

**RETHINKING THE ESA’S “ORDERLY  
PROGRESSION”—RECOVERY CREDIT  
SYSTEMS AND ENERGY DEVELOPMENT  
ON PUBLIC LANDS**

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# RETHINKING THE ESA’S “ORDERLY PROGRESSION” – RECOVERY CREDIT SYSTEMS AND ENERGY DEVELOPMENT ON PUBLIC LANDS

CARLOS R. ROMO\*

## TABLE OF CONTENTS

I. BACKGROUND ON ESA .....	473
A. ESA Goals & Listing Process .....	473
B. Incidental Take Authorizations .....	474
1. ESA Section 7 Consultation.....	474
2. ESA Section 10 Permits .....	475
II. BLM CONSERVATION MANAGEMENT AND SPECIES POLICIES .....	476
A. BLM Land Use Planning and NEPA .....	477
B. Special Status Species & BLM Species Management.....	477
C. Implementation of BLM Species Policy with Oil and Gas Development.....	478
III. BACKGROUND ON RCS.....	480
A. RCS Guidance.....	480
B. Texas DSL Plan: Expansion of RCS to Pre-Listed Species with Non-Federal Agencies .....	482
IV. RECOVERY CREDITS FOR SPECIES PROTECTION & ENERGY DEVELOPMENT ON BLM LANDS .....	484
A. The General Lack of Emphasis on Recovery under the ESA .....	484
B. Problems with BLM’s Current Species Policy.....	486
1. Emphasis on Quantity over Quality .....	486
2. Conflict in Courts of Appeals on Triggering NEPA .....	487
3. Challenges to RMP Process .....	487
4. Problems Implementing NEPA Categorical Exclusions .....	488
V. CAN RCS HELP BLM REFOCUS ITS CONSERVATION POLICIES ON PROACTIVE RECOVERY EFFORTS? .....	489
A. Legal Factors: Can BLM Legally Adopt RCS? .....	489
B. Biological Factors: Reversing the “Orderly Progression” of the ESA to Focus on Recovery .....	490
1. Greater Emphasis on Recovery and Habitat Conservation.....	490
2. Ability to Account for Effects from Climate Change .....	492
C. Political Factors: Multiple-use, Certainty and Conservation Incentives .....	492
1. Fulfilling the “Multiple-use” and Conservation	

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Mandates .....	493
2. Greater Predictability for Lease-holders .....	493
3. Environmental Group Support for Recovery Incentives.....	494
4. BLM Has the Capacity, but It Also Will Need the Administrative Will .....	495
VI. CONCLUSION .....	496

The Endangered Species Act (“ESA”) is frequently maligned by both conservation groups and developers. Some critics observe that proposed listings of species as threatened or endangered may come too late to help a species avoid extinction, and may do too little to help promote species recovery.<sup>1</sup> Others cite the statute’s failure to allow for consideration of economic costs of a species listing as a reason the ESA needs reform.<sup>2</sup> These tensions have been increasingly evident in recent proposed listings aimed at protecting species affected by oil and gas development.<sup>3</sup> And they have prompted renewed calls for ESA reform.<sup>4</sup>

Still, recent innovations in ESA policy have the potential to reshape the ESA and appease critics on both sides even without congressional action. In particular, recovery credit systems (“RCS”) are a promising new approach that encourage a focus on recovery through market-based incentives. A recent expansion of the RCS concept in the “hybrid” Texas Conservation Plan for the Dunes Sagebrush Lizard (“Texas DSL Plan”) applies conservation measures to the oil and gas industry and encourages proactive conservation efforts focused on recovery before a species is even listed.

This article examines how recovery credits could be expanded on federal lands. The Bureau of Land Management (“BLM”) is in an ideal position to expand innovative species conservation efforts focused on the use of recovery credits because: (1) the BLM is focused on the conservation of species on public lands (often focusing on species before they are listed under the ESA), (2) BLM’s current spe-

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1. John Charles Kunich, *Species & Habitat Conservation: The Fallacy of Deathbed Conservation under the Endangered Species Act*, 24 ENVTL. L. 501, 550 (1994) (noting that “the ESA allows species to deteriorate to the brink of extinction before it begins to intervene”); see ROBERT BONNIE, ENVIRONMENTAL DEFENSE FUND, BUILDING ON SUCCESS: IMPROVING THE ENDANGERED SPECIES ACT (2005), available at [http://apps.edf.org/documents/4466\\_Building%20on%20Success.pdf](http://apps.edf.org/documents/4466_Building%20on%20Success.pdf).

2. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 490 (2008).

3. See, e.g., the proposal to list the dunes sagebrush lizard as an endangered species and the political fallout it caused as a result of its location in the heart of the oil and gas producing Permian Basin. Endangered and Threatened Wildlife and Plants; Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77801 (proposed Dec. 14, 2010); David Porter, *Playing Chicken in Oil-Patch Politics*, WALL STREET J. (Dec. 5, 2012), [http://online.wsj.com/article/SB1000142412788732390160457815716395836\\_9742.html](http://online.wsj.com/article/SB1000142412788732390160457815716395836_9742.html) (noting that endangered species listings threaten development in the Permian Basin, which accounts for seventy percent of Texas’s total oil production and twenty percent of the nation’s production).

4. Legislative consideration of ESA reform appears to re-emerge every few years. Most recently, hearings were held on ESA reform issues on June 19, 2012 before the House Committee on Natural Resources in the U.S. House of Representatives. See *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Hearing Before the House Committee on Natural Resources*, NATURAL RESOURCES COMMITTEE (June 19, 2012), <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=298882>. For a discussion of efforts to pass the Threatened and Endangered Species Recovery Act of 2005, see Steven A. Burns & Jeffrey H. Wood, *Moving Toward Recovery: A Southeastern Analysis of the Threatened & Endangered Species Recovery Act of 2005 (H.R. 3824)*, 21 J. LAND USE & ENVTL. L. 23 (2005).

cies policy is outdated and in need of improvement, and (3) BLM is facing increasing pressure to balance conservation with energy development.<sup>5</sup> The need for a new species tool at BLM is particularly important given recent suits challenging BLM conservation practices as applied to energy development and due to future listing decisions targeting species with significant habitat on BLM lands.

This article is organized as follows: Part I summarizes the basic framework of the ESA and species management on BLM lands. Part II discusses BLM conservation policies with a focus on BLM policies managing environmental impacts from oil and gas activities. Part III reviews the origins of the RCS concept and the recent expansion of recovery credits to private entities and pre-listing conservation planning efforts. And finally Parts IV and V analyze why expansion of the RCS model to BLM lands to address species affected by oil and gas and energy development is appropriate. The article concludes that RCS offers a promising new tool for balancing the competing species conservation and energy development interests on public lands while encouraging a renewed focus on species recovery.

## I. BACKGROUND ON ESA

### A. ESA Goals & Listing Process

Since 1973, the ESA has tasked the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively the “Service”) with the goal to prevent the extinction of “any member of the animal kingdom.”<sup>6</sup> When the ESA was enacted, Congress specifically found that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation” and that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, recreational, and scientific value to the Nation and its people.”<sup>7</sup> The purpose of the ESA is to provide a program and means to conserve species and their ecosystems.<sup>8</sup>

Section 4 of the ESA establishes how a species is listed as threatened or endangered and the factors that must be considered in a listing decision.<sup>9</sup> Any interested person may submit a petition to list a species, and by statute, the agencies responsible for making listing decisions are required to respond to petitions within specific time limits.<sup>10</sup> In practice, listing priorities are driven by citizen suit litigation.<sup>11</sup> Indeed, two recent Settlement Agreements finalized in 2011 between the

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5. The focus of this article is on the BLM because it manages over 245 million surface acres of public lands (more than any other federal agency) and 700 million acres of sub-surface mineral estate throughout the nation. See *The Bureau of Land Management: Who We Are, What We Do*, BLM (Jan. 26, 2012), available at [http://www.blm.gov/wo/st/en/info/About\\_BLM.html](http://www.blm.gov/wo/st/en/info/About_BLM.html).

6. 16 U.S.C. § 1532 (2012) (defining fish and wildlife).

7. 16 U.S.C. § 1531 (2012).

8. *Id.* § 1531(b).

9. 16 U.S.C. § 1533(b) (2012).

10. *Id.*

11. Recent congressional inquiries found that the Center for Biological Diversity, one advocacy organization that frequently files ESA listing suits seeking agency action on species petitions, was awarded \$2,148,572.46 in attorney fees under the fee-shifting provisions of the ESA. See Press Release, House

Department of Interior and two species advocacy groups resolving listing suits for over 250 species outline the agency “workplan” that will drive listing priorities for the next four years.<sup>12</sup>

Once listed, ESA Section 9 prohibits “take” of threatened or endangered species.<sup>13</sup> This prohibition is one of the most powerful tools in any environmental law.<sup>14</sup> Regulations approved by the Supreme Court and applicable to the Service define “harass” in the statutory definition of “take” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”<sup>15</sup> The take prohibition applies with equal force to government and private actors. Coupled with the potential for civil and criminal penalties and the delegation of civil enforcement of the ESA to private individuals via citizen suits,<sup>16</sup> the presence of a threatened or endangered species near a landowner’s or developer’s property can trigger immediate cessation of activities that could harm the species.

## B. Incidental Take Authorizations

There are two exceptions to the general prohibition on take of threatened and endangered species relevant to conservation planning on BLM lands: incidental take authorizations obtained through ESA section 7 consultation for federal agency actions and ESA section 10 permits for incidental take.

### 1. ESA Section 7 Consultation

ESA section 7(a)(2) requires that every federal agency consult with the Service to “insure that any action authorized, funded, or carried out by such agency (hereinafter referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”<sup>17</sup> If the Service determines that an agency action may affect a species, ESA section 7(c) requires that a “Biological Assessment” be conducted before an agency makes any “irretrievable commitment of resources.”<sup>18</sup> The biological assessment must evaluate the “potential effects of the action . . . and determine whether any such species or habitat are likely to be adversely affected by the action.”<sup>19</sup> Section 7 consultations apply “to all

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Natural Res. Comm. Chairman Doc Hastings, Natural Res. Comm., DOJ Documents Confirm Ctr. for Biological Diversity Received Millions in Taxpayer Funds from ESA-Related Lawsuits (Jun. 27, 2012), available at <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=301242>.

12. *In re Endangered Species Act Sec. 4 Deadline Litig.*, 277 F.R.D. 1 (D.D.C. 2011) (the 2011 Settlement Agreements).

13. 16 U.S.C. § 1538 (2012).

14. J.B. Ruhl, *Is the Endangered Species Act Eco-Pragmatic?*, 87 MINN. L. REV. 885, 918 (2003) (noting that prohibition on take is “one of the most powerful and broadly applicable statements of the precautionary principle on the books”).

15. 16 U.S.C. § 1532(19) (2012) (defining take); 50 C.F.R. § 17.3 (2012) (defining harass); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 708 (1995).

16. 16 U.S.C. § 1540 (2012).

17. 16 U.S.C. § 1536(a)(2) (2012).

18. *Id.* § 1536(c).

19. 50 C.F.R. § 402.12(a) (2012).

actions in which there is discretionary Federal involvement or control.”<sup>20</sup> An agency’s biological assessment may serve as the agency’s compliance with National Environmental Policy Act (“NEPA”) requirements.<sup>21</sup>

If a biological assessment determines that an action is “not likely to adversely affect” a species, no formal section 7 consultation is required.<sup>22</sup> But if formal consultation is required, the FWS must conduct a full review of the agency action and issue a biological opinion to determine “whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”<sup>23</sup> If an action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, the consultation must determine whether there are “reasonable and prudent alternatives” to the planned agency action that would not jeopardize the species.<sup>24</sup>

If the FWS determines that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate ESA section 7(a)(2), it must include in its biological opinions an estimate of the take of the species.<sup>25</sup> This final section 7 determination serves as an incidental take permit for the agency action. The take authorization is contingent on the action agency carrying out the terms and conditions to protect the species in the biological opinion. While the terms of a biological opinion are legally only advisory, courts have noted that “action agencies very rarely choose to engage in conduct that the Service has concluded is likely to jeopardize the continued existence of a listed species.”<sup>26</sup>

## 2. ESA Section 10 Permits

ESA section 10 also allows parties to obtain permits for the take of species. Section 10(a)(1)(A) permits are granted for “scientific purposes or to enhance the propagation or survival of the affected species.”<sup>27</sup> The FWS has adopted a conservation program for species not yet listed as threatened or endangered (so-called “candidate species”) under the premise that activities on non-federal lands designed to conserve a species pre-listing should qualify for “enhancement of survival” permits post-listing.<sup>28</sup> While Candidate Conservation Agreements (“CCAs”) can be

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20. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (stating that section 7 “covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specified triggering events have occurred”).

21. 16 U.S.C. § 1536(c)(1) (2012).

22. 50 C.F.R. § 402.14(b)(1) (2012).

23. *Id.* § 402.14(g)(4).

24. *Id.* § 402.14(h).

25. *Id.* § 402.14(i).

26. *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also* Interagency Cooperation, 51 Fed. Reg. 19,926, 19,928 (June 3, 1986) (“[T]he Service issues biological opinions to assist the Federal agencies in conforming their proposed actions to the requirements of section 7. However, the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2).”).

27. 16 U.S.C. § 1539(a)(1)(A) (2012).

28. *See* Announcement of Final Policy for Candidate Conservation Agreement with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999) (adopting a Candidate Conservation Agreement with Assurances policy to offer incentives to encourage non-federal property owners to conserve candidate species).

used with federal agencies (including the BLM), the Service adopted a Candidate Conservation Agreement with Assurances (“CCAA”) policy as a means to encourage non-federal property owners to take pro-active measures to conserve species in exchange for assurances that additional conservation measures are not required if the species is ultimately listed.<sup>29</sup> It is also Service policy to consider the conservation benefits of conservation plans in making listing determinations.<sup>30</sup>

Section 10(a)(1)(B) permits allow for incidental take of species as long as a conservation plan is submitted showing the steps the applicant will implement “to minimize and mitigate such impacts” and as long as the Service finds that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species.”<sup>31</sup> These permits are more commonly known as Habitat Conservation Plans (“HCP”).<sup>32</sup>

Unlike CCAs, which are focused on the conservation of species pre-listing, a key requirement for applicants seeking incidental take permits through HCPs is the demonstration that the applicant will “minimize and mitigate” impacts “to the maximum extent practicable.”<sup>33</sup> Further, issuance of the permit may not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”<sup>34</sup> The Service has noted that the criteria for incidental take permits under section 10 of the ESA are “essentially identical” to the implementing criteria under section 7, which require that issuance of a permit not “jeopardize the continued existence of any listed species, or result in “destruction or adverse modification” of designated critical habitat.<sup>35</sup> Regulations define “jeopardize” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of that species.”<sup>36</sup> This overlap in issuance criteria between section 7 and section 10 helps support the exchange of conservation best practices between the programs.

## II. BLM CONSERVATION MANAGEMENT AND SPECIES POLICIES

A brief discussion outlining the current species management practices of the BLM is necessary to understand why BLM is primed to adopt new recovery-focused measures associated with oil and gas activities. The following outlines the current overlay of the Federal Land Policy and Management Act (“FLMPA”), NEPA and ESA section 7 requirements related to species conservation and oil and gas production on BLM lands.

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29. *Id.* at 32,729.

30. Policy for Evaluation of Conservation Efforts when Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003). For an evolution of Service policy on the evaluation of CCAs in making listing decisions, see J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 386 (1998).

31. 16 U.S.C. § 1539(a)(2)(A), (B).

32. Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 61 Fed. Reg. 63,854 (proposed Dec. 2, 1996) [hereinafter HCP Handbook], available at <http://www.fws.gov/endangered/esa-library/pdf/HCPBKTOC.PDF>.

33. 16 U.S.C. § 1539(a)(2)(A), (B).

34. *Id.* § 1539(a)(2)(B)(iv).

35. HCP Handbook, *supra* note 32.

36. 50 C.F.R. § 402.02(d) (2012).

#### A. BLM Land Use Planning and NEPA

The FLMPA charges the BLM to manage federal lands in a manner that will protect, among other resources, their ecological value with a focus on “multiple uses” and “sustained yield.”<sup>37</sup> BLM accomplishes these goals through the development of statutorily mandated land use plans called Resource Management Plans (“RMPs”).<sup>38</sup>

Pursuant to the BLM’s implementing regulations, “[a]pproval of a resource management plan is considered a major Federal action significantly affecting the quality of the human environment.”<sup>39</sup> Consequently, RMPs require the development of Environmental Impact Statements (“EIS”) under NEPA.<sup>40</sup> Assessment of a given environmental impact must occur as soon as that impact is “reasonably foreseeable,” and must take place before an “irretrievable commitment of resources” occurs.<sup>41</sup>

The purpose of an EIS is to assess the proposed agency action and its environmental impacts and “inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>42</sup>

#### B. Special Status Species & BLM Species Management

Due to the BLM’s general land use and ecological conservation goals under the FLMPA, it has statutory responsibilities for protecting species on federal lands independent of the ESA. Accordingly, it has propounded its own policy manual for managing what it terms “special status species.”<sup>43</sup>

According to BLM’s Special Status Species Management manual, “BLM special status species are: (1) species listed or proposed for listing under the Endangered Species Act (ESA), and (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s).”<sup>44</sup> To be considered “Bureau Sensitive Species,” BLM must have capability to significantly affect the conservation status of the species through management, there must be information that a species has undergone or is predicted to undergo a downward trend affecting the viability of the species, or there is evidence that habitats on BLM land are threatened.<sup>45</sup>

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37. 43 U.S.C. § 1701(7) (2012).

38. 43 U.S.C. § 1712(b), (c) (2012).

39. 43 C.F.R. § 1601.0-6.

40. *Id.*; see also 42 U.S.C. § 4332(C) (2012).

41. 40 C.F.R. § 1502.22 (2012); 42 U.S.C. § 4332(2)(C)(v).

42. 40 C.F.R. § 1502.1 (2012).

43. See U.S. DEPT. OF INTERIOR BUREAU OF LAND MGMT., 6840—SPECIAL STATUS SPECIES MANAGEMENT (Dec. 12, 2008) [hereinafter SPECIAL STATUS SPECIES MANUAL], available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_manual.Par.43545.File.dat/6840.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.43545.File.dat/6840.pdf).

44. *Id.* § .01.

45. *Id.* § .2A1.

The two purposes of the BLM policy are to “conserve and/or recover” species covered by the ESA so that listing is no longer necessary and “initiate proactive conservation measures” for Bureau sensitive species.<sup>46</sup> The policy for federal candidate species and BLM sensitive species is to ensure that no action that requires BLM approval contributes to the need to list a species as threatened or endangered.

While any given action by the BLM must account for special status species, BLM manages species listed under the ESA through ESA section 7 consultations combined with the NEPA process.<sup>47</sup> For example, ESA section 7 biological assessments can be consolidated into a NEPA EIS.<sup>48</sup> The level of section 7 review for a particular BLM land use planning decision will largely depend on the NEPA analysis and ESA review already conducted in connection with earlier “steps” in BLM’s land use process. New analyses and section 7 consultations may not be necessary if existing analyses and NEPA documents are determined to be adequate. In addition, new NEPA analyses are also frequently “tiered” to account for existing analyses.<sup>49</sup>

A recent trend is for BLM is to combine NEPA analyses of RMPs and leases, provided both types of decisions are adequately addressed with the appropriate level of NEPA analysis.<sup>50</sup> This combined “programmatic” approach (generally in an EIS) can be sufficiently detailed to contemplate actual site development. An example of combining planning and implementation decisions is a 2008 BLM RMP Amendment in New Mexico that included both land use planning decisions and implementation decisions to address the effects from oil and gas leasing on the Dunes Sagebrush Lizard and Lesser Prairie Chicken.<sup>51</sup> A programmatic RMP will typically spell out specific best management practices and other stipulations that may be added to an APD in the form of conditions of approval (“COAs”).<sup>52</sup>

### C. Implementation of BLM Species Policy with Oil and Gas Development

Oil and gas leasing on BLM land involves three levels of BLM land use planning. From broadest to most site-specific, these are: RMPs,<sup>53</sup> leasing decisions,<sup>54</sup>

46. *Id.* §.02.

47. 50 C.F.R. § 402.06 (2012).

48. SPECIAL STATUS SPECIES MANUAL, *supra* note 43, at § .1F5a (“The BLM may satisfy the requirement to prepare a [Biological Assessment] by incorporating by reference material from a previous biological assessment pertaining to a similar action or through preparation of an environmental assessment or environmental impact statement.”).

49. *Id.* § .1F12.

50. See U.S. DEPT. OF INTERIOR BUREAU OF LAND MGMT., H-1601-1 – LAND USE PLANNING HANDBOOK 29-30 (March 11, 2005), available at [http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/planning\\_general.Par.65225.File.dat/blm\\_lup\\_handbook .pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/planning_general.Par.65225.File.dat/blm_lup_handbook.pdf) [hereinafter LAND USE PLANNING HANDBOOK]. Because “implementation decisions” have different administrative review provisions than an RMP, combined planning efforts have to separate out which review procedures available for each land use planning component. Under 43 C.F.R. § 3165.4(a) (2012), a party may appeal BLM’s decisions concerning oil and gas leasing and operations to the Interior Board of Land Appeals (“IBLA”).

51. See U.S. DEPT. OF INTERIOR BUREAU OF LAND MGMT., SPECIAL STATUS SPECIES RECORD OF DECISION AND APPROVED RES. MGMT. PLAN AMENDMENT (Apr. 2008), available at [http://www.blm.gov/pgdata/etc/medialib/blm/nm/field\\_offices/roswell/rfo\\_planning/special\\_status\\_species.Par.34868.File.dat/pdf\\_sss\\_rod\\_rmpa\\_May\\_2008.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nm/field_offices/roswell/rfo_planning/special_status_species.Par.34868.File.dat/pdf_sss_rod_rmpa_May_2008.pdf) (introductory letter to the amended plan from Douglas J. Burger, District Manager of the BLM Pecos District).

52. See LAND USE PLANNING HANDBOOK, *supra* note 50, at 47; see also 43 C.F.R. § 3101.1-2 (2012); Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations, 72 Fed. Reg. 10,308 (Mar. 7, 2007).

53. 43 U.S.C. § 1712(a) (2012).

and Plans of Development (“POD”) or Applications for Permits to Drill (“APD”).<sup>55</sup> BLM’s so-called “Implementation Decisions” constitute BLM’s final actions allowing on-the-ground actions to proceed.<sup>56</sup>

As noted above, the development of RMPs will require detailed EIS under NEPA. Amendments to an RMP and new leasing and APDs generally take the form of a more limited Environmental Assessment (“EA”) which is then “tiered” to prior analysis conducted in association with the RMP.<sup>57</sup> For example, when the New Mexico office conducted a lease sale in summer 2012, the office performed a more limited EA that referenced the previous EIS conducted with the RMP amendment.<sup>58</sup> Still, even a more limited EA requires an analysis of alternatives and public comment unless no new NEPA analysis is required at all.<sup>59</sup> EISs and EAs analyzing implementation decisions will generally prescribe species conservation measures and/or mitigation required of lessees.

The 2005 Energy Policy Act excluded five categories of oil and gas development on BLM lands from NEPA.<sup>60</sup> For instance, one exclusion covers surface disturbances of less than 5 acres when the total surface disturbance on the lease is not greater than 150 acres and a site-specific NEPA analysis has been previously completed.<sup>61</sup> BLM’s NEPA Policy Manual interprets requirements applicable to each categorical exclusion.<sup>62</sup> However, even if an action is categorically excluded from NEPA review, section 7 consultation may still be required.

Species conservation and energy development on BLM lands involves a complicated and overlapping set of requirements. As discussed further below, the myriad applicable requirements create two truisms. First, it is increasingly difficult to balance all the “multiple uses” that the BLM must manage on federal lands. As a result, BLM is more apt to set-aside certain public lands for oil and gas development and then prohibit development on other nearby parcels. Second, BLM’s cur-

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54. *Id.* § 1712(e).

55. 43 C.F.R. § 3162.3-1(c) (2012).

56. LAND USE PLANNING HANDBOOK, *supra* note 50, at 29–30.

57. *Id.* tbl. III-1 at 16; 40 C.F.R. §§ 1508.28, 1502.21 (2012).

58. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., ENVTL. ASSESSMENT FOR JULY 2012 COMPETITIVE OIL AND GAS LEASE SALE, EA No. DOI-BLM-NM-P020-2012-0585-EA (July 2012), *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/0/og\\_sale\\_notices\\_and/2012/july\\_2012.Par.676.57.File.dat/](http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/0/og_sale_notices_and/2012/july_2012.Par.676.57.File.dat/).

59. For instance, existing NEPA documents may be adequate to make a “Determination of NEPA Adequacy.” (DNA). *See* DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., BLM NAT’L ENVTL. POLICY ACT HANDBOOK H1790-1 (Jan. 2008) [hereinafter BLM NEPA HANDBOOK], *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf).

60. 42 U.S.C. § 15942 (2012). The five exclusions are: (1) individual surface disturbances of less than five acres so long as the total surface disturbance on the lease is not greater than 150 acres, and site-specific analysis in a document prepared pursuant to the NEPA has been previously completed; (2) drilling an oil and gas well at a location or well pad site at which drilling has occurred within five years prior to the date of spudding the well; (3) drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five years prior to the date of spudding the well; (4) placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five years prior to the date of placement of the pipeline; (5) maintenance of a minor activity, other than any construction or major renovation of a building or facility.

61. *Id.*

62. *See* BLM NEPA HANDBOOK, *supra* note 59, app. 2 at 141.

rent species conservation policies are increasingly besieged, either through drawn-out environmental impact analyses, or more recently, litigation. As discussed more fully below, this background helps set the stage for BLM to potentially avail itself of RCS as a tool to help BLM manage these competing interests.

### III. BACKGROUND ON RCS

The RCS concept was designed for use by federal agencies on non-federal lands. However, the hybrid Texas Conservation Plan for the Dunes Sagebrush Lizard is a recent innovative extension of recovery awards used with private entities and with a focus on conservation measures associated with oil and gas activities. After this Part provides more background on the original RCS concept and the application of RCS to oil and gas activities, Part V will explain why this approach may be particularly useful for energy development on public lands.

#### A. RCS Guidance

The concept of a recovery credit is as follows: an entity overseeing conservation measures can “bank” credits generated from activities focusing on the recovery of species for later use (debits) with activities that require mitigation.<sup>63</sup> It is a “quantifiable unit of measure sanctioned by the Service representing a contribution to the recovery of a species listed under the ESA.”<sup>64</sup> A “recovery crediting system” must result in a “net benefit to recovery” of the species.<sup>65</sup> The Service defined “net benefit to recovery” to mean “[e]nhancement of a species’ current status by addressing the threats identified at the time of listing or in a current status review.”<sup>66</sup> In other words, a net benefit means “not an even trade of debits for credits.”<sup>67</sup>

The Service issued guidance in 2007 proposing a “Recovery Credit System” for use by federal agencies as a means to “complement” existing “conservation tools” used to implement the ESA.<sup>68</sup> The concept was originally developed for use by the Department of Defense at its training grounds in Ft. Hood in Texas.<sup>69</sup> In its guidance seeking to expand the concept, the Service noted that only federal agencies would be able to use recovery credit systems, and recovery credits could only be accrued through conservation activities on *non-federal* lands.<sup>70</sup> The Service highlighted the original limitation to non-federal lands when it responded to a public comment regarding the issue:

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63. Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. 62,258, 62,259 (Nov. 2, 2007).

64. *Id.*

65. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 73 Fed. Reg. 44,761, 44,763 (July 31, 2008).

66. *Id.* at 44,768.

67. *Id.* at 44,764.

68. Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. at 62,258.

69. *Id.* at 62,259. A third-party independent evaluation of the Ft. Hood recovery credit system found that the project “met its goals for habitat conservation.” ROBERSTON CONSULTING GROUP, INC. THIRD PARTY EVALUATION OF THE RECOVERY CREDIT SYSTEM PROOF OF CONCEPT 61, (2010), available at [http://rcs.tamu.edu/media/277203/final\\_rcs\\_eval\\_report\\_march\\_2010.pdf](http://rcs.tamu.edu/media/277203/final_rcs_eval_report_march_2010.pdf).

70. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 73 Fed. Reg. at 44,762–63.

Only conservation that occurs on non-Federal lands can be counted as recovery credits.

The Service supports the mitigation of impacts using either Federal or non-Federal lands. As noted above, recovery credits were intended to promote the recovery of listed species on non-Federal land and to offset adverse effects to listed species from proposed Federal actions.<sup>71</sup>

In contrast to a conservation bank, a key aspect of a recovery credit system is the ability to generate credits from non-permanent conservation activities. As the Service noted in its final guidance and response to comments, the intent was to develop a system of generating credits from activities that would not permanently encumber land as a means to encourage more private landowners to conduct conservation activities benefitting a species:

The most apparent distinguishing characteristics of recovery crediting are the possibility of encumbering property on a less than permanent basis and of protecting habitat in a dispersed array over a landscape. Some landowners may find non-permanent arrangements more attractive than conventional banks, and thus be induced to participate where they might not otherwise.<sup>72</sup>

One rationale for development of credits for non-permanent conservation activities was the need for conservation measures that could be used in exchange for temporary impacts.<sup>73</sup> Another goal was to flexibly define how recovery credits could be generated beyond the permanent reserve set-asides traditionally used with conservation banking.<sup>74</sup> The Service did not want to “preclude the inclusion of any recovery tasks (e.g., research, public outreach) that are necessary for delisting or downlisting of the target species in the development of RCS.”<sup>75</sup>

According to the Service, the debiting analysis associated with RCS is subject to an ESA section 7 programmatic consultation.<sup>76</sup> As the Service notes:

In implementing an RCS, the programmatic approach will be necessary due to the nature of credit and debit concepts, and to ensure a net benefit to recovery of the species. The Federal action subject to consultation is the establishment of the debiting process and actions included therein. Under

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71. *Id.* at 44,763.

72. *Id.* at 44,765.

73. *Id.*

74. Memorandum from the Director of the Fish & Wildlife Service on Guidance for the Establishment, Use, and Operation of Conservation Banks 2, (May 3, 2003) (defining “conservation bank” as “a parcel of land containing natural resource values that are conserved and managed in perpetuity, through a conservation easement held by an entity responsible for enforcing the terms of the easement, for specified listed species and used to offset impacts occurring . . . to the same resource values on non-bank lands”), available at [http://www.fws.gov/endangered/esa-library/pdf/Conservation\\_Banking\\_Guidance.pdf](http://www.fws.gov/endangered/esa-library/pdf/Conservation_Banking_Guidance.pdf).

75. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 73 Fed. Reg. at 44,764.

76. 73 Fed. Reg. at 44,764.

programmatic consultation, much of the effects analysis is completed upfront, rather than repeatedly for each individual action.<sup>77</sup>

In particular, the Service notes that a “two-stage,” “tiered” consultation is most appropriate for recovery credit systems. The first stage analyzes the “landscape-level effects” from the debiting process in a programmatic biological opinion.<sup>78</sup> The second stage addresses “project specific effects,” which should be expedited by the anticipation of project-specific effects in the programmatic biological opinion.<sup>79</sup> As discussed more fully below, the parallel of the RCS programmatic consultation to the BLM’s RMP and implementation decision NEPA process makes the RCS approach particularly appropriate for BLM resource planning.

#### B. Texas DSL Plan: Expansion of RCS to Pre-Listed Species with Non-Federal Agencies

The Texas DSL Plan was developed in 2011–2012 as a means to manage conservation efforts for the DSL in the Permian Basin, a region that produces twenty percent of domestic oil and gas.<sup>80</sup> The Texas DSL Plan extended the RCS concept in several important ways.

One innovative aspect of the Texas DSL Plan is its unique combination of a CCAA and HCP. The “hybrid” approach was necessary in part because of the uncertainty as to whether the DSL would be listed. The Texas DSL Plan was not finalized until February 2012, and a listing decision was to be made by statute by June 2012.<sup>81</sup> Thus, combining elements of a CCAA and HCP allowed stakeholders an opportunity to show the Service that a listing was precluded by proactive conservation measures taken under the CCAA pre-listing. But it also accounted for the possibility that a listing would ultimately be made, and for the potential need for an HCP to mitigate take post-listing.

The other major innovation of the Texas DSL Plan was the extension of the RCS concept to non-federal agencies.<sup>82</sup> RCS was particularly useful in Texas because of the complex issues associated with oil and gas mineral and surface rights in the Permian Basin. The Texas DSL Plan noted that ownership and occupancy of

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77. *Id.* at 44,771.

78. *Id.*

79. *Id.*

80. U.S. FISH AND WILDLIFE SERVICE ET AL., TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD (*SCeloporus arenicolus*) (Sept. 27, 2011) [hereinafter TEXAS DSL PLAN], available at [www.fws.gov/southwest/es/.../TX\\_Cons\\_Plan\\_DSL\\_20110927.pdf](http://www.fws.gov/southwest/es/.../TX_Cons_Plan_DSL_20110927.pdf).

81. The DSL was proposed for listing in December 2010, which would have made a listing decision due by December 2011. 75 Fed. Reg. 77,801 (proposed Dec. 14, 2010). However, due to “substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the proposed listing,” the Service re-opened the record and delayed a final listing determination for six months. 76 Fed. Reg. 75,858 (proposed Dec. 5, 2011) (to be codified at 50 C.F.R. pt. 17). This critical period not only allowed the Texas DSL Plan to be finalized before a final listing decision was made, but it also allowed the Service to account for the plan in the final determination under its Policy for Evaluation of Conservation Efforts When Making Listing Decisions (“PECE Policy”). 68 Fed. Reg. 15,100 (Mar. 28, 2003) (to be codified at 50 C.F.R. ch. IV). Ultimately, the Service withdrew the proposal to list the DSL and cited the high levels of participation in the Texas DSL Plan and New Mexico CCA as a motivation for the withdrawal. 77 Fed. Reg. 36,872 (proposed June 19, 2012) (to be codified at 50 C.F.R. pt. 17).

82. TEXAS DSL PLAN, *supra* note 80, at 10.

lands in the Permian Basin was often shared among multiple entities.<sup>83</sup> As with the Ft. Hood program, and as the Service explained in the RCS guidance, recovery credits are useful over conservation banks when extra landowner incentives are necessary and when it may not be appropriate to permanently encumber lands in perpetuity. Indeed, the Texas DSL Plan emphasized this point:

Any effort to create a permanent set-aside of meaningful acreage for the DSL will require the written agreement from all interest holders, which may be an insurmountable task due to the inability to identify and obtain agreement of all owners of the surface and mineral estates. The challenges of identifying and acquiring written agreement from all of these interests, particularly the surface and mineral interests which in this area are typically severed and held by different people and entities, make the establishment of a permanent preserve in most cases impracticable, if not impossible.<sup>84</sup>

As the Texas DSL Plan further rationalized, even if fully unified owners of DSL habitat land that were “willing sellers” could be identified, securing the interests as conservation easements at an affordable price would be unlikely when the substantial mineral interests were accounted for.<sup>85</sup> Thus, the Texas DSL Plan needed recovery credits that would encourage landowners and oil and gas operators to take proactive conservation steps without permanently setting aside habitat.

The focus on recovery in the Texas DSL Plan *pre-listing* is also a critical extension of the recovery credit system concept. Recovery credits were originally developed at Ft. Hood for conservation of two endangered species: the golden-cheek warbler and black-capped vireo.<sup>86</sup> Litigation has established that recovery is not a mandatory aspect of HCPs, let alone a CCAA, which encourages pro-active conservation efforts before a species is even listed.<sup>87</sup> Indeed, the RCS guidance partly assumed that recovery efforts would be relatively well-established in an already existing recovery plan, which is developed after a species is listed as endangered or threatened.<sup>88</sup> However, the Service noted in its RCS guidance that other information besides recovery plans could be used to establish an RCS.<sup>89</sup>

In the case of the Texas DSL Plan, part of the plan itself was to generate more information on what conservation activities could provide a net benefit to the species.<sup>90</sup> Thus, a portion of the plan’s recovery focus was on developing research and

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83. *Id.* at 75.

84. *Id.*

85. *Id.*

86. SHELLEY ROBERTSON & H. BRUCE RINKER, THIRD PARTY EVALUATION OF THE RECOVERY CREDIT SYSTEM PROOF OF CONCEPT 3, ROBERSTON CONSULTING GROUP (Mar. 2010), available at rcs.tamu.edu/media/277203/final\_rcs\_eval\_report\_march\_2010.pdf.

87. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp.2d 31, 42 (D.D.C. 2007).

88. 73 Fed. Reg. 44,765 (July 31, 2008); 16 U.S.C. § 1533(f) (2012). The criteria for recovery plans is established under *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121 (2001). There, the district court invalidated a Service recovery plan that failed to establish (1) “objective measurable criteria” that would allow for a determination of when a species could be removed from the list of endangered species, and (2) “estimates of the time required to carry out those measures needed to achieve the plan’s goal.”

89. 73 Fed. Reg. at 44,765.

90. See generally TEXAS DSL PLAN, *supra* note 80.

additional knowledge about the DSL. This is consistent with the RCS guidance, which provided for flexibility in determining what activities could generate recovery credits.<sup>91</sup> In the case of the Texas DSL Plan, entities will continue to generate recovery credits pre-listing which can then be used by entities that cannot avoid DSL habitat should a listing triggering take and mitigation requirements occur. Because mitigation and recovery are not legally required pre-listing, the plan is encouraging conservation efforts targeting recovery even though take is not yet strictly prohibited.<sup>92</sup>

#### IV. RECOVERY CREDITS FOR SPECIES PROTECTION & ENERGY DEVELOPMENT ON BLM LANDS

Just as the Texas DSL Plan extended the RCS concept to private entities, the BLM might find use for RCS on federal lands. This Part explores some of the reasons why it is the appropriate time to consider this expansion of the RCS concept, and examines some of the potential factors to consider in the adoption of the approach on federal lands.

##### A. The General Lack of Emphasis on Recovery under the ESA

While recovery of species is undoubtedly one of the goals of the ESA,<sup>93</sup> recovery achievements contemplated by the ESA have been lackluster.<sup>94</sup> Some scholars have noted that this is in part because the legal requirements for recovery and regulations implementing recovery have never been fully developed.<sup>95</sup> Moreover, the Service has long taken the stance that recovery is not a requirement for HCPs. For instance, it notes that the Service “cannot mandate that HCPs contribute to recovery,”<sup>96</sup> and acknowledges that recovery is “not a statutory requirement” of HCPs in conservation plan guidance:

Issuance of a section 10 permit must not “appreciably reduce” the likelihood of the survival and recovery of the species in the wild. Note that this does not explicitly require an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan. This reflects the fact that HCPs were designed by Congress to authorize incidental take, not to be mandatory recovery tools.<sup>97</sup>

Indeed, the Service notes in its HCP guidance that HCPs are not even required to benefit species.<sup>98</sup>

The lack of emphasis on recovery of species at earlier stages has been criticized by legal scholars for some time. For example, more than fifteen years ago,

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91. *Id.* at 44,764.

92. TEXAS DSL PLAN, *supra* note 80, at 51.

93. 16 U.S.C. § 1533(f) (2012) (requiring development of “recovery plans” for species).

94. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 490 (2008) (noting that the ESA “rarely leads to the recovery of species”); *see also* Kieran F. Suckling & Martin Taylor, *Critical Habitat and Recovery*, in *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 75* (Dale D. Goble et al. eds., 2006) (noting that only fifteen of approximately 1,370 species had been removed from the list as of 2006).

95. Suckling & Taylor, *supra* note 94, at 75.

96. HCP Handbook, *supra* note 32, at 1–15.

97. *Id.* at 3–20.

98. *Id.* at 3–21.

scholars suggested that recovery under the ESA should be re-emphasized by the Service as a means to “do more than simply prevent species from going extinct” and change public perception of the ESA to one more oriented at “problem-solving” rather than “disjointed prohibitions.”<sup>99</sup> Others have noted that, while the ESA has been effective at keeping species from going extinct, only a very small number of species have been recovered.<sup>100</sup> In one article on recovery, the authors postulate that critical habitat designation is key to recovery, and yet only ten percent of species listings have resulted in critical habitat designations, and designations are de-emphasized by the Service.<sup>101</sup>

The Service’s policy to exclude recovery goals and benefits to the species as explicit goals of HCPs and conservation planning has been challenged by species advocates via an ESA citizen suit.<sup>102</sup> In *Spirit of Sage Council v. Kempthorne*, plaintiffs in the Federal District Court of the District of Columbia argued that the definition of “conservation” under the ESA required the Service to include recovery requirements in HCPs.<sup>103</sup> Under the ESA, “conservation” is defined as all methods that can “bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.”<sup>104</sup> D.C. District Judge Emmet Sullivan ruled that this idea might be reasonable if ESA section 10 did not further define the requirements of an HCP.<sup>105</sup> But because section 10 specifies the elements of an HCP, and the ESA section 10 requirements “do not address at all the recovery of species,” the court concluded that “the statutory text makes clear that [incidental take permits] can be granted even if doing so threatens the recovery of a listed species.”<sup>106</sup>

The role of recovery in section 7 consultations is less clear. Similar to ESA section 10, ESA section 7 focuses on prohibiting agency action that will jeopardize a species.<sup>107</sup> However, section 7 implementing regulations expressly require agencies to consider both survival and recovery in consultations on agency actions.<sup>108</sup> The U.S. Court of Appeals for the Ninth Circuit has interpreted these provisions to require an agency to consider both how its actions jeopardize a species and its effects on recovery.<sup>109</sup> Still, it is unclear if this is the Service’s universal policy (the Service adamantly argued in the Ninth Circuit that its duties ended with a jeopardy analysis focused on survival of the species and that it was not required to examine

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99. Federico Cheever, *The Road To Recovery: A New Way Of Thinking About The Endangered Species Act*, 23 *ECOLOGY L.Q.* 1, 8 (1996).

100. Suckling & Taylor, *supra* note 94, at 75.

101. *Id.* at 89.

102. *Spirit of Sage Council v. Kempthorne*, 511 F. Supp.2d 31, 42 (D.D.C. 2007).

103. *Id.*

104. 16 U.S.C. § 1532(3) (2012).

105. *Spirit of Sage Council*, 511 F. Supp.2d at 42.

106. *Id.*

107. 16 U.S.C. § 1536(a)(2) (2012) (prohibiting agency action that is “likely to jeopardize the continued existence of” any listed species).

108. 50 C.F.R. § 402.02 (2012) (prohibiting any agency action “that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild”).

109. *Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008).

recovery goals as part of a section 7 consultation).<sup>110</sup> Moreover, there is little guidance or consensus as to how agencies like the BLM account for recovery in their RMPs and implementation decisions, and the BLM does not appear to be actively encouraging conservation measures focused on recovery versus avoidance.<sup>111</sup>

## B. Problems with BLM's Current Species Policy

The other significant issue with BLM's current species policies is the time and effort taken to include species conservation measures as part of the RMP NEPA process. Moreover, many RMPs are still challenged as a result of their failure to consider specific species issues.

### 1. Emphasis on Quantity over Quality

The U.S. Supreme Court recently noted that “NEPA itself does not mandate particular results.’ Instead, NEPA imposes only procedural requirements.”<sup>112</sup> Indeed, some scholars have noted that NEPA’s “onerous procedural requirements” may be a type of a “penalty-default” that “induces” agencies to “investigate more environmentally benign ways of implementing projects and programs.”<sup>113</sup> Indeed, NEPA seems to perversely encourage large EIS documents that emphasize quantity over quality.<sup>114</sup>

The development of an EIS is time and money intensive; according to one government task force report, a “typical’ EIS takes approximately one to six years to complete (compared to 9–18 months for a typical ‘large’ EA [(Environmental Assessment)]), and costs \$250,000–\$2,000,000 to prepare (compared with \$50,000–\$200,000 for the typical ‘large’ EA).<sup>115</sup> It does not help the recovery of the species when RMPs take 4–5 years or longer to develop.<sup>116</sup>

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110. *Id.* In the decision, the court notes that NMFS was taking the position that recovery did not need to be examined at all. The court found this position unacceptable, yet it ultimately punted on making an affirmative statement as to what was required: “[w]e need not consider whether the ESA itself requires NMFS to consider both survival and recovery (as [we previously] held was the case for critical habitat), because we conclude that the text of the jeopardy regulation is not ‘reasonably susceptible’ to the ‘survival only’ interpretation NMFS now gives it.” *Id.* at 932 (quoting *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976)).

111. *See infra* Part IV.B.

112. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008) (quoting *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989)).

113. Bradley C. Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 TEX. L. REV. 1409, 1420 (2008).

114. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 917 (2002).

115. Neal McAiley, *NEPA and Assessment of Greenhouse Gas Emissions*, 41 ENVTL. L. RPT. NEWS & ANALYSIS 10197, at 10198 (2011) (citing NEPA Task Force Report to CEQ, *Modernizing NEPA Implementation*, ch. 6 (Sept. 2003), available at <http://ceq.hss.doe.gov/ntf/report/chapter6.pdf>). If it is unclear whether an action would have a significant effect, an EA is prepared. 40 C.F.R. § 1508.9(a) (2012). If the EA reveals that effects will be significant, an EIS must be prepared. 40 C.F.R. § 1502.3 (2012). If the EA determines effects will not be significant (or if effects were previously contemplated in other NEPA documents), a Finding of No Significant Impact (“FONSI”) can be made. 40 C.F.R. § 1508.13 (2012).

116. *See, e.g., Dominguez-Escalante National Conservation Area Resource Management Plan*, BLM COLO., [http://www.blm.gov/co/st/en/nca/denca/denca\\_rmp.html](http://www.blm.gov/co/st/en/nca/denca/denca_rmp.html) (last updated Dec. 11, 2012) (discussing that the gathering of data and development of an RMP alone takes up to three years).

## 2. Conflict in Courts of Appeals on Triggering NEPA

Whether an EIS accounts for lease-level analysis depends on whether certain environmental effects are reasonably foreseeable and what BLM region you are in (U.S. Courts of Appeals for the Ninth and Tenth Circuits use different standards). In the Ninth Circuit, the sale of oil and gas leases is generally considered a “foreseeable” impact from issuance of an RMP and an EIS contemplating leasing must be prepared.<sup>117</sup> In the Tenth Circuit, if certain environmental effects are not reasonably foreseeable, it may be appropriate to wait to issue an EIS or EA until site-specific plans are proposed.<sup>118</sup> To the extent impacts of an oil and gas lease are reasonably foreseeable before a lease is issued, a NEPA analysis of the site-specific impacts of the lease may be required prior to lease issuance.<sup>119</sup> The confusion over when analyses can be combined and streamlined contributes to the BLM’s current inefficient approach to species.

## 3. Challenges to RMP Process

Failing to consider site-specific “sensitive species” impacts in a RMP NEPA analysis can also be grounds for challenging a RMP.<sup>120</sup> In *Western Watersheds v. Salazar*, plaintiffs challenged sixteen RMPs under NEPA and the Administrative Procedure Act on the basis that the EISs did not adequately consider the environmental impacts of grazing and energy development, among other influences, on the greater sage-grouse.<sup>121</sup> The district court examined several EISs on a “test” basis and concluded that the EISs were “deficient” in part because they “fail[ed] to address the BLM’s Special Status Species Policy . . . emphasis[ing] the importance of protecting sage grouse habitat in the land use plan.”<sup>122</sup> As the court stressed: “the BLM’s own policies stress the need to avoid waiting for the site-specific project to consider sage grouse habitat protections, and to consider those issues in the programmatic land use planning process.”<sup>123</sup>

The successful challenge of RMPs in Wyoming and other states has led to interim “Instruction Memoranda” to address sensitive species.<sup>124</sup> BLM has also adopted state conservation measures in Wyoming.<sup>125</sup> The patchwork of ever-

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117. See *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988).

118. See *Park Cnty. Res. Council, Inc. v. U.S. Dep’t of Agriculture*, 817 F.2d 609, 623 (10th Cir. 1987) (determining not to issue an EIS until issuance of an APD) (overruled in part on other grounds).

119. See *New Mexico v. BLM*, 565 F.3d 683, 719 (10th Cir. 2009).

120. See *W. Watersheds v. Salazar*, 2011 WL 4526746, \*14 (D. Idaho 2011) (successfully challenging Wyoming RMPs for failure to account for studies on greater sage grouse (at the time, a “BLM Sensitive Species”) in an EIS).

121. See *id.* at \*1.

122. See *id.* at \*13.

123. *Id.* The BLM argued that the Special Status Species Policy was “mere guidelines rather than requirements.” *Id.* But the court concluded that “[a]t the very least, NEPA requires the BLM to discuss its own official policies.” See *id.* at \*14.

124. See Bureau of Land Management Instruction Memorandum No. 2012-043 (Dec. 27, 2011), [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2012/IM\\_2012-043.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-043.html) (applicable to greater sage grouse).

125. See *id.* (adopting Wyoming Governor’s Executive Order 2011-5, Greater Sage-Grouse Core Area Protection).

changing policies and instructions has created significant uncertainty regarding applicable conservation measures on BLM lands in the Northwest and has called into question whether existing leases are always at the whim of changing conservation emphases.

ESA suits related to the RMP process also target the requirement to re-initiate consultation. For example, in a recent suit stemming from the Deepwater Horizon spill in the Gulf of Mexico, conservation groups alleged that the Department of Interior violated NEPA and the ESA when it failed to stop drilling activities pending the reinitiation of section 7 consultation of oil and gas exploration after the 2010 spill.<sup>126</sup> The Eleventh Circuit disagreed and concluded that the NEPA analysis was appropriate and that the ESA analysis could be updated once reinitiation was complete.<sup>127</sup> The Center for Biological Diversity is also threatening suit against BLM field offices in California on the basis that the RMP process did not adequately address impacts from hydraulic fracturing activities on federal lands.<sup>128</sup> Specifically, the group claims that BLM is relying on outdated biological opinions that fail to evaluate the impacts from hydraulic fracturing on species such as the California Condor, despite the increase in fracking activities in California. CBD argues that recent RMP amendments are inadequate, and focuses on impacts to species in the Monterey Shale play in the Hollister and Bakersfield BLM areas.<sup>129</sup>

#### 4. Problems Implementing NEPA Categorical Exclusions

Even BLM's determinations of when NEPA does not apply suffers from programmatic implementation issues. A 2008 Government Accountability Office ("GAO") Report found that the BLM approved over a quarter of APDs from 2006–2008 using categorical exclusions.<sup>130</sup> However, the report also noted that "BLM's use of section 390 categorical exclusions has frequently been out of compliance with both the law and BLM's guidance."<sup>131</sup> The GAO concluded that some of these violated "NEPA's twin aims of ensuring that BLM and the public are fully informed of the environmental consequences of BLM's actions."<sup>132</sup> As a result, GAO recommended that Congress amend the act to clarify the exclusions and that BLM improve implementation by clarifying guidance.<sup>133</sup>

All of these legal issues have prevented the BLM from implementing a successful species policy, let alone one focused on recovery of species. At the same time, BLM has been criticized in national political discussions for both opening up

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126. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1249 (11th Cir. 2012).

127. *Id.* at 1253.

128. *See Lawsuit Launched to Protect Endangered Species From Fracking in California – Risky Drilling Technique Threatens Condor, Other Wildlife on Monterey Shale*, CTR. FOR BIOLOGICAL DIVERSITY (Aug. 29, 2012), [http://www.biologicaldiversity.org/news/press\\_releases/2012/fracking-08-29-2012.html](http://www.biologicaldiversity.org/news/press_releases/2012/fracking-08-29-2012.html).

129. *Id.*

130. *Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under section 390 of the Act*, U.S. GOV'T ACCOUNTABILITY OFF., 12 (2009) <http://www.gao.gov/new.items/d09872.pdf> [hereinafter *GAO Report*].

131. *Id.* at 21.

132. *Id.*

133. *Id.*

too much land and not allowing more energy development.<sup>134</sup> The long-term challenge lying ahead with numerous listings on the horizon as a result of the 2011 Settlement Agreements and increased demands for energy development on federal lands suggests the BLM's species policy woes may only get worse. A new approach to management of species along with energy development is therefore worth consideration.

#### V. CAN RCS HELP BLM REFOCUS ITS CONSERVATION POLICIES ON PROACTIVE RECOVERY EFFORTS?

The RCS concept at Ft. Hood and the private-sector driven example of the Texas DSL Plan highlight how recovery goals can be successfully integrated with energy development. This Part explores how the BLM could adopt RCS and how it fits with its existing "multiple-use" and conservation mandates. The analysis uses three factors to help frame the discussion: (1) legal, (2) biological, and (2) political.

##### A. Legal Factors: Can BLM Legally Adopt RCS?

A statutory or regulatory change is unnecessary for BLM to adopt an RCS concept. As the RCS guidance noted, any federal agency may already include recovery measures in a proposed agency action as mandatory, non-discretionary actions or activities that will minimize adverse effects to listed species.<sup>135</sup> BLM's Species Management policies already contemplate a more stringent approach to species conservation than that required of other federal agencies under section 7, and BLM likely has its own broad authority to implement a RCS approach under FLMPA. With BLM, the issue appears to be a reluctance to integrate recovery into its existing processes. As *National Wildlife Federation vs. NMFS* showed, even the Service vigorously contested whether recovery is a goal for section 7 consultations.<sup>136</sup>

An RCS approach would also appear to be consistent with the BLM's existing programmatic NEPA process. As with BLM's current two-stage NEPA process for RMPs and implementation decisions, the Service's 2008 RCS guidance noted that a programmatic RCS concept would use a "two-tiered" consultation approach.<sup>137</sup> Indeed, biological opinions are already part of the EIS process. But there is a possibility that more focus on recovery early on in the NEPA process could help allevi-

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134. *Reactions Are Mixed as BLM Issues Programmatic EIS for Oil Shale*, OIL & GAS J. (Sept. 12, 2008) <http://www.oilshale.com/articles/2008/09/reactions-are-mixed-as-blm-issues-programmatic-eis-for-oil-shale.html> (last accessed Jan 12, 2013). The topic of BLM's role in impeding drilling also came up in the October 16, 2012 presidential debate. Mitt Romney argued that "oil production is down 14 percent on federal lands" in a broader attack against President Barack Obama's policies on oil and gas production. For an analysis of Romney's statement, see POLITIFACT, <http://www.politifact.com/truth-o-meter/statements/2012/oct/16/mitt-romney/mitt-romney-says-oil-production-down-14-percent-ye/> (last accessed Jan 26, 2013).

135. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 73 Fed. Reg. 44,771 (July 21, 2008).

136. *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008).

137. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 73 Fed. Reg. at 44,771.

ate some of the ESA-related litigation currently associated with BLM's species policy.

The original RCS guidance did limit the concept to federal agencies and non-federal lands.<sup>138</sup> This did not stop the Service from approving the expansion of the RCS model to private entities in the Texas DSL Plan. The Service's guidance also specifically noted that "recovery crediting is a mechanism with broad potential application."<sup>139</sup>

#### B. Biological Factors: Reversing the "Orderly Progression" of the ESA to Focus on Recovery

As one legal scholar has noted, the drafters of the ESA appeared to have in mind an "orderly progression from listing through recovery."<sup>140</sup> They evidently viewed the progression as follows:

[S]pecies at risk of extinction would be identified, the factors placing them at risk would be determined, the conservation methods needed to eliminate the threats would be determined and implemented at the biologically relevant scale, and the species would be recovered to a point at which it could be delisted as a self-sustaining wild population.<sup>141</sup>

But only about twenty-four species have been recovered since the implementation of the ESA in 1973.<sup>142</sup>

##### 1. Greater Emphasis on Recovery and Habitat Conservation

A primary goal of RCS is to put greater emphasis on recovery in BLM's species planning efforts. An analysis of Service de-listing decisions concludes that there are two components to recovery: biological/demographics and risk management.<sup>143</sup> As the long-term steward of federal lands, the BLM is particularly well-positioned to track recovery efforts and manage species risks by following-through on adaptive management goals.

A RCS approach allows BLM to refocus its species conservation energies on habitat conservation, even when critical habitat designations have not yet been made. Critical habitat designations only occur in about twenty-five percent of listed species.<sup>144</sup> Both scholars and advocates have noted the importance of critical habitat designations to recovery of species and lament that "critical habitat is the most

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138. *Id.* at 44,763.

139. Endangered and Threatened Wildlife and Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72 Fed. Reg. 62,258, 62,259 (Nov. 2, 2007).

140. Dale D. Goble, *The Endangered Species Act: What We Talk About When We Talk About Recovery*, 49 NAT. RESOURCES J. 1, 3 (2009).

141. *Id.*

142. See FWS, DE-LISTING REPORT (Jan. 14, 2013), available at [http://ecos.fws.gov/tess\\_public/DelistingReport.do](http://ecos.fws.gov/tess_public/DelistingReport.do).

143. Goble, *supra* note 140, at 1; see also *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1163 (D. Mont. 2008) (rejecting a de-listing of a distinct population segment of the gray wolf because the Service failed to establish sufficient numbers and risk management systems to ensure the wolf would not be hunted to extinction).

144. Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat under the Endangered Species Act*, 58 BUF. L. REV. 1095, 1107 (2010) (reviewing the implementation of designations of critical habitat and related court challenges).

underused provision of the ESA because it is also the only provision that establishes a clear regulatory link between habitat protection and recovery.”<sup>145</sup> RCS has been proven to meet habitat conservation goals, and a re-emphasis on habitat conservation is one of the key potential biological advantages of the RCS concept. Furthermore, in many cases RCS will encourage habitat conservation on BLM lands for species even before they are listed.

The ultimate biological goal of the RCS will be to encourage greater emphasis on conservation measures that promote recovery and not just avoidance or mitigation. While BLM RMPs prescribe particular avoidance or minimization measures in the form of best practices, BLM appears reluctant to pursue proactive measures aimed at providing a “net benefit to recovery.”<sup>146</sup> Even when BLM has adopted a Candidate Conservation Agreement to encourage pro-active conservation measures for non-listed species, there is little incentive to conduct recovery measures when other conservation measures are allowed.<sup>147</sup> In comparison, with the Texas DSL Plan, recovery measures that generate recovery credits are encouraged through market incentives. For example, with the Texas DSL Plan, conservation measures believed to have higher recovery effects are valued more.<sup>148</sup> At the same time, portions of the credit are set-aside until after the benefit to the species is demonstrated, either through effectiveness monitoring or other scientific research.<sup>149</sup> Similarly, RCS on BLM lands has the potential to encourage greater emphasis on the long term “net benefit to the recovery” of the species, leading to greater biological benefits than those contemplated under current BLM policy.

Some scholars question whether public lands are sufficient to focus species conservation efforts.<sup>150</sup> But as with Ft. Hood, the BLM could extend recovery credits to landowners on private lands with contiguous or adjacent habitat to BLM lands. Professor Sheldon’s analysis also focused on rejecting a theory that reliance on federal public lands alone could stave off extinction of species.<sup>151</sup> The RCS’s ability to encourage pro-recovery conservation measures on both public and private

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145. Suckling & Taylor, *supra* note 94, at 89.

146. See Defenders of Wildlife and Sierra Club, Comments on the Notice of Availability of the Supplement to the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States, 76 Fed. Reg. 66958 (Jan. 27, 2012) available at [http://solareis.anl.gov/documents/docs/comments/supplement/Solar\\_supp\\_20140-20159.pdf](http://solareis.anl.gov/documents/docs/comments/supplement/Solar_supp_20140-20159.pdf) (arguing that BLM should expressly use a “net benefit to recovery” standard analyzing land use decisions for solar power development).

147. See, e.g., *Best Management Practices Associated with the RMP Amendment for the Lesser Prairie Chicken and Sand Dune Lizard in New Mexico*, BLM, [http://www.blm.gov/nm/st/en/fo/Roswell\\_Field\\_Office/special\\_status\\_species.html](http://www.blm.gov/nm/st/en/fo/Roswell_Field_Office/special_status_species.html) (last visited Feb. 27, 2013); see also Environmental Assessment for a Candidate Conservation Agreement for the Lesser Prairie-chicken (*Tympanuchus pallidicinctus*) and Sand Dune Lizard (*Sceloporus arenicolus*) in New Mexico, DOI-BLM- NM- P010- 2011- 57 – EA, Pecos District Office, Roswell, New Mexico (November 2010) (no discussion of a net benefit to the recovery of the species).

148. TEXAS DSL PLAN, *supra* note 80, at 51–52.

149. *Id.*

150. Karin P. Sheldon, *Upstream of Peril: The Role of Federal Lands in Addressing the Extinction Crisis*, 24 PACE ENVTL. L. REV. 1, 20 (2007). Professor Sheldon noted that there are three obstacles to effective reliance on federal lands for species conservation: biological, management issues, and politics. *Id.*

151. *Id.*

lands is an entirely different scenario. An RCS approach could also reward efforts to take conservation measures that benefit multiple species on federal lands.

## 2. Ability to Account for Effects from Climate Change

One RCS aspect needing further analysis is whether recovery credits may better address the complexities of managing species and lands subject to the effects of climate change. Scholars note that:

[a] pure reserve strategy also may not be ecologically sustainable in the long run. Reserves attempt to preserve the species on a fixed area of land. If the habitat of the species changes as a result of climate change or other factors, fixed reserves may no longer provide viable habitat. Management of the working landscape may provide needed flexibility and adaptability.<sup>152</sup>

Obviously, a permanent reserve no longer inhabited by a species as a result of climate change no longer benefits the species. RCS coupled with adaptive management has the ability to adeptly change recovery goals and measures as climate change effects take hold.

## C. Political Factors: Multiple-use, Certainty and Conservation Incentives

“An important element of the ESA's political stability has been its inherent, but long unrecognized, flexibility.”<sup>153</sup> The RCS concept is an example of an ESA conservation tool that transcends political lines. The original concept was promoted in 2007 during Republican President George W. Bush's second term, and was derided at the time as a “weakening” of federal agency duties under section 7.<sup>154</sup> Yet, an independent evaluation of the program concluded that the RCS concept met its habitat conservation goals and incentivized private landowners who would otherwise be indifferent to endangered species to join federal agency habitat conservation efforts.<sup>155</sup>

The extension of the RCS concept to non-federal agencies in the Texas DSL Plan under Democrat President Barack Obama's administration shows the potential bi-partisan support for RCS. Conservation groups still questioned whether the Texas DSL Plan would be effective, but their focus with the DSL was on the adequacy of the BLM's conservation measures in New Mexico due to the fact that nearly half

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152. Barton H. Thompson, Jr., *Managing the Working Landscape*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 101,103 (Dale D. Goble et al. eds., 2006).

153. Holly Doremus, *Lessons Learned*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 195, 199 (Dale D. Goble et al. eds., 2006).

154. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 73 Fed. Reg. 44,761 (July 31, 2008); see also Alice Kenny, *Recovery Credits: Protection or Passing the Buck?*, ECOSYSTEM MARKETPLACE (Mar. 18, 2008), [http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page\\_id=5689&section=home](http://www.ecosystemmarketplace.com/pages/dynamic/article.page.php?page_id=5689&section=home).

155. See generally ROBERTSON CONSULTING GROUP, INC., THIRD PARTY EVALUATION OF THE RECOVERY CREDIT SYSTEM PROOF OF CONCEPT (Mar. 2010), available at [http://rcs.tamu.edu/media/277203/final\\_rcs\\_eval\\_report\\_march\\_2010.pdf](http://rcs.tamu.edu/media/277203/final_rcs_eval_report_march_2010.pdf).

of all DSL habitat (approximately 300,000 acres) occurs on BLM-managed public lands.<sup>156</sup>

### 1. Fulfilling the “Multiple-use” and Conservation Mandates

One of the more promising political aspects of the RCS approach is its ability to help fulfill BLM’s multiple-use<sup>157</sup> and species conservation mandates simultaneously. An RCS targeted at managing lands with multiple uses and not focused on preserving land in perpetuity would be appealing to most lease holders on federal lands.

Indeed, many of the same motivations that encouraged use of RCS at Ft. Hood and with the Texas DSL Plan exist on BLM lands. As with the original RCS system designed to encourage greater private landowner conservation, there is a need to encourage conservation efforts with public land lessees.

While BLM is authorized to set aside part of the surface estate for species conservation, RCS may encourage conservation by both mineral lessees and surface lessees and thus better fulfill the BLM’s multiple-use mandate without the need for permanently setting aside the land. There may even be a set of recovery activities that BLM lessees can conduct on properties that would enhance properties above and beyond setting aside reserves (e.g. in situations involving effects from climate change). To the extent certain oil and gas activities such as seismic exploration are temporary in nature, RCS also offers an opportunity to offset temporary impacts with recovery credits much in the same way the Ft. Hood RCS operated. BLM also manages significant acreage under a split estate, where it has control over mineral rights under private lands.<sup>158</sup> Similar complications resulting from multiple interest holders motivated the use of the RCS with the Texas DSL Plan.

### 2. Greater Predictability for Lease-holders

The key benefit that will likely attract lease-holders to RCS on BLM lands is greater certainty regarding development plans and species conservation. Recent developments in Wyoming related to the Greater sage-grouse are indicative of the uncertainty lease holders face in managing species on public lands under existing BLM species policy. Greater sage-grouse habitat is addressed in as many as ninety-

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156. See Letter from Center for Biological Diversity to the U.S. Fish and Wildlife Service, RE: FWS-R2-ES-2010-004; Endangered Status for the Dunes Sagebrush Lizard (Mar. 12, 2012), available at [http://www.biologicaldiversity.org/species/reptiles/dunes\\_sagebrush\\_lizard/pdfs/CBD\\_cmt\\_DSL\\_list\\_031212.pdf](http://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/CBD_cmt_DSL_list_031212.pdf).

157. The multiple use mandate requires the BLM to manage public lands to meet the needs of the American people. See 43 U.S.C.A. § 1732 (West 2013); see also 43 U.S.C.A. § 1702 (West 2013) (defining multiple use).

158. According to the BLM’s most recent statistics, BLM manages 247 million acres, and there are 57 million acres of federal minerals that have split-estates (federal mineral ownership under private lands). See *Mineral and Surface Acreage Managed by the BLM*, BLM, [http://www.blm.gov/wo/st/en/info/About\\_BLM/subsurface.html](http://www.blm.gov/wo/st/en/info/About_BLM/subsurface.html) (last updated Oct. 13, 2011).

eight current BLM RMPs.<sup>159</sup> New instruction memoranda are issued by BLM periodically to address species and carve out certain requirements that apply in certain states.<sup>160</sup> And at the same time, ongoing litigation challenging the BLM's NEPA and ESA process has resulted in a remand of RMPs with applicable conservation measures.<sup>161</sup>

If an RCS approach could be adopted for the greater sage-grouse range-wide, there would be significantly more certainty for leaseholders in what conservation measures apply. While the approach would be just as likely to be challenged by conservation groups, it may be able to withstand greater scrutiny by the courts to the extent the focus on a "net benefit to the recovery of the species" goes beyond what may be strictly required under the ESA for section 7 consultations.<sup>162</sup>

Even if greater predictability were established, there is the possibility that leaseholders will not want to voluntarily conduct recovery measures for a species that they view as not likely to be listed as threatened or endangered. But since BLM is already able to require mandatory conservation measures as part of its leasing program, it would appear that leaseholders are no worse off under the RCS approach. The difference with RCS is that leaseholders would be incentivized to perform recovery measures if they were given higher valuation credits. That the recovery measures could help preclude a listing under the Service's PECE policy would also be an incentive to participate in an RCS program.

### 3. Environmental Group Support for Recovery Incentives

Forward-looking conservation groups have signaled their support for RCS generally for the same reasons identified above under the discussion of the benefits of the RCS concept.<sup>163</sup> Indeed, the Environmental Defense Fund was one of the partners who helped create the Ft. Hood RCS, and an Environmental Defense Fund Scientist chaired the Ft. Hood RCS Science Committee that established the biological criteria for the golden cheeked warbler.<sup>164</sup>

Another feature of RCS that may appeal to environmentalists more generally is the ability of recovery credits to account for climate change and GHG impacts in recovery credit valuations.<sup>165</sup> The Ft. Hood and Texas DSL Plan did not address

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159. See *Rocky Mountain Region – National Greater Sage-Grouse Planning Strategy*, BLM (Jan. 18, 2013), <http://blm.gov/wo/st/en/prog/more/sagegrouse/eastern.html>.

160. See BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2012-043, GREATER SAGE-GROUSE INTERIM MANAGEMENT POLICIES AND PROCEDURES, (Dec. 2011), available at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2012/IM\\_2012-043.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-043.html). This Instruction Memorandum notes that activities in Wyoming must follow separate conditions. *Id.*

161. See *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2011 WL 4526746, \*14 (D. Idaho 2011) (successfully challenging Wyoming RMPs for failure to account for studies on greater sage-grouse in an EIS).

162. TEXAS DSL PLAN, *supra* note 80, at 51–52.

163. See Press Release, Environmental Defense Fund, System Benefits Both Endangered Species, U.S. Army - Report Finds Market-based Conservation Mutually Beneficial to Endangered Species and Private Landowners (Mar. 24, 2010), available at <http://www.edf.org/news/system-benefits-both-endangered-species-us-army>.

164. *Id.*

165. See Mark Squillace & Alexander Hood, *NEPA, Climate Change, and Public Lands Decision Making*, 42 ENVTL. L. 469, 510–11 (2012) (recommending that federal land management agencies should recognize "that GHG emissions impose external costs that must be reflected, to the extent possible, in agency decisions" such as natural resource extraction on BLM lands).

climate change effects when valuing credits, but the flexibility of the RCS approach would allow for such considerations if BLM were motivated to do so.

#### 4. BLM Has the Capacity, but It Also Will Need the Administrative Will

One of the biggest challenges to implementation of RCS on BLM lands would hinge on the internal political will and financial ability of the BLM to adopt the approach. Administratively, promoting RCS for any given species would be a significant and complex undertaking by an agency already managing many competing interests with limited resources. In response to the original RCS guidance in 2008, critics noted that RCS could take away from the existing missions of federal agencies.<sup>166</sup> With the Texas DSL Plan, conservation groups complained that the state agency overseeing the RCS program had little experience managing such a “brand new creation.”<sup>167</sup>

Several agency characteristics make these concerns less applicable to BLM. First, the agency is already mandated to consider multiple uses and species conservation on federal lands and is performing similar tasks in its current NEPA reviews.<sup>168</sup> As noted above, the RCS concept contemplates a “tiered” programmatic process similar to NEPA.<sup>169</sup> The criteria for recovery credits could be determined at the programmatic stage while debit calculations could be determined at the implementation decision or leasing stage. Just as BLM would be expected to continue to develop RMPs, EIS, implementation decisions, and EAs, the RCS would be one additional conservation tool for the BLM to manage with its existing resources.

Second, the BLM has ample technical capability to manage an RCS program itself as opposed to outsourcing the program to a third-party intermediary. BLM already conducts auctions for lease parcels. A recovery credit market would use similar market-driven concepts.<sup>170</sup> Moreover, the RCS concept adopted by BLM could rely more heavily on fees derived from exchange of credits versus participation fees. Alternatively, BLM could encourage lessees to develop conservation plans such as CCAs that integrate RCS approaches and that build in participation fees as a funding source. This would be similar to a blend of the New Mexico CCA on BLM lands and the Texas DSL Plan integrating RCS. It is not clear why developing these plans would be any more resource intensive than the current BLM RMP process. To the extent they are more resource intensive, BLM should consider re-allocating a portion of the \$4.8 billion in revenues generated from energy development on BLM lands to development and management of an RCS focused on energy development.<sup>171</sup>

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166. NAT'L MITIGATION ASS'N, COMMENTS ON RCS GUIDANCE (Dec. 3, 2007), available at <http://www.mitigationbanking.org/pdfs/nmba0002.pdf>.

167. See CTR. FOR BIOLOGICAL DIVERSITY, PUBLIC COMMENTS RE: FWS-R2-ES-2010-004; ENDANGERED STATUS FOR THE DUNES SAGEBRUSH LIZARD 2 (Mar. 12, 2012).

168. See 73 Fed. Reg. 44,771 (July 31, 2008).

169. *Id.*

170. See, e.g., TEXAS DSL PLAN, *supra* note 80, at Appendix G (outlining bid process for generation of recovery awards).

171. See BLM, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2012 I-2 (2012), available at [http://www.doi.gov/budget/appropriations/2012/upload/FY2012\\_BLM\\_Green](http://www.doi.gov/budget/appropriations/2012/upload/FY2012_BLM_Green)

The last reason why RCS may be politically viable is that BLM, like other federal agencies managing ESA issues, may be frustrated with the effectiveness of its current species management policies in promoting recovery of species and may be willing to try a new approach on a pilot basis.<sup>172</sup> At the very least, it is likely open to considering new innovations that may improve species conservation while helping it achieve its mission.

## VI. CONCLUSION

The BLM continues to manage species conservation through its Special Status Species Policy and NEPA. But as energy development on BLM lands grows, the agency should consider expansion of the RCS concept onto federal lands as an innovative conservation tool. With RCS, the BLM will support its own mandates for multiple-use and conservation and may yet help the ESA achieve its twin goals of both preventing extinction and encouraging recovery of species.

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book.pdf (noting that “[i]n 2012, public lands will generate an estimated \$4.8 billion in revenues, mostly from energy development”).

172. See, e.g., *Improving ESA Implementation: Regulatory Reform*, U.S. FISH & WILDLIFE SERV. (Feb. 8, 2013), [http://www.fws.gov/endangered/improving\\_ESA/reg\\_reform.html](http://www.fws.gov/endangered/improving_ESA/reg_reform.html).