The Endangered Species Act: Private Land Strategies for Working Together

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The State of Hawai'i has the dubious distinction of being the "endangered species capitol of the U.S." with the latest tally as follows:

PLANTS:
- 272 endangered plants
- 10 threatened plants
- 10 candidates
- 293 species of concern

ANIMALS:
- 77 endangered animals
- 4 threatened animals
- 28 candidates
- 363 species of concern

This focus on numbers of species sometimes diverts our attention from the stated purposes of the Endangered Species Act of 1973 (ESA), which are to ". . . provide a means whereby the **ecosystems** upon which endangered species and threatened species depend may be conserved. . . ."

Understanding the implications that this holds for land development and the legal, political, and social arena that exists today requires some basic understanding of the key provisions of the Endangered Species Act. Several key provisions of the ESA deserve review: the species listing process, the Section 9 prohibition on the take of listed species, the Section 7 consultation process, and the Section 10 incidental take permit process. Knowledge of the flexibility of the ESA helps private landowners learn of three tools to conserve endangered species on private land: Conservation Agreements, Safe Harbor Agreements, and Habitat Conservation Plans.

Government intervention in the protection of America's endangered and threatened species is relatively recent, with passage of the Endangered Species Act about 25 years ago. Fish and Wildlife Service biologists have since been sensitized by knowledge that the vast majority of these species are on private, not public, lands. Although this nation has made considerable progress with endangered species conservation over the past 25 years, the task is not complete. The Secretary of the Interior recognizes that implementation of the Act should be improved by building stronger partnerships with states and local governments, and especially with private industry and individuals.

Before an animal or plant can be placed on the federal endangered and threatened species list, threats to the species from habitat destruction, pollution, over harvesting, disease, predation or other natural or man-made factors must be reviewed and evaluated. This review process provides many opportunities for public input from concerned citizens and organizations, the scientific community, and all levels of government. The rulemaking process can also end in the Service's refusal to place a species on the list or designate critical habitat, once all the facts are known through this fact-finding, public process. After an animal is placed on the list, it cannot be possessed, taken, or transported in interstate or international commerce without special permission. "Take" is defined in the ESA, making it illegal for anyone to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered animals, or attempt to do so. "Harm" may include significant habitat modification where it actually kills or injures a listed animal through impairment of essential behavior. Federal prohibitions under the ESA for the destruction of listed plants on federal lands are restrictive, but on non-federal lands, harm to listed plants is only illegal if such harm is in knowing violation of state law.

Section 7 of the ESA requires that all federal agencies do not undertake activities that will jeopardize the continued existence of listed species or result in destruction or adverse modification to their critical habitat. Through the Section 7 consultation process, the ESA allows the taking of listed species incidental to an agency action if such taking does not jeopardize the species. In these cases the federal agency is required to adopt terms and conditions and reasonable and prudent measures identified by the Service to minimize the level of incidental take on animals. In addition, Cooperative Agreements, sometimes referred to as Safe Harbor Agreements, can be signed between a private party and the Service in which the Service in essence takes responsi-

bility for any incidental take (intra-service Section 7) which might occur during the time the Cooperative Agreement is in effect.

Habitat Conservation Plans can also be implemented through Section 10 of the ESA, and incidental take permits are available when non-federal activities will result in "take" of threatened or endangered species. Such a conservation plan must accompany an application for an incidental take permit. These plans are often referred to as "HCPs". The purpose of the HCP and permit is to allow these activities by determining and minimizing the level of "take" and mitigating for that take to the maximum extent practicable.

The Service, through the provisions of the ESA, can provide such exemptions to private landowners to legally proceed with activities that would otherwise result in illegal take of a listed species while still meeting agreed-upon Fish and Wildlife goals. The administration has shown its desire to assure fair treatment for private landowners by issuing ten principles that outline "user friendly" mechanisms for building new partnerships and strengthening existing ones through a fair, cooperative, and scientifically sound approach. Some of these principles include the need to provide quick, responsive answers and certainty to landowners; to treat landowners fairly and with consideration; to create incentives for landowners to conserve species; and to minimize social and economic impacts. In addition, on August 11, 1994, Secretary of the Interior Bruce Babbitt issued a "no surprises" policy associated with habitat conservation planning on private lands. This policy assures landowners that in the event that an unlisted species addressed in an approved conservation plan is subsequently listed pursuant to the ESA, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the ESA. The "no surprises" policy was intended to provide assurances to non-federal landowners participating in habitat conservation planning that no additional land restrictions or financial compensation will be required from an HCP permittee for species adequately covered by a properly functioning HCP.

A suit challenging this policy, however, was recently filed by the Biodiversity Legal Foundation, the Spirit of the Sage Council, and others, claiming that the Fish and Wildlife Service has violated its duties under the ESA. In Hawai'i, application of Habitat Conservation Planning and other mechanisms to exempt purely private incidental taking is pending resolution of the inconsistencies with current state law that does not specifically allow a state exemption process for incidental take.

Many private landowners are not aware of the federal assistance programs available to help them in their habitat restoration, conservation, and management efforts. Conservation Agreements can allow development to occur with protection of a species assured to the point that it may never require placement on the list of endangered or threatened species. The private lands "Partners for Wildlife" program, administered by the Fish and Wildlife Service, is a land-stewardship program that provides financial and technical assistance to private landowners desiring to restore wildlife habitat on their lands. As such, the program helps private landowners to conserve the nation's biodiversity. In addition to cost-share payments, the types of assistance include design and management of restoration projects, dirt moving, reseeding, and advice on soil and water quality improvement, water management, native plant revegetation, and grazing management. Funding for this program has been increasing over the years and private landowners are encouraged to contact the Fish and Wildlife Service Private Lands Coordinator if they may be interested in this partnership opportunity.

The ESA, as amended and with new policies, provides a number of mechanisms—seldom used in the past—to resolve or avoid apparent conflicts between the needs of species threatened with extinction and the rights of private landowners. A number of private parties in Hawaii have taken full advantage of these programs. The Service is grateful to the landowners of Kai Malino, Kealia, and McCandless Ranches who have worked tirelessly to protect the last remaining 'alala on their lands. The same debt of gratitude is extended to Kamehameha Schools/Bishop Estate, which is seeking innovative ways in partnership with the Fish and Wildlife Service to protect endangered species on their lands. Similarly, the Service appreciates the cooperation of Chevron, Inc. in a restoration program for endangered Hawaiian stilts on O'ahu. The Fish and Wildlife Service Pacific Islands Office looks forward to expanding its partnerships with private landowners, in cooperation with the state, as we seek to protect, enhance, and recover endangered and threatened species in Hawai'i.