

WEATHERING THE STORM: FINDING SAFE HARBORS IN ESA CONTROVERSY

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I. INTRODUCTION

Since the passage of the Endangered Species Act (ESA)¹ it has been hailed as the strongest weapon in the arsenal of conservationists for saving and preserving species in decline.² However, over time the ESA has been used more like a club, constantly hanging over the heads of economic interests and local governments. This use of the ESA has produced a dichotomy in how it is viewed, where “people tend to either glorify the ESA as visionary or demonize it as invasive.”³ Economic interests, as well as state and local governments, often witness their pursuits being pushed aside by the powerful restrictions of the ESA. The ESA has bred opposition throughout American courts, and while the court disputes lead to high legal fees, they yield negligible results for endangered species. While some may see these courtroom battles as campaigns to save species that are in decline, others may argue they have merely fanned the flames of opposition and prevented rational solutions to conservation and economic problems.

One example of such litigation is the court battles over the greater sage-grouse (*Centrocercus urophasianus*) of the Intermountain West. After various appeals to administrative agencies, and years of litigation, it is odd to note that no final decision has been made on whether to list the sage-grouse as endangered.⁴

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¹ Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (current version at 16 U.S.C. §§ 1531-44 (2006)).

² See Amanda R. Garcia, *The Sage Grouse Debate: Cost-Benefit Analysis and the Discourse of the Endangered Species Act*, 14 N.Y.U. ENVTL. L.J. 572, 573 (2006).

³ Rodney B.W. Smith & Jason F. Shogren, *Protecting Species on Private Land*, in PROTECTING ENDANGERED SPECIES IN THE UNITED STATES: BIOLOGICAL NEEDS, POLITICAL REALITIES, ECONOMIC CHOICES 326, 338 (Jason F. Shogren & John Tschirhart eds., Cambridge Univ. Press 2001).

⁴ See Scott Streater, *Oil and Gas Drilling Plans Must Accommodate Grouse to Avoid ESA Listing- Study*, N.Y. TIMES, Oct. 22, 2009, available at <http://www.nytimes.com/gwire/2009/10/22/22greenwire-oil-and-gas-drilling-plans-must-accommodate-gro-1246.html> (explaining the Obama administration has a Feb. 2010 deadline to decide if the sage-grouse will be listed or not). The Department of the Interior, under Secretary Ken Salazar, has determined that the “greater sage-grouse warrants the protection of the Endangered Species Act but that listing the species at this time is precluded by the need to address higher priority species first.” United States Dep’t of the Interior, D.O.I., Interior Expands Common-Sense Efforts to Conserve Sage-Grouse Habitat in the West (Mar. 5, 2010), http://www.doi.gov/news/doinews/2010_03_05_news.cfm (last visited Apr. 10, 2010). This may seem to be final action, but suits have been filed challenging this decision as unlawfully delaying protection under the ESA. Western Watersheds Project, News Release, *Lawsuit Launched to Protect Sage Grouse, Vanishing Nevada Bird* (Mar. 29, 2010), <http://www.westernwatersheds.org/news->

When species in decline, such as the sage-grouse, cannot be listed after years of litigation, it is appropriate to question the ESA's efficacy.

This Note argues the ESA is not as beneficial to conservation as some may suppose. In addition, other laws may be more capable of bridging the intellectual, and perhaps even moral, gap between conservationists and economic interests. Better, and less litigious, ways exist to protect the environment and the human environments that surround it. This Note will discuss why the ESA is not the best method to conserve species in decline, such as the sage-grouse, and that other legal means—such as the 2008 Farm Bill⁵ and candidate conservation agreements with assurances—can more effectively meet the needs of both conservationists and economic interests.

II. THE ENDANGERED SPECIES ACT AND THE 2008 FARM BILL

A. *The ESA*

The ESA's force has prompted those opposed to environmental restrictions to dispute the listing of certain species, especially when the listing could interfere with economic interests. A continuing dispute in Utah and throughout the Intermountain West involves the failure to list the greater sage-grouse as an endangered species. Due to the decline of sage-grouse populations,⁶ conservation groups have petitioned the United States Fish and Wildlife Service (FWS) to list it under the ESA. The dispute continues after several failed attempts to list the greater sage-grouse under the ESA.⁷

The ESA is “perhaps the most far-reaching and important federal legislation specifically concerned with the preservation of wildlife,”⁸ but there are numerous issues and situations to which it cannot easily be applied for purposes of conservation. One of the reasons the sage-grouse's listing under the ESA is so hotly debated is the impact a listing decision could have on the economy and private property rights of those in sage-grouse habitat. For many conservationists, private property has been “the bad guy” in the environmental picture because traditional use of private property may be the cause for the decline of many species.⁹ For private landowners the conservationists' cause is perceived as a

media/news-release/2010/03/29/lawsuit-launched-protect-sage-grouse-vanishing-nevada-bird (last visited Apr. 10, 2010).

⁵ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008) (codified as amended in scattered sections of 7, 12, 15, 16, 19, 20, 21, 25, 26, 40, 42 U.S.C.).

⁶ Populations are measured by the number of males found at sites used by the sage-grouse for display and mating purposes called leks. SAGE- AND COLUMBIAN SHARP-TAILED GROUSE TECHNICAL COMM., GREATER SAGE-GROUSE POPULATION TRENDS: AN ANALYSIS OF LEK COUNT DATABASES 1965-2007, 3 (July 2008).

⁷ See Initiation of Status Review of the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 73 Fed. Reg. 10,218, 10,219 (Feb. 26, 2008) (to be codified as 50 C.F.R. pt.17).

⁸ 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 62 *813 (2001).

⁹ Thomas W. Merrill, *Private Property and the Politics of Environmental Protection*, 28 HARV. J. L. & POL'Y 69, 69 (2004).

revocation of some of their most cherished rights, equivalent in many respects to a government taking without just compensation.¹⁰ Classifications of wildlife under the ESA receive enormous amounts of political backlash from economic interests, such as industry and private land owners. This backlash is due to the perception that the ESA is an “uncompromising, at-all-cost statute.”¹¹ In the case of the sage-grouse, industry has hotly contested the listing because of the restrictions that could be placed on natural resource extraction.¹²

Under the ESA an endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range”¹³ In contrast, a threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹⁴ The term species in the ESA refers not only to the scientific classification but also to “subpopulations” and “distinct population segments” of animals and plants.¹⁵ A species listing is determined by an Executive cabinet-level secretary,¹⁶ according to “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or education purposes; (C) Disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.”¹⁷ In addition, the listing decision must be based solely on “the best scientific and commercial data available . . . after taking into account those” efforts “made by any state or foreign nation, to protect such species”¹⁸ Consideration should also be given species “identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency that is responsible for the conservation of fish or wildlife or plants.”¹⁹ In addition to agencies, “interested persons,” may petition to add a species or to remove it from the lists of endangered or threatened species.²⁰

Once a determination is made to list a species as either endangered or threatened, restrictions then apply not only to the species itself, but also to its habitat. It is also unlawful for a person under the jurisdiction of the United States to, among other things import, export, possess, sell, transport, receive, or take any listed species.²¹ The term “take” is defined broadly and means to “harass, harm,

¹⁰ Robert Innes, *The Economics of “Takings” in a Multiparcel Model with a Powerful Government*, in PROTECTING ENDANGERED SPECIES IN THE UNITED STATES: BIOLOGICAL NEEDS, POLITICAL REALITIES, ECONOMIC CHOICES 263 (Jason F. Shogren & John Tschirhart eds., Cambridge Univ. Press 2001).

¹¹ Garcia, *supra* note 2, at 592, 596-599.

¹² *Id.*

¹³ 16 U.S.C. § 1532(6) (2006).

¹⁴ *Id.* § 1532(20).

¹⁵ *Id.* § 1531(16).

¹⁶ The Secretary of Commerce or the Secretary of the Interior are some examples. *See, e.g.*, 35A AM. JUR. 2D *Fish, Game, and Wildlife Conservation* § 63* 813 (2001).

¹⁷ 16 U.S.C. § 1533(a)(1).

¹⁸ *Id.* § 1533(b)(1)(A).

¹⁹ *Id.* § 1533 (b)(1)(B).

²⁰ *Id.* § 1533(b)(3)(A).

²¹ *Id.* § 1538(a)(1).

pursue, hunt, shoot, wound, kill, capture, or collect or to attempt to engage in any such conduct.”²² Further regulations define the term “harm”—as used in the definition of “take”—as including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²³ ESA prohibition violations are enforceable through civil²⁴ and criminal penalties.²⁵

1. *The ESA in Action*

There has been a steady march toward a use of ESA species listings without regard for implications to human endeavors or property concerns. An example is that of *Tennessee Valley Authority v. Hill*²⁶ (*TVA*), in which the ESA stopped the Tellico Dam project on the Little Tennessee River. In 1973 an endangered fish, the snail darter, was found living in the area of the dam.²⁷ The United States Supreme Court took into account that creation of the Tellico dam project would completely flood and destroy the snail darter’s habitat.²⁸ The Court held that the ESA required the protection of the snail darter and its habitat, halting the completion of the Tellico Dam.²⁹ The Court pointed out the strength of the ESA:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.³⁰

The presence of a small fish was sufficient to prevent a project by the federal government itself. In the wake of *TVA*, Congress amended the ESA, allowing greater flexibility by creating a review board—commonly called the “God Squad”³¹—with authority to grant exemptions if it found by special majority that:

²² *Id.* § 1532(20).

²³ 50 C.F.R. § 17.3 (2002). The definition of harm was later upheld in *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

²⁴ 16 U.S.C. § 1540(a) (allowing a civil penalty of up to \$25,000 for each violation of certain ESA requirements).

²⁵ *Id.* § 1540(b) (allowing for a fine of up to \$50,000, or a year in prison, or both).

²⁶ 437 U.S. 153 (1978).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 171.

³⁰ *Id.* at 172-73.

³¹ “The committee is commonly known as the ‘God Squad,’ not for its collective wisdom but because the decisions it may render were once left to an even higher authority.” Ted Gup, *Essay: Down with The God Squad*, TIME, Nov. 5, 1990, available at <http://www.time.com/time/magazine>

(a) the federal project is of regional or national significance; (b) there is no “reasonable and prudent alternative[;]” and (c) the project as proposed “clearly outweighs the alternatives.”³² But even the “God Squad” unanimously denied the completion of the Tellico dam finding the “project was ill-conceived and uneconomic . . . and deserved to be killed on its own merits.”³³

Later cases highlighted the breadth of what “take” means under the ESA when applied to specific species. Two cases dealing with the Hawaiian Palila bird allowed a broad interpretation of “take.” In *Palila v. Hawaii Department of Land & Natural Resources (Palila I)*,³⁴ the Ninth Circuit Court of Appeals affirmed a lower court finding that the maintenance of feral sheep and goats was destroying the critical habitat of the Palila bird.³⁵ The trial court found that the grazing of the goats and sheep degraded the habitat of the Palila because the sheep and goats consumed plants essential to the survival of the Palila.³⁶ In addition, the Ninth Circuit agreed with the trial court’s finding that the Hawaii Department of Land and Natural Resources’ maintenance of feral sheep and goats was a “take” because the definition of a “take” includes the terms “harass” and “harm.”³⁷ Harass was defined at the time to be “an intentional or negligent act or omission that significantly disrupts normal behavior patterns of the endangered animal.”³⁸ In addition it was a “take” under the ESA because “harm” was defined as “activity that results in significant environmental modification or degradation of the endangered animal’s habitat.”³⁹

In the second case of *Palila v. Hawaii Department of Land and Natural Resources (Palila II)*,⁴⁰ the Ninth Circuit again affirmed the trial court’s decision that mouflon sheep grazing was harming the Palila bird habitat.⁴¹ The trial court found a taking of the Palila because the sheep had caused harm to the Palila habitat similar to what had been caused by the feral goats and sheep in *Palila I*. The difference in *Palila II* was that the Secretary of the Interior had narrowed the definition of “harm” since *Palila I*.⁴² The definition was narrowed to “an act which actually kills or injures wildlife.”⁴³ However, the trial court found the narrower definition would not change the outcome:

/article/0,9171,971548,00.html.

³² Frona M. Powell, *Defining Harm under the Endangered Species Act: Implications of Babbitt v. Sweet Home*, 33 AM. BUS. L.J. 131, 136 (2001).

³³ *Id.* The Tellico dam was ultimately finished due to a House appropriation bill that overrode the previous decisions to prevent the project’s completion. *Id.*

³⁴ 639 F.2d 495 (9th Cir. 1981).

³⁵ *Id.* at 498.

³⁶ *Id.* at 496.

³⁷ *Id.* at. *See also* 16 U.S.C. § 1532(19) (2006).

³⁸ *Palila I*, 639 F.2d at 497.

³⁹ *Id.* (citation omitted).

⁴⁰ 852 F.2d 1106 (9th Cir. 1988).

⁴¹ *Id.* at 1110-11.

⁴² 649 F.Supp. 1070 (D.C. Haw. 1986).

⁴³ 50 C.F.R. § 17.3 (2002).

Obviously since the purpose of the Endangered Species Act is to protect endangered wildlife, there can be no finding of a taking unless habitat modification or degradation has an adverse impact on the protected species. As the Secretary explained, however, this injury to the species does not necessitate a finding of death to individual species members. Drawing from this, I conclude that a showing of “harm” similarly does not require a decline in population numbers.... The key to the Secretary’s definition is harm to the species as a whole through habitat destruction or modification. If the habitat modification prevents the population from recovering, then this causes injury to the species and should be actionable under section 9.⁴⁴

Under the above rule, as described by the trial court, it found once again that the sheep harmed the endangered Palila by harming its habitat.⁴⁵ The Ninth Circuit never reached the issue of “harm” but affirmed the trial court’s decision that a “take” had occurred.⁴⁶ The *Palila* cases illustrate the ESA’s ability to control what occurs on habitat of a listed species, even if the actions do not directly affect the listed species. Anything that is viewed as habitat modification will constitute a “take” prohibited under the ESA. In both *Palila* cases, the offending sheep and goats were ordered to be removed from the Palila’s habitat.⁴⁷

TVA and the *Palila* cases are illustrative of the ESA’s ability to protect listed species. However, the above cases deal with government actions; a federal project in the *TVA* case and a state agency in the *Palila* cases. It must be understood that the ESA applies to all habitat of listed species, whether that habitat is on public or private land. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (Babbitt)*⁴⁸ illustrates, *inter alia*, that the ESA’s power is not enforced only against government projects or entities. On the contrary, the ESA is equally applicable to private projects and to private lands.

In *Babbitt*, the U.S. Supreme Court considered the definition of the term “harm,” as defined by then Secretary of the Interior, Bruce Babbitt.⁴⁹ This action was originally brought in the U.S. District Court for the District of Columbia by “small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests.”⁵⁰ The various groups argued that the application of “harm,” as defined by regulation promulgated by the Secretary of the Interior, “had injured them economically.”⁵¹ The listed species involved in this dispute were the endangered red-cockaded woodpecker and the threatened

⁴⁴ *Palila II*, 649 F.Supp. at 1077.

⁴⁵ *Id.* at 1080.

⁴⁶ *Palila II*, 852 F.2d at 1010-11.

⁴⁷ *Palila II*, 649 F.Supp. at 1082-83.

⁴⁸ 515 U.S. 687 (1995).

⁴⁹ *Id.* at 692.

⁵⁰ *Id.*

⁵¹ *Id.*

northern spotted owl.⁵² The district court rejected the groups' arguments citing the *Palila I* decision.⁵³ On appeal, the D.C. Circuit Court of Appeals, relying on the legislative history of the ESA, decided that the definition of "harm" was too broad.⁵⁴ The D.C. Circuit reasoned that Congress "must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted."⁵⁵ The Supreme Court granted certiorari to rectify the circuit split between the D.C. Circuit's *Babbitt* decision and the Ninth Circuit's *Palila* decisions.⁵⁶ The Court found the Secretary's definition of "harm" was reasonable, adopting the broad definition approved by the Ninth Circuit and discarding the narrower definition applied by the D.C. Circuit.⁵⁷

The Court's decision, written by Justice Stevens, explains that "harm" is not intentional harm only:

First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume, *arguendo*, that those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured.⁵⁸

The Court's use of the broad interpretation implies that even private land owners, could be liable for any unintended "harm" they may cause to a listed animal or its habitat. It has been argued that such a decision imposes a type of strict liability on anyone who modifies or degrades a listed animal's habitat even if done on private land. This is especially true because the prohibition on a "take" of a listed species applies to all persons and not just government actors.⁵⁹

The above four cases, when considered together, demonstrate why the ESA can be so troubling to private land owners and business interests that seek to reap the rewards of investment in economic activities such as energy and natural resource development. Such regulations could prevent endeavors that may change a habitat or simply disrupt the breeding patterns of a listed species. This is not a mere conjecture; the possible listing of the sage-grouse is currently having such an effect.⁶⁰ Many businesses that produce energy from conventional fossil fuels and

⁵² *Id.*

⁵³ *Id.* at 693.

⁵⁴ *Id.* at 694.

⁵⁵ *Id.*

⁵⁶ *Babbitt*, 515 U.S. 687, 695 (1995).

⁵⁷ *Id.* at 708.

⁵⁸ *Id.* at 696-97 (footnote omitted).

⁵⁹ 16 U.S.C. § 1538(a)(1) (2006).

⁶⁰ See Scott Streater, *Sage Grouse: Wyo. survey shows population down since 2008*, LAND LETTER, Aug. 27, 2009, <http://www.eenews.net/public/Landletter/2009/08/27/4> (last visited Feb. 4, 2010).

wind power are reluctant to invest in areas that could, in the future, be protected sage-grouse habitat under the ESA.⁶¹

2. *Economic Opposition to the ESA*

Despite the ESA's force, political expediency often prevails over environmental concerns. Because many of the ESA's provisions are broadly interpreted, listing an animal as threatened or endangered would seem the best way to protect species in decline. However, this is not always true. In the case of the sage-grouse, the attempt to stem the bird's continual decline and possible extinction was not solved even after numerous petitions to the listing process.⁶² One reason the listing has not taken place is the efforts of numerous industrial groups seeking to prevent the sage-grouse from being listed.⁶³ Because of the economic-backed outrage, some have supposed the denial to place the sage-grouse on the ESA list has been based on political pressure.⁶⁴ If such assertions are true, then species listing will depend more on how many lobbyists the parties can afford as opposed to "the best scientific and commercial data available."⁶⁵

The sage-grouse may represent a large problem in the economic and environmental future of the Intermountain West, but the bird itself is small. Sage-grouse are chicken-sized birds living in sagebrush rangelands across eleven states and two Canadian provinces.⁶⁶ Sage-grouse consist of two species, the greater sage-grouse (*Centrocercus urophasianus*) and the Gunnison sage-grouse (*Centrocercus minimus*).⁶⁷ Sage-grouse populations are in decline for several reasons,⁶⁸ most of which tie back into habitat destruction. Sage-grouse are sagebrush "obligates," or in other words, the sage-grouse's survival is tied to

⁶¹ *Id.*

⁶² See Initiation of Status Review of the Greater Sage-Grouse, *supra* note 7, at 10,219.

⁶³ See Garcia, *supra* note 2, at 597.

⁶⁴ *Id.* at 584-85 (citing Holly Doremus, *Listing Decisions under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L. Q. 1029, 1113-18 (1997)).

⁶⁵ 16 U.S.C. § 1533(b)(1)(A) (2006).

⁶⁶ U.S.D.A.-N.R.C.S./U.S.U. Sage-Grouse Restoration Project, *Sage-Grouse Restoration Project: History*, <http://sgrp.usu.edu/htm/history> (last visited Oct. 15, 2009). The Sage-grouse once inhabited fifteen states and three Canadian Provinces. *Id.*

⁶⁷ *Id.*

⁶⁸ A panel commissioned by the FWS listed the threats to sage-grouse in order of importance ranked from highest to lowest as: invasive plant species, infrastructure, wildfire, agriculture, detrimental grazing, oil and gas, urbanization, coal strip mining, weather, conifer invasion, human, predation, disease, water developments, prescribed fire, hard rock mining, hunting, climate change, and contaminants. National Resources Conservation Service, Mont., What are the Issues? (Feb. 3, 2009), <http://www.mt.nrcs.usda.gov/technical/ecs/biology/sagegrouse/issues.html> (last visited Nov. 16, 2009). Infrastructure means "fences, roads, power lines, communications towers, and pipelines, developed for any purpose." *Id.* Agriculture relates to activities "associated with farming." *Id.* "Human" is defined as "increased human presences in sagebrush ecosystems from recreational, residential, and resource development activities." *Id.*

sagebrush habitat.⁶⁹ One reason cited for the population decline is the sage-grouse's dependence on "large expanses of sagebrush."⁷⁰ Since 1965 the observed populations of sage-grouse across western North America have declined, and continue to decline.⁷¹ Conservationists attempted to list the greater sage-grouse under the ESA numerous times.⁷² Despite these attempts, the sage-grouse remains unlisted, though a listing may be reconsidered under the Obama administration.⁷³ The current conclusion by the FWS is that listing the greater sage-grouse as endangered or threatened throughout its range "is not warranted."⁷⁴

The pressure against listing the sage-grouse involves the possible results that an ESA listing could have on the economies of regions with sage-grouse habitat. The ESA regulations have the potential to severely limit what private land owners may do on their land if it is part of a listed species' habitat. Any act that modifies the privately owned land could potentially cause a habitat disturbance that could significantly impair the sage-grouse's behavioral or breeding patterns. For example, suppose a land owner discovered a natural gas deposit on their land beneath a sage-grouse lek, or male sage-grouse strutting ground.⁷⁵ If sage-grouse were listed under the ESA, then arguably the landowner could not build a natural gas well on that spot, if the well could significantly impair the grouse's breeding patterns. While the sage-grouse has a large habitat range across North America, approximately 30 percent of sagebrush rangeland in the western United States is privately owned. For example, in Utah it is estimated that over 50 percent of sage-grouse populations are found on private land.⁷⁶ Under such circumstances, it is inevitable that an ESA sage-grouse listing would have an economic impact on private landowners.

Private property rights go hand in hand with economic development in the sage-grouse's habitat. Those opposed to the sage-grouse's listing view an endangered species listing as hampering business in areas that the sage-grouse inhabit. The economic concerns revolve around energy and natural resource extraction.⁷⁷ In fact, opponents to listing the sage-grouse, such as the former Secretary of the Interior Gale Norton, warned that a sage-grouse listing could turn the bird into "the spotted owl" of the Intermountain West"; but the sage-grouse would be worse because "the sage grouse occupies nearly 12 times as much land as

⁶⁹ Endangered and Threatened Wildlife and Plants; 12-Month Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed. Reg. 2244, 2252 (Jan. 12, 2005) (to be codified at 50 C.F.R. pt. 17).

⁷⁰ See U.S.D.A.-N.R.C.S./U.S.U., *supra* note 66.

⁷¹ SAGE- AND COLUMBIAN SHARP-TAILED GROUSE TECHNICAL COMM., *supra* note 6, at 48.

⁷² See Initiation of Status Review of the Greater Sage-Grouse, *supra* note 7, at 10,219.

⁷³ The dispute has not been resolved; currently the classification by the FWS is still pending suit, see *supra* note 2 and accompanying text.

⁷⁴ 12-Month Finding for Petitions to List the Greater Sage-Grouse, *supra* note 69, at 2244.

⁷⁵ A lek is an area where male sage-grouse display to attract females. See SAGE- AND COLUMBIAN SHARP-TAILED GROUSE TECHNICAL COMM., *supra* note 6, at 3.

⁷⁶ *Id.*

⁷⁷ See Gary Gerhardt, *Clash on High Plains—Protecting Sage Grouse Habitat Could Put Brakes on Drilling for Oil, Gas in Several Western States*, ROCKY MOUNTAIN NEWS, Nov. 11, 2004, at 6A; see also Streater, *supra* note 4.

the northern spotted owl.”⁷⁸ As a result of the listing of the spotted owl “[m]illions of acres were set aside for the owls, and thousands of jobs were lost . . . [and t]he lesson isn’t forgotten. Stakes are high enough that energy development supporters have begun a major effort to block the sage grouse from making it on the endangered species list.”⁷⁹

However, fears that economic interests could threaten the sage-grouse population are not unfounded. A recent study found that “oil and gas development in the Intermountain West could slash sage-grouse populations in critical breeding grounds by as much as 19 percent.”⁸⁰ Economic interests that could affect the sage-grouse population are not limited to fossil fuels. Even some renewable energy sources, such as wind power, cannot be tapped in places like Wyoming for fear of lowering the sage-grouse population, which could, as a result, trigger a listing under the ESA.⁸¹

A lesson that can be gleaned from the sage-grouse situation is that the ESA is not the environmental “pitbull” that so many conservationists believe it to be.⁸² Perhaps all of the opposition to a listing could have been avoided and a more amenable solution realized if the ESA took into account concerns for economic needs and the natural environment. Although the ESA is designed to broadly take into account the biological needs of an animal through the best scientific and commercial data, it is blind to most human and economic considerations. If conservationists continue to push for species preservation and use the ESA as though it were a relentless pit-bull, opposition will only increase as energy resources become more valuable and public demand for energy increases.

3. *ESA Litigation Leading to Fishy Results*

One of the ESA’s great deficiencies is that it produces litigation and judicial determinations that either do not protect animals or inadequately protects those that are listed. The ESA breeds useless litigation that tends to remove the focus from the important issue, such as how to save a species in a state of population decline, and moves that focus to the usual debate of economic development versus biological integrity. The ESA is not protecting species that may need protection, for example, the sage-grouse as mentioned above.⁸³ An example of an animal that has received inadequate protection under the ESA comes from the Ninth Circuit decision of *Trout Unlimited v. Lohn (Lohn)*.⁸⁴ The *Lohn* case upheld the downgrading of

⁷⁸ *Id.* (quoting Secretary Norton).

⁷⁹ Tom Kenworthy, *Battle Brewing Over Sage Grouse Protection*, USA TODAY, Jul. 12, 2004, at 2A, available at http://www.usatoday.com/news/nation/2004-07-12-sage-grouse-protection_x.htm.

⁸⁰ Streater, *supra* note 4.

⁸¹ See Streater, *supra* note 60.

⁸² Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 139 (2004) (citing George Cameron Coggins, *An Ivory Tower Perspective on Endangered Species Law*, 8 NAT. RESOURCES & ENV’T 3, 3 (1993)).

⁸³ See discussion *supra* Part II.A.2.

⁸⁴ 559 F.3d 946 (9th Cir. 2009).

Pacific salmon and steelhead trout from the Upper Columbia River by the National Marine Fisheries Service (NMFS) from a status of endangered to threatened.⁸⁵

The primary concern for the plaintiffs in *Lohn* was that hatchery fish should not be included with natural fish because hatchery fish may reduce the genetic diversity in the natural fish populations.⁸⁶ The distinctions between endangered and threatened are important, but under both classifications, there may still be some “regulated taking.”⁸⁷ To understand why some believe that certain fish in the Upper Columbia River should be listed as endangered, instead of threatened, it is important to first understand the process the NMFS must follow to make such distinctions. The decision by the NMFS was based not on the threat to the entire species of salmon and steelhead trout, but on the threat to the fish as distinct population segments.⁸⁸ This means that the ESA listing does not deal with the entire species, but only a specific population of the species. The NMFS has further defined distinct population segments to mean an “evolutionary significant unit (ESU).”⁸⁹ For an ESU to qualify under the ESA, it must (1), be substantially reproductively isolated⁹⁰ from other conspecific population units; and (2), it must represent an important component in the evolutionary legacy⁹¹ of the species.⁹² In 1996, the NMFS’s ESU policy was changed to adopt a joint policy with the FWS.⁹³ The new policy factors for an ESU were (1) the “[d]iscreteness of the population segment in relation to the remainder of the species to which it belongs,” (2) “[t]he significance of the population segment to the species to which it belongs,” and (3) “[t]he population segment’s conservation status in relation to the [ESA’s] standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).”⁹⁴ The Pacific salmon was listed as an ESU under the first NMFS policy and the steelhead trout was an ESU under the second joint NMFS/FWS policy.

Originally, the NMFS decided that natural fish and hatchery fish of the same species would not be counted together to determine the size of an ESU under the

⁸⁵ *Id.* at 962.

⁸⁶ David Horrigan, *Agency Backed on its Plan for Protecting Fish*, NAT’L L.J., 16, Mar. 23, 2009.

⁸⁷ 16 U.S.C. § 1532(3) (2006).

⁸⁸ *Lohn*, 559 F.3d at 950; *see also* 16 U.S.C. § 1531(16) (2006).

⁸⁹ Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,618 (Nov. 20, 1991).

⁹⁰ Isolation is based on “movements of tagged fish, recolonization rates of other populations, measurements of genetic differences between populations, and evaluations of the efficacy of natural barriers.” *Id.*

⁹¹ Evolutionary legacy is based on “the ecological/genetic diversity of the species as a whole[;] [i]n other words, if the population became extinct, would this event represent a significant loss to the ecological/genetic diversity of the species?” *Id.*

⁹² *Id.*

⁹³ Policy Regarding the Recognition of Distinct Vertebrate Population Segments, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996).

⁹⁴ *Id.*

ESA.⁹⁵ However, after a federal district court decision⁹⁶ required an ESU to include both the natural and hatchery raised fish, the NMFS changed its policy to coincide with the court decision.⁹⁷ The NMFS now considers an entire ESU to include hatchery and natural salmon and trout. In the Upper Columbia River natural steelhead trout are mixed with hatchery fish, and the NMFS determined the viability of the ESU of these steelhead trout by including the hatchery fish with the natural fish. With the new policy, the NMFS decided to downlist both steelhead trout in the Upper Columbia River from endangered to threatened because of the population totals. Trout Unlimited petitioned the NMFS to separate the natural steelhead from the hatchery counterparts to preserve the genetic diversity of the trout species.⁹⁸ The Building Association of Washington and other industry groups also sued the NMFS. These groups argued the NMFS prohibition on taking any natural or hatchery fish with an intact adipose fin⁹⁹ was arbitrary and capricious.¹⁰⁰ The court found that the NMFS had not been arbitrary and capricious,¹⁰¹ and deferred to the agency's determination.¹⁰²

The *Lohn* case is an example of a species in decline that was given inadequate protection under the ESA. Like the sage-grouse, economic forces represented by the industry groups, resisted efforts to give the steelhead trout stronger protection under the ESA. In addition, similar to the sage-grouse, there was an economic push-back on efforts to either list or maintain a listing status under the ESA. This

⁹⁵ Interim Policy on Artificial Propagation of Pacific Salmon, 58 Fed. Reg. 17,573, 17,574 (Apr. 5, 1993). This same policy allowed for hatchery fish to be included with natural fish when determining the population of an ESU, but concluded hatchery "fish will not be included as part of the listed species." *Id.* at 17,575.

⁹⁶ *Alesea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001). In *Alesea Valley*, the NMFS determined the number of nine different populations of Coho salmon by including in the ESU both the hatchery and natural salmon together; however, only the natural salmon were listed as threatened. *Id.* at 1161. Conservation groups sued to have both the hatchery and natural salmon listed together in order to have both natural and hatchery salmon listed as threatened under the ESA. *Id.* at 1159. The court ruled in favor of the plaintiffs finding that the distinction used by the NMFS was arbitrary and capricious and that the NMFS could only consider an entire species, subspecies, or distinct population segment. *Id.* at 1162, 1163-64. It is also worth noting that in the *Alesea Valley* case the plaintiffs were seeking to require that both hatchery and natural salmon to be included in the same ESU, but in the *Lohn* case plaintiffs sought to have hatchery and natural fish separated when determining the ESU. In both cases the plaintiffs sought to force the NMFS to protect fish under the ESA through litigation. Unfortunately, the sum result of both litigations is that it is harder to protect salmon populations that include hatchery raised fish.

⁹⁷ *Trout Unlimited v. Lohn*, 559 F.3d 946, 951 (9th Cir. 2009).

⁹⁸ *Id.* at 953, *see also* *Horrigan*, *supra* note 86, at 16.

⁹⁹ "The adipose fin is a small, fleshy appendage" located on certain fish species between the dorsal and caudal fins. GLEN S. AXELROD & BRIAN M. SCOTT, *ENCYCLOPEDIA OF EXOTIC TROPICAL FISHES FOR FRESHWATER AQUARIUMS*, 50 (T.F.H. Publications, Inc., 2005).

¹⁰⁰ *Lohn*, 559 F.3d at 953.

¹⁰¹ *Id.* at 955; 5 U.S.C. § 706(2)(A) (2006) ("The reviewing court shall . . . hold unlawful and set aside . . . agency action . . . found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law.").

¹⁰² *Lohn*, 559 F.3d at 956 ("Nothing in the record suggests that NMFS's decision was uninformed or was arbitrary and capricious. Trout Unlimited and NMFS are engaged in a good faith disagreement that is supported by science on both sides . . . [i]n such situations, we stay our hand.").

economic push-back is attributable to various aspects of the ESA. As stated earlier the ESA is seen as an all-or-nothing approach, a regulation that forces individuals to protect listed species. Conservationists use the ESA to force others to preserve species or natural habitat of those species that are critically endangered.¹⁰³ Another reason for the push-back is the blatant lack of concern the ESA has for the economies of communities that are near or inhabit the habitat of listed species. While some changes have been made to make the ESA more economically friendly,¹⁰⁴ it is still viewed by many to be an anti-economic legal development.

The *Lohn* case exhibits an example of how the ESA breeds litigation. While conservation groups litigate over issues such as the listing of sage-grouse or steelhead trout, money was spent on avenues of conservation that have not benefited the animals that the litigants are seeking to protect. The American adversarial system is not the best avenue of protection for species in decline; additionally, litigating ESA listings may result in little or no success for conservation. While lawyers may earn a paycheck, this litigation does little to promote the needs of the individual species which are supposedly the interests conservationists seek to protect.

B. The 2008 Farm Bill Title II

There is a better way to protect the environment as well as allow economic interests to flourish. When considering the impact of environmental regulations on economic interest, well-known writer, farmer, and conservationist Wendell Berry acknowledged the importance of economic interests on the future success of wilderness conservation:

As part of my own effort to think better, I decided not long ago that I would not endorse any more wilderness preservation projects that do not seek also to improve the health of the surrounding economic landscapes and human communities. One of the reasons is that I don't think we can preserve either wildness or wilderness areas if we can't preserve the economic landscapes and the people who use them.¹⁰⁵

Berry goes on to say:

The question we must deal with is not whether the domestic and the wild are separate or can be separated; it is how, in the human economy, their indissoluble and necessary connection can be properly maintained. But to say that wildness and domesticity are not separate, and that we humans

¹⁰³ See Garcia, *supra* note 2, at 573.

¹⁰⁴ 16 U.S.C. § 1533 (b)(1)(A) (2006); Pub. L. No. 97-304 § 2(a)(2), 96 Stat. 1411 (changing the requirement from science only to best science and commercial data available).

¹⁰⁵ Wendell Berry, *Conservationist and Agrarian*, in *FARMING AND THE FATE OF WILD NATURE: ESSAYS IN CONSERVATION-BASED AGRICULTURE* 3, 4 (Daniel Imhoff & Jo Ann Baumgartner eds., 2006).

are to a large extent responsible for the proper maintenance of their relationship, is to come under a heavy responsibility to be practical.¹⁰⁶

To be practical and consistent with Berry's admonition means that environmental protection will consider not only the needs of the environment but also the needs of the people who depend on that environment.

Those who are most dependent and near to critical habitat are often those employed in the agricultural industry.¹⁰⁷ The agricultural industry comprises farmers, ranchers, and related industries. A law that has tried to take into account the closeness of farmers to untouched wilderness is reflected in the various Farm Bills passed by the U.S. Congress. The most recent Farm Bill, or the Food, Conservation, and Energy Act of 2008,¹⁰⁸ shows the ESA is not the only way to approach the conservation of species with declining populations, such as the sage-grouse. One of the great flaws of the ESA is that it does not accord much deference to those who live or work in the affected area. Those who work or live in the listed animal's habitat must be careful not to "take" or even "harm" the listed species or its habitat, whether on private or public land, or they may be subject to civil or criminal liability under the ESA. As opposed to the all-or-nothing regulations of the ESA, the Farm Bills conserve through incentive programs. These programs have flexibility to take into account the needs of both people and species in decline.

1. Importance of Conservation in the Farm Bills

The first Farm Bill, the Agricultural adjustment Act of 1933, was passed in an effort to stop farm foreclosures and falling corn prices.¹⁰⁹ However, the early Farm Bills provided for subsidies and conservation programs aimed at erosion control.¹¹⁰ In later attempts to regulate the agricultural market by reducing grain production, the Emergency Feed Grain Act of 1961 paid farmers to place acres under production into "conservation areas."¹¹¹ In 1965, the Cropland Production Act gave the Secretary of Agriculture authority to make 5- or 10-year contracts with farmers who would "convert cropland into uses that would conserve water, soil, wildlife, or forest resources, establish or protect open spaces, natural beauty, or wildlife, or recreational resources, or prevent air or water pollution."¹¹²

¹⁰⁶ *Id.* at 5.

¹⁰⁷ Agriculture is ranked as the fourth most important threat to sage-grouse populations with detrimental grazing ranked as the fifth. *See* sources cited *supra* note 68.

¹⁰⁸ Pub. L. No. 110-246, 122 Stat. 1651 (2008) (codified as amended in scattered sections of 7, 12, 15, 16, 19, 20, 21, 25, 26, 40, 42 U.S.C.).

¹⁰⁹ DANIEL IMHOFF, *FOODFIGHT: THE CITIZENS GUIDE TO A FOOD AND FARM BILL* 35.

¹¹⁰ *See* Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES, 4th Quarter 2004, at 37, available at <http://www.choicesmagazine.org/2004-4/2004-4.pdf>.

¹¹¹ *Id.* at 39.

¹¹² *Id.*

The Farm Bills were not always environmentally friendly. In the 1970s when landmark environmental legislation, such as the ESA, was passed the agricultural industry of the United States took an opposite path. In an effort to meet higher worldwide demands for food, farmers were told to “plant fence row to fence row.”¹¹³ Many Farmers “tilled up their conservation acreage” to plant wheat when their conservation contracts expired.¹¹⁴ “Forests were decimated and critical wetlands were drained, frequently with the direct assistance and financial support from the [United States Department of Agriculture (USDA)]. In addition, the heightened use of toxic chemicals on farms caused the nation’s watersheds to become increasingly polluted and resulted in a sharp decline in plant and animal health.”¹¹⁵ Subsequent Farm Bills, passed from the late 1970s and throughout the 1980s, showed a renewed concern for the environmental effects of farming.¹¹⁶ The motivation for this legislative policy change was attributable to a growing “environmental lobby, who found it was easier to make environmental changes in agriculture through Farm Bills than through environmental legislation.”¹¹⁷ Even with the 1973 passage of the ESA, those seeking to make environmental changes in the 1980s sought policy approaches to solve then-current environmental problems. Only a few years after the passage of the ESA, it was apparent that the ESA was not solving all the problems related to conserving habitat and protecting species and wild habitat near agricultural economic communities.

The 1985 Farm Bill¹¹⁸ was the first to devote a title to conservation, and this has continued into the 2008 Farm Bill with conservation listed under Title II.¹¹⁹ The 1985 Farm Bill also enacted new conservation programs such as Sodbuster, Swampbuster, Conservation Compliance, and the Conservation Reserve Program.¹²⁰ Conservation programs established penalties for those farms with highly erodible soils that did not implement a farm program.¹²¹ “The inclusion of such measures in the 1985 Farm Bill marked ‘a turning point in agricultural conservation history.’”¹²² Many of these programs continued past the turn of the century, allowing the public to rent land from farmers that were highly erodible, as well as for “conservation of other biologically sensitive and important areas.”¹²³ Later Farm Bills allowed for the creation of conservation easements and created

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ William S. Eubanks II, *A Rotten System: Subsidizing environmental Degradation and Poor Public Health with our Nation’s Tax Dollars*, 28 STAN. ENVTL. L. J. 213, 224-225 (2009).

¹¹⁶ See Cain & Lovejoy, *supra* note 110, at 39.

¹¹⁷ *Id.*

¹¹⁸ Food Security Act of 1985 Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7, 15, 16, 21 U.S.C.).

¹¹⁹ H.R. 6124, 110th Cong. 2d Sess., Pub. L. No. 110-246, 122 Stat. 1651 (2008).

¹²⁰ Cain & Lovejoy, *supra* note 110, at 40.

¹²¹ *Id.*

¹²² Eubanks, *supra* note 115, at 242 (quoting Craig Cox, U.S. Agriculture conservation Policy & Programs: History, Trends, and Implications, in U.S. AGRICULTURAL POLICY AND THE 2007 FARM BILL 113, 115-17 (Kaush Arha et al. eds., 2007), available at http://woods.stanford.edu/docs/farmbill/farmbill_book.pdf).

¹²³ *Id.*

new programs such as the Environmental Quality Incentive Program (EQIP), the Wildlife Habitat Incentive Program (WHIP), the Conservation Security Program (CSP)¹²⁴ and the Grassland Reserve Program (GRP).¹²⁵

The 2008 Farm Bill continues many of the programs found in the 2002 Farm Bill and, in many instances, increases the amount of funds that may be appropriated for the various conservation programs.¹²⁶ Spending in such programs as EQIP gives agricultural producers “information and technical and financial assistance in designing and implementing conservation practices . . . on their land.”¹²⁷ Such programs will help those who are on the front lines with nature, such as farmers and ranchers who live and work in the habitat of such species as the sage-grouse to care for these habitats and the species that live in them in a way that the heavy-handed ESA would not be able to do. For example, the sage-grouse decline in population is being considered through an evaluation of Farm Bill programs authorized under the 2002 Farm Bill.¹²⁸ In addition, many state, regional, and federal associations have created “plans and measures to improve habitat functions and provide protection to [sage-grouse] . . . since the [FWS’s] decision not to list the greater sage-grouse.”¹²⁹

The 2008 Farm Bill’s programs are just one way that conservation and economic interests can be considered together. While it is not a complete answer for the preservation of species in decline, it is a step in the right direction. The Farm Bill programs are palatable to those with economic interests because they offer incentives, rather than regulations that may overprotect listed species to the point that such regulations result in under-protecting the surrounding human interests.

2. Criticisms of the Farm Bill

The Farm Bills are not without their critics, particularly those devoted to environmental preservation. William Eubanks argues that “[d]espite Congress’s recognition of the environmental devastation caused by commodity-driven agriculture, as illustrated by its attempts to mitigate these impacts, its Farm Bill conservation programs have achieved weak results in recent years.”¹³⁰ Eubanks continues by saying that until policy making is taken out of the hands of the

¹²⁴ The 2008 Farm Bill has replaced the CSP with the Conservation Stewardship Program (CSP). United States Department of Agriculture, Briefing Rooms, Conservation Policy: Background, <http://www.ers.usda.gov/Briefing/ConservationPolicy/background.htm> (last visited Jan. 26, 2010) [hereinafter USDA].

¹²⁵ Cain & Lovejoy, *supra* note 110, at 40-41.

¹²⁶ USDA, 2008 Farm Bill Side-By-Side, Title II: Conservation, <http://www.ers.usda.gov/FarmBill/2008/Titles/TitleIIConservation.htm> (last visited Jan. 26, 2010).

¹²⁷ USDA, *supra* note 124.

¹²⁸ USDA-NRCS/USU Sage-grouse Restoration Project, <http://sgrp.usu.edu> (last visited Jan. 26, 2010); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended in scattered sections of 7, 16, 21 U.S.C.).

¹²⁹ Hadassah Reimer, *A Small Bird with a Big Footprint*, WYOMING LAWYER, Feb. 2008, at 25, 27.

¹³⁰ Eubanks, *supra* note 115, at 244.

agriculture industry, and Congress sufficiently funds Farm Bill programs, “conservation programs [in the Farm Bills] will continue to fail while agribusiness profits at the expense of the natural environment.”¹³¹ Farm Bill programs are also targeted at “megafarms;” huge farms that receive most of the Farm Bill subsidies. This practice “overprotects some aspects of the environment while severely underprotecting others.”¹³²

Another critique for the Farm Bill’s failure to adequately protect the environment is the “lack of public involvement in the Farm Bill conservation program approval process.”¹³³ Too much of the public “assume[s] that our nation’s various environmental laws such as . . . the Endangered Species Act apply equally to all industries to protect our share of the natural environment.”¹³⁴ While there are many other critiques of the entire farm bill,¹³⁵ it is important to note that one of the reasons the Farm Bills are less effective than they could be is due to public reliance on such environmental laws as the ESA. Simple reliance on the ESA is misplaced. After years of indoctrination that the ESA will protect all species because it is removed from the political sphere are not only untrue; but worse, it retards innovation of other needed conservation laws and policies that could bridge the gap between environmental and economic concerns. For species such as the sage-grouse, there is no simple solution. Yet a regulatory “club,” like the ESA, held over the heads of industry and state officials is not a viable answer either. A club should not be used when the finesse of a carefully crafted plan would be more appropriate.

III. QUESTIONS AND RESOLUTION

With all the questions raised by environmental problems, it is hard to find a solution that fits every situation. Some conservationists have created complex programs and formulas in a search for answers,¹³⁶ but these abstract proposals simply highlight the problems inherent in the ESA. The tension between economic and environmental concerns occurs because opposing sides each feel it has the moral high ground. Conservationists see themselves as protecting a fragile ecosystem and the vulnerable creatures that inhabit it. On the other hand economic interests see themselves as providing a living for themselves and their employees.

¹³¹ *Id.* at 247.

¹³² *Id.* at 248.

¹³³ *Id.*

¹³⁴ *Id.* Eubanks goes on to point out the many exceptions for farmers to environmental legislations. Take for example the many farms not controlled by the Clean Water Act which “legally discharge animal wastes, fertilizers, and pesticides in U.S. waters without a permit.” *Id.* at 249. This loop hole has caused hypoxic dead zones to occur in marine environments that many of these farm runoffs flow into, such as the Gulf of Mexico and the Chesapeake Bay. Imhoff, *supra* note 109, at 15. The “dead zone” off the coast of Louisiana, Mississippi, and Texas “is the size of several small New England states.” *Id.*

¹³⁵ The Farm Bill policies are blamed for causing problems ranging from environmental degradation to U.S. problems with obesity. *See id.* at 51-52, 89-97.

¹³⁶ *See generally* Smith & Shogren, *supra* note 3, at 334-36 (stating that complex formulas are used to determine problems caused by environmental regulations on private land).

The problem can be portrayed in an example of the two competing views, or conservationists against economic interests. Conservationists might hesitantly admit that many of the environmental protections may have a negative impact on the surrounding economy, but would point out that saving the environment is worth the economic degradation. But industry and economic concerns might also reluctantly divulge that many of the practices they employ may hurt the surrounding environment, but would contend that some environmental degradation is worth the price. In a manner of speaking, both sides see themselves as having the moral high ground over the other.

To bridge the gaping rift between conservation and economics, the two sides need to step off their self-created moral high ground and look for solutions that allow for environmental protection while still promoting the economy around it. Until this is done, more and more species like the sage-grouse will be the casualties of adolescent finger pointing and competing moral visions. Such creative solutions are not likely to come under a “pit bull” environmental law such as the ESA; rather, laws such as the Farm Bills, which seek to capture both environmental and economic concerns, are better positioned to bridge the moral divide. To explain how the Farm Bills can be used to help bridge this gap, the bills should be evaluated in conjunction with the current debate over the sage-grouse.

One of the main economic concerns with listing the sage-grouse under the ESA would be the economic effects on the extraction of natural resources, mainly oil and gas, which are found in abundance in the habitat of the sage-grouse.¹³⁷ Listing the sage-grouse would likely prevent development of these energy resources. But the Farm Bills can bring together economic and environmental concerns because they have titles for conservation and for energy.¹³⁸ By contrast, the ESA deals exclusively with species that require listing under the act. While a listing may consider “commercial data”¹³⁹ the ESA is not capable of figuring out a balance due to the Act’s absolute approach—to protect or not protect. Farm Bill programs can be used to find a middle ground, by also considering economic concerns that may be affecting the sage-grouse, unlike the ESA, which does not consider economic concerns but only takes into account the habitat needs and protected status of the sage-grouse.

Another problem of the ESA is that it creates immediate tensions when called upon. Conservationists often carry the club-like ESA to the negotiation table and swing it threateningly in the face of the soon-to-be affected economic concerns. This threatening posture invites those with economic concerns to grab for their own set of clubs. An example of an economic club would be an appeal to the public with arguments similar to “people have to decide whether they are willing to pay the price of protecting wildlife if it means not having natural gas to heat their homes.”¹⁴⁰ When it is proposed that a species needs protection, both sides prepare for a battle instead of mediation. A law that could mitigate conflicts and

¹³⁷ See Streater, *supra* note 4.

¹³⁸ *E.g.* Title IX.

¹³⁹ 16 U.S.C. § 1533(b)(1)(A) (2006).

¹⁴⁰ Gerhardt, *supra* note 77, at 6A.

replace mutual distrust with mutual concern would have the possibility of allowing both sides to feel they have won. Such a solution would not only be good for people and economic interests, but also good for the sage-grouse. This type of solution can be realized with the use of the Farm Bill programs, but not with the ESA.

As stated above, the suggestion that the Farm Bill programs can meet new challenges facing the environment is not new.¹⁴¹ “The Farm Bill has provided an unprecedented opportunity to apply conservation for the benefit of many fish and wildlife species. Because Farm Bill programs are relatively new and not fully understood or appreciated by the wildlife community, their potential is yet to be fully realized.”¹⁴² The beauty of Farm Bill programs is they take into account the perspective of caring for animals and the human economic interests that present the conflict with the environment. While people are part, or sometimes all, of the problem facing species in decline, people are capable of changing their behaviors if made aware of what types of activities cause habitat degradation. This approach has the ability to take the human “problem” and turn it into a human solution.

A. How Can the Farm Bills Help a Species like the Sage-grouse?

Farm Bill programs are already helping the sage-grouse and bringing economic interests together with conservationists. Consider the example of the Awapa Plateau in Southern Utah:

A few miles west of Utah’s Capital Reef National Park lies the vast Awapa Plateau, where a progressive group of ranchers, state and federal land managers, researchers and other conservationists has [sic] joined forces to improve rangelands that support local human and natural communities with the help of the USDA Wildlife Habitat Incentives Program (WHIP).¹⁴³

The WHIP program, funded under the Farm Bills, in a real sense brought together the various parties to help sage-grouse avoid a listing under the ESA. WHIP’s incentive provides funds to landowners and livestock permittees to improve wildlife habitat on non-federal lands.¹⁴⁴ The Awapa Plateau supports one of Utah’s largest sage-grouse populations on a mix of public and private land.¹⁴⁵ While 90 percent of the land is publically owned, local communities still depend upon the entire area for sheep and cattle grazing.¹⁴⁶ In this case the parties conceded that

¹⁴¹ See *supra* Part II.B.1.

¹⁴² Randall L. Gray, & Billy M. Teels, *Contributions of the Farm Bill on Fish and Wildlife*, 34 WILDLIFE SOCIETY BULLETIN 903, 905, (2006), available at <http://www.jstor.org/stable/4134297>.

¹⁴³ Environmental Defense Fund, *Utah Group Uses WHIP to Restore Sagebrush Rangelands*, (Nov. 17, 2004), <http://www.edf.org/article.cfm?contentID=4496> (last visited Jan. 26, 2010).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

poor sagebrush rangeland health, “declining sage-grouse populations, and future livestock production were inextricably linked”¹⁴⁷ The rangeland’s poor health was due to a combination of fire suppression practices and improper grazing, which led to mostly sagebrush and few other grasses or forbs.¹⁴⁸ WHIP funds were used by the parties in the Awapa Plateau to conduct rangeland restoration treatments on the state-owned lands.¹⁴⁹ Treatments in the study have produced promising results, with improved rangeland health for both wildlife and livestock.¹⁵⁰ The studies have shown that different types of treatments¹⁵¹ to sagebrush habitat “may be a viable conservation practice . . . for enhancing sage-grouse brood-rearing habitat.”¹⁵² Another example of Farm Bill programs in action is the restoration of habitat for Gunnison sage-grouse in Utah under the CRP program.¹⁵³ A study suggested that the continuation of land enrolled in the CRP program would be “a means of stabilizing Gunnison sage-grouse habitat”¹⁵⁴

While the Farm Bill’s programs are helping the sage-grouse, it also protects other species. In California, endangered amphibians have gained new habitat due to livestock ponds that were restored using Environmental Quality Incentives Program (EQIP)¹⁵⁵ funds.¹⁵⁶ In another example from Montana, EQIP funds have been used to help in the conservation of pallid sturgeon and help local landowners.¹⁵⁷ In an effort to recreate natural conditions for the pallid sturgeon, more water is released from the Fort Peck Reservoir to reach natural Missouri river flooding levels, but this release also floods hundreds of farms that are down river.¹⁵⁸ EQIP funds were used to help farmers move equipment, prevent water

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Environmental Defense Fund, *Utah Group Uses WHIP to restore Sagebrush Rangelands*, (Nov. 17, 2004), <http://www.edf.org/article.cfm?contentID=4496> (last visited Jan. 29, 2010).

¹⁵⁰ *Id.*

¹⁵¹ Certain chemical and mechanical treatments are designed to reduce sagebrush canopy, to increase the growth of grasses and forbs, which are essential to the survival of young sage-grouse. David K. Dahlgren, Renee Chi, & Terry A. Messmer, *Greater sage-grouse Response to Sagebrush Management in Utah*, 34 WILDLIFE SOCIETY BULLETIN 975, 975, (2006), available at <http://sgrp.usu.edu/files/uploads/pdfs/ParkerTrtsWSB.pdf>.

¹⁵² *Id.* at 983.

¹⁵³ Sarah G. Lupis, Terry A. Messmer, & Todd Black, *Gunnison Sage-Grouse Use of Conservation Reserve Program Fields in Utah and Response to Emergency Grazing: A Preliminary Evaluation*, 34 WILDLIFE SOCIETY BULLETIN 957, 961, (2006), available at <http://www.bioone.org/doi/pdf/10.2193/0091-7648%282006%2934%5B957%3AGSUOCR%5D2.0.CO%3B2>.

¹⁵⁴ *Id.*

¹⁵⁵ EQIP is a “voluntary program that provides financial and technical assistance to farmers and ranchers who face threats to soil, water, air, and related natural resources on their land.” U.S.D.A., released May 2008, http://www.nrcs.usda.gov/farmbill/pdfs/EQIP_At_A_Glance_062608final.pdf (last visited March 24, 2010).

¹⁵⁶ Micahel J. Bean, *A Happy Marriage: Farm Bill Conservation Programs and Endangered Species Safe Harbor Agreements*, in CENTER FOR CONSERVATION INCENTIVES, Feb. 22, 2007, <http://www.edf.org/article.cfm?contentID=5922> (last visited Jan. 29, 2010).

¹⁵⁷ Suzy Friedman, *Montana Landowners Use EQIP to Advance Conservation of Rare Wildlife*, in CENTER FOR CONSERVATION INCENTIVES, Feb. 18, 2004, <http://www.edf.org/article.cfm?contentID=4523> (last visited Jan. 29, 2010).

¹⁵⁸ *Id.*

contamination, and create wildlife habitat at the same time.¹⁵⁹ This is an example of natural restoration which could easily hurt the economic interests of many, but a Farm Bill program was used to minimize the effects of possible economic losses. These examples show that even endangered species such as the pallid sturgeon can be protected, along with their habitat, while taking economic interests into consideration.

While sage-grouse may be a concern for ranchers and farmers, they are also a concern for the industries trying to develop natural resources, such as natural gas and wind power. While Farm Bill programs have been beneficial to agriculture, can this benefit be extended to the energy industry? The answer is not easy. A problem to consider is that the 2008 Farm Bill's Title IX for energy is designed to benefit energy programs focused on biofuels, such as ethanol; but the program does not extend to natural resource development.¹⁶⁰ Title VI of the 2008 Farm Bill creates a policy, where such USDA programs should be extended to help industries that produce energy from natural resources to benefit rural economies.¹⁶¹ With so many programs geared to help rural areas with economic development, it fits that the conservational, energy, and rural developmental aspects of the Farm Bill should intersect to protect the interests of both sage-grouse and energy development. Also Farm Bill programs, such as WHIP, do not require that land have a history of agricultural production.¹⁶²

While Farm Bill programs applied to some natural resource extraction could help save species, this would be difficult under current Farm Bill programs. As mentioned above, Farm Bill programs pay for energy development for biofuels, such as ethanol, but not for natural resources such as natural gas. The reason to extend these Farm Bill programs to natural resource extraction in the sage-grouse controversy is that these are the industries, in addition to agricultural industries, that would be most affected by a listing of the sage-grouse under the ESA.¹⁶³ This should be done by using programs already in the Farm Bills, and applying those programs to limited situations, such as in the sage-grouse controversy, when a species in decline would be most benefited. For example, if a natural gas deposit were discovered next to a sage-grouse breeding lek, a Farm Bill program could help alleviate the cost of added expense for habitat preservation. This added expense would be caused by the more difficult process of extracting the natural gas from further away from the deposit, instead of simply extracting the natural gas

¹⁵⁹ *Id.*

¹⁶⁰ See United States Department of Agriculture, *2008 Farm Bill Side-By-Side, Title IX: Energy*, <http://www.ers.usda.gov/FarmBill/2008/Titles/TitleIXEnergy.htm> (last visited Jan. 29, 2010).

¹⁶¹ See United States Department of Agriculture, *2008 Farm Bill Side-By-Side, Title VI: Rural Development*, <http://www.ers.usda.gov/FarmBill/2008/Titles/TitleVIRural.htm#general> (last visited Jan. 29, 2010).

¹⁶² Randall L. Gray, & Billy M Teels, *Wildlife and Fish Conservation Through the Farm Bill*, 34 WILDLIFE SOCIETY BULLETIN, 906, 908 (2008), available at <http://www.bioone.org/doi/pdf/10.2193/0091-7648%282006%2934%5B906%3AWAFCTT%5D2.0.CO%3B2>.

¹⁶³ See generally Streater, *supra* note 4 (explaining a listing under the ESA would hurt both fossil fuel and green energy production in Wyoming).

from the easiest location, located on the sage-grouse habitat. Adding a narrowly-defined policy to the Farm Bill should be done in the next Farm Bill to help industries in site specific situations.¹⁶⁴ This may seem like a pie-in-the-sky idea, but there are examples of how Farm Bill programs could perform such a role.

An example of how a solution under the Farm Bill could occur comes from Wyoming, where 54 percent of the sage-grouse population resides. The state has taken some drastic steps to protect its sage-grouse.¹⁶⁵ In addition to large populations of sage-grouse, Wyoming also has huge reserves of natural gas, as well as wind for renewable energy purposes.¹⁶⁶ In an effort to avoid an ESA listing, Governor Dave Freudenthal has steered energy development away from the core breeding areas of the sage-grouse.¹⁶⁷ Moving natural gas extraction and putting wind turbines in areas that will affect sage-grouse less are more viable solutions. Here, the Farm Bill programs could help preserve sage-grouse habitat and help those affected by the extra cost associated with natural gas and natural resource extraction, which must be relocated to avoid disturbing core sage-grouse habitat. This example from Wyoming would be similar to the EQIP assistance given to those whose land was flooded to increase populations of the pallid sturgeon.

This approach would require that conservationists and economic interests work together to come to a common consensus on how to protect the environment. Farm Bill programs are not without problems because these programs need better data from field offices to identify and adequately protect lands most beneficial to the target species.¹⁶⁸ Conservationists could provide this insight and expertise. Instead of wasting resources on litigation and on challenging FWS decisions, conservationists could help the field offices make funding decisions that follow a better understanding of what is needed to protect a specific species.

B. Fear of the ESA

The ESA has achieved change and protects endangered species and it could be argued it also protects unlisted species in decline. Despite the failures surrounding the proposed listing of the sage-grouse under the ESA, the proposal has produced action, not by the actual implementation of an ESA-listing but rather out of fear the ESA application engenders. States like Wyoming have a stake in protecting the development of its interests, both environmental and economic;

¹⁶⁴ The current Farm Bill programs remain in effect through the 2012 crop year. USDA, *Newsroom, Program Fact Sheets*, http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20081219_insup_en_dcp.html (last visited Feb. 5, 2010).

¹⁶⁵ Streater, *supra* note 4.

¹⁶⁶ Streater, *supra* note 60.

¹⁶⁷ Streater, *supra* note 4.

¹⁶⁸ See L. Wes Burger Jr., *Creating Wildlife Habitat Through Federal Farm Programs: An Objective-Driven Approach*, 34 WILDLIFE SOCIETY BULLETIN 994, 998 (2006), available at <http://www.bioone.org/doi/pdf/10.2193/0091-7648%282006%2934%5B994%3ACWHTFF%5D2.0.CO%3B2>.

however, these interests are not balanced. Quite often the result of local government and state regulation of conservation has prompted a race to the bottom, or in other words a race to reach the least amount of protection that is required by federal law. Often local and state governments will gladly sacrifice their environmental interests in favor of their economic interests. After all, it takes money to preserve the environment and economic interests bring money into state coffers by increasing the tax base. It is in the best economic interest of local communities to side with interests that will produce, rather than consume scarce resources.

Some might argue that the only way to stop this race to the bottom and adequately protect species in decline is to have a very persuasive law, such as the ESA, hanging over the heads of local governments to force them to give more weight to environmental interests than they would on their own. For example, Wyoming has created core-breeding areas that are being protected in an effort to avoid the listing of the sage-grouse under the ESA.¹⁶⁹ These Wyoming regulations were not created in an effort to protect biodiversity, but rather to avoid the odious burden that ESA oversight would require throughout the habitat of the sage-grouse. Such an example would seem to prove the argument that the ESA not only protects listed animals, but also animals that are not even listed. But such a conclusion ignores the problem that this tenuous situation creates.

Fear of the ESA can motivate behavior that is beneficial to wildlife, but it can also hamper good wildlife management. Take for example the already mentioned red-cockaded woodpecker, which is listed as an endangered species under the ESA. Despite some success in preserving red-cockaded woodpecker habitat on public land, efforts aimed at habitat preservation have “languished on private lands . . . elsewhere in the bird’s range.”¹⁷⁰ Privately-owned habitat was not managed to the benefit of the woodpecker because the ESA offered the private landowner little incentive to preserve or restore habitat; on the contrary, it creates a reversed incentives *not* to preserve habitat for endangered species. If such habitat exists on private land, then it could be subject to ESA restrictions, which could restrict such activities as cutting timber.¹⁷¹ In a preemptive move, some private landowners actually cut down their own trees before they could be considered old growth in an effort to avoid receiving a designation as woodpecker habitat subject to ESA restrictions.¹⁷² The example of the red-cockaded woodpecker shows that simple fear of the ESA is not necessarily beneficial but often harmful, inhibiting opportunities for wildlife to recover. Once again the ESA falls short of actually benefiting listed species to the fullest extent. In some ways the ESA perpetuates and even exacerbates problems facing endangered species; the ESA alone cannot promote what is most beneficial to the species, which is habitat restoration.

¹⁶⁹ See Streater, *supra* note 4.

¹⁷⁰ Margaret McMillan, *Safe Harbor’s First Decade: Helping Landowners Help Endangered Species*, CENTER FOR CONSERVATION INCENTIVES, Jul. 26, 2005, <http://www.edf.org/article.cfm?contentID=4666> (last visited Jan. 29, 2010).

¹⁷¹ *Id.*

¹⁷² *Id.*

The answer to this problem does not come from the ESA. Rather, it comes from a somewhat new legal solution called safe harbor agreements. These agreements allow private landowners to create or restore habitat for endangered animals in exchange for a guarantee that no additional regulations will apply to the restored or enhanced environment.¹⁷³ These agreements work because they are made directly with the landowner and the federal or state agency that is charged with the preservation of the endangered species. There are two types of safe harbor agreements:

One is an individual agreement between a landowner and the federal agency responsible for conserving the species (the agency is usually the U.S. Fish and Wildlife Service, but for some fish species is the National Marine Fisheries Service). The landowner agrees to do something beneficial for endangered species in exchange for a guarantee of being subject to no additional regulatory restrictions related to the newly restored or enhanced habitat. The other is an “umbrella” agreement. In this type of agreement, an intermediary (which can be a state fish and game agency, state or federal agricultural agency, or even a private conservation organization) develops a safe harbor program for a specific area, such as a county or group of counties. Once the Fish and Wildlife Service or the Marine Fisheries Service approves that program, the intermediary works with individual landowners to develop written agreements that are covered by the intermediary’s umbrella agreement. The result for the landowners is exactly the same—they can now restore habitats for endangered species without fear of new regulations—but much of the red tape is handled by the intermediary that holds the permit.¹⁷⁴

Both types of agreements—the individual and the “umbrella”—avoid the problems that the fear of the ESA engenders, and allow for mutually beneficial solutions without forcing unwelcome regulations on private landowners and their economic interests.

C. Creating a Safe Harbor for Unlisted Animals like the Sage-Grouse

Safe Harbor agreements cannot be used to protect habitat of animals such as the sage-grouse until they are listed. But similar agreements, called Candidate Conservation Agreements with Assurances (CCAA), apply to unlisted species. CCAA’s operate similar to safe harbor agreements, in that they are voluntary agreements between the landowner and an organization such as the FWS. The agreements allow voluntary habitat improvements to occur to help a certain species

¹⁷³ ENVIRONMENTAL DEFENSE FUND, SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, 4 (1999), http://www.edf.org/documents/8420_SafeHarborHandbook.pdf (last visited Jan. 29, 2010).

¹⁷⁴ *Id.*

and, if at a later time the species is listed under the ESA the habitat improvements will not result in more restrictions on the landowner.¹⁷⁵ In the case of the sage-grouse, CCAA's would allow private landowners to use these assurances to utilize Farm Bill programs, voluntarily improve sage-grouse habitat and possibly avoid the necessity of listing the sage-grouse under the ESA. This approach eliminates problems associated with the ESA and in many respects improves species conservation. A one-sided-approach to the ESA may not protect species in the same way that a cooperative approach may, as seen in the example of using the Farm Bill programs and CCAA's. A CCAA approach would allow private land owners to preserve habitat that they might otherwise destroy for fear of future ESA regulation.

IV. CONCLUSION

Solutions exist to correct the problems the ESA creates while still retaining the ESA's benefits. This can be achieved by implementing cooperation between private economic interests and environmental interests. The purpose of this Note was to show that the focus of many conservationists is too centered on the regulations and protections of the ESA. The ESA has not adequately protected species; in many instances the ESA actually hampers the restoration of endangered species and other non-listed species. If the focus were changed from using the ESA as a first resort, there would likely be more success in preserving species in decline and in increasing their populations. Instead of looking only to conservation interests, to the exclusion of economic and other interests, conservation should be done with the help of economic interests. The Farm Bill programs use this model, by incentivizing preservation efforts for those who may otherwise oppose preservation because they fear potential restrictions.

In addition to implementing Safe Harbor agreements and CCAA's, species such as the sage-grouse, may receive more protection than under the ESA, without the need to be listed under the ESA. Conservationists, not using the club-like ESA, would also create incentives for economic interests to not use their political power. Instead of spending time, energy, and money on litigation, these resources could be applied to protect and save many different species. The result would be more protection for endangered, threatened, and unlisted species and less political opposition.

¹⁷⁵ Michael Bean, *New Conservation Tool Guidance to Help Western Landowners*, CENTER FOR CONSERVATION INCENTIVES, Jan. 14, 2009, <http://www.edf.org/article.cfm?contentID=9098> (last visited Jan. 29, 2010).