

# **ENDANGERED SPECIES IN THE OIL PATCH**

## **Presenter**

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### I. INTRODUCTION

Frustrated environmentalist, who have been unsuccessful in proving contamination related to hydraulic fracturing operations, have begun to utilize the Endangered Species Act (“ESA”) to further their anti-fossil fuel agenda. The ESA has been dubbed “the pitbull of federal environmental statutes”<sup>1</sup> with an avowed purpose to conserve threatened and endangered species and their associated habitats which they depend on for survival.<sup>2</sup> However, the ESA provides security to the threatened and endangered species irrespective of monetary cost.<sup>3</sup> As such,

<sup>1</sup> Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 605 (1991) (quoting an address by Donald Barry, Majority Counsel, House of Representatives Comm. on Merchant Marine and Fisheries, ABA Section on Natural Resources, Energy and Environmental Law Workshop on Endangered Species (Apr. 6, 1990)).

<sup>2</sup> 16 U.S.C. § 1531(b) (2012).

<sup>3</sup> See George C. Coggins, *An Ivory Tower Perspective on Endangered Species Law*, 8 NAT. RESOURCES & ENV’T 3, 3 (1993).

environmental groups have recently sought the listing of various species (which coincidentally reside in the nations' most prolific natural resources areas) as a weapon to stop oil and gas development. Due to the seriousness of these actions, this article will provide an overview of the ESA with a discussion of recent developments so that a practitioner will have a working knowledge of the pending matters as well as their potential impact on future development.

## II. BACKGROUND

Effectively negotiating the interplay between the ESA and the planning process for oil and gas operations requires an understanding of: (a) congressional purpose and approach, and (b) the underlying statutory mechanics for enforcement.

### A. ESA Purpose and Approach

#### 1. Delegation to the FWS

When legislators codified the ESA in 1973, their aim was to actively conserve biological diversity.<sup>4</sup> The ESA begins with findings and a declaration of purpose.<sup>5</sup> Congress found, *inter alia*, that biodiversity and species protection represent "esthetic, ecological, educational, historical, recreational, and scientific value" to the people of the United States.<sup>6</sup> Specifically, Congress sought to "provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take [other] such steps as may be appropriate."<sup>7</sup> Realizing that an outright cure for all harmful acts was not realistic, Congress pushed for preventative action to take place "sooner rather than later"<sup>8</sup> by delegating the implementation and enforcement of the ESA to the Department of the Interior and Department of Commerce<sup>9</sup> to identify and list endangered<sup>10</sup> and threatened<sup>11</sup> species.<sup>12</sup> The Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS"), designates the status of marine fish and certain marine mammals, while the Secretary of the Interior, acting through the Fish and Wildlife Service ("FWS"), is responsible for all other wildlife.<sup>13</sup>

#### 2. Sections 9 and 11 of the ESA

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<sup>4</sup> 16 U.S.C. §§ 1531-44.

<sup>5</sup> *Id.* § 1531.

<sup>6</sup> *Id.* § 1531(a)(3).

<sup>7</sup> *Id.* § 1531(b).

<sup>8</sup> *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997).

<sup>9</sup> § 1532(15).

<sup>10</sup> "Endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man." *Id.* § 1532(6).

<sup>11</sup> "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

<sup>12</sup> *Id.* § 1532(16).

<sup>13</sup> *Id.* § 1532(15). Once a species is listed, all federal agencies must consult with the FWS or NMFS if the agency's proposed action is likely to harm the species or adversely modify its critical habitat. *Id.* § 1536(a)(2).

Given this backdrop, under Section 9 of the ESA, a person—whether acting as a state or private actor—may not “take” an endangered species on private or public land.<sup>14</sup> To “take” under the ESA is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>15</sup> To harass, includes “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.”<sup>16</sup> To “harm” includes “an act which actually kills or injures wildlife,” as well as a “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>17</sup> A taking under the ESA also includes any action resulting in potentially deleterious effects to the habitat of a listed species.<sup>18</sup> Moreover, any acts that “maliciously damage or destroy” an endangered plant species found on federal land or in violation of state law constitutes a taking.<sup>19</sup>

Should a person violate section 9, section 11 provides for both civil and criminal penalties.<sup>20</sup> Civil penalties may be as high as \$25,000 per violation<sup>21</sup> and criminal fines can reach \$50,000 with up to one year in prison per violation.<sup>22</sup>

### 3. Seminal case: *Tennessee Valley Authority. v. Hill*

While the statutory language certainly has teeth and reflects lofty protection goals, the true gravity of this legislation came to the forefront in 1978 when the ESA received an auspicious red carpet debut riding on a litigation story that bore striking similarities to the iconic clash between David and Goliath.<sup>23</sup> In the seminal endangered species case, *Tennessee Valley Authority* pitted the survival of the diminutive snail darter<sup>24</sup> against the colossal economic interests supporting the nearly completed Tellico Dam on the Little Tennessee River.<sup>25</sup> Writing for the majority, Justice Burger dispelled any hesitation about the might of the ESA by declaring: “Congress intended endangered species to be afforded the highest of priorities.”<sup>26</sup> Indeed, with the stroke of a pen, the Supreme Court upheld the protection of the snail darter in the face of a massive dam project that was partially funded by Congress itself, whereby assuring the people of

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<sup>14</sup> The prohibitions of section 9 reach beyond actions of the federal government to encapsulate the actions of all persons within the jurisdiction of the United States. *Id.* § 1538(a)(1).

<sup>15</sup> *Id.* § 1532(19).

<sup>16</sup> 50 C.F.R. § 17.3 (2012).

<sup>17</sup> *Id.*

<sup>18</sup> *See id.* (defining “harm” as “an act [by any agency or private person] which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”).

<sup>19</sup> 16 U.S.C. § 1538(a)(2)(B) (2012).

<sup>20</sup> *See id.* § 1540.

<sup>21</sup> *Id.* § 1540(a)(1).

<sup>22</sup> *Id.* § 1540(b)(1).

<sup>23</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-88 (1978).

<sup>24</sup> The snail darter is a three-inch long fish of the perch species with no commercial value. *Id.* at 158.

<sup>25</sup> The Tellico Dam was constructed by the Tennessee Valley Authority for electric power generation, flood control, shoreline development, and recreational purposes. *Id.* at 157. At the time of the Court’s decision, the dam was “virtually completed and . . . essentially ready for operation.” *Id.* at 157-58.

<sup>26</sup> *Id.* at 174.

the United States that the federal government intended and planned to enforce the ESA.<sup>27</sup> Reading between the lines, *Tennessee Valley Authority* demonstrates that the ESA was not meant to be a hollow law collecting dust with scant enforcement. Despite subsequent controversy over this decision and numerous amendments to the ESA, the fundamental tenants for species and habitat protection remain intact.<sup>28</sup>

## B. Mechanics of the ESA

Purely a creature of statute without common law origins, the ESA presents terms that may be unfamiliar to those not actively involved in environmental law. As a federal statute with intersecting components, one can only contend with the ESA and its ramifications by cross-referencing the different sections and understanding how each apply in the grand statutory scheme.

### 1. Section 3 of the ESA

Section 3 of the ESA launches key definitions.<sup>29</sup> Among these, an “endangered species” includes “any species which is in danger of extinction throughout all or a significant portion of its range.”<sup>30</sup> 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.”<sup>31</sup> A “person” is broadly defined to include any person or entity subject to the jurisdiction of the United States.<sup>32</sup>

### 2. Section 4 of the ESA

Section 4 provides a bifurcated system for protection. First, the species must go through a listing process based on an evaluation of five categories of “natural and manmade factors affecting its continued existence.”<sup>33</sup> Second, a critical habitat identified.<sup>34</sup> These two determinations are not made concurrently; the Secretary of the Interior or Commerce has a full year (with the discretion to add another year if deemed prudent) after the listing decision is made to determine the location of the critical habitat.<sup>35</sup>

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<sup>27</sup> By a 6-3 vote. *Id.*

<sup>28</sup> See James H. Bolin, *Of Razorbacks and Reservoirs: The Endangered Species Act's Protection of Endangered Colorado River Basin Fish*, 11 PACE ENVTL. L. REV. 35, 43 (1993). After *Tennessee Valley Authority*, the ESA was amended to allow the approval of exemptions from the Act's requirements by a Cabinet-level committee, facetiously termed the “God Squad.” *Id.* As of 1992, the committee had voted on only three cases after the Supreme Court's decision, one of which was the Tellico Dam project. See Karl Gleaves & Katherine Wellman, *Economics and the Endangered Species Act*, 13 PUB. LAND L. REV. 150, 157 (1992). The completion of the Tellico Dam was ultimately authorized by legislation. *Id.*

<sup>29</sup> 16 U.S.C. § 1532 (2012).

<sup>30</sup> *Id.* § 1532(6).

<sup>31</sup> *Id.* § 1532(20).

<sup>32</sup> *Id.* § 1532(13).

<sup>33</sup> *Id.* § 1533(a)(1), (a)(1)(E).

<sup>34</sup> *Id.* § 1533(a)(3).

<sup>35</sup> *Id.* § 1533(b)(6)(C). For an interesting discussion of what a court should do if the Secretary fails to designate critical habitat within the statutorily-required two years, check out: *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1268-71 (11th Cir. 2007).

a. Listing Process

As a threshold for protection, to list a species as endangered or threatened, the FWS or NMFS (collectively, “the Services”) must weigh:

the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting its continued existence.<sup>36</sup>

As listing decisions should be made “sooner rather than later,”<sup>37</sup> such actions turn “solely on the basis of the best scientific and commercial data available.”<sup>38</sup> These decisions do not require absolute scientific certainty.<sup>39</sup> A listing decision is also made without consideration for any second-order economic effects that may result.<sup>40</sup>

Once initiated, the listing process lays out a very strict timeline.<sup>41</sup> The agency must make an initial finding within ninety days, present a proposed rule within twelve months, and adopt a final rule within twelve months after the proposed rule.<sup>42</sup> In practical application, notwithstanding these rigid timelines, most petitions are processed only after litigation.<sup>43</sup> A decision not to list a species is subject to judicial review.<sup>44</sup> After receiving the petition, the Secretary of the Interior or Commerce may either find that: (1) the petitioned action is not warranted; (2) the action is warranted and agency must issue a proposed listing rule; or (3) the action is warranted, but precluded by higher priority listing activities.<sup>45</sup> In accord with these options, a proposed species is a candidate species that was found to warrant listing as either threatened or endangered and was officially proposed in a Federal Register notice after the completion of a status review and consideration of other protective conservation measures.<sup>46</sup> At the beginning of 2013, the FWS listed 102 proposed species<sup>47</sup> and the NMFS listed 72 proposed species.<sup>48</sup> In contrast to proposed species, a warranted but precluded species is one found to warrant listing as either threatened or endangered, but is precluded because of higher listing

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<sup>36</sup> § 1533(a)(1).

<sup>37</sup> *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997).

<sup>38</sup> § 1531(b)(1)(A).

<sup>39</sup> *Ctr. for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223, 1236 (W.D. Wash. 2003).

<sup>40</sup> *See* § 1533(b)(1)(A) & 50 C.F.R. § 424.11(b) (2012).

<sup>41</sup> Brendan Cummings & Kassie R. Siegel, *Ursus Maritimus: Polar Bears on Thin Ice*, 22 NAT. RESOURCES & ENV'T 3, 4 (Fall 2007).

<sup>42</sup> § 1533.

<sup>43</sup> Cummings, *supra* note 45, at 4.

<sup>44</sup> *Id.*

<sup>45</sup> § 1533(b)(3)(B).

<sup>46</sup> *Id.* § 1533(b)(3)(A).

<sup>47</sup> U.S. FISH AND WILDLIFE SERVICE, *Species Reports, Environmental Conservation Online System*, [http://ecos.fws.gov/tess\\_public/SpeciesReport.do?listingType=P](http://ecos.fws.gov/tess_public/SpeciesReport.do?listingType=P) (last visited Jan. 1, 2013).

<sup>48</sup> NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION FISHERIES SERVICE, *Candidate and Proposed Species Under the Endangered Species Act (ESA)*, <http://www.nmfs.noaa.gov/pr/species/esa/candidate.htm> (last visited Jan. 1, 2013).

priorities.<sup>49</sup> As a result, the species becomes a “candidate” for listing with its status reviewed annually in a Candidate Notice of Review (“CNOR”) published in the Federal Register.<sup>50</sup> Under a CNOR, the Services reevaluate each candidate designation,<sup>51</sup> monitor candidate species, and implement emergency listings when necessary.<sup>52</sup> Importantly, a candidate species is *not* afforded any protection under the ESA.<sup>53</sup> Due in part to the continual review process, the number of candidate species has ballooned over the years with the FWS listing 187 candidate species<sup>54</sup> and the NMFS listing 20 candidate species<sup>55</sup> at the beginning of 2013.

### b. Critical Habitat Designation

If a species is listed, the ESA *requires* the designation of critical habitat “to the maximum extent prudent and determinable.”<sup>56</sup> A critical habitat is comprised of “the specific areas within the geographical area occupied by the species at the time it is listed . . . [and] on which are found those physical or biological features essential to the conservation of the species and which may require special management consideration.”<sup>57</sup> Before designating a particular area as critical habitat, the Secretary must first consider “the economic impact, and any other relevant impact.”<sup>58</sup> Nevertheless, the D.C. Circuit Court has held that the Services are not obligated to conduct studies to obtain missing data.<sup>59</sup> Moreover, “[t]he Service[s] must utilize the best scientific . . . data available, not the best scientific data possible.”<sup>60</sup>

### 3. Section 7 of the ESA

Section 7 involves agency actions and consultations.<sup>61</sup> The purpose of consultation is to obtain an advanced expert opinion by the Services to determine whether an action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid unfavorable consequences.<sup>62</sup> The consultation requirement reflects “a conscious decision by Congress to give endangered species

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<sup>49</sup> § 1533(b)(3)(B)(iii).

<sup>50</sup> See 2007 Candidate Notice of Review, 72 Fed. Reg. at 69,034, 69,048.

<sup>51</sup> 2007 Candidate Notice of Review, 72 Fed. Reg. at 69,048.

<sup>52</sup> The duty to monitor is codified at 16 U.S.C. § 1533(b)(3)(C)(iii). The duty to make use of the emergency listing provisions is codified at 16 U.S.C. § 1533(b)(7). See also 2007 Candidate Notice of Review, 72 Fed. Reg. at 69,034.

<sup>53</sup> Sally A. Paez, Note, *Preventing the Extinction of Candidate Species: The Lesser Prairie-Chicken in New Mexico*, 49 NAT. RESOURCES J. 525, 547 (2009) (“Under the current administration of the ESA, candidates are not being added to the list of threatened or endangered species, and therefore do not receive the legal protections afforded to threatened and endangered species.”).

<sup>54</sup> U.S. FISH AND WILDLIFE SERVICE, *Species Reports, Environmental Conservation Online System*, [http://ecos.fws.gov/tess\\_public/pub/SpeciesReport.do?listingType=C&mapstatus=1](http://ecos.fws.gov/tess_public/pub/SpeciesReport.do?listingType=C&mapstatus=1) (last visited Jan. 1, 2013).

<sup>55</sup> NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION FISHERIES SERVICE, *Candidate and Proposed Species Under the Endangered Species Act (ESA)*, <http://www.nmfs.noaa.gov/pr/species/esa/candidate.htm> (last visited Jan. 1, 2013).

<sup>56</sup> 16 U.S.C. § 1533(a)(3)(A) (2012).

<sup>57</sup> *Id.* § 1532(5)(A)(i).

<sup>58</sup> *Id.* § 1533(b)(2).

<sup>59</sup> *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

<sup>60</sup> *Bldg. Indus. Ass’n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001).

<sup>61</sup> § 1536.

<sup>62</sup> *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003).



priority over the ‘primary missions’ of federal agencies.”<sup>63</sup> To this end, section 7 requires all federal agencies to “utilize their authorities in furtherance of the purposes of” the ESA.<sup>64</sup> Section 7 mandates that agencies “consult” with the Secretary of the Interior or Commerce before they undertake any action which may affect a listed species in order to ensure that the planned action is not likely to jeopardize the continued existence of that species.<sup>65</sup> The idea behind section 7 is to identify possible dangers that federal actions may pose to a listed species before those actions take place in order to avoid or mitigate adverse effects.<sup>66</sup> Although this section is explicitly directed to federal agencies, any private party or other governmental entity, such as a state, may be affected if it seeks a federal permit or its project has some federal involvement.<sup>67</sup>

a. Federal Nexus

At its core, section 7 requires a federal nexus (i.e., federal government involvement) and mandates that the Secretary work with federal agencies on “any action authorized, funded, or carried out” that may affect a listed species or its habitat to insure that the action will not “jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [its] habitat.”<sup>68</sup> If an entity requiring a permit or license from a federal agency to carry out its plans “has reason to believe that an endangered species or threatened species may be present in the area affected by the project and that implementation of such action will likely affect such species,” the agency must consult and work with the Services.<sup>69</sup> Under the latter provision, these areas may include drilling activities on federal lands, drilling on federal offshore leases, pipelines crossing wetlands that require permits from the Army Corps of Engineers, and activities affecting the waters of the United States.

b. Preliminary Determination and Outcome

The requirement to consult and the level of consultation to satisfy the ESA is necessarily a matter of degree. The acting agency which proposes the action must determine whether its action may affect the listed species or critical habitat and then present its conclusions in a biological assessment.<sup>70</sup> If the acting agency determines that its action will have no effect, consultation is not required.<sup>71</sup> If the acting agency finds that its proposed action may affect a listed species or critical habitat, it must formally or informally consult with the FWS or NMFS as

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<sup>63</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

<sup>64</sup> § 1536(a)(1).

<sup>65</sup> § 1536(a)(2).

<sup>66</sup> See Daniel J. Rohlf, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 137 (1989).

<sup>67</sup> See, e.g., *Conservation Law Found., Inc. v. Anarus*, 623 F.2d 712 (1st Cir. 1979) (holding that a private party who applied for a lease from the federal government for oil and gas exploration was subject to the ESA), *amended*, 14 Env’t Rep. Cas. (BNA) 1229 (1st Cir. 1980); *Nat’l Wildlife Fed’n v. Coleman*, 529 F.2d 359 (5th Cir.) (holding that a state highway department must comply with the ESA when constructing a thoroughfare using federal money), *cert. denied sub nom. Boteler v. Nat’l Wildlife Fed’n*, 429 U.S. 979 (1976).

<sup>68</sup> 16 U.S.C. § 1536(a)(2).

<sup>69</sup> *Id.* § 1536(a)(3).

<sup>70</sup> *Id.* § 1536(c)(1); 50 C.F.R. § 402.12 (2012).

<sup>71</sup> 50 C.F.R. § 402.14.

so-called consulting agencies.<sup>72</sup> The “may affect” standard is a “relatively low” threshold for triggering consultation.<sup>73</sup> “*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character,” triggers the requirement.<sup>74</sup> As explained, “[t]he threshold for formal consultation must be set sufficiently low to allow federal agencies to satisfy their duty to ‘insure’” that their actions do not jeopardize listed species or adversely modify critical habitat.<sup>75</sup> If the FWS or NMFS, acting as consulting agencies, determine during informal consultation that the proposed action is “not likely to adversely affect any listed species or critical habitat,” formal consultation is not required and the process ends.<sup>76</sup> Importantly, actions that have any chance of affecting listed species or critical habitat — even if it is later determined that the actions are “not likely” to do so—require at least some level of consultation.<sup>77</sup>

#### c. Formal Consultation Outcomes

If the acting agency or consulting agency determines that the proposed action is likely to adversely affect a listed species or critical habitat, the parties must engage in formal consultation.<sup>78</sup> In a formal consultation, the consulting agency issues a biological opinion stating whether the action is likely to jeopardize the species or habitat.<sup>79</sup> Generally, formal consultations must be concluded within 90 days after initiation, and a final biological opinion is due within 45 days after conclusion of consultations.<sup>80</sup> If there is a finding of “no jeopardy,” the consulting agency must issue an incidental take statement that sets particular levels for a taking of that species which will not jeopardize its existence.<sup>81</sup> If these levels are later exceeded, FWS or NMFS must reinstate consultations.<sup>82</sup> If it finds jeopardy is likely, then the acting agency may suggest reasonable and prudent alternatives to ensure that the listed species or critical habitat is not put in jeopardy.<sup>83</sup> At a minimum, the Services will prohibit activity in its current state.<sup>84</sup> Again, the requirements to engage in consultation only apply to agency actions “in which there is discretionary federal involvement or control.”<sup>85</sup>

### 4. Section 10 of the ESA

#### a. Incidental Take Permit

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<sup>72</sup> *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1122 (9th Cir. 1997).

<sup>73</sup> *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009).

<sup>74</sup> *Id.* at 1018-19 (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis in original).

<sup>75</sup> 51 Fed. Reg. at 19,949.

<sup>76</sup> 50 C.F.R. § 402.14(b)(1).

<sup>77</sup> *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

<sup>78</sup> 50 C.F.R. §§ 402.13, 402.14.

<sup>79</sup> 16 U.S.C. § 1536(b) (2012); 50 C.F.R. § 402.14.

<sup>80</sup> *Haw. Longline Ass’n v. Nat’l Marine Fisheries Serv.*, No. 01-765 (CKK/JMF), 2002 U.S. Dist. LEXIS 7263, at \*37 (D.D.C. Apr. 25, 2002) (interpreting 50 C.F.R. § 402.14(e)).

<sup>81</sup> § 1536(b)(4); 50 C.F.R. § 402.14(i).

<sup>82</sup> 50 C.F.R. § 402.16.

<sup>83</sup> § 1536(b); *see also* 50 C.F.R. § 402.14(h)(3).

<sup>84</sup> 50 CFR § 402.14(h)(3) (“If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.”).

<sup>85</sup> 50 C.F.R. § 402.03.

Section 10 authorizes the Services to grant an incidental take permit, allowing an entity to incidentally kill an endangered species or to modify its habitat in the course of business activity.<sup>86</sup> A take is incidental if it is prohibited under section 9 but “is incidental to, and not the purpose of carrying out an otherwise lawful activity.”<sup>87</sup> Incidental takings of a listed species will be allowed if the applicant prepares a Habitat Conservation Plan that effectively makes the species’ chances better than if the status quo had been left in place.<sup>88</sup>

b. Habitat Conservation Plan

At bottom, a Habitat Conservation Plan (“HCP”) minimizes and mitigates harmful effects.<sup>89</sup> Applicants must include a description of the impacts that will likely result from the taking, proposed steps to minimize such impacts, and alternatives considered by the applicant including reasons why these alternatives are not being pursued.<sup>90</sup> The HCP must contain specific information, analysis, and plans—including financial support—that specify how the applicant will “minimize and mitigate” the adverse impact on the protected species.<sup>91</sup> The regulations further require the Services to include precise measures to address any changed circumstances arising during the lifetime of the permit which may jeopardize the survival and recovery of the threatened or endangered (i.e., listed and non-listed) species covered by the plan.<sup>92</sup> *A fortiori*, permit holders may be required to adjust to changed circumstances *only* if additional mitigation measures are provided for in the HCP.<sup>93</sup>

As an end result, if an applicant can show that its HCP will improve the lot of the creature such that a few incidental takings will not matter, then the applicant may obtain a section 10 permit to relieve the prospect of section 9 liability.<sup>94</sup> The Secretaries issue permits for an incidental taking if the information provided in the plan is satisfactory and “the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.”<sup>95</sup> Moreover, the Secretaries may revoke a permit if the holder does not comply with its terms.<sup>96</sup> The issuance of a take permit may also trigger Section 7 consultation<sup>97</sup> or require a federal

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<sup>86</sup> § 1539(a)(1)(B) (1988); *see also* Donald E. Soderberg & Paul E. Larsen, TRIGGERING SECTION 7: FEDERAL LAND SALES AND “INCIDENTAL TAKE” PERMITS, 6 J. LAND USE & ENVTL. L. 169, 177-80 (1991).

<sup>87</sup> *See* 50 C.F.R. 17.22 for detailed provisions.

<sup>88</sup> *Id.* § 1539(a)(2)(A). The section sets forth the requirements in an HCP: “(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.”

<sup>89</sup> *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 544 (D. Md. 2009).

<sup>90</sup> § 1539(a)(2)(A)(i)-(iv); *see also* 50 C.F.R. § 17.22(b).

<sup>91</sup> § 1539(a)(2)(A).

<sup>92</sup> 50 C.F.R. §§ 17.22(b)(1)(iii)(B), 17.32(b)(1)(iii)(B).

<sup>93</sup> *Id.*

<sup>94</sup> § 1539(a)(2)(B).

<sup>95</sup> *Id.* § 1539(a)(2)(B)(iv).

<sup>96</sup> *Id.* § 1539(a)(2)(C).

<sup>97</sup> *Envtl. Prot. Info. Ctr. v. United States Fish & Wildlife Serv.*, No. C 04-04647 CRB, 2005 U.S. Dist. LEXIS 30843, at \*4 (N.D. Cal. Nov. 10, 2005) (“The issuance, or rather, consideration of whether to issue, a take permit also requires the Service to initiate consultation pursuant to section 7 of the ESA.”)

agency to prepare an environmental impact statement (“EIS”) pursuant to the National Environmental Policy Act (“NEPA”).<sup>98</sup>

A HCP also provides regulatory certainty to permit holders.<sup>99</sup> Under the “No Surprises Rule,” the Services assure private landowners that it will not impose additional restrictions on the use of natural resources or the implementation of mitigation measures beyond what is provided for under a properly functioning HCP.<sup>100</sup> Similarly, “no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after a permit is issued indicating that additional mitigation is needed for a given species covered by a permit.”<sup>101</sup>

### c. Candidate Conservation Agreements

As the final intersecting statutory component, the Services operate a separately budgeted Candidate Conservation Program (“CCP”) that provides some conservation benefits to candidate species.<sup>102</sup> The CCP provides technical and financial support to landowners who wish to develop voluntary conservation strategies for candidate species in order to address threats to the species while also avoiding the need to list the species as threatened or endangered.<sup>103</sup>

The Services offer two types of voluntary conservation agreements to landowners: Candidate Conservation Agreements (“CCA”) and Candidate Conservation Agreements with Assurances (“CCAA”).<sup>104</sup> CCAs are partnerships between the Services and other federal agencies designed to develop and implement strategies to conserve candidate species.<sup>105</sup> Here, the landowner agrees to take certain actions to reduce the threat to these species so that listing will not be necessary.<sup>106</sup> In return, the landowner generally receives an incidental take permit to allow a taking or habitat modification to achieve the conditions set forth in the agreement.<sup>107</sup> CCAAs are partnerships where the Services offer incentives to non-federal landowners, including states, tribes, citizens, and local governments, to enter voluntary conservation agreements.<sup>108</sup> CCAAs may include provisions in which the Services agree to not enact further

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<sup>98</sup> See 42 U.S.C. § 4332(2)(C) (mandating that federal agencies prepare an EIS for “major federal actions” “significantly affecting the quality of the human environment”); see also *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) (“NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”) (citation omitted); *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (holding that if a federal takings permit is a prerequisite for a project with an adverse impact on the environment, the relevant federal agency may be required to prepare an EIS).

<sup>99</sup> *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 545, n.2 (D. Md. 2009).

<sup>100</sup> See, e.g., 65 Fed. Reg. 35,242; 35,242-43 (June 1, 2000).

<sup>101</sup> *Spirit of the Sage Council v. Norton*, 294 F. Supp. 2d 67, 78 (D.D.C. 2003) (quoting No Surprises Rule, 63 Fed. Reg. 8859, 8863 (Feb. 23, 1998), codified at 50 C.F.R. §§ 17.22, 17.32).

<sup>102</sup> 2007 Candidate Notice of Review, 72 Fed. Reg. at 69,054.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726, 32,727 (June 17, 1999).

<sup>106</sup> 50 C.F.R. § 17.22(d) (2012).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

land use restrictions on private property in the future.<sup>109</sup> Partnerships like CCAs and CCAAs were originally contemplated by section 2 of the ESA, which encourages cooperative conservation efforts between the Services and public, private, and government entities for the purpose of removing or reducing the threats to imperiled species.<sup>110</sup>

### III. RECENT DEVELOPMENTS RELEVANT TO OIL AND GAS PRODUCTION

#### 1. Past Use of the ESA to Further Hidden Agendas

Unfortunately, utilization of the ESA to further hidden agendas of special-interest organizations is not new. As mentioned above, in the 1970s an environmental group brought a citizen suit against the Tennessee Valley Authority ostensibly to save the Tennessee snail darter, a fish species believed to be threatened by the construction of the Tellico Dam.<sup>111</sup> However, some believe that the real aim of the litigation was not to protect the fish but to stop construction of the dam. The snail darter merely provided an alternative vehicle for the anti-dam agenda.

Similarly, in March 2010, the Aransas Project filed a citizen suit under the ESA against Texas Commission on Environmental Quality officials concerning dwindling whooping crane populations.<sup>112</sup> The plaintiffs asserted that such population declines were related to a decrease of water flowing into the Gulf of Mexico from the Guadalupe River Basin.<sup>113</sup> Some believe that the lawsuit was actually a coordinated effort by affected rural landowners to halt Exelon Corp.'s plan to build a new nuclear power plant upstream.<sup>114</sup>

#### 2. Recent Texas ESA Actions

##### a. Dunes Sagebrush Lizard

On April 10, 2008, the Wild Earth Guardians filed a petition to list the Dunes Sagebrush Lizard under the ESA.<sup>115</sup> The Dunes Sagebrush Lizard is a small light brown lizard that is approximately 2.8 inches in length which is believed to inhabit in West Texas and Southeast New Mexico.<sup>116</sup> On December 14, 2010, the FWS proposed a rule to formally list the Dunes Sagebrush Lizard as an endangered species claiming, among other things, that the lizard faces immediate and significant threats due to increased oil and gas activities which allegedly deteriorated the lizard's required shinnery oak habitat.<sup>117</sup> Following the proposal there was much debate on whether the science supported the listing.

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<sup>109</sup> *Id.*

<sup>110</sup> 16 U.S.C. § 1531(a)(5) (2012).

<sup>111</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-88 (1978).

<sup>112</sup> *Aransas Project v. Shaw*, --- F.Supp.2d ----, 2013 WL 943780 at \*2 (S.D.Tex. 2013).

<sup>113</sup> *Id.* at \* 4.

<sup>114</sup> Ana Campoy, *Texans Fight Over Birds, Water Rights*, Wall Street Journal (March 13, 2010).

<sup>115</sup> *Group Pushes for Emergency Protection for Sand Dune Lizard*, Wild Earth Guardians, <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=5704&AddInterest=1059> (April 10, 2008).

<sup>116</sup> *Dunes Sagebrush Lizard*, U.S. Fish & Wildlife Service, <http://www.fws.gov/southwest/es/DSL.html> (accessed May 8, 2013).

<sup>117</sup> *Id.*

On June 13, 2012, the FWS announced that as a result of voluntary conservation agreements in place in New Mexico and Texas that provide for the long-term conservation of the dunes sagebrush lizard, it has determined that the species does not need to be listed under the ESA.<sup>118</sup> According to the FWS, the state-led voluntary conservation efforts will protect existing shinnery oak dune habitat as well as greatly reduce the impact of oil and gas development across the species' range which covers over 650,000 acres in New Mexico and Texas, totaling 88 percent of the lizard's habitat.<sup>119</sup> The measures will also minimize the anticipated impacts of other threats, such as off-road vehicle traffic, wind and solar development, and increased predation caused by development.<sup>120</sup> According to Secretary of the Interior Ken Salazar, "This [was] a great example of how states and landowners [could] take early, landscape-level action to protect wildlife habitat before a species is listed under the Endangered Species Act."<sup>121</sup>

b. Lesser Prairie-Chicken

Wild Earth Guardians were also instrumental in adding the Lesser Prairie-Chicken as an endangered species.<sup>122</sup> The Lesser Prairie-Chicken is a ground-nesting bird native to portions of Texas, Colorado, Kansas, New Mexico and Oklahoma.<sup>123</sup> In Texas, it is found primarily in the Texas Panhandle and the Permian Basin which overlaps with the habitat of the Dunes Sagebrush Lizard.<sup>124</sup> On November 30, 2012, the FWS announced that it was initiating a process to consider whether the Lesser Prairie-Chicken should be considered as a "threatened" species under the ESA.<sup>125</sup> According to the FWS, the Lesser Prairie-Chickens' native grasslands and prairies have been reduced by an estimated 84 percent which is primarily a result of habitat fragmentation due to oil and gas activities and conversion of native grassland habitat to agriculture.<sup>126</sup>

In Texas, several stakeholders have drafted a proposed conservation agreement in the hope that the FWS will approve the plan and forgo listing the bird.<sup>127</sup> The agreement describes oil and gas companies' involvement in habitat conservation efforts, and ideally will be merged

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<sup>118</sup> Landmark Conservation Agreements Keep Dunes Sagebrush Lizard off the Endangered Species List in NM, TX, U.S. Fish & Wildlife, [http://www.fws.gov/southwest/es/Documents/R2ES/NR\\_for\\_DSL\\_Final\\_Determination\\_13June2012.pdf](http://www.fws.gov/southwest/es/Documents/R2ES/NR_for_DSL_Final_Determination_13June2012.pdf) (accessed May 8, 2013).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Lesser prairie-chicken Tympanuchus pallidicinctus ESA status: candidate for listing*, Wild Earth Guardians, [http://www.wildearthguardians.org/site/PageServer?pagename=species\\_birds\\_lesser\\_prairie\\_chicken](http://www.wildearthguardians.org/site/PageServer?pagename=species_birds_lesser_prairie_chicken)

<sup>123</sup> David Porter, Commissioner of Texas Railroad Commission, *Playing Chicken in Oil-Patch Politics*, <http://www.rrc.state.tx.us/commissioners/porter/press/120612.php> (December 6, 2012).

<sup>124</sup> *Id.*

<sup>125</sup> *U.S. Fish and Wildlife Service Initiates Process to Consider Lesser Prairie-Chicken As "Threatened" Species Under the Endangered Species Act*, U.S. Fish & Wildlife Service, [http://www.fws.gov/southwest/es/Documents/R2ES/LPC\\_Proposed\\_Listing\\_NR\\_Final\\_30Nov2012.pdf](http://www.fws.gov/southwest/es/Documents/R2ES/LPC_Proposed_Listing_NR_Final_30Nov2012.pdf) (Nov. 30, 2012).

<sup>126</sup> *U.S. Fish and Wildlife Service Reopens Comment Period on Lesser Prairie-Chicken Listing Proposal*, U.S. Fish & Wildlife Service, [http://www.fws.gov/southwest/es/Documents/R2ES/LPC\\_Reopen\\_4d\\_NR\\_FINAL\\_6April2013.pdf](http://www.fws.gov/southwest/es/Documents/R2ES/LPC_Reopen_4d_NR_FINAL_6April2013.pdf) (May 6, 2013).

<sup>127</sup> David Porter, Commissioner of Texas Railroad Commission, *Playing Chicken in Oil-Patch Politics*, <http://www.rrc.state.tx.us/commissioners/porter/press/120612.php> (December 6, 2012).

with similar documents being developed in other states.<sup>128</sup> As mentioned above, a similar plan prevented the Dunes Sagebrush Lizard from being listed.

On May 6, 2013, the FWS announced that it was reopening the public comment period on its 2012 proposal to add the Lesser Prairie-Chicken as a threatened species to allow an opportunity for the public, the scientific community and other interested parties to provide input on the original listing proposal in light of a newly-released range-wide conservation plan for the species.<sup>129</sup> The reopened comment period also allows the public to review and comment on a proposed special rule that, if approved, would foster conservation of the Lesser Prairie-Chicken and give landowners across the species' range additional flexibility to manage their land, should the species require protection as a threatened species under the ESA.<sup>130</sup> Public comments will be accepted until June 20, 2013.<sup>131</sup>

c. Spot-Tailed Earless Lizard

On May 24, 2011, the FWS announced that the Spot-Tailed Earless Lizard may warrant federal protection as a threatened or endangered species. This 90-day finding follows an initial review of a petition from Wild Earth Guardians, seeking to protect the Spot-Tailed Earless Lizard under the ESA.<sup>132</sup> The lizard's habitat includes substantial portions of the Eagle Ford Shale in Texas.<sup>133</sup> The Eagle Ford Shale is one of the top oil and gas producing regions in the country.<sup>134</sup>

d. Ocelots

On October 16, 2012, Los Angeles Dodgers pitcher, Josh Beckett, filed suit against a Texas pipeline company claiming that the clearance of 40 acres of scrub on his 7000-acre hunting ranch south of San Antonio would disturb critical habitat for endangered ocelots in the area.<sup>135</sup> Mr. Beckett is represented by the same counsel that successfully represented the Aransas Project referenced above. In response, the defendants argue that the ESA claim is merely a sham to leverage additional money from them in exchange for an easement.<sup>136</sup> The nearest known population of ocelots was reportedly over 120 miles away from the ranch.<sup>137</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> U.S. Fish and Wildlife Service Reopens Comment Period, U.S. Fish & Wildlife Service, [http://www.fws.gov/southwest/es/Documents/R2ES/LPC\\_Reopen\\_4d\\_NR\\_FINAL\\_6April2013.pdf](http://www.fws.gov/southwest/es/Documents/R2ES/LPC_Reopen_4d_NR_FINAL_6April2013.pdf) (May 6, 2013).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *The Spot-Tailed Earless Lizard May Warrant Protection under the ESA*, U.S. Fish & Wildlife Service, [http://www.fws.gov/southwest/es/Documents/R2ES/SpotTailedEarlessLizard\\_NR\\_Final\\_23May11.pdf](http://www.fws.gov/southwest/es/Documents/R2ES/SpotTailedEarlessLizard_NR_Final_23May11.pdf) (May 23, 2011).

<sup>133</sup> *Id.*

<sup>134</sup> David Porter, Commissioner of Texas Railroad Commission, *Playing Chicken in Oil-Patch Politics*, <http://www.rrc.state.tx.us/commissioners/porter/press/120612.php> (December 6, 2012).

<sup>135</sup> *Beckett Ventures, Inc. and Hall of Fame Land Ventures, LP v. Eagle Ford Midstream, LP, et al.*, No. 5:12-CV-00164 (S.D. Tex., filed Oct. 16, 2012).

<sup>136</sup> Christopher Sherman, Dodgers MVP sues Eagle Ford Shale over ocelots, San Antonio Express-News, <http://www.mysanantonio.com/news/environment/article/Pipeline-work-leads-to-an-ocelot-of-legal-woe-3954378.php> (Oct. 18, 2012).

<sup>137</sup> *Id.*

### 3. Recent ESA Actions in Other Parts of the Country

Other parts of the country where oil and gas development is occurring are also encountering their own endangered species battles. For instance, on August 29, 2012, the Center for Biological Diversity, formally announced its intent to sue the Bureau of Land Management for failing to properly evaluate hydraulic fracturing's threats to endangered species on public land leased for oil and gas activities in California.<sup>138</sup> The group claimed that the arrival of hydraulic fracturing will unleash a new drilling boom that would severely damage much of the last remaining habitat for some of California's most endangered species, including California Condors and San Joaquin Kit Foxes.<sup>139</sup> However, it is unclear whether suit has actually been filed to date.

In Wisconsin, much of the remaining habitat of the endangered Karner blue butterfly overlaps with Wisconsin's sandstone deposits which are being mined to support nearby hydraulic fracturing operations.<sup>140</sup> Endangered bats are also a growing concern. For instance, Arkansas is home to three endangered bat populations: Gray, Indiana and Ozark Big-Eared Bats<sup>141</sup> and more than 99 percent of Pennsylvania's bats have died from white-nose syndrome, prompting state and federal authorities to consider listing several bat species as endangered.<sup>142</sup> Finally, North Dakota is home to the Black-footed Ferret which was recently spotted just south of the Bakken Shale.<sup>143</sup>

### IV. CONCLUSION

As mentioned above, the ESA provides security to threatened and endangered species irrespective of its monetary cost.<sup>144</sup> For instance, listing the Dunes Sagebrush Lizard would have jeopardized thousands of jobs and a tremendous amount of production from the Permian Basin, which produces more than one million barrels of oil a day, accounting for 70% of Texas' total production and 20% of the nation's oil production.<sup>145</sup>

On the other hand, there is money to be made by environmental groups in this arena. From 2007 to 2011, the FWS gave \$680,492 in tax money to the Wild Earth Guardians.<sup>146</sup> During that same time, the Wild Earth Guardians sued U.S. Fish and Wildlife 76 times, including

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<sup>138</sup> Lawsuit Launched to Protect Endangered Species From Fracking in California, Center for Biological Diversity, [http://www.biologicaldiversity.org/news/press\\_releases/2012/fracking-08-29-2012.html](http://www.biologicaldiversity.org/news/press_releases/2012/fracking-08-29-2012.html) (Aug. 29, 2012).

<sup>139</sup> *Id.*

<sup>140</sup> Kate Golden, Are frac sand miners failing to check for rare butterfly? Wisconsin Watch, <http://www.wisconsinwatch.org/category/environment/> (April 13, 2013).

<sup>141</sup> U.S. Fish & Wildlife Service, <http://www.fws.gov/arkansas-es/docs/ESDay/Photographs%20of%20Endangered%20Species%20in%20Arkansas.pdf>

<sup>142</sup> Rick Wills, *White-nose syndrome in Pa. bats could lead to endangered status, affect jobs*, Trib Live, <http://triblive.com/state/pennsylvania/3089341-74/bats-state-bat#axzz2SjwWHI8n> (Dec. 15, 2012).

<sup>143</sup> Black-Footed Ferret, U.S. Fish & Wildlife Service, <http://www.fws.gov/southdakotafieldoffice/b-ferret.htm>

<sup>144</sup> See George C. Coggins, *An Ivory Tower Perspective on Endangered Species Law*, 8 NAT. RESOURCES & ENV'T 3, 3 (1993).

<sup>145</sup> David Porter, Commissioner of the Texas Railroad Commission, *Playing Chicken in Oil-Patch Politics*, December 6, 2012.

<sup>146</sup> Jerry Patterson, Federal reptile dysfunction defeated, [http://www.glo.texas.gov/glo\\_news/press\\_releases/2012/Dunes-sagebrush-lizard.pdf](http://www.glo.texas.gov/glo_news/press_releases/2012/Dunes-sagebrush-lizard.pdf) (June 13, 2012).



the lawsuit that triggered the proposal to list the Dunes Sagebrush Lizard which ultimately failed.<sup>147</sup> In addition, from 2004 to 2010, FWS paid attorney fees of \$1.5 million in 26 cases and the U.S. Treasury Department paid \$14.2 million from 2003 to 2010 to a range of plaintiffs in related environmental cases.<sup>148</sup>

In June 2012, Texas Land Commissioner Jerry Patterson testified before the House Natural Resources Committee and described the practice of federal authorities adding species to the endangered list based not on sound science, but rather in response to lawsuits filed by federally funded, radical environmental groups.<sup>149</sup> At the hearing, Mr. Patterson said that: “The U.S. Fish and Wildlife Service is faced with a no-win situation ... They are overwhelmed by environmental groups with hundreds of candidate listings that the agency cannot possibly respond to in the statutory timeline specified. They then find themselves in violation of that statute and subsequently sued by these same groups that filed to protect the species.”<sup>150</sup>

In February 2013, Texas U.S. Senator John Cornyn introduced the Endangered Species Act Settlement Reform Act, which will give impacted local parties a say in the settlement of litigation between special interest groups and FWS.<sup>151</sup> On March 26, 2013, Texas Congressmen Bill Flores, John Carter, K. Michael Conaway and Mac Thornberry along with New Mexico Congressman Steve Pearce introduced a companion bill in the U.S. House of Representatives.<sup>152</sup> Both bills are making their way through Congress.

In the meanwhile, the same environmental groups have now turned their attention to the Lesser Prairie-Chicken whose habitat overlaps that of the Dunes Sagebrush Lizards as well as the Spot-Tailed Earless Lizard that resides in the Eagle Ford Shale.<sup>153</sup> Such listings could make drilling all but impossible in areas of Texas, Colorado, Kansas, New Mexico and Oklahoma thereby preventing our efforts to achieve energy independence. Although the industry has achieved some recent success, pursuant to a settlement agreement, the FWS has committed to, among other things, review 250 candidate species by the end of year 2016.<sup>154</sup> As a result, unless there is congressional intervention, it appears that the ESA will continue to come into play for years to come.

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<sup>147</sup> *Id.*

<sup>148</sup> Asher Price, *Who pays environmental lawyers, and do they get rich?* Austin American Statesmen (July 10, 2012).

<sup>149</sup> Patterson calls for changes to Endangered Species Act, Guidry News, <http://www.guidrynews.com/story.aspx?id=1000044098> (June 19, 2012).

<sup>150</sup> *Id.*

<sup>151</sup> Cornyn Introduces Bill to Prevent Abuse of Endangered Species Act Litigation, [http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord\\_id=63eab662-4ab2-4611-86a7-9997f8ce4221](http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=63eab662-4ab2-4611-86a7-9997f8ce4221) (Feb. 27, 2013).

<sup>152</sup> Congressional Members Introduce Endangered Species Act Settlement Reform, <http://flores.house.gov/press-releases/congressional-members-introduce-endangered-species-act-settlement-reform/> (March 26, 2013).

<sup>153</sup> *Id.*

<sup>154</sup> Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Guardian’s Claims at 2, No. 10-377 (D.D.C. May 10, 2011).