THE ENDANGERED SPECIES ACT

ISSUE

The Endangered Species Act (ESA) was passed in 1973 to protect and recover imperiled species and their habitats. There are currently more than 2,000 plant and animal species listed under the act, and billions of taxpayer dollars are devoted to enforcement efforts related to the act each year.[1]

Under the takings clause, in Section 9 of the act, it is illegal to kill, harm, or "take" a listed species.[2] The law also prohibits private landowners from engaging in activities that could harm or modify an endangered species' habitat without first obtaining a federal permit.

The ESA calls for U.S. Fish and Wildlife Service (USFWS) biologists to prevent landowners from engaging in activities that might harm listed species or their habitats. For instance, the act can restrict a landowner's ability to harvest timber if the timber provides habitat for the endangered red-cockaded woodpecker. Or the act could infringe upon a farmer's ability to divert water from a nearby stream for crop irrigation if the waterway is home to an endangered fish such as the delta smelt.[3]

When landowners are forced to give up the use of their land for an endangered species, they personally bear the cost of protecting the species. When a landowner cannot cut his own trees because they are home to red-cockaded woodpeckers, his livelihood is threatened from that loss of potential revenue. Furthermore, the ESA does not require landowners be compensated for income lost due to the act's land-use restrictions. As a result, landowners often see endangered species as liabilities.

The policy, therefore, often causes farmers and ranchers to manage their lands in ways that do not promote endangered species habitat—or may even actively harm it. For example, to avoid the headaches that can accompany ESA restrictions, North Carolina timber producer Ben Cone undertook efforts decades ago to keep his stands from becoming old-growth pines, which are considered ideal habitat for the endangered red-cockaded woodpecker.[4] Prior to the discovery of the endangered bird on his property, Cone waited to harvest his timber until the trees were 80 years old, and he cut a 50-acre block of timber every five to 10 years. Once the woodpeckers were discovered on his property, he changed his strategy and began to clear cut 300 to 500 acres of 40-year-old timber every year to prevent the forest from becoming old-growth habitat for the woodpecker. Cone was afraid that if he let the timber grow to the point that it was considered endangered-species habitat, he would no longer be able to harvest and sell his timber.

Other landowners have gone so far as to destroy evidence of an endangered species on their properties—often referred to as "shoot, shovel, and shut up." In these cases, private landowners who are capable of providing critical habitat for imperiled species do not engage in land management practices that are beneficial for such species for fear that land-use restrictions will threaten their freedom to manage their private property.

In response to concerns by landowners that the Endangered Species Act creates these perverse incentives, the U.S. Fish and Wildlife Service devised Safe Harbor Agreements in 1995.[5] A Safe Harbor Agreement is a voluntary agreement between either the USFWS or the National Oceanic and Atmospheric Administration and property owners whose actions contribute to the recovery of a listed species. Under such an agreement, property owners are assured that if they contribute to the

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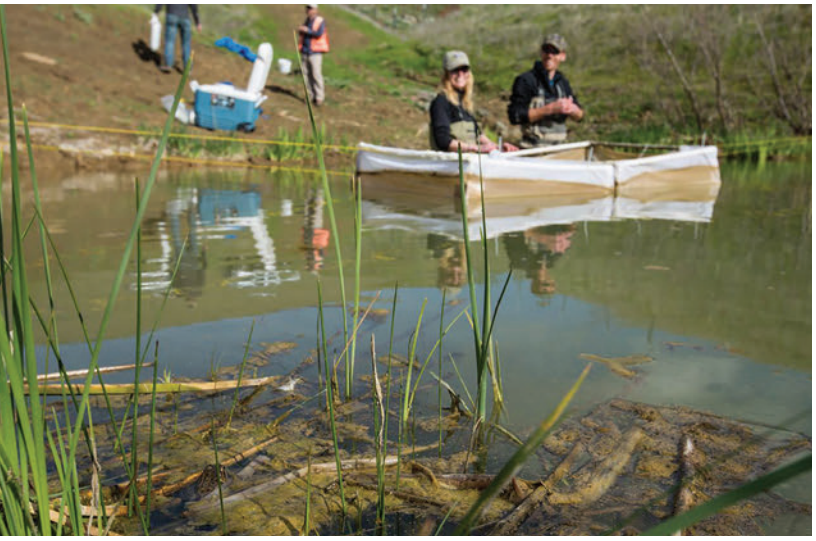

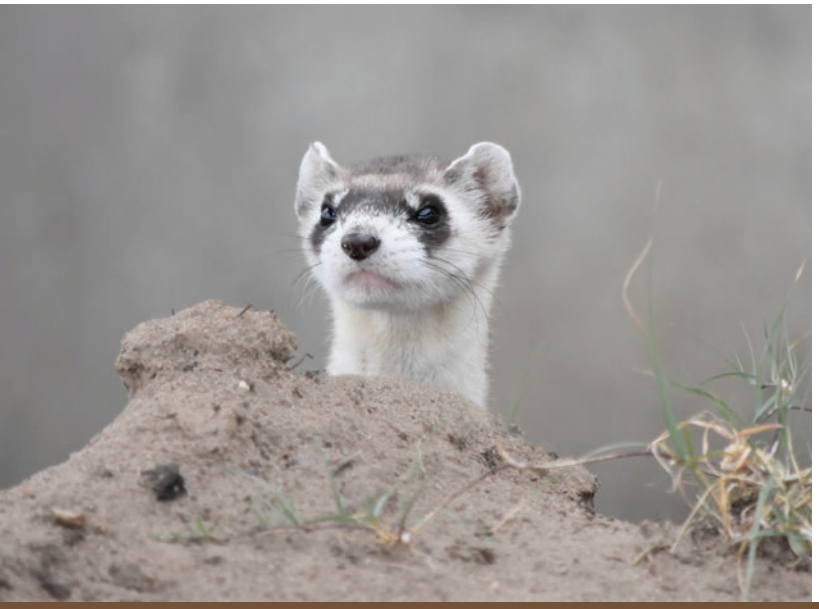

Threatened California red-legged frogs have found refuge on private lands engaged in conservation banking (top left). Endangered black-footed ferrets were successfully introduced onto Turkey Creek Ranch in Colorado (bottom left). The endangered red-cockaded woodpecker thrives in old-growth pine habitat (right).

recovery of listed species on their property, the USFWS will not require additional restrictions on the property without landowner consent. In short, the agreements maintain the landowners' authority over their land when they make efforts to preserve endangered species.

When the Walker family of Pueblo, Colorado, faced a prairie dog infestation at Turkey Creek Ranch, they hoped to solve the problem by introducing one of the rodent's natural predators onto their property: the black-footed ferret. But the ferret is endangered, so introducing it would mean the USFWS could restrict ranch activities that might harm the ferrets. There was a chance the Walkers would have to stop grazing cattle in many areas, which would limit their ability to manage the land as a working cattle ranch.

To address these concerns, the family pursued a Safe Harbor Agreement with the USFWS. Under the agreement, the Walkers cannot purposely kill

the ferrets, but they are protected if the animals are accidentally killed in the day-to-day use of the ranch. This allows the family to continue operating their cattle ranch while still providing a home for the endangered ferrets.

While Safe Harbor Agreements do help address some of the perverse incentives of the Endangered Species Act by providing assurances against accidental takings, landowners are still required to jump through many hoops to enter into one, increasing the transaction costs required to conserve species. While some agreements can be developed within six to nine months, more complex agreements can take much longer.[6] Landowners must gather general information about their property, and the USFWS then describes the baseline requirements necessary to sustain the species. Using these baselines, the property owner and the USFWS devise land-use objectives, assess habitat quality, and identify other information needed to develop an agreement. Together the landowner and USFWS determine targets for species conservation and establish management approaches for private properties.

Even then, yet another step is needed to formalize agreements: an enhancement of survival permit. Once all the red tape is cleared, the enhancement of survival permit and Safe Harbor Agreement together allow landowners to improve habitat for listed species without incurring additional restrictions. But before the permit can be issued, the application is subject to a 30-day public comment period and an internal review.[7] Even after all the paperwork, while a Safe Harbor Agreement can protect a landowner's management authority, an endangered species is still rarely considered an asset on working lands.

In addition, a Safe Harbor Agreement does not protect neighboring landowners. If an endangered species is reintroduced on a property, the goal is that the species' population will multiply and, subsequently, expand onto neighboring lands. With this expansion comes the potential for the neighboring landowners to have their property subjected to usage restrictions in the name of endangered species conservation. Thus, the cycle of viewing an endangered species as a liability rather than an asset is repeated.[8]

Though the Endangered Species Act is well intentioned, it often pits conservation of endangered species and the activities of working lands against each other—threatening the existence of both.

REFORM

The approval process for Safe Harbor Agreements should be streamlined to encourage landowners to enter into agreements rather than adopt a "shoot, shovel, and shut up" approach to endangered species. Requiring a landowner who has already worked with the USFWS to design a Safe Harbor Agreement to return to the agency for an enhancement of survival permit is unnecessary overlap. If the USFWS did a thorough job working with the landowner to create the Safe Harbor Agreement, then a separate application, review, and public comment process should not be necessary. Instead, the USFWS should grant an enhancement of survival permit upon completion of the Safe Harbor Agreement. Streamlining the permitting process would reduce the transaction costs of enacting Safe Harbor Agreements for landowners, making it more appealing for owners of working lands to incorporate species conservation into land management practices.

In addition, when a landowner introduces an endangered species onto his or her property, neighbors should be prioritized for Safe Harbor Agreements,

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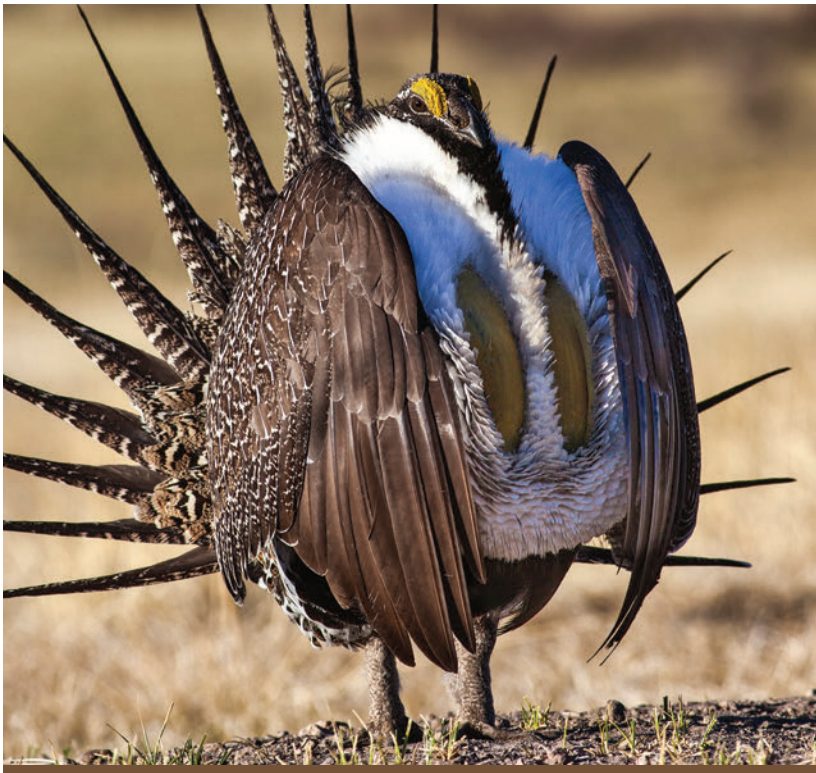

The majority of habitat for the endangered sage grouse is located on private land.

even before the species spreads to their property. If the neighbors are protected from unnecessary risks that come with the presence of an endangered species, they will be more willing to allow the species to spread onto their land. As a result, whole communities could become involved in species conservation rather than potentially undertaking efforts to keep the endangered animals off their properties.

Conservation banking would go a step further, motivating landowners to protect imperiled species. This sort of banking transforms endangered species from liabilities into assets by allowing landowners to profit from conserving species and their habitats. Landowners engaged in conservation banking actively manage their lands to protect endangered species, earning credits based on the amount of habitat they provide and the population of the species on their land, among related factors.[9] When developers or other parties harm endangered species or their habitats, they are required to mitigate the harmful effects. This can be achieved by purchasing credits from a conservation bank. However, credits must be purchased within a so-called "designated service area"—a set area within which the bank owner may sell credits. The USFWS determines these areas based on physical and ecological attributes to ensure the credits sold directly offset the harm caused. This method is intended to create a market for species conservation within a service area.

Credit banking creates a market for endangered species conservation, allowing working lands to become valuable and profitable sites for conservation.[10] But the market is limited in effect. Often, the USFWS requires credits be purchased from the conservation bank closest to the mitigation site. Instead of being able to purchase from any conservation bank within a given service area, the USFWS ends up picking the winner in the market. This can dampen landowners' willingness to get involved in conservation banking because they cannot be sure they will even get a chance to participate in the service area's market. To improve the conservation credit market and promote the protection of endangered species through conservation banking, the sale of conservation credits should be allowed within a predetermined service area. Because buyers would be required to purchase credits within a service area set by the USFWS, the credit would represent habitat extremely similar to the habitat being harmed by the purchaser. Therefore, credits would not need to be purchased from the closest site to ensure uniformity because the whole service area would have already been approved for uniformity.

A service area-wide market would allow more people to benefit from preserving endangered species through conservation banking. Instead of the government selecting winners, buyers and sellers within a service area could freely trade, ensuring all endangered species conservationists could be rewarded for their work by selling credits.