This paper was originally published by the Rocky Mountain Mineral Law Foundation in the manual of the
Special Institute on the Endangered Species Act:
Current and Emerging Issues Affecting Resource Development (2015)

A NECESSARY TOOL FOR CONSERVATION: THE CASE FOR SECTION 4(D) OF THE ENDANGERED SPECIES ACT

BY

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I. INTRODUCTION

In recent years, no Endangered Species Act ("ESA") issue has divided landowners, project developers, environmental groups, and state and local governments more than ESA Section 4(d). Whereas landowners and project proponents generally view rules promulgated under Section 4(d) as an important and necessary tool to incentivize voluntary conservation measures and soften the sometimes significant economic impact of listing decisions, environmental groups typically view these rules as a means to avoid restricting activities and development when listed species' habitat "overlaps with politically powerful industries."[1] While there is no doubt certain industries, like their environmental non-governmental organization counterparts, have helped shape the contours of recent 4(d) rules, the view that the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (together, the "Services") have somehow transformed 4(d) into a "vehicle to authorize takes for threatened species"[2] discounts the statutory text as well as both the innovative and workable conservation approaches that are possible through Section 4(d) and the many policy reasons to limit application of the ESA's take prohibitions where application of the take prohibitions is not needed to conserve the species. Although 4(d) rules are not appropriate in all instances, this article argues that Section 4(d) grants the Services the necessary discretion to tailor application of ESA take prohibitions to threatened species in a manner that responds to the specific threats to and conservation needs of each species, often resulting in innovative approaches to conserve listed species and their habitat.

II. DISCUSSION

A. Rather than "exempting" or "allowing" acts that would otherwise be prohibited, Section 4(d) enables the Services to customize prohibitions to respond to the circumstances and conservation needs of each species.

When establishing the ESA, Congress applied a blanket prohibition against the "take" of species listed as "endangered" but did not extend the prohibition to species listed as

[1] Joshua Zaffos, *A grouse divided: Will new federal protections rescue the Gunnison sage grouse?*, HIGH COUNTRY NEWS, Dec. 8, 2014, *available at* https://www.hcn.org/issues/46.21/a-grouse-divided.

[2] Michael C. Blumm & Kya B. Marienfeld, *Endangered Species Act Listings and Climate Change: Avoiding the Elephant in the Room*, 20 ANIMAL L. 277, 307 (2014).

"threatened."[3] Congress excluded "threatened" species from the Section 9(a) take prohibitions, and placed the burden on the Services to either justify application of the take prohibitions as a reasoned exercise of agency discretion, or to justify the adoption of other measures as "necessary and advisable" to conserve a species. Specifically, Section 4(d) of the ESA provides the Services with two tools to address threatened species: (a) the promulgation of regulations deemed "necessary and advisable" to conserve a threatened species and (b) the application, by rule, of the Section 9(a) take prohibitions to a threatened species.[4] "Section 4(d) of the ESA thus authorizes the Service to extend any or all of the Section 9 take prohibitions, as well as the necessary protective measures, to any threatened species."[5]

The USFWS and NMFS have implemented Section 4(d) differently. With each species it lists as threatened, NMFS addresses Section 4(d), thereby applying or limiting the ESA's take prohibition to each species on a case-by-case basis. In contrast, USFWS has adopted a blanket rule that extends the ESA take prohibition to all threatened species *unless* USFWS adopts a species-specific 4(d) rule that essentially withdraws the blanket take prohibition as it applies to a particular threatened species.[6] However, in each case, Section 4(d) grants the Services the authority and discretion to tailor application of the ESA take prohibition to threatened species in a manner that is specific to the circumstances and conservation needs of each species.[7]

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[3] Other ESA protections apply to both threatened and endangered species, including Section 7, which requires federal agencies to ensure, in consultation with the Services, that any action the agencies authorize, fund, or carry out will not be likely to jeopardize the continued existed of a listed species, or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2).

[4] 16 U.S.C. § 1533(d); *see Sweet Home Chapter of Communities for Great Or. v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993) ("[T]he two sentences of § 1533(d) represent separate grants of authority."), *rev'd on other grounds*, 515 U.S. 687 (1995); *Trout Unlimited v. Lohn*, 559 F.3d 946, 962 n.12 (9th Cir. 2009) (finding Section 4(d) "does not *require* regulations protecting threatened species from taking" (emphasis in original)); *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214 (D. D.C. 2011) (rejecting plaintiffs' plain language reading of the section asserting that all special 4(d) rules must be "necessary and advisable" for the conservation of the species and finding that ESA is ambiguous on that point).

[5] *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d at 230 ("The [USFWS] was not required to demonstrate that diverging from the general regulation at 50 C.F.R. § 17.31(a) is necessary and advisable to provide for the conservation of the polar bear. Rather, the relevant question before the Court is whether the [USFWS] reasonably concluded that the specific prohibitions and exceptions set forth in its [special 4(d) rule] are necessary and advisable to provide for the conservation of the polar bear.").

[6] 50 C.F.R. § 17.31(a), (c).

[7] *See Wash. Envtl. Council v. NMFS*, No. C00-1547R, 2002 WL 511479, at *8 (W.D. Wash. Feb. 27, 2002) ("The language of 4(d) makes it clear that NMFS 'may' impose a take prohibition. The unavoidable implication is that NMFS may, in its discretion, choose not to

(continued . . .)

Although species-specific 4(d) rules are often viewed as permitting or exempting acts that would otherwise be prohibited, the USFWS has noted that it is "more accurate to say that a species-specific 4(d) rule supersedes the blanket 4(d) rule for the species at issue, and extends a more tailored set of prohibitions to the species."[8] Thus, even though the USFWS frequently uses the terms "exempt" and "allow" in order to clearly convey which activities are *not* subject to the ESA's take prohibitions, "this use of language is for clarity only."[9] Thus, provided the species should be listed as "threatened" rather than "endangered"[10] and the agency provides a reasoned basis for the prohibitions and "exceptions" in the rule, a species-specific 4(d) rule that extends a tailored set of prohibitions to conserve the species is consistent with the text and spirit of the statute.

B. Section 4(d) enables the Services to incentivize and recognize pre-listing state and private conservation efforts.

One way that the Services have tailored species-specific 4(d) rules is to recognize long-term pre-listing conservation partnerships with landowners and state and local governments. In the final 4(d) rule for the lesser prairie-chicken (*Tympanuchus pallicicinctus*) ("LPC"), a species of grouse found in shrublands and grasslands in the southern Great Plains, the USFWS provided that take incidental to activities conducted by a participant in the Lesser Prairie Chicken Range-Wide Conservation Plan ("Range-Wide Plan"), and operating in compliance with the Range-Wide Plan, would not be prohibited.[11] The USFWS included this provision in the 4(d) rule "in

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(. . . continued)
impose a take prohibition. NMFS's decision to craft a limited take prohibition under 4(d) must be, *a fortiori* under this analysis, within its discretion.").

[8] USFWS, *Final Environmental Assessment of 4(d) Protective Regulations for the Utah Prairie Dog* at 1-2 (June 2012), *available at* http://www.fws.gov/mountain-prairie/species/mammals/UTprairiedog/2012_August_FinalEnvironmentalAssessmentProposed4dRule.pdf ("In the interest of providing a clear rule and environmental assessment with simple language, we will be using 'exempt' and 'allow' in order to convey that the 4(d) rule would not prohibit certain actions. It is important to note that this use of language is for clarity only. The 4(d) rule would still function by prescribing the regulations necessary and advisable to conserve species.").

[9] *Id*.

[10] Under the ESA, "endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). "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." 16 U.S.C. § 1532(20).

[11] 79 Fed. Reg. 20,074 (Apr. 10, 2014).

recognition of the significant conservation planning efforts of the five State wildlife agencies within the range of the [LPC]."[12] Although the LPC listing decision was recently vacated by the U.S. District Court for the Western District of Texas,[13] the LPC 4(d) rule remains illustrative of the extent to which Section 4(d) enables the Services to incentivize and recognize collaborative pre-listing state and private conservation efforts.

The Range-Wide Plan was developed by the Western Association of Fish & Wildlife Agencies ("WAFWA"), which includes representatives of the state wildlife agencies within the LPC's range, and applies to a number of activities, including oil and gas operations, agricultural practices, and wind energy. Although developed prior to USFWS's decision to list the species with the goal of implementing the plan to obviate the need for listing, the Range-Wide Plan was designed with Section 4(d) in mind.[14] Indeed, the Range-Wide Plan was drafted such that, if the USFWS decided to list the LPC, a 4(d) rule could provide that take incidental to activities conducted by a participant enrolled in, and operating in compliance with, the Range-Wide Plan would not be prohibited.[15]

Using a support tool (the Critical Habitat Assessment Tool or CHAT) that identifies focal areas and connectivity zones for LPC, the Range-Wide Plan sets forth population and habitat goals, and establishes a mitigation framework administered by WAFWA that allows participants to mitigate any unavoidable impacts. In addition to the mitigation framework, the Range-Wide Plan requires participants to comply with established avoidance and minimization measures. For example, because LPC have been shown to collide with fences, the Range-Wide Plan requires participants to install appropriate fence markings along new fences.[16] Similarly, because power lines serve as potential perch sites for raptors that may prey on LPC, the Range-Wide Plan requires participants to bury distribution lines within 1.25 miles of leks active within the previous five years.[17]

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[12] *Id*.

[13] *Permian Basin Petroleum Ass'n v. U.S. Dep't of Interior*, No. 7:14-cv-00050-RAJ, 2015 WL 5307052 (W.D. Tex. Sept. 1, 2015) (concluding that the USFWS had not properly applied its Policy for Evaluation of Conservation Efforts When Making Listing Decisions to its evaluation of the Range-Wide Plan).

[14] Western Association of Fish and Wildlife Agencies, *The Lesser Prairie-Chicken Range-wide Conservation Plan* at 1 (Oct. 2013), *available at* http://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/Initiatives/Lesser%20Prairie%20Chicken/2013LPCRWPfinalfor4drule12092013.pdf.

[15] *Id*.

[16] *Id*. at 109.

[17] *Id*. at 108.

The Range-Wide Plan has already helped stimulate significant private landowner interest and investment. According to WAFWA,

> "[s]ince the [Range-Wide Plan] went into effect last year, more than 96,000 acres of [LPC] habitat is being conserved through ten-year landowner agreements. More than 180 oil, gas, wind, electric and pipeline companies have enrolled about 11 million acres across the five states, and have committed $47.5 million for habitat conservation."[18]

To the extent the Services are able, through Section 4(d), to encourage these types of collaborative conservation actions and commitments, which in the case of LPC are occurring primarily on private land, Section 4(d) can become an effective tool to incentivize voluntary pre-listing conservation efforts. Indeed, as Barton H. Thompson Jr. observed, "[t]he nation's efforts to protect and promote biodiversity will be successful only to the degree that those efforts ensure that private landowners, in managing their lands, take into account the needs of the other species that live or could live there."[19] Incentivizing private conservation efforts through Section 4(d) and other similar mechanisms is critical.

This strategy of recognizing pre-listing conservation efforts in 4(d) rules is similar to the USFWS's current practice of excluding lands enrolled in habitat conservation plans ("HCP") and safe harbor agreements ("SHA") from designated critical habitat. Both practices acknowledge the fact that regulatory assurances—whether in the form of excluding lands enrolled in HCPs or SHAs from critical habitat or a commitment that, done properly, pre-listing conservation efforts will be covered under a species-specific 4(d) rule—are necessary to secure long-term conservation commitments from private landowners.[20] Indeed, absent regulatory assurances through Section 4(d) or other similar mechanisms, it is difficult to see how a broad, landscape-level conservation effort like the Range-Wide Plan would generate sufficient support and investment to justify the significant development and implementation costs.

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[18] Western Association of Fish and Wildlife Agencies, *WAFWA Statement Regarding the Federal Court Decision about the Lesser Prairie-Chicken* (Sept. 3, 2015), *available at* http://www.wafwa.org/news/e_1626/News/2015/9/WAFWAStatementRegardingtheFederalCourtDecisionabouttheLesserPrairie-Chicken.htm .

[19] Barton H. Thompson Jr., *Managing the Working Landscape*, THE ENDANGERED SPECIES ACT AT THIRTY 101 (Dale D. Goble et al., eds., 2006) ("[A]lmost 80 percent of the species listed by the United States as endangered or threatened depend on private land for some or all of their habitat needs.").

[20] *See* Robert D. Thornton & Liz Klebaner, *The Critical Habitat Exclusion Policy: Implications for Conservation Partnerships on Private Land*, NATURAL RESOURCES & ENVIRONMENT, ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES 13 (Summer 2015) (arguing that the Services should revamp the proposed policy regarding exclusions from critical habitat to commit to the exclusion of HCPs and other conservation partnerships as a means to promote landscape-level conservation on private lands).

C. Section 4(d) allows the Services to tailor listing decisions to address identified threats to species.

In addition to recognizing pre-listing conservation efforts, Section 4(d) also allows the Services to tailor listing decisions to respond to the actual threats to the species. In the USFWS's final listing decision and interim 4(d) rule on the northern long-eared bat (*Myotis septentrionalis*) ("NLEB"),[21] the USFWS opted to tailor its application of the ESA take prohibitions based on whether an activity is proposed in areas of the country affected by white-nose syndrome. For areas of the country not affected by white-nose syndrome,[22] the interim 4(d) rule exempts incidental take from all activities.[23] For areas of the country affected by white-nose syndrome, the interim 4(d) rule exempts from ESA take prohibitions the following activities: (1) forest management practices, (2) maintenance and limited expansion of transportation and utility rights-of-way, (3) prairie habitat management, and (4) limited tree removal projects, provided these activities protect known maternity roosts and hibernacula.[24] These activities are exempted provided: (1) the activity occurs more than 0.25 mile (0.4 km) from a known, occupied hibernacula, (2) the activity avoids cutting or destroying known, occupied roost trees during the pup season (June 1–July 31), and (3) the activity avoids clearcuts (and similar harvest methods, *e.g.*, seed tree, shelterwood, and coppice) within 0.25 mile (0.4 km) of known, occupied roost trees during the pup season (June 1–July 31).[25]

Although there are several other factors that affect that NLEB, the USFWS noted in its listing decision that "no other threat is as severe and immediate to the [NLEB's] persistence as the disease, white nose syndrome (WNS)."[26] The decision goes on to note that "other threat factors (including forest management activities, wind-energy development; habitat modification, destruction, and disturbance; and other threats) may have cumulative effects to the species in addition to WNS; however, they have not independently caused significant, population-level effects on the [NLEB]."[27] Thus, the interim 4(d) rule differentiates between those areas within the WNS buffer zone, the set of counties within the range of the NLEB "within 150 miles (241 km) of the boundary of U.S. counties or Canadian districts where the fungus Pd [the fungus that

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[21] 80 Fed. Reg. 17,974 (Apr. 2, 2015).

[22] USFWS, *Northern Long-Eared Bat Interim 4(d) Rule: White-Nose Syndrome Buffer Zone* (June 30, 2015), *available at* http://www.fws.gov/midwest/nleb/documents/WNSBufferZone.pdf.

[23] 80 Fed. Reg. at 18,032.

[24] *Id*.

[25] *Id*.

[26] *Id*. at 17,989.

[27] *Id*. at 18,023-24.

causes WNS] or WNS has been detected,"[28] and those areas outside the WNS buffer zone. Not only is this differentiation grounded in USFWS's analysis of other threat factors, thereby only imposing the ESA's take prohibitions to the extent those prohibitions are needed for conservation of the species, (1) it does not unnecessarily restrict projects and activities within the range of the NLEB that would not cause significant, population-level effects and (2) it allows the USFWS to focus its limited resources on conservation efforts within the areas where the species is in decline.

Moreover, because the USFWS's WNS buffer zone is updated as new data is collected, the application of take prohibitions will adapt when and if WNS is detected in additional U.S. counties or Canadian districts. Thus, if the WNS buffer zone were to move into North and South Dakota, for example, only those activities discussed above (*e.g.*, certain forest management practices and transportation maintenance practices, provided such activities adhere to the standards outlined in the rule) would be exempted from the ESA take prohibitions.[29]

D. Section 4(d) enables the Services to refrain from applying the ESA's take prohibitions where existing regulatory mechanisms are sufficiently protective.

Section 4(d) also enables the Services to take into account existing regulatory mechanisms when deciding whether to apply the ESA's take prohibitions to a threatened species, thereby enabling the Services to conserve valuable agency resources where species are adequately protected under separate authorities. In the final 4(d) rule for the polar bear (*Ursus maritimus*),[30] the USFWS extended all of the ESA take prohibitions to the polar bear, with two notable exceptions. First, for activities authorized or exempted under the Marine Mammal Protection Act ("MMPA") or Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the USFWS declined to apply the ESA take prohibitions (*i.e.*, no additional authorization under the ESA is required where the activity is authorized under the MMPA or CITES). Second, the USFWS determined that incidental take "caused by activities within the United States but outside the current polar bear range would not be subject to the takings prohibition."[31]

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[28] *Id*.

[29] Not only can species-specific 4(d) rules be designed to adapt to changing circumstances, the reasonableness of the Section 4(d) approach is reinforced by the Services' ability to rescind or amend 4(d) rules at any time.

[30] 78 Fed. Reg. 11,766 (Feb. 20, 2013). The USFWS initially published the polar bear 4(d) rule in 2008, but lawsuits challenging the rule were filed in various federal district courts. These lawsuits were consolidated and, in 2011, the U.S. District Court for the District of the Columbia upheld all of the provisions of the 4(d) rule under the ESA but found that the USFWS violated the National Environmental Policy Act and the Administrative Procedure Act. *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214. The USFWS prepared an environmental assessment and, in 2013, published the final 4(d) rule.

[31] 78 Fed. Reg. at 11,766.

Focusing on the first exception, the USFWS "assessed the conservation needs to the polar bear in light of the extensive protections already provided to the species under the MMPA and CITES" and determined that the 4(d) rule "synchronize[d] the management of the polar bear under the ESA with management provisions under the MMPA and CITES."[32] Congress enacted the MMPA to protect and enhance marine mammal populations.[33] The MMPA imposes a general moratorium on "taking" marine mammals and marine mammal products.[34] "Take" is defined in the MMPA as "to harass, hunt, capture, or kill, or attempt to harass, capture, or kill any marine mammal."[35] The MMPA provides some limited exceptions to its take prohibition. The Secretary of the Interior has the authority to issue permits authorizing incidental take associated with otherwise lawful activities, provided such take will have a "negligible impact" on the species."[36] CITES protects species at risk from international trade by regulating international trade in certain animals and plants. Although CITES does not regulate take or domestic trade of polar bears, it contributes to species conservation by regulating international trade in polar bears and polar bear products.

The USFWS's decision on the 4(d) rule explains that even though the definitions of "take" under the MMPA and ESA "differ in terminology," where they differ, "due to the breadth of the MMPA's definition of 'harassment,' the MMPA's definition of 'take' is, overall, more protective."[37] Thus, "managing take of polar bears under the MMPA adequately provides for the conservation of polar bears."[38] Moreover,

> "[t]he length of the authorization under the MMPA are limited to 1 year for [incidental harassment authorizations], 3 years for commercial fishing authorizations, and 5 years for incidental take regulations, thus ensuring that activities likely to cause incidental take of polar bears are periodically reviewed and mitigation measures updated, if necessary, to ensure that take

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[32] *Id.* at 11,768.

[33] 16 U.S.C. § 1361(2), (6).

[34] 16 U.S.C. § 1371(a).

[35] 16 U.S.C. § 1362(13). The USFWS's decision on the 4(d) rule notes that the definitions of "take" under the MMPA and ESA differ; "however, they are similar in application" and "due to the breadth of the MMPA's definition of 'harassment,' the MMPA definition of 'take' is, overall, more protective." 78 Fed. Reg. at 11,770.

[36] 16 U.S.C. § 1371(a)(5).

[37] 78 Fed. Reg. at 11,770.

[38] *Id*.

> remains at a negligible level. Incidental take permits and statements under the ESA have no such statutory time limits . . . ."[39]

Thus, according to the USFWS, the incidental take standards under the MMPA provide more protection than the ESA.

Without opining on whether the MMPA's take standards indeed provide "more protection"' than the ESA's as applied to polar bears, the Services' ability to account for existing regulatory mechanisms through Section 4(d) is an important tool for eliminating duplicative regulations and conserving limited agency resources. If a species is adequately protected by existing regulatory mechanisms—whether those mechanisms flow from local, state, or other federal authorities—it is reasonable that the Services should have the flexibility not to apply the ESA's take prohibitions.

E. Without the regulatory assurances and flexibility provided by Section 4(d), the ESA becomes unworkable and operates to encourage the conversion of land to uses that may not support listed species.

Section 4(d) has also become an effective tool to soften the sometimes devastating economic impact of ESA listings, thereby removing incentives to eliminate suitable habitat and enabling stakeholders to work together in an effort to conserve the species. For example, the 4(d) rule for the streaked horned lark (*Eremophila alpestris strigata*) "exempts," among other things, certain airport maintenance activities and operations and agricultural activities from the ESA's take prohibitions "in order to provide for the conservation" of the species.[40] Endemic to the Pacific Northwest, the current range of the streaked horned lark, a subspecies of the horned lark, is divided into three regions: south Puget Sound in Washington, the Washington coast and lower Columbia River islands (including dredge spoil deposition sites near the Columbia River in Portland, Oregon), and the Willamette Valley in Oregon. Habitat used by streaked horned larks is generally flat with substantial areas of bare ground and sparse vegetation, including grasses and forbs. Streaked horned lark populations are found at many airports because "airport maintenance requirements provide the desired open landscape context and short vegetation structure."[41]

With respect to airports, the USFWS's final decision on the 4(d) rule notes that certain management actions taken at airports are "generally beneficial to the streak horned lark."[42] These actions include vegetation management to maintain desired grass height on or adjacent to

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[39] *Id*. at 11,771.

[40] 78 Fed. Reg. 61,452 (Oct. 3, 2013).

[41] *Id*. at 61,459-60.

[42] Id. at 61,500.

airports, discing, herbicide use, hazing of "hazardous wildlife" (*e.g.*, geese), and routine maintenance.[43] In addition to exempting these maintenance activities that arguably have a benefit on the subspecies, the 4(d) rule exempts take associated with accidental aircraft strikes, noting that such "strikes are an unavoidable consequence of creation of habitat for larks on airfields."[44] The notice explains:

> "The listing of the streaked horned lark imposes a requirement on airport managers where the subspecies occurs to consider the effects of their management activities on this subspecies. It is likely that airport managers would take actions to deter the subspecies from areas where it currently occurs in order to avoid the burden of the resulting take restrictions that would accrue from the presence of a listed species. However, this special rule, which exempts the non-Federal airport activities listed above, and which may otherwise result in take under section 9 of the [ESA], eliminates the incentive for airports to reduce or eliminate populations of streaked horned larks from the airfields."[45]

Thus, the USFWS opted to exclude airport activities not only because certain activities were deemed beneficial to the subspecies, but because it recognized that applying the ESA's take prohibitions to airport activities could spur airport operators to take actions to eliminate favorable habitat conditions.

For agricultural activities, the USFWS's final decision notes that "[w]hile some agricultural activities may harm or kill individual streaked horned larks, maintenance of extensive agricultural lands in the Willamette Valley is crucial to maintaining the population of streaked horned larks in the valley." Thus, the 4(d) agricultural "exemption" was, in part, a recognition that "routine agricultural activities, even those with the potential to inadvertently take individual streaked horned larks, are necessary components of agricultural operations and create habitat that may provide for the long-term conservation needs of the subspecies."[46] The 4(d) rule also recognized that

> "this special rule will further conservation of the subspecies by discouraging conversions of the agricultural landscape into habitats unsuitable for the streaked horned lark and encouraging landowners to continue managing the remaining landscape in ways

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[43] *Id*.

[44] *Id.*

[45] *Id*.

[46] *Id.*

> that meet the needs of their operation and provide suitable habitat for the streaked horned lark.
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> . . . [I]n certain instances, easing the general take prohibitions on non-federal agricultural lands may encourage continued responsible land uses that provide an overall benefit to the subspecies . . . . [S]uch a special rule will promote the conservation efforts and private land partnerships critical for species recovery."[47]

Thus, the streaked horned lark example illustrates that easing the ESA take prohibitions for certain ongoing activities like airport operations and agricultural activities not only helps promote collaborative conservation efforts, it discourages the elimination of habitat and/or the conversion of land to other uses that may not support listed species.[48]

F. Section 4(d) allows private landowners and the Services to prioritize resources in a manner that brings the most benefit to the species.

In addition to the benefits to species outlined above, Section 4(d) is an effective tool because it enables the Services to devote limited resources to promoting and monitoring conservation measures rather than processing applications and reviewing HCPs submitted under ESA Section 10.[49] It also allows private landowners to avoid unnecessary process and time delays and to put money allocated for ESA compliance to work to benefit the species. This is particularly relevant given the time and expense involved in pursuing a project- or activity-specific HCP. Even for "low-effect" HCPs, which are those involving minor or negligible effects on listed species and their habitat, the Services are required to consider each HCP on a case-by-case basis and the process often takes multiple years.[50] Thus, where the threats to the

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[47] *Id*.

[48] "Easing" take prohibitions on ongoing activities like airport operations and agricultural activities also arguably dampens arguments that the cost of listing on existing activities and industries is simply too high, thereby making the ESA less vulnerable to efforts to amend.

[49] Under Section 10 of the ESA, the Services may, where appropriate, authorize the taking of federally listed species if such taking occurs incidentally during otherwise legal activities. 16 U.S.C. § 1539(a)(1)(B). Section 10 requires an applicant for an incidental take permit to submit an HCP that specifies, among other things, the impacts that are likely to result from the taking and the measures the permit applicant will undertake to minimize and mitigate such impacts. 16 U.S.C. § 1539(a)(2)(A). Section 10 provides statutory criteria that must be satisfied before an incidental take permit can be issued. 16 U.S.C. § 1539(a)(2)(B).

[50] Although the Services' Habitat Conservation Planning and Incidental Take Permit Processing Handbook notes that a low-effect HCP should take less than three months, an HCP with an environmental assessment should take three to five months, and an HCP with an environmental impact statement should take less than 10 months (USFWS & NMFS, *Habitat*

(continued . . .)

species are known and there are clear, easily implementable conservation measures, a species-specific 4(d) can avoid imposing unnecessary burdens on private landowners and the agencies.

For some species, such as the Oregon silverspot butterfly (*Speyeria zerene hippolyta*), a 4(d) rule with specific prescriptive protection measures could provide for effective conservation of the species without imposing unnecessary regulatory burdens on private landowners and the USFWS. Historically, the Oregon silverspot butterfly was scattered along the Washington and Oregon coasts and was closely associated with the distribution of early blue violet (*Viola adunca*), the primary larval host plant found in open meadows. However, the exclusion of fire and the advanced ecological succession of meadows to brushland and forest have reduced the butterfly's habitat. Scotch broom, a non-native species, and exotic grasses have crowded out native meadow plants including the blue violet, becoming a major threat to Oregon silverspot butterfly habitat. Because much of the available Oregon silverspot butterfly habitat exists on small parcels of private land, a 4(d) strategy that allowed particular activities provided the landowner followed a prescription of removing invasive plants, including Scotch broom, and planting native nectar plants, could be very effective. Indeed, particularly on small parcels of private land, 4(d) rules that includes clear and easily implementable conservation measures are likely to be far more effective at encouraging conservation efforts than a habitat conservation plan approach because HCPs are costly and time-consuming.

G. Section 4(d) is not a panacea.

Although Section 4(d) can provide the Services with the necessary discretion to tailor application of ESA take prohibitions to threatened species in a manner that responds to the specific threats to and the conservation needs of each species, at times resulting in innovative approaches to conservation, and can dampen the negative economic effect on existing operations in a manner that incentivizes collaborative conservation efforts, 4(d) rules are not appropriate in all circumstances. For some species, like those discussed above, 4(d) rules provide (or, with respect to the Oregon silverspot butterfly, could provide) for effective conservation of the species without imposing unnecessary regulatory burdens on private landowners and the USFWS. For other species, where there is more uncertainty with respect to particular threats and necessary conservation measures across the landscape, a species-specific 4(d) rule may be less appropriate. Perhaps, then, it is most helpful to consider Section 4(d) as one among many tools that can be used to tailor application of the ESA to address the conservation needs of species.

III. CONCLUSION

Over the years, Section 4(d) has ignited significant controversy regarding whether and to

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(. . . continued)
Conservation Planning and Incidental Take Permit Processing Handbook at 6-3 (Nov. 4, 1996), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf), the fact is that low-effect HCPs generally take closer to six to nine months from the time there is an "agreed upon" HCP and non-low-effect HCPs (whether involving an environmental assessment or environmental impact statements) often take 18 months to three years.

what extent the Services should use the provision as a vehicle to "exempt" the take of threatened species. Although there are no doubt situations where species-specific 4(d) rules are not appropriate and the ESA's take provisions should apply broadly to ensure the protection of a particular threatened species, there are countless examples of the Services using Section 4(d) to further the purpose of the ESA to protect and recover imperiled species and the ecosystems upon which they depend.