A BIRD IN THE HAND
STATE-DRIVEN SUCCESS IN SAGE-GROUSE CONSERVATION
Primary Investigators:

Jordan K. Lofthouse, MSE, Strata Policy PhD Fellow
Camille Harmer, BS, Strata Policy

July 2017
## Table of Contents

Executive Summary ..................................................................................................................1

Introduction ..........................................................................................................................1

Giving States More Power Helps Conservation .................................................................1
  States as Laboratories of Innovation ...................................................................................2
  States Often Have Better Data and Resources than the Federal Government ..................3
  States Often Know and Respond to Local Needs Better ...................................................4
  Experimenting with More Cooperation and Decentralization ...........................................5

The Political Battle over the Greater Sage-Grouse ..............................................................5
  Petitions and Reviews for Listing the Greater Sage-Grouse As Endangered ....................5
  States and Federal Agencies Protect the Greater-Sage Grouse ........................................7
  The 2015 Decision Not to List the Greater Sage-Grouse ................................................10
  Utah’s Example of Greater Sage-Grouse Conservation ....................................................11

Recommendations for Using the ESA More Effectively .....................................................13
  Increasing Cooperation Between the Federal Government and States ..........................13
  Increasing Flexibility for Protecting Species .....................................................................14

Conclusion ..........................................................................................................................15
Executive Summary

The greater sage-grouse, a wild bird that lives across the Western United States, has become one of the most controversial species in American history. Over the past few decades, a political movement has worked to place the greater sage-grouse under the protection of the Endangered Species Act (ESA). After the U.S. Fish and Wildlife Service (FWS) announced its interest in listing the species in 2010, several Western states increased their efforts to preserve the greater sage-grouse. In 2015, the FWS decided not to list the sage-grouse as threatened or endangered under the ESA, in large part because the states proved that they could effectively protect the species.

The fight over the sage-grouse illustrates how state governments can and do conserve species. States cooperate with federal agencies to increase decentralized decision-making and more successfully protect species. By deferring to states, the federal government could be more effective at conserving species and limiting the economic harm caused by the ESA. The purpose of this policy brief is to illustrate why increasing state management of endangered species would be an improvement over the current approach.

Cooperative federalism and decentralized decision-making occur when the federal government allows lower levels of government to make their own policies. This type of decision-making is beneficial in three ways. First, states serve as “laboratories” of innovation for testing various approaches to conservation. Second, state agencies may have better data and expertise regarding species conservation than federal agencies. Third, state governments are often more responsive to the needs of local people better than federal decision-makers. They are able to create policies and conservation plans that more carefully account for local economic and geographic factors.

The federal government could enhance species recovery by cooperating more with the states and by deferring many conservation decisions to lower levels of government. Over the past twenty years, many scholars have noted the “lack of consistent and sustained cooperation between state and federal agencies” on endangered species issues. Following the example demonstrated by state-level sage-grouse management, the federal government could allow for more cooperative and decentralized policies that may improve overall species conservation. In particular, the federal government could change the implementation of the ESAs Section 6 or Section 4(d) to increase cooperation and decentralization.

Introduction

In this Strata report, we first show why cooperative federalism and decentralized decision-making are important for the effective conservation of species, especially the greater sage-grouse. Then we explain how the political battle over the greater sage-grouse illustrates that states can protect species without a listing under the Endangered Species Act (ESA). We conclude with recommendations for how state and federal agencies can improve species conservation through cooperation and decentralization. The purpose of this policy brief is to summarize the benefits of increasing state management of species and their habitats.

Giving States More Power Helps Conservation

The federal government could improve species conservation if it cooperated more fully with state governments and decentralized much of its decision-making power. Cooperative federalism occurs when the federal government and state governments share responsibility over public policy. There is a sharp divide in how cooperative federalism is used in environmental policy, particularly between pollution control and resource management. Many federal environmental laws are largely based on cooperative federalism, such as the Clean Water Act or the Clean Air Act. In these acts, the federal government sets overarching goals that states can attain through their own individualized plans. Pollution control laws may still be costly and onerous, but states have more flexibility in how they implement these laws.

---

The ESA could be more effective if federal policymakers adopted the pollution-control model of cooperative federalism. Federal policymakers could change the ESA so that federal coordination with state and local jurisdictions is more common. If federal agencies, especially the FWS, were to certify local programs for meeting ESA goals more often, local people could use grassroots conservation effectively without the need for redundant efforts of federal managers.²

Decentralized decision-making occurs when lower levels of government have the ability to make their own policies. This type of decision-making is beneficial in a few ways. First, the states serve as “laboratories” of innovation where many approaches are tried. Second, state agencies may have better available science, expertise, mapping capabilities, biological inventories, biological management goals, state wildlife action plans, and other important data than federal agencies. Third, state governments often are often more responsive to local preferences and know the needs of local people better than federal decision-makers.

States as Laboratories of Innovation

Allowing states to take the lead on species conservation may be beneficial because state governments can test out a variety of approaches. When states are free to experiment with different management regimes, they are more likely to find the most efficient and effective policies. State officials can adopt policies that have worked in other states and avoid policies that have not. This type of experimentation and innovation has been compared to a “laboratory of democracy.” Michael S. Greve, a professor at the Antonin Scalia Law School at George Mason University, writes that “one can make a powerful theoretical case for the experimental, decentralized politics that the laboratory metaphor suggests.”³ Smaller, localized policies are more capable of adapting to changing circumstances, whether economic or ecological.

One of the most pragmatic reasons for decentralized decision-making is that policymakers, at both the federal and state levels, do not always know exactly what they are doing or what the consequences of their actions will be. When federal policymakers face uncertainty, one overarching policy that applies the same solution to many different problems makes little sense because policymakers can make a mistake that affects the entire country. Using state-based policies allows for gradual changes that foster a system of “feedback and institutional learning.” State-based policies can more easily address the needs, circumstances, and preferences of people nearest to the problem.⁴

In recent years, some scholars argue that the federal government’s approach to working with states has become less cooperative and more coercive through the use of statutory mandates, conditional grants, preemption, and administrative regulations. These tactics force the states to comply with the wishes of federal decision-makers.⁵ Over the past forty years, Congress and the president have increasingly relied on mandates and preemption to impose national priorities on state governments, especially regarding environmental issues.⁶

The coercive federalism we know today arose in the 1970s. In particular, the federal government began to use regulatory tools to superecede state policies. Prior to this shift, the federal government used mainly fiscal tools to facilitate cooperation with state governments. John Kincaid, the executive director of the U.S. Advisory Commission on Intergovernmental Relations, claims that during the 1970s and 1980s, the federal government eroded “constitutional and political limits” on federal regulatory power, which led to “a more coercive system of

---

4  Ibid.
federal preemptions of state and local authority and unfunded mandates on state and local governments." Kincaid also asserts that a coercive system undermines government responsibility and public accountability, but state and local governments lack the leverage to reverse this trend. If the federal government were to revert back to a more cooperative system, as opposed to a coercive system, states may be better equipped to create innovative policies for species conservation.

**States Often Have Better Data and Resources than the Federal Government**

State governments often have better information on the needs of endangered species within their borders, and they have better knowledge of the needs of the people who are affected by endangered species policies. Elinor Ostrom, a Nobel Prize winner in economics, argued that many environmental issues can be solved most effectively by the people closest to the problem. Top-down, one-size-fits-all policies often replace local ways of managing environmental issues, and can compound existing problems by implementing policies that fail to consider local issues.

State agencies frequently have more employees on the ground, documenting state species populations and ecological factors. For example, in Wyoming, the state’s wildlife agency employs 173 field biologists and wardens, while the FWS only has 24 employees working on similar projects in the state. California employs 1,236 wardens and biologists, but the FWS only employs 188 and NOAA Fisheries employs only 66. A larger number of government employees do not automatically lead to better knowledge and better policies, but, compared to the federal government, states often employ more people to gather data and enforce public policies. Because states often employ local people, states may have more knowledge relating to the needs of local people and ecosystems than the federal government.

For example, Utah’s Division of Wildlife Resources manages the Utah Conservation Data Center (UCDC), which is the comprehensive repository for the state’s biodiversity information. The UCDC holds data on all of Utah’s vertebrate wildlife species, including rare native species and game animals, as well as many invertebrate and plant species. The UCDC collects its information from a wide variety of sources, including the Utah Division of Wildlife Resources, the Utah Reclamation Mitigation and Conservation Commission, the United States National Park Service, the United States Forest Service, the United States Fish and Wildlife Service, the United States Bureau of Land Management, Utah State University, the University of Utah, Brigham Young University, the network of state/province Natural Heritage Programs and Conservation Data Centers, The Nature Conservancy, NatureServe, museums, and numerous individuals.

Other states have similarly robust wildlife agencies that collect and manage extensive data repositories. For example, the California Department of Fish and Wildlife’s (CDFW) Data Portal holds information on angling records, CDFW special hunts, coho salmon recovery tasks, conservation and mitigation banking, ecosystem restoration programs, habitat tracking and reporting, steelhead trout management tasks, and wildlife incident reporting, among other data. The Idaho Fish and Wildlife Information System employees a team of professionals, including biologists, data managers, GIS professionals, and programmers, to compile data on the state’s wildlife. In particular, the Idaho Species Diversity Database, which is a subset of the Information System, holds the most complete set of site-specific data on Idaho’s fish, wildlife, and plant diversity.

---

8 Ibid.
11 Ibid.
Although the FWS also has large amounts of population and geospatial data for wildlife and plants, states often have more comprehensive datasets and more employees to collect and catalog the data. The entire FWS employs approximately 9,000 people in its central administrative office, eight regional offices, and nearly 700 field offices.\(^\text{15}\) California, for comparison, has roughly 2,500 employees in its Department of Fish and Wildlife.\(^\text{16}\) The Florida Fish and Wildlife Conservation Commission has approximately 2,100 full-time employees working in law enforcement, research, management, and outreach.\(^\text{17}\) Even Wyoming, the state with the smallest population, employs roughly 350 people in its Game and Fish Department who manage the state’s 800 wildlife species.\(^\text{18}\)

**States Often Know and Respond to Local Needs Better**

The main flaw of a heavily centralized system is that a uniform policy for the entire country does not necessarily reflect local needs and preferences.\(^\text{19}\) Public policies for ecological problems cannot be reduced to a single prescription that will completely solve the issue. Ecological issues, especially endangered species issues, are incredibly complex, which is why a diversity of decentralized approaches may be the most effective means of addressing these problems. Elinor Ostrom asserts that “a set of rules used in one physical environment may have vastly different consequences if used in a different physical environment.” Using local knowledge and a diversity of approaches makes public policy more adaptable in a changing world.\(^\text{20}\) Ostrom and Andersson assert that the complexity of many natural resources requires sophisticated governance systems. They argue that multilevel governance arrangements are necessary for the proper governance of natural resource issues, like endangered species.\(^\text{21}\)

Terry Anderson and Peter Hill, PhD economists and senior research fellows at the Property and Environment Research Center, argue that federalism has several advantages over a single sovereign government. First, federalism allows lower levels of government to craft their policies and programs in a way that their citizens demand. Second, federalism allows citizens to better monitor and constrain policymakers and policies. Federal politicians and bureaucrats are much more difficult to monitor and constrain than state or local policymakers. Third, federalism facilitates a common market without trade barriers between states, which allows ideas for policies to move more freely.\(^\text{22}\)

Anderson and Hill state that national control is necessary in some circumstances, such as when pollution crosses state borders or when states must share water in rivers. Centralization, however, comes with costs that policymakers must balance if they desire the most effective and efficient outcomes. One of these costs is that centralization distances the decision-makers from the people they affect, and citizens can no longer monitor and constrain policymakers as well as they did before. When decision-makers are farther removed, it becomes more difficult to discern whether their decisions are for the benefit of the public or special interest groups. One of the largest costs of centralization is that it becomes prohibitively expensive for citizens to “vote with their feet” by moving to a different

---

jurisdiction. Citizens cannot easily escape a policy they disagree with when they feel that the national government abuses its power, but they can more easily escape a state policy they disagree with.\(^{23}\)

With overarching federal regulations, local people may change their behavior because they fear inflexible, stringent policies. For example, before the black-footed ferret was listed as endangered, Montana ranchers saw the ferrets as allies. Ranchers viewed prairie dogs as pests, and the black-footed ferrets would prey on them. The number of ferrets dwindled, and they were eventually listed on the federal endangered species list. Instead of working to preserve the ferrets, landowners have fought attempts to reintroduce them because landowners are subject to FWS regulations and are required to provide habitat without compensation. This approach has created the incentives for landowners to “shoot, shovel, and shut up” when they encounter ferrets on their land, instead of preserving the species.\(^{24}\)

Finding the right balance between individual, state, and national control of wildlife management is a key goal for policymakers if they want to find the most effective and efficient way of preserving species. That balance, however, is lacking under the current system.\(^{25}\) Because state governments are generally more responsive to their constituents’ preferences, allowing individuals and state governments to take the lead on species conservation may help strike the balance between species preservation and economic impacts.

**Experimenting with More Cooperation and Decentralization**

Decentralization can be problematic because it involves the redistribution of power and resources among different units of a government. Elinor Ostrom argues that federal officials may be hesitant to pursue decentralization because they must voluntarily give up some of their power to state officials. With this in mind, it is important to understand who is involved in the transfer of power and what their incentives are. Effective decentralization involves aligning the interests of federal decision-makers among themselves and with state officials. When incentives are aligned, it becomes easier and less costly to decentralize power.\(^{26}\) One-size-fits-all approaches are unlikely to align the interests of different levels of policymakers. The federal government and the states could take many approaches to rearrange decision-making responsibilities.

Below, we explain how decentralization and cooperative federalism can benefit conservation policy though the story of the greater sage-grouse. State governments proved that they had the knowledge and resources to conserve a particular species innovatively while also meeting the needs of local people. The case of the sage-grouse shows how the states and the federal government worked together for a mutually beneficial solution. The federal government wanted to ensure that the sage-grouse was conserved, so they retained the power to list the species under the ESA with all its stringent protections. State policymakers were granted the power to choose how to conserve the species, which led to effective compromise between local interests and the preservation of the sage-grouse. The example of the greater sage-grouse illustrates how the federal government could delegate more management of species to the states.

**The Political Battle over the Greater Sage-Grouse**

**Petitions and Reviews for Listing the Greater Sage-Grouse As Endangered**

The greater sage-grouse is an important species because it serves as a proxy for other political battles. The species is considered an “umbrella species” for other sagebrush-associated animals. An umbrella species is used in conservation

\(^{23}\) Ibid.


planning to protect the biodiversity of lesser known species. While the umbrella species concept has shown to be useful in certain situations, some biologists are skeptical of the concept.27

Outside of the scientific community, conservationists often fight for the listing of an umbrella species under the ESA as a way to protect landscapes or other animals. For example, the habitat of the greater sage-grouse stretches across much of the Western United States. Listing the species could initiate strict protections across tens of millions of acres. For the same reason, it is strategic for people who wish to use the land for purposes other than conservation to fight against the listing of such a widespread umbrella species.

Beginning in 2002, several individuals submitted petitions to list the greater sage-grouse as endangered under the ESA. The FWS began the 90-day finding process in December 2003 and found in April 2004 that there was substantial evidence to complete a status review of the species. As required by the ESA, the Service then began its yearlong status review to determine whether a listing was warranted. In January 2005, the FWS published its 12-month finding that the listing of the greater sage-grouse was not warranted under the ESA.28

This first status review, however, was controversial. Western Watersheds Project (WWP) filed a court complaint on July 14, 2006, stating that the FWS’s 12-month finding was incorrect and arbitrary. On December 4, 2007, the 9th District Court agreed with the WWP and found that the FWS’s decision was arbitrary and capricious under the Administrative Procedure Act. The court reversed the FWS’s decision and remanded the finding back to the FWS.29

Due to the Court’s decision, the FWS announced that it was initiating a new status review for the greater sage-grouse in February 2008. The Service also began the collection of information regarding the species from interested parties. The requested information included the status of and any potential threats to the species. Once the status review was completed, the FWS would then decide whether listing the greater sage-grouse as threatened or endangered was warranted.30

In April 2008, the FWS extended the period for submitting information on the status review of the greater sage-grouse. The stated purpose of the extension was to "provide the public and Federal, State, and local agencies with an additional opportunity to submit information for the status review."31

States and Federal Agencies Protect the Greater-Sage Grouse

After the new 12-month review, the FWS found in March 2010 that the range-wide listing of the greater sage-grouse was “warranted but precluded” by higher priority listing actions. Warranted but precluded means that the FWS believes a listing under the ESA is warranted but will develop a proposed rule to list the species when their “priorities allow.” With this designation, the greater sage-grouse was identified as a “candidate species” for full listing under the ESA, which entitles it to certain protections that are less stringent than a threatened or endangered listing.

Many political leaders in Western states feared the listing of the greater sage-grouse under the ESA because such a listing would limit productive land use in their states and prevent states from protecting the species as they best saw fit. In 2011, Secretary of the Interior Ken Salazar invited the 11 states with sage-grouse populations to produce sage-grouse management plans. These plans could be individualized to each state, and Secretary Salazar encouraged state policymakers to balance economic development and management of the species. By 2015, most of these Western states implemented new conservation strategies or strengthened their existing strategies for sage-grouse preservation to avoid the need for federal listing of the species.

For example, Wyoming’s Governor Matthew Mead issued Executive Order 2015-4 dealing with greater sage-grouse core area protections. One of the expressly stated reasons for these additional protections was because “the United States Department of the Interior has determined that listing the greater sage-grouse range-wide as a threatened or endangered species is currently precluded making it a candidate species.” In February 2013, the State of Utah issued a new conservation plan for greater sage-grouse specifically “to protect high-quality habitat, enhance impaired habitat, and restore converted habitat to support, in Utah, a portion of the range-wide population of greater sage-grouse [...] necessary to eliminate threats to the species and negate the need for the listing of the species under the provisions of the federal Endangered Species Act.”

Idaho’s Governor Butch Otter signed Executive Order 2012-02 to establish Idaho’s Sage-Grouse Task Force specifically because “listing of the species would have a significant impact on the State’s custom, culture and way of life.” The Task Force’s purpose was to make recommendations for long-term viability of sage-grouse populations in Idaho and to prevent the listing of the species under the ESA. In June 2012, the Task Force issued its recommendations which were meant avoid the need for listing the species by facilitating solutions to threats to the species and its habitat. These solutions included the establishment of Sage-Grouse Management Areas, and addressed the threats of wildfire, invasive species, large infrastructure projects, livestock grazing management, West Nile virus, grazing infrastructure, and recreation.
Montana’s Governor Steve Bullock issued Executive Order No. 12-2015 to amend and implement the Montana Sage-Grouse Conservation Strategy to “demonstrate to the USFWS that the sage-grouse does not warrant federal protection under the ESA.”

Other Western states have similar language in their management plans for the greater sage-grouse. Nearly every state’s plan was intended to avoid the listing of the greater sage-grouse because many state leaders believed that a listing would harm the economy and the management of lands within Western states. Some states included this language before the 2005 finding of “not warranted,” while others included the language after the 2010 finding of “warranted but precluded.” Oregon, for example, created the Greater Sage-Grouse Conservation Assessment and Strategy, which cites that “[f]ull protection for sage-grouse under ESA would have serious economic, social, and cultural consequences across the Western United States.”

Federal lawmakers from Western states also feared the listing of the greater sage-grouse. For example, Representative Rob Bishop (R-UT) and Representative Cynthia Lummis (R-WY) served on the House Committee on Natural Resources during this time and argued that the states could adequately protect the species without the need for a listing. Lummis stated,

“In 2011, Secretary Salazar invited the states to take the lead in conserving sage-grouse. [...] The states have responded with tens of millions of dollars, countless man hours, and an unprecedented dedication to sage-grouse conservation. [...] The issues that threaten sage-grouse populations in these 11 states are so different, a cookie-cutter approach won’t work.”

Not all federal lawmakers on the Committee on Natural Resources were in agreement. Representative Jared Polis (D-CO) opposed Bishop’s and Lummis’s arguments, stating, “The greater sage-grouse [...] is threatened by industrial oil and gas development, fragmentation of its sagebrush habitat, fire, and invasive weeds. Due to these threats, the greater sage-grouse occupies only half of the historic range and, therefore, based entirely on its merits has become a candidate for listing under the Endangered Species Act.”

Kathleen Clarke, the former Director of the Bureau of Land Management (BLM) and current Director of the Public Lands Policy Coordinating Office for the State of Utah, argued that state and federal agencies were capable of protecting the species without an ESA listing. During her time as Director of the BLM, she implemented the BLM’s sage-grouse strategy for conservation in 2003 and 2004. This national plan established a comprehensive approach to sage-grouse habitat management on BLM lands. Clarke attributed the 2005 finding of “not warranted” to the BLM’s effective conservation strategies. After the 2010 finding of “warranted but precluded,” she argued before the House Committee on Natural Resources that states were protecting the greater sage-grouse:

---


43  Ibid.

“[…] I think there is a dichotomy developing between the state’s collaborative approach and Federal unilateralism. What started out as a very promising partnership is becoming increasingly imbalanced and, sadly, adversarial. […] The State of Utah is absolutely committed to the conservation, long-term conservation, of the sage-grouse. Over $50 million have been invested in the last 10 years in sage-grouse conservation, and Utah has only 4 percent of the birds. But that is the second–highest amount that any state has invested in the grouse conservation.”

Not only were state officials worried about the potential listing of the greater sage-grouse, many federal land management officials in both the BLM and United States Forest Service (USFS) thought that a listing would be detrimental. For example, the BLM National Policy Guidance specifically states that “it is in the interest of the Federal government […] to conserve sensitive species with the intent to avoid a need to list.” Roughly half of all remaining sage-grouse live on BLM or USFS land. Both BLM and USFS plans are intended to facilitate collaboration between federal, state, and local entities to improve species conservation. These sage-grouse plans have three objectives. First, the plans are meant to reduce habitat fragmentation by protecting undisturbed habitat. Second, the plans are meant to improve habitat through “purposeful management.” Third, the plans work to reduce the threat of rangeland fire, which can have long-term impacts on sagebrush.

The BLM and USFS adopted new federal management plans in September 2015, which amended the land-use plans for 98 BLM and USFS units. The 2015 federal plans increased protection for sage-grouse in nearly 70 million acres of federal land across much of the Western United States. The BLM and USFS also partnered with more than 1,100 private individuals across the West through the Sage-Grouse Initiative (SGI). The United State Department of Agriculture’s Natural Resources Conservation Service runs the SGI to restore about 4.4 million acres of habitat and simultaneously allow economic development on federal public lands. The SGI was set up as a voluntary, incentive-based conservation effort. Since 2010, the Natural Resources Conservation Service has spent more than $296.5 million on the SGI. Another $128 million has come from other conservation partners and landowners, making total SGI investment $424.5 million.

The SGI has five main objectives. First, the SGI works to promote grazing practices that will reduce threats to annual grasses. This includes restoring disturbed areas, eliminating noxious weeds, and decreasing the potential for wildfire. Second, the SGI incentivizes the removal of conifer trees that are encroaching on sagebrush habitat. Third, the SGI helps to acquire conservation easements to limit urban and exurban development in sage-grouse habitats, as well as the spread of cropland and grazing land. Fourth, the SGI works to preserve and restore wetlands and irrigated fields, which are key to sage-grouse health and reproduction. Fifth, the SGI works to reduce sage-grouse fence collisions by marking fences in high-risk areas to make them more easily visible to sage-grouse. Sage-grouse can die when they collide with infrastructure such as fences. Marking fences can reduce collision rates by roughly 83 percent. (Stevens, B. S., Reese, K. P., Connelly, J. W. and Musil, D. D. (2012). Greater sage-grouse and fences: Does marking reduce collisions?. Wildlife Society Bulletin, 36: 297–303. doi:10.1002/wsb.142)
From 2013 to 2015, the FWS and the BLM entered into Candidate Conservation Agreements (CCA) on 5.5 million acres of both private and federal lands. CCAs are voluntary agreements between the FWS and another party that are meant to aid in the conservation of candidate species. People who participate in CCAs voluntarily commit to reduce threats to candidate species, which may eliminate the need for a listing. The FWS has entered into many CCAs with other federal agencies, state governments, local governments, tribal governments, and private property owners. Idaho, Wyoming, and Oregon, for example, all entered into CCAs with the FWS for sage-grouse protection.

The 2015 Decision Not to List the Greater Sage-Grouse

In September 2015, the FWS decided that it would not list the greater sage-grouse as threatened or endangered. The Service also chose to withdraw the species from the Candidate Species list. The FWS justified its decision by stating that “multiple conservation efforts across the range, particularly the regulatory protections in federal and state management plans, have sufficiently addressed the primary threats which originally caused the bird to be designated as warranted for ESA protection in 2010.” The FWS concluded that a listing was not necessary because of “thousands of other conservation efforts across the species’ 173- million-acre range, including the voluntary commitment of millions of acres of private ranchland to sage-grouse conservation.”

The sage-grouse largely faded from public debate until 2017 when Secretary of the Interior Ryan Zinke began considering how the Department of the Interior (DOI) approaches sage-grouse management. In May 2017, Secretary Zinke announced that the DOI was considering switching sage-grouse conservation plans from a habitat management model to population objectives. Then in June 2017, Secretary Zinke issued Secretarial Order 3353, stating that the DOI would review federal greater sage-grouse conservation plans. The basis of this review is to determine whether the plans are limiting energy production on public lands. State governments and the DOI could use this review as an opportunity to incorporate cooperative federalism and decentralization into species management more greatly.

---


55 Ibid.

Some governors would rather use a habitat management model rather than population objectives. Governor Matthew Mead of Wyoming and Governor John Hickenlooper of Colorado co-signed a letter to Secretary Zinke on May 26, 2017, emphasizing “the need for coordination between the Department of the Interior and the sage-grouse states through the Sage-Grouse Task Force.” The letter also expressed the governors’ concerns that population objectives for the states are “not the right decision.” The governors wrote that their states are “willing to work with [the DOI] to develop the best approach for managing the species on federal lands.” Other states, such as Nevada and California, argue that the current resource management plans may not be the most effective and efficient means of conservation and a change in direction is needed. The current review of sage grouse management and future reviews could allow some states to continue with habitat management models, but other states could use population objectives. Allowing states to choose their species conservation method ensures that they can meet the varying needs of their local culture and ecology.

Utah’s Example of Greater Sage-Grouse Conservation

Most western states have sage-grouse conservation plans or initiatives, but Utah’s plan is a particularly clear example of how states can incorporate tradeoffs between different interest groups, while also prioritizing the conservation of the sage-grouse. Utah has been protecting the sage-grouse since 1996 through Local Area Working Groups. The Utah Wildlife Board implemented the state’s first Strategic Plan for the Management of Sage Grouse in Utah in 2005. The plan was updated in 2009. The most recent version of Utah’s plan was created in 2013, but was implemented in 2015 through an executive order from Governor Herbert. The plan lists five main objectives:

1. Sustain an average male sage-grouse population of 4,100 between all Sage-Grouse Management Areas (SGMAs) and increase those populations to an average of 5,000
2. Annually protect an additional 10,000 acres of sage-grouse habitat on private land and on lands owned by Utah’s School and Institutional Trust Lands Administration (SITLA) through “conservation covenants, leases, easements or other legal tools”
3. Annually improve an average of 25,000 acres of sage-grouse habitat
4. Increase the total area of SGMAs by 50,000 acres per year
5. “Maintain viable populations within each SGMA”

The government of Utah created the new sage-grouse conservation plan to avoid the listing of the species as endangered because the listing would “have a significant adverse effect on the economy, custom and culture of the


There are currently 11 defined SGMAs within the state. Adjustments of the SGMA boundaries are reviewed every five years, unless other events require that the areas be reviewed more frequently. These events include wildfire or successful habitat improvement (Conservation plan for greater sage-grouse in Utah. (2013, February 14). State of Utah. p. 8. Retrieved from https://wildlife.utah.gov/uplandgame/sage-grouse/pdf/greater_sage_grouse_plan.pdf). Under the plan, state agencies are to coordinate with the Public Lands Policy Coordinating Office and the Division of Wildlife Resources to ensure that state activities do not interfere with the protection of the greater sage-grouse (State of Utah Office of the Governor Exec. Order No. 2015-001. Retrieved from http://publiclands.utah.gov/wp-content/uploads/2015/02/EO-Sage-Grouse1.pdf).
State of Utah. The longest-lived strategy for conserving the greater sage-grouse in Utah has been Local Area Working Groups. Since 1996, these groups have brought together state and federal agents, local landowners, and other interested parties to conserve sage-grouse. Each group has its own conservation plan and works to reverse the decline of sage-grouse in their area. Utah currently has 12 Local Working Groups, but there are more than 60 across the West.

Local Area Working Groups were the state’s pioneer efforts to conserve the sage-grouse and have become a crucial part of more recent state conservation plans. The state’s current conservation plan promotes several policies to combat the many threats to the greater sage-grouse population. These threats include the destruction of habitat from wildfire, invasive species, predators, mineral extraction, roads, renewable energy development, recreation, livestock grazing, and hunting. The plan contains guidelines for mitigating each of these risks, while still maintaining a balance between conservation and other activities. For example, the plan suggests controlling predator populations, removing conifers from sage-grouse habitat, and only allowing recreation on defined trails and roads during winter and nesting season. Hunting sage-grouse is allowed in SGMAs with a permit. In addition, the plan requires that mineral extractors “engage in reclamation efforts as projects advance or are completed.”

Unlike the ESA, Utah’s conservation plan prioritizes the rights of local governments and private landowners. The conservation plan allows the protection of sage-grouse to be a compromise between local considerations and the requirements of federal agencies. All 11 SGMAs contain land owned by private citizens, local governments, SITLA, Division of Wildlife Resources, Division of State Parks and Recreation, the BLM, and the USFS. Using SITLA or private lands for the conservation purposes of the SGMA requires compensation to or a contractual agreement with the landowner. In the development of the state’s sage-grouse conservation plan, the future use of lands was also taken into account. Areas that were identified as likely places for future development were not included in SGMAs, and sage-grouse populations in these areas were identified as non-essential.

The Utah Community-Based Conservation Program (CBCP), run by a Utah State University extension program and staffed predominantly by university-affiliated researchers, conserves the greater sage-grouse by working with local landowners to ensure the protection of the species. The CBCP works with local groups across Utah that have their own sage-grouse conservation plans. These groups are composed of private interests and governmental
entities, and were charged to assess the local nature and scope of the threats to the species, and to recommend a course of action to address those threats.66 The extension program also publishes peer-reviewed research on the sage-grouse, which better helps the State of Utah understand the complexities of greater sage-grouse conservation and implement more effective conservation methods.67

Utah’s exemplary conservation of the sage-grouse illustrates that states can and do succeed in the conservation of sage-grouse. In 2014, SGMAs contained 7.5 million acres of land, and from 2013-2014, Utah’s sage-grouse population increased by 40 percent.68 This should show that cooperation between federal interests and state control can be a win-win compromise for states, the federal government, local interests, and environmental concerns.

Recommendations for Using the ESA More Effectively

Greater sage-grouse conservation illustrates cooperation between the federal and state governments. Using the example of the sage-grouse, we highlight two ways that the ESA could be better used to protect species and minimize impacts to surrounding communities:

1. The federal government could use the ESA’s Section 6 more fully to enhance cooperation in species conservation.
2. The federal government could be more flexible in the way works with state and local governments by using and expanding Section 4(d).

Increasing Cooperation Between the Federal Government and States

State governments are capable of species conservation, but the ability of states to manage species within their boundaries is limited under the current implementation of the ESA. Section 6 of the ESA states that the federal government “shall cooperate to the maximum extent practicable with the States” to protect listed species.69 Under Section 6, the FWS is supposed to consult with state governments when working to conserve endangered or threatened species, but cooperation has only played a minor role.

Many scholars and policy analysts consistently agree that there has been a “lack of consistent and sustained cooperation between state and federal agencies.”70 From the 1970s through the 1990s, the FWS heavily relied on threatening states with regulatory action under the ESA. This tactic has fostered a culture of distrust between state and federal agencies. The decades of tension have led to incoherent policies and a lack of comprehensive commitments by both levels of government. In recent years, there seems to be more signs of cooperation between federal and state agencies, but partnership between the different levels of government is still strained.71

The case of the greater sage-grouse shows that the federal government can work with state governments to successfully promote the conservation and recovery of species. The FWS could incorporate more cooperative federalism into its policies before and after a species is listed. Congress or the FWS could change the

66  Ibid.
67  Utah Community-Based Conservation Program. (n.d.) Utah’s Community-Based Conservation Program. Retrieved from http://utahcbcp.org/index
71  Ibid.
implementation of the law to facilitate state programs that would allow for local permitting and federal oversight. The federal government could also delegate to the states the ability to set standards with site-specific tailoring.\textsuperscript{72}

Section 6 is also important because it authorizes funding for a variety of state conservation programs, as long as they are at least as stringent as federal programs. Some states have created comprehensive endangered species programs that match the ESA's stringency. For example, California created the Coordinated Regional Strategy to Conserve Biological Diversity, also known as the Agreement on Biological Diversity, in 1991.\textsuperscript{73} Most states have signed cooperative agreements for limited projects. Under Section 6, the federal government can extend funding to states and territories to conserve species and habitats on non-federal lands. To receive these funds, states or territories must have a cooperative agreement with the Secretary of the Interior.\textsuperscript{74} In FY 2016, the FWS used the Cooperative Endangered Species Conservation Fund to award approximately $56.3 million to states.\textsuperscript{75} Although ESA grants given to states under Section 6 have been growing over the past 30 years, grants alone will not solve endangered species issues. On top of grant funding, one of the most important cooperative actions would be allowing states to issue permits for “taking” species, which are currently available only from FWS Regional Offices.\textsuperscript{76}

The federal government could use Section 6 of the ESA as it was originally intended for a more consistent, sustained partnership between the different levels of government. States could lead the recovery efforts for threatened and endangered species if the federal government granted them the authority and resources necessary. Overcoming the neglect of Section 6 is a complex issue, but working toward better cooperation may help increase the recovery of species, as well as mitigate the economic harm inflicted on the people who are affected by endangered species designations. State lawmakers and agencies would be more likely to take on a greater role in species conservation if such actions were a positive experience, not a frustrating one.\textsuperscript{77}

Collaborative conservation could fail if the fragile trust between the federal and state agencies were undone. For example, litigation could undermine the fragile collaborative conservation of sage-grouse and other species. The umbrella species status of the sage-grouse increases the incentive of conservation groups to sue the FWS to list these species. If the FWS chooses to list the greater sage-grouse after states, landowners, industry leaders, and taxpayers have spent large sums of money to protect it, then distrust between the states and the federal government will likely increase.\textsuperscript{78}

**Increasing Flexibility for Protecting Species**

Section 4(d) of the ESA allows the FWS to make special rules and regulations to protect species that are listed as threatened. The section states that, “Whenever any species is listed as [...] threatened [...] the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.”\textsuperscript{79} In essence,}

---


\textsuperscript{76} To “take” a species is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” Permitting takings allows loggers, miners, farmers, and other land owners to still operate on their properties without fear of legal repercussions. Taking permits typically require that the permit holder engage in other conservation activities to offset their takings. Fischman, R. L. (2005). Cooperative Federalism and Natural Resources Law. Articles by Maurer Faculty. Paper 219. Retrieved from http://www.repository.law.indiana.edu/facpub/219


Section 4(d) gives the FWS flexibility to create guidelines and policies for the conservation of threatened species, which often involves deferring decision-making power to the states.

Section 4(d) allows the FWS to enhance the preservation of a threatened species by allowing local governments more flexibility to oversee the preservation of a species. The FWS has had some success using Section 4(d) in the past. For example, the FWS has used the section to allow the trapping and killing of Minnesota wolves that have killed domestic animals. The FWS has also used the section to simplify the definition of what is considered a “take” of a threatened species, which provides more flexibility for those that work with or around threatened species. In addition, the FWS has allowed the State of Washington to run local conservation programs for the Puget Sound Chinook salmon.

Section 4(d) allows the federal government to expand the role of state governments in the protection of threatened species and to be more flexible in the way that it approaches threatened-species conservation. The FWS could create more 4(d) rules that would allow states to create conservation plans for threatened species. These rules might make it less costly for states to take part in conservation. Deferring to states would decrease costs for the FWS and allow local officials and community members to make conservation decisions.

Congress could amend the ESA to expand the flexibility of Section 4(d) to more than just threatened species, such as endangered species, candidate species, and other species of concern. If the FWS and state agencies had more flexibility, they may be more effective at conserving species. For the most part, the ESA currently acts as a blanket policy that gives the federal government unilateral power to make decisions regarding species protection. By allowing states to take flexible approaches to species conservation in diverse circumstances, the federal government could oversee more effective conservation strategies. The federal government could still hold the power to oversee state decisions while also giving states the ability to make policies that are most appropriate and effective for their unique circumstances. If Congress amended the ESA to allow more flexibility for state-led conservation, it could lessen the burden of ESA designations on states.

The federal government can use the ESA more effectively to conserve species and limit economic harm by decentralizing much of the decision-making. Overhauling the wording of the ESA to make it more palatable to states would be a difficult task, but Sections 6 and 4(d) are two existing mechanisms that the FWS could use more fully to improve species conservation. These two sections already allow for state conservation programs, but they are not used to their fullest potential. Cooperation and flexibility may improve species conservation both before and after an ESA designation.

**Conclusion**

When the federal government allows states to take the lead on conservation strategies, states can effectively implement their own plans to protect species. In 2015, the FWS chose not to list the the greater sage-grouse because state governments and federal land management agencies proved that they could sufficiently cooperate to protect the species without the need for listing under the ESA. The saga of the sage-grouse shows that, when allowed to work properly, cooperative federalism and decentralized decision-making can effectively conserve species and minimize economic harm.

Cooperative federalism and decentralized decision-making are beneficial because states can experiment with diverse approaches to conservation. State agencies often have better data and expertise than federal agencies, which can

---


make them better equipped to address conservation issues. In addition, state governments often know and respond to the needs of local people better than federal decision-makers.

The ESA could be improved in many ways to take advantage of cooperative federalism and decentralized decision-making, but two of the most practical ways to improve ESA implementation is to improve the use Section 6 and Section 4(d) of the ESA.

Section 6 states that the federal government shall cooperate with the states on species conservation, but this section has been largely ignored over the course of the ESA’s history. The FWS already has the ability under the Act to defer power to the states though this section. The federal government already uses cooperative federalism and decentralized decision-making in environmental policies, such as the Clean Air Act and the Clean Water Act. These laws shows that the federal government can and will cooperate with states to address environmental issues. Expanding the use of Section 6 will likely be one of the simplest ways to take advantage of the benefits of decentralization.

Section 4(d) allows the federal government to provide exemptions and defer power to the states to protect species that are listed as threatened. The FWS could use 4(d) rules more often, and Congress could amend the ESA to widen Section 4(d) so that states have more power and flexibility to conserve species before and after they are listed.

The federal government’s approach of threatening states and private landowners with restrictions and regulations has built a culture distrust that has limited the effectiveness of species conservation. The benefit of cooperative federalism and decentralized decision-making is that we can achieve the national goal of species conservation while also using local knowledge and limiting economic harm. If federal officials changed the implementation of the ESA, they could use the Act as a guide to help the states create their own plans, rather than imposing harsh regulations from above.

The saga of the sage-grouse illustrates two important points. First, state governments can and do conserve species, and they often do it in a less burdensome way than the federal government. Second, the ESA stands in need of reform to help species recover more effectively and to limit economic harm to American citizens.