

ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5284

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEFENDERS OF WILDLIFE, et al.,
Plaintiffs/Appellants,

v.

SALLY JEWELL, et al.,
Defendants/Appellees,

and

SUSAN COMBS, et al.,
Defendant-Intervenors/Appellees.

On Appeal from the United States District Court
for the District of Columbia
Honorable Rudolph Contreras, District Judge

***INITIAL BRIEF OF AMICUS CURIAE PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE***

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**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

(A) **Parties and Amici.** Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants Defenders of Wildlife, et al.

The Amicus Curiae supporting Defendants/Appellees and Defendant-Intervenors/Appellees is Pacific Legal Foundation (PLF).

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief for Appellants Defenders of Wildlife, et al.

(C) **Related Cases.** Amicus Curiae Pacific Legal Foundation is not aware of any related cases in this or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29(b), PLF, a nonprofit corporation organized under the laws of California, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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GLOSSARY OF ABBREVIATIONS

Pacific Legal Foundation	PLF
Policy for Evaluation of Conservation Efforts	PECE

IDENTITY AND INTEREST OF *AMICUS CURIAE*

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. It defends limited government, property rights, and a balanced approach to environmental protection in courts nationwide. PLF has extensive experience litigating environmental and constitutional issues, *e.g.*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Delta Construction Co. v. EPA*, No. 11-1428 (D.C. Cir. 2015), and participating as *amicus curiae*, *e.g.*, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. brief filed Mar. 4, 2015).

PLF submits this brief because it believes its public policy perspective and litigation experience will provide an additional viewpoint with respect to the issues presented, which will be helpful to this Court.¹ Pursuant to Circuit Rule 29(b), all parties have consented to the filing of this brief.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellants Defenders of Wildlife, et al.

¹ Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than PLF, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

It's oft said that you can catch more flies with honey than vinegar. Similarly, you can get more environmental protection by working with people—hearing their concerns, minimizing their burdens, and getting them to buy in—than by threatening them with ruinous fines and imprisonment. *See* 16 U.S.C. § 1540 (penalties for violation of the Endangered Species Act). Conservation agreements are one way to take advantage of this. They are an early conservation effort that can recover a species before it reaches a dire state and without the extreme burdens associated with regulation under the Endangered Species Act. *See* Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,102 (Mar. 28, 2003).

Appellants are skeptical of these conservation efforts and distrustful of state regulation. They construe the Service's Policy for Evaluation of Conservation Efforts, 68 Fed. Reg. 15,100, to require absolute certainty that private and state conservation efforts will be implemented and successful before they can be considered. Not only is this interpretation contrary to the policy, it would undermine conservation and recovery efforts and frustrate the values of federalism.

ARGUMENT

I

PRIVATE CONSERVATION EFFORTS CAN BE MORE EFFICIENT THAN TOP-DOWN REGULATION

Regulation under the Endangered Species Act is not the only nor necessarily the best approach to conserving and recovering species. *Cf.* Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. Colo. L. Rev. 361, 406 (2001) (“[S]imply having a law in place that demands protection of listed species does not guarantee that protection occurs.”). Often less onerous, collaborative, and voluntary approaches can work better. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011) (the Endangered Species Act recognizes that species can be recovered by measures less onerous and regulatory than the statute).

The Endangered Species Act—like many of the other 1970s era environmental regulations that have not been updated—relies on a command-and-control approach. *See* D. Bart Turner & Chris J. Williams, *Law in a Changing Climate*, 70 Ala. Law. 358, 361 (2009). It doesn’t directly incorporate modern market-based mechanisms that can achieve the same or better results at lower costs. *See id.*; Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization,*

Bureaucratization, and Senescence, 37 *Environ. L. & Pol’y J.* 105, 120-25 (2014).

The Endangered Species Act’s approach imposes severe costs on landowners who leave their property in suitable condition to provide habitat for imperiled species. *See* Brian Seasholes, *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program*, Reason Found. Policy Study No. 433 at 9 (2014).² These severe costs discourage landowners from accommodating species and may undermine conservation and recovery. *See id.* at 9-22. In addition to its perverse incentives, the statute fails to provide much encouragement for property owners to take affirmative steps to improve degraded habitat or recover species. *See, e.g.*, U.S. Fish and Wildlife Service, *PECE Evaluation for the New Mexico CCA/CCAA and Texas Conservation Plan* at 39 (2012)³ (hereinafter “PECE Evaluation”) (the Texas Conservation Plan will encourage affirmative conservation measures that would not be achieved under the statute). These shortcomings are particularly problematic because most species rely on private property for the vast

² Available at http://reason.org/files/endangered_species_act_reform.pdf.

³ Available at http://www.fws.gov/southwest/es/Documents/R2ES/DSL_PECE_NM_and_TX_06112012.pdf.

majority of their habitat. *See* U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* (1994).⁴

State and private conservation efforts, on the other hand, can better balance the costs and benefits of species conservation and better promote the conservation and recovery of species. *See* Seasholes, *supra*, at 30-31; Andrew G. Frank, *Reforming the Endangered Species Act: Voluntary Conservation Agreements, Government Compensation and Incentives for Private Action*, 22 Colum. J. Envtl. L. 137, 145-46 (1997). Extremely productive economic activity, that might otherwise be blocked by the Endangered Species Act's onerous prohibitions, can go forward while marginal economic activity with severe environmental impacts is discouraged. *See* Gabriel Eckstein & Jesse Snyder, *Endangered Species in the Oil Patch: Challenges and Opportunities for the Oil and Gas Industry*, 1 Tex. A&ML. Rev. 379, 397-98 (2013). In this case, for instance, the listing of the Dunes sagebrush lizard could have disrupted valuable natural gas development and investments in renewable energy, like wind and solar power generation. *See* Withdrawal of the Proposed Rule To List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872, 36,890-91 (June 19, 2012). The Texas Conservation Plan would allow worthwhile projects to go forward while requiring them to avoid impacts to the species and mitigate any impacts that are unavoidable. PECE Evaluation at 36.

⁴ Available at <http://www.gao.gov/assets/230/220827.pdf>.

Since flexible state and private conservation effects can benefit species more than the Endangered Species Act’s command-and-control approach, landowners will not be the only ones feeling the pinch if this Court were to reverse the decision below. Endangered and threatened species will suffer as well. *See, e.g.*, Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20,074 (Apr. 10, 2014) (encouraging conservation efforts under state plans—including those at issue here—benefits the lesser prairie-chicken more than forbidding take). They will, for instance, lose out on affirmative conservation and restoration efforts. *See* PECE Evaluation at 39 (noting that the Texas Conservation Plan will provide conservation benefits that would not be achieved under the Endangered Species Act). Here, the Texas Conservation Plan calls for removing unused infrastructure that fragments habitat and mesquite that encroaches on shimmery oak dunes, all to the lizard’s benefit. PECE Evaluation at 23-24.

Contrary to Appellants’ assumptions, flexibility in state and private conservation efforts is a feature, not a bug. The Policy for Evaluation of Conservation Efforts considers whether conservation efforts incorporate “adaptive management.” 68 Fed. Reg. at 15,103. Adaptive management is a flexible decision-making framework that incorporates the unavoidable uncertainty of conservation efforts by encouraging real world experimentation. Eckstein & Snyder, *supra*, at 400. Because adaptive management is an iterative process that allows states and property owners to

learn by doing, we don't know precisely which conservation measures will prove most effective and thus ultimately be preferred. But this doesn't undermine the Service's analysis of the certainty that the adaptive process will be implemented and successful. PECE Evaluation at 38.

The Texas Conservation Plan, for instance, identifies 34 potential conservation measures that can be required at a particular site. PECE Evaluation at 22. Which measure is chosen will depend on the significance of the effects of the activities at the site and which measures have proven most efficient and effective for lizard conservation. *See id.* Ultimately, the purpose of this adaptive management process is to identify the measures that will allow the state and property owners to reclaim and restore lizard habitat. *See id.* at 23.

II

DEFERENCE TO STATE SUPERVISION OF THESE CONSERVATION EFFORTS SHOWS DUE REGARD FOR FEDERALISM

In addition to promoting more efficient and effective species recovery, reliance on state and private efforts shows due regard for federalism. Federalism is a core underpinning of the structure of American government. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). It secures individual liberty, political accountability, and promotes smarter, more efficient government through variation and experimentation. *See id.*; *see also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991);

Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1498-1500 (1987).

In particular, it gives state governments primacy over certain public policy issues, subject to constitutional constraints, by limiting the role of the federal government. *See Bond*, 131 S. Ct. at 2364. One such policy issue is the regulation and protection of wildlife. *See Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896); *see also Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979) (“preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership”).

Even when the federal government has authority to regulate a particular policy issue, it will often accommodate these federalism values by adopting a cooperative regime that accommodates state interests or by setting general standards that states may implement. *See New York v. United States*, 505 U.S. 144, 167 (1992); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). When done right, such programs can ensure federal priorities are achieved while preserving the benefits of state variation and experimentation. *See Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 665 (2001).

In adopting the Endangered Species Act, Congress recognized a role for federalism. The statute expressly requires the Service to consider the effects of state efforts to protect species during the listing process. 16 U.S.C. § 1533(b)(1)(A); *see* Christine O. Gregoire & Robert K. Costello, *The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 Wash. L. Rev. 697, 716 (1999) (the statute allows the Service to consider a wide swath of state and voluntary conservation efforts). The threat of excessively burdensome regulation under the act gives states incentives to develop more reasonable and balanced regimes. *See* Doremus, *supra*, at 411-12.

The Service's decision not to list the Dunes sagebrush lizard shows due regard for these federalism values. As the Service's Policy for Evaluating Conservation Efforts acknowledges, state conservation efforts can be more beneficial to both the regulated public and species than the Endangered Species Act's punitive one-size-fits-all approach. *See* 68 Fed. Reg. at 15,102. Through adaptive management, it also allows for state and private experimentation that can help us find better, smarter ways to conserve and recover the species. *See id.* at 15,104.

III

THERE IS NO REASON TO ASSUME THAT THE STATE AND PRIVATE CONSERVATION EFFORTS WILL NOT GO FORWARD

Chiefly, Appellants fault the Service for concluding that there could be any certainty that conservation efforts, absent an immediate threat of listing, will be implemented or successful in redressing threats to a species. But states and landowners have many incentives to ensure that these conservation efforts go forward and succeed.

A. States Have an Interest in Ensuring That Their Conservation Programs Remain Credible

The states and private landowners have a strong incentive to ensure that conservation plans like those at issue here succeed because their credibility will be essential to avoiding listing of other species going forward. *See* PECE Evaluation at 10. This incentive is particularly important for states, as endangered species issues continuously recur. *See* Kalin Harvard, *Railroading the Dunes Sagebrush Lizard: Why It Is Important to the Oil and Gas Industry that Texas Agencies Handle Conservation Measures*, 13 Tex. Tech. Admin. L.J. 349, 349-50 (2012) (explaining the importance to Texas' economy of addressing endangered species issues in the Permian Basin). The Texas Conservation Plan, for instance, is part of the state's broader effort to align stakeholders to balance economic growth and environmental

protection through the Interagency Task Force on Economic Growth and Endangered Species. *See* PECE Evaluation at 30.

If the states and property owners fail to protect species, their plans won't have the credibility required to avoid future listings of species with even more significant impacts on individuals, local communities and economies. As the Service recognized, the state conservation plans at issue here needed to be credible so that they could also be relied upon for the lesser prairie-chicken. *See* PECE Evaluation at 10. Although the lesser prairie-chicken was ultimately listed, state conservation efforts formed the basis of a special rule to allow take of the species incidental to those efforts. *See* Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20,074 (Apr. 10, 2014). In adopting that rule, the Service specifically recognized that the state and private conservation efforts are more beneficial to the species' conservation than the statute's burdensome approach would be. *See id.* at 20,079 (finding it necessary and advisable for the conservation of the lesser prairie-chicken to exempt activities authorized under the state conservation plans from regulation). In particular, they provide incentives for landowners to take affirmative steps to improve habitat and conserve species whereas the Endangered Species Act focuses on restricting human activities. *See id.*

The credibility of state conservation plans is of national importance. For example, the Service is currently considering listing the greater sage-grouse, which would affect eleven states and approximately 165 million acres. U.S. Fish &

Wildlife Serv., *The Greater Sage-grouse: Facts, figures and discussion*, http://www.fws.gov/greatersagegrouse/factsheets/GreaterSageGrouseCanon_FINAL.pdf (last visited May 26, 2015). This would have severe consequences for agriculture, ranching, and energy development across the region. See Reid Wilson, *Western states worry decision on bird's fate could cost billions in development*, Wash. Post, May 11, 2014.⁵ To avoid this, the states, conservation groups, landowners, and industry formed the Sage Grouse Initiative to facilitate private conservation efforts that could alleviate the need for listing. See USDA, *Outcomes in Conservation: Sage Grouse Initiative* (Feb. 12, 2015).⁶ This collaborative effort has resulted in the restoration of over 4.4 million acres of habitat and \$400 million invested in the grouse's conservation. See *id.* at 1. A similar push in California and Nevada has led the Service to withdraw its proposal to list the greater sage-grouses found in those states. *Withdrawal of the Proposed Rule to List the Bi-State Distinct Population Segment of Greater Sage-Grouse and Designate Critical Habitat*, 80 Fed. Reg. 22,828 (Apr. 23, 2015). A decision from this Court that made it exceedingly difficult for the Service

⁵ Available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/11/western-states-worry-decision-on-birds-fate-could-cost-billions-in-development/>.

⁶ Available at http://www.nrcs.usda.gov/wps/PA_NRCSCConsumption/download?cid=stelprdb1270408&ext=pdf.

to rely on such efforts would undermine these efforts to the detriment of both people and species.

B. Listing Could Be Proposed Again at Any Time

The Service's decision not to list a species based on state and private conservation efforts does not mean that affected landowners are out of the woods. The threat of the lizard's listing remains an incentive to implement the conservation measures and ensure that they succeed. *See* Kirsten Uchitel, *PECE and Cooperative Conservation: Innovation or Subversion Under the Endangered Species Act?*, 26 J. Land Resources & Env'tl. L. 233, 252-53 (2006). If the Service concludes that the conservation measures are not being implemented or successfully conserving the species, it can adopt an emergency listing to protect the species immediately. 50 C.F.R. § 424.20; 68 Fed. Reg. at 15,114. The state and the sophisticated oil and gas interests that are heavily involved in establishing the Texas Conservation Plan know this. In light of the burdens that a listing would impose, this risk will continue to operate as a tremendous incentive for landowners to enroll and participate in the Plan. *See* Eckstein & Snyder, *supra*, at 399. The Texas Conservation Plan will make it easier for the Service to determine whether the species should be emergency listed. Although it contains privacy protections for enrollees—a key to boosting enrollment—the Plan's reporting requirements will result in the state providing to the

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DATED: May 28, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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/s/ Jonathan Wood
JONATHAN WOOD