explore incentives, and foster cooperation out on the land. It can be done. If we are to achieve meaningful conservation goals in this country, it must be done. Adherence to the simplistic arguments of the extremes in this debate will only impede conservation progress and further polarize the decision-making process.

In his first inaugural address, Thomas Jefferson said, "Not every difference of opinion is a difference of principle."[153] It is important to remember that when considering how to reconcile what appear to be diametrically opposing views. The dialogues sponsored by The Keystone Center and Defenders of Wildlife involved diverse gatherings of stakeholders and showed how much common ground really exists on these issues.[154]

Most Americans support endangered species protection and property rights, and they continue to believe that economic interests and conservation interests are compatible. Unfortunately, the debate, with its focus on conflict, promotes mistrust and division and squelches opportunities for collaboration. A more civil dialogue is essential to finding solutions to natural resource dilemmas. As Endicott writes: "All involved must realize that land conservation works best when economic interests and ecological values are mutually supportive—and that both public and private sectors must work hard to ensure that this happens."[155]

We must also recognize how times have changed. Increasingly, the roles of the public and private sector have blurred. In a recent report on land conservation priorities, the National Research Council concluded:

> Public and private values cannot be conveniently separated. The vigorous pursuit of public values no longer takes place only on public lands or out-of-the way preserves and set-asides. Just as federal lands host a broad array of private uses and ownership rights, private lands are shouldering an increasing public responsibility in the areas of conservation, environmental protection, and public-interest health and recreation.[156]

Finding the proper balance of public and private responsibilities is not easy and will take time. Both sectors have an important role to play.

What is needed now is an informed discussion at the national level about the extent of the biodiversity crisis and what commitment the nation

153. Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 331, 322 (Adrienne Koch & William Peden eds., 1944).

154. *See generally* KEYSTONE, *supra* note 84.

155. ENDICOTT, *supra* note 147, at 11.

156. NATIONAL RESEARCH COUNCIL, *supra* note 3, at 49.

is willing to make in order to stem the tide of species and habitat loss. Adequate resources from a variety of public and private sources will be critical to any meaningful national effort. In this tight fiscal climate, it will take a strong public conviction that species preservation is important to wrest the necessary resources from other programs. That may yet happen. "A nation that has paid farmers not to grow pigs may yet find the will to pay them to grow owls, eagles or hedgerows."[157] Various incentive programs should be adopted to encourage the active participation of landowners in species preservation.

Land-use decisions at the community level, more than anything else, will determine the shape and vitality of the landscape in the future. Federal and state programs can contribute a great deal to conservation, but local governments and individuals must do their part as well. The land ethic must be strengthened.

The controversy over the ESA is not merely about one statute and its effect on people. It is an age old debate about the proper role of government, the conflict between economic and social interests, and our ethical obligations to other living things and to future generations. All of these dilemmas are manifest in discussions of the Act and its importance. As Aldo Leopold said: "We shall never achieve harmony with the land, any more than we shall achieve absolute justice or liberty for people. In these higher aspirations the important thing is not to achieve, but to strive."[158]

The limits of government regulation increasingly are being recognized. Regulations, while important, can only achieve so much before resistance serves to undermine the very purpose of the statute. Public private partnerships offer the best hope for achieving conservation goals in the next century. In fashioning a new ESA—one that works better for wildlife and landowners—we should strive to develop cooperative models that reflect this new paradigm.

157. *Id.* at 211.

158. ALDO LEOPOLD, A SAND COUNTY ALMANAC 210 (1966).