Conservation Agreements and ESA Listing: the Utah Listing Preclusion Model

Introduction

Endangered Species Act ("ESA")[1] listing can substantially affect state interests.[2] When a species is listed, the federal government assumes primary authority for species management and severe prohibitions come into play.[3] Because listing results in a loss of state authority and prohibitions that can curtail state actions, states may seek to preclude listing through conservation agreements ("agreements") with the U.S. Fish and Wildlife Service ("FWS").[4] Individually tailored agreements are generally less burdensome to states than one-size-fits-all ESA prohibitions.

In the past five years, Utah species accounted for twenty-five percent of those where listing was precluded by an agreement.[5] During this time period, no state has precluded listing for more

[1] 16 U.S.C. §§ 1531–44 (2012).
[2] Historically, the states had almost unlimited power to manage and regulate wildlife. *See* Geer v. State of Conn., 161 U.S. 519, 534 (1896) ("The right to preserve game flows from the undoubted existence in the state of a police power . . . ."); Lacoste v. Dept. of Conservation of State of Louisiana, 263 U.S. 545, 549 (1924) ("The wild animals within [a State's] borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people.").
[3] § 1538.
[4] For example, Utah was motivated to preclude Coral Pink Sand Dunes tiger beetle listing as the listing would cause "immense" economic harm and the closure of Coral Pink Sand Dunes State Park, "[shutting] out the more than 50,000 campers, wildlife watchers and off-roaders who visit the [park] each year." Amy Joi O'Donoghue, *Utah Lawmakers Want to Tangle with Beetle*, DESERET NEWS, Oct. 17, 2012, *available at* http://www.deseretnews.com/article/print/865564673/Utah-lawmakers-want-to-tangle-with-beetle.html.
[5] Conservation agreements have precluded the need to list at least forty species. *See* U.S. Fish and Wildlife Service, *Non-Listed Species Precluded from Listing Due to Conservation,* http://ecos.fws.gov/tess_public/reports/non-listed-species-precluded-from-listing-due-to-conservation-report (last visited Apr. 10, 2015). The FWS table notes thirty-seven species. The table does not include Coral Pink Sand Dunes tiger beetle, Graham's beardtongue, and White River beardtongue and potentially others. *Id*. The FWS table of species almost certainly underestimates the number of species for which a conservation agreement has precluded listing. Between 2010 and 2014, sixteen species were precluded from listing by conservation agreements. *Id*. Of the sixteen, four are species that occur either entirely or predominantly within Utah. The four Utah species are Coral Pink Sand Dunes tiger beetle, least chub, Graham's beardtongue, and White River beardtongue.

species than Utah.[6] Recent listing preclusions in Utah provide a valuable model for other states to consider when faced with a potential ESA listing.

This essay contains three substantive parts. Part I provides and overview of the ESA listing requirements and FWS regulations. Part II examines listing preclusion in Utah. Part III synthesizes the Utah examples and provides three key elements necessary for a successful listing preclusion.

Part I:

Listing Under the Endangered Species Act

The ESA's purpose is to conserve listed species and their habitats.[7] To accomplish this goal, the ESA requires all federal agencies to conserve and prevent the extinction of listed species and prohibits all "persons" from "taking" such species.[8] Significantly, ESA protections are not triggered until the FWS lists a species as threatened or endangered.[9]

The FWS generally initiates listing decisions in response to a petition.[10] When petitioned, the listing process proceeds in four steps.[11] First, in a 90-day finding, the FWS must determine

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[6] California is tied with Utah and has also precluded the need to list four species between 2010 and 2014: (1) Mardon skipper; (2) Soldier Meadows Cinquefoil; (3) Orcutt's hazardia; and (4) Brand's phacelia. *Id*.
[7] *Id.*
[8] §§ 1536, 1538. "Person" is defined broadly to include any "individual, corporation, partnership, trust, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." § 1532 (13). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." § 1532 (19).
[9] The ESA defines an endangered species as one that "is in danger of extinction" and a threatened species as one that is "likely to become an endangered species within the foreseeable future." § 1532(6).
[10] The FWS may self-initiate a listing decision but due to budget constraints it rarely does. Save Our Springs Alliance v. Norton, 361 F. Supp. 2d 643, 648 (W.D. Tex. 2005).
[11] § 1533(b)(3).

whether the petition contains information indicating that listing may be warranted.[12] Second, in a 12-month finding, the FWS will analyze the best available science pertaining to the species and determine whether listing the species is warranted.[13] Third, if listing is warranted, the FWS will prepare a proposed listing rule.[14] Fourth, the FWS will either: publish a final rule listing the species, withdraw the proposed rule, or extend the decision period. [15]

In making listing decisions, the FWS must use the "best available scientific and commercial data"[16] to consider five broad categories of threats to the species: (1) habitat loss; (2) commercial or recreational overuse; (3) disease or predation; (4) inadequacy of regulatory mechanisms; and (5) other factors.[17] "[A]ny one or a combination" of these factors may result in a listing.[18] Additionally, the FWS must consider state efforts to conserve the species.[19] To fulfill this requirement, the FWS will consider conservation agreements made between it and states.[20]

The FWS Policy for Evaluation of Conservation Efforts (PECE) guides consideration of conservation agreements during listing.[21] Before an agreement can preclude the need to list, the

[12] § 1533(b)(3)(a).
[13] § 1533(b)(3)(B). The 12-month finding must conclude that listing is either: warranted, not warranted, or warranted but precluded. A warranted but precluded species is considered a candidate for listing under the ESA or simply a "candidate species." *Id.*
[14] § 1533(b)(3)(ii).
[15] § 1533(b)(6)(A).
[16] § 1533(b)(1)(A).
[17] § 1533(a)(1)(A)-(E).
[18] 50 C.F.R. § 424.11(c).
[19] § 1533(b)(1)(A).
[20] Conservation agreements are "formal, voluntary agreements between the FWS and one or more parties to address the conservation needs of one or more [species]." U.S. Fish and Wildlife Service, *Candidate Conservation Agreements Factsheet*, 1 (March 2011), *available at* http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf (last visited Apr. 10, 2015).
[21] Policy for Evaluating Conservation Efforts, 68 Fed. Reg. 15100, 15113–15 (March 28, 2003).

FWS must find there is "a high level of certainty that the effort will be implemented" and the agreement will effectively "[result] in the elimination or adequate reduction of the threats."[22]

Part II:

Listing Preclusion in Utah

Since 2010, Utah has precluded listing for four species—Coral Pink Sand Dunes tiger beetle, least chub, Graham's beardtongue, and White River beardtongue. This section describes the mechanics of listing preclusion for each of these species by briefly describing: (1) the species biology and ESA listing history; (2) Utah's conservation agreement; and lastly (3) the FWS decision that listing was precluded.

Coral Pink Sand Dunes Tiger Beetle

The Coral Pink Sand Dunes tiger beetle ("beetle") is a predatory insect. The beetle's habitat is limited to approximately 500 acres of sand dunes in the Coral Pink Sand Dunes geologic feature of southern Utah.[23] The feature itself is about 3,500 acres in size.[24] Utah owns the southern part of the feature and manages it as the Coral Pink Sand Dunes State Park. [25] The Bureau of Land Management ("BLM") manages the northern portion of the feature.[26]

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[22] *Id.* at 15114. Courts reviewing precluded listings generally focus on the history of conservation measure implementation and effectiveness when determining whether a conservation agreement can substitute for ESA listing. *See* Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001); Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. CIV.A. 05-CV-00305RP, 2007 WL 716108 (D. Colo. 2007); Oregon Natural Res. Council v. Daley, 6 F. Supp. 2d 1139 (D. Or. 1998); Save Our Springs v. Babbitt, 27 F. Supp. 2d 739 (W.D. Tex. 1997). As discussed in Part II, the FWS likewise focuses heavily on the history of conservation measure implementation when conducting a PECE analysis.

[23] Proposed Threatened Status for Coral Pink Sand Dunes Tiger Beetle and Designation of Critical Habitat, 77 Fed. Reg. 60208, 60211 (Oct. 2, 2012).

[24] *Id*.

[25] *Id.* at 60218–19.

[26] *Id*.

In 1994, responding to a petition, FWS issued a 90-day finding stating there was substantial information to support listing the beetle.[27] In 1997, Utah, the BLM, Kane County, and the FWS drafted a conservation agreement and the parties began implementation.[28] The FWS took no further action on the species until 2012, when they issued a proposed listing rule.[29] The proposed listing rule identified several threats to the species including climate change and off-road vehicles (ORVs). [30]

In response to the 2012 proposed listing rule, the parties revised the 1997 agreement.[31] The revised agreement included measures designed to directly or indirectly address the threats described in the proposed rule.[32] To address ORV use, the agreement expanded already existing conservation areas and created new ones.[33] The agreement indirectly addresses climate change by including, within conservation areas, habitats of different elevations and varying levels of soil moisture.[34] This measure was intended to offset the drying effects of climate change by allowing beetles to move to cooler and wetter habitat as conditions change.[35]

In 2013, the FWS applied a PECE analysis to the new conservation agreement and withdrew their listing proposal.[36] In assessing whether there was substantial certainty that the conservation

[27] 90-Day Finding for a Petition to List the Coral Pink Sand Dunes Tiger Beetle, 59 Fed. Reg. 47293 (Sept. 15, 1994).
[28] Withdrawal of the Proposed Rule To List Coral Pink Sand Dunes Tiger Beetle and Designate Critical Habitat, 78 Fed. Reg. 61082, 61097 (Oct. 2, 2013).
[29] Proposed Threatened Status for Coral Pink Sand Dunes Tiger Beetle and Designation of Critical Habitat, 77 Fed. Reg. at 60208.
[30] *Id*. at 60209.
[31] Withdrawal of the Proposed Rule To List Coral Pink Sand Dunes Tiger Beetle and Designate Critical Habitat, 78 Fed. Reg. at 61097.
[32] *Id.*
[33] *Id*.
[34] *Id*.
[35] *Id.* at 61089.
[36] *Id.* at 61081.

agreement would be implemented and effectively remove threats, the FWS looked to a track record of conservation implementation that dated back to the 1997 agreement. The FWS found that the conservation measures were sufficiently certain to be implemented because the signatories had reliably funded and implemented the earlier agreement.[37] The FWS was confident that new conservation measures would effectively reduce threats because they enlarged existing conservation areas that had effectively protected a limited amount of beetle habitat.[38]

Least Chub

Least chub is a small minnow that is found only in Utah's Bonneville Basin.[39] In the early 1900s, least chub were common.[40] In the 1940s, their numbers began to decrease and by 2007 sixty percent of the known least chub populations were extirpated.[41]

The FWS issued a proposed listing rule for least chub in 1995.[42] In 1999, Utah, the FWS, and other agencies developed a conservation agreement for the species that caused the FWS to withdraw the proposed listing.[43] Eleven years later, the FWS published a 12-month finding stating, "[d]espite the positive accomplishments of the [1999 agreement]," listing was warranted.[44] The finding identified several threats to least chub including cattle grazing, groundwater withdrawal, nonnative fishes, and climate change.[45]

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[37] *Id.* at 61112.
[38] *Id*.
[39] 12-Month Finding on the Petition To List Least Chub as an Endangered or Threatened Species, 79 Fed. Reg. 51042, 51043 (Aug. 26, 2014).
[40] *Id.*
[41] *Id.*
[42] *Id*. at 51042.
[43] *Id.*
[44] *Id.* at 51047.
[45] *Id*.

In response to the 12-month finding, Utah and its partners revised the 1999 agreement.[46] The revised agreement described several new conservation measures addressing the threats identified in 12-month finding. Conservation measures included the introduction of least chub onto state and private lands, cattle exclusion and the purchase and retirement of grazing rights, development of a nonnative fish management plan, and ongoing study of groundwater impacts. [47]

In August 2014, the FWS revised their 12-month finding and determined that listing was not warranted.[48] Similar to the beetle PECE analysis, the FWS based its certainty that the agreement would be implemented effectively on a sixteen-year track record of conservation for the species.[49]

Graham's and White River Beardtongues

Graham's and White River beardtongues are perennial flowering plants native to eastern Utah and a small portion of western Colorado. [50] They occur in similar habitats in the same general geographic area and are both limited to narrow bands of specific soil types.[51]

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[46] *Id*.
[47] *Id*.
[48] *Id.* at 51042.
[49] *Id.* at 51047–48.
[50] Withdrawal of the Proposed Rules To List Graham's Beardtongue (Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis) and Designate Critical Habitat, 79 Fed. Reg. 46042, 46043, 46049 (Aug. 6, 2014).
[51] *Id*. Graham's beardtongue occurs in an 80 by 6-mile "horseshoe shaped band" of habitat. Of this area, approximately 52 percent is BLM managed and 48 percent a mix of state and private lands. The plant's oddly shaped distribution is explained by its requirement of exposed oil shale strata habitat. White River beardtongue primarily inhabits areas with calcium carbonate soils that occur along a 20-mile long band. Approximately 61 percent of this area is on BLM managed lands with the remaining 39 percent being a mix of state and private lands. *Id.*

In 1996, the FWS issued a proposed listing rule for Graham's beardtongue only to withdraw it shortly thereafter.[52] A federal district court vacated and remanded the withdrawal decision.[53] The FWS reconsidered the status of Graham's beardtongue and issued another proposed listing rule in 2013.[54] The 2013 rule included a second species, the White River beardtongue.[55] The proposed rule identified oil shale development and the cumulative effects of oil shale development, grazing pressure, invasive weeds, and climate change as threats to both species.[56]

In response to the 2006 proposed listing rule for Graham's beardtongue, Utah, the BLM, and others began drafting a conservation agreement that was signed in 2007.[57] Following the 2013 proposed rule, the same parties revised the agreement, this time including White River beardtongue.[58] The agreement primarily addresses threats by establishing 44,373 acres of conservation areas. [59] Outside of the conservation areas, the BLM committed to avoiding surface disturbances within 300 feet of the plants.[60]

[52] *Id*. at 46042.
[53] Ctr. For Native Ecosystems v. U.S. Fish and Wildlife Serv., 795 F. Supp. 2d 1199, 1210 (D. Colo. 2011) ("I conclude that FWS violated the ESA in withdrawing the proposed rule to list Graham's penstemon by failing to consider the threats in combination, ignoring or disregarding the best available scientific and commercial information, and relying on undetermined or unspecified conservation measures which were not implemented or established to be effective.").
[54] Endangered and Threatened Wildlife and Plants; Threatened Species Status for Graham's Beardtongue (Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis), 78 Fed. Reg. 47590 (Aug. 6, 2013).
[55] *Id*.
[56] *Id*. at 47608–09.
[57] Withdrawal of the Proposed Rules To List Graham's Beardtongue (Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis) and Designate Critical Habitat, 79 Fed. Reg. at 46042.
[58] *Id*. at 46043.
[59] *Id.*
[60] *Id.*

In 2014, the FWS withdrew its proposal to list the species.[61] In their PECE analysis, the FWS cited the signatories' six-year track record of implementing conservation measures.[62] The FWS was certain that the agreement would be implemented and would reduce or remove threats because the signatories had "effectively implemented conservation measures from the 2007 [agreement] including surveying and monitoring the populations of both species, and implementing avoidance buffers from ground-disturbing activities on BLM lands."[63]

Part III:

The Utah Model for Listing Preclusion

The Utah examples illustrate three key elements that states should consider when attempting to preclude ESA listing through a conservation agreement: (1) establishing a track record of conservation agreement implementation; (2) addressing each major threat identified in the FWS threats assessment;[64] and (3) focusing on species with limited ranges.

Establishing a Track Record

States must engage with the FWS early if they hope to establish a track record.[65] Establishing a conservation track record is critical because an agreement will preclude listing only if the FWS

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[61] *Id.* at 46042.
[62] *Id*. at 46073.
[63] *Id*.
[64] A "major threat" is one that either alone or cumulatively with other threats would cause a species to be threatened or endangered.
[65] This will require states to keep track of listing petitions and the status of species within their borders. Because of limited resources, states cannot create conservation agreements for all species. Consequently, states will have to strategically select which species to enter into conservation agreement for based on several factors. One factor is the likelihood and imminence of species listing. Additional factors, like the species range and the state's ability to remove threats, are discussed in this section. Other considerations include the balancing between the economic and political costs of a species listing verses the economic and political costs of implementing a conservation agreement. This balancing consideration should be a threshold question for pursuing a conservation agreement, however full discussion of balancing is beyond the scope of this essay. Balancing will be fact specific and vary by species as well as by existing and future land uses, and local politics. It is possible for conservation agreement implementation to be

determines that the agreement will be implemented and will reduce or remove threats. For the beetle, least chub, and Graham's beardtongue, FWS considered track records of prior conservation implementation as evidence that new agreements would be implemented. Additionally, the FWS will look at the track record of previous conservation measure effectiveness to forecast and assess the effectiveness of new measures. The White River beardtongue was the only Utah species without a track record as it was not included in earlier agreements. For this species, the FWS signaled a willingness to consider the track record of closely related species.

Addressing All Major Threats

The FWS can list a species based on "any one or a combination" threats.[66] So it is critically important that agreements address all major threats to a species. In many cases, addressing specific threats is a straightforward process. For example, the Graham's and White River beardtongues agreement addressed the threat of oil shale development by prohibiting development in conservation areas.

In other cases, such as when climate change is a major threat to the species, addressing a specific threat may be difficult or impossible. The causes of climate change are dispersed and global. Thus, no state will be capable of directly reducing or removing climate change. However, the Utah agreements demonstrate that climate change can be reduced indirectly by increasing species

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more burdensome than ESA listing. For example, if the species occurs on already protected lands, there may be no state benefit by precluding listing. However, when a species inhabits lands with valuable industrial or extractive uses, state tailored conservation agreements will provide clear economic benefits as compared to blanket ESA protections. In rare situations, a species may be viewed as a nuisance or dangerous to the public. Either of these perceptions would make state conservation action politically unpopular.

[66] 50 C.F.R. § 424.11(c).

resilience to climate change, offsetting effects of climate change to the species, and reducing other threats that act cumulatively with climate change.

When threats are outside a state's authority, unless the state can address them indirectly, the state will need to involve additional local, state, and federal authorities in the agreement.[67] Least chub illustrates this point. Utah could not control grazing on BLM lands or groundwater withdrawal in Nevada, so Utah recruited the BLM and the Southern Nevada Water Authority to join the agreement.

Focusing on Species with Limited Ranges

The four Utah species all have small ranges that are either entirely or almost entirely within the state.[68] National examples of species for which listing was precluded also have limited ranges.[69] Larger species ranges generally mean that more states, counties, agencies, and private landowners have control over lands where the species occur. Similarly, as range increases so does the diversity of factors threatening the species. For these reasons, forming an agreement with all of the necessary parties that can address the many diverse threats is exceedingly difficult for species with large ranges.

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[67] The added benefit of recruiting additional parties to the agreement is that partners may share resources, expertise, and conservation implementation costs.

[68] The tiger beetle's known range is approximately 500 acres. Least chub occurs within one hydrologic basin in Utah. Graham's beardtongue occurs in an 80 by 6-mile band, the majority of which is in Utah. White River beardtongue primarily inhabits a 20-mile long band, the majority of which is in Utah.

[69] For example, FWS removed the Camp Shelby burrowing crayfish from its list of candidate species in response to a CCA between the FWS, National Guard, Forest Service, and Mississippi Department of Wildlife, Fisheries, and Parks. The geographic extent of this species is less than 500 acres. Hadassah Reimer et al., *Give PECE a Chance: Evaluating Conservation Programs to Avoid Endangered Species Act Listings*, 56 ROCKY MTN. MIN. L. INST. 21-1, 8 (2010). A conservation agreement between the FWS and the Southern Conservation Corporation removed two Adams Cave beetles from the candidate list. *Id.* The entirety of these species habitat was within a single 1,500 feet long cave. *Id*. A conservation agreement between the FWS and the Bozeman Fish Technology Center removed the Thermie Riffle beetle from the candidate list. *Id.* This beetle species only occurred along approximately 165 feet of a small creek. *Id*.

Conclusion

Because of the conflicts associated with ESA listing, states may desire to preclude listing by developing a conservation agreement. As the Utah examples illustrate, states can preclude listing when three key elements are satisfied. First, states must establish a conservation track record for the species. Second, states must address, either directly or indirectly, all major threats to the species. Third, states should focus their preclusion efforts on species with relatively small ranges.