

Shooting the Albatross: Why a State Takeover of Federal Public Lands Would Make Endangered Species Act Compliance More Expensive and Difficult

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“Ah wel-a-day! what evil looks
Had I from old and young;
Instead of the Cross the Albatross
About my neck was hung.”¹

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¹ Samuel Taylor Coleridge, *The Rime of the Ancyent Marinere*, in WILLIAM WORDSWORTH, LYRICAL BALLADS, AND OTHER POEMS, 1797-1800, 774 (James Butler & Karen Green eds., 1992).

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I. INTRODUCTION

Coleridge’s famous poem, the Rime of the Ancient Mariner, tells the tale of a seaman who, in a mix of ignorance and exuberance, shoots an albatross. Rather than winning him the accolades he anticipates, his act casts a terrible curse on the ship and all its crew, who find themselves mired in the doldrums and dying of thirst. The parable has prescience today, as states soldier forth on their efforts to wrest the public domain from federal control, ignorant of the harms “success” in their quest would likely bring. Delays in Endangered Species Act (“ESA” or “the Act”) compliance reflects a particularly important unintended consequence of a potential transfer of the public domain from the federal government to the states. This article shows that such a transfer would change the procedural requirements associated with ESA compliance. The loss of federal ownership would drive a lengthier and more expensive process, potentially chilling precisely the kind of development public land transfer proponents seek.

In 2012, with enactment of the Transfer of Public Lands Act (“TPLA”),² the State of Utah demanded that the United States transfer title to 31.2 million acres³ of federal public land to the state no later than December 31, 2014.⁴ With passage of the deadline and no sign of federal capitulation, Utah is moving forward with preparation for a lawsuit against the United States.⁵ By the close of the 2015 legislative session, thirteen additional states had followed Utah’s lead, introducing at least fifty-five bills to either support, study, or demand the transfer of federal public lands to the states.⁶

² H.B. 148, 2012 Gen. Sess. (Utah 2012) (codified at UTAH CODE ANN. §§ 63L-6-101 to -104 (2014)).

³ See Jan Elise Stambro et al., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH xxv (Nov. 2014) (quantifying acreage demanded) <http://publiclands.utah.gov/wp-content/uploads/2014/11/1.%20Land%20Transfer%20Analysis%20Final%20Report.pdf>.

⁴ UTAH CODE ANN. § 63L-6-103(1) (West 2014).

⁵ On December 9, 2015, Utah’s Commission on the Stewardship of Public Lands voted to authorize preparation of a legal brief and motion for leave to file an original jurisdiction suit in the U.S. Supreme Court. Litigation is projected to cost the state \$13.8 million in outside legal fees. John W. Howard et al, *Legal Analysis of the Legal Consulting Services Team*, 145 (Dec. 9, 2015), <http://le.utah.gov/interim/2015/pdf/00005590.pdf>.

⁶ For a partial list see SCOTT HENDRICK, NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATION ADDRESSING TRANSFER OF PUBLIC LANDS TO STATES (Aug. 2014)

Utah and other states pursuing a federal land transfer claim several justifications for their efforts: reducing federal regulatory burdens, facilitating “active resource management,” and expediting commodity development.⁷ In particular, it is hoped that expedited commodity development will translate into more jobs and increased revenue for the states. This article serves as a caution to that hope, focusing on compliance with the Endangered Species Act⁸ — and how the TPLA could increase the time and expense involved in ESA compliance for non-federal actors. By making ESA compliance more burdensome, states put at risk the economic development goals they seek to advance.

While it is true that transferring federal lands to the states may, in certain instances, reduce the time required to permit some types of development,⁹ it is also clear that transferring land out of federal ownership will shift the burden of ESA compliance to non-federal landowners or their lessees and permittees. We conclude that transferring land out of federal ownership would materially change the ESA compliance process for both existing and future projects. These changes are likely to significantly increase both the time and expense of ESA compliance.

This paper describes the differences between federal agency consultation under section seven of the ESA, which applies to projects authorized by, carried out by, or funded by federal agencies, and the process under section ten of the ESA that similarly situated non-federal entities must undertake if their action has no “federal nexus” (federal authorization, involvement, or funding). We look to the oil and gas sector as an example because of the sector’s importance to the Utah state economy, and because of available data regarding individual oil and gas well locations.

Changing to section ten ESA compliance processes would increase compliance costs and result in potentially significant permitting delays for the oil and gas industry. Any delay in permitting or suspension of operations that generate revenue for the state would make it more difficult to fund management of what

(summarizing bills through August, 2014) (on file with authors).

⁷ See, e.g., CONSTITUTIONAL DEFENSE COUNCIL, TOWARD A BALANCED PUBLIC LANDS POLICY, A CASE STATEMENT FOR THE H.B. 148: UTAH’S TRANSFER OF PUBLIC LANDS ACT 5-6 (Nov. 2012), <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf>.

⁸ 16 U.S.C. §§ 1531-1543 (2012).

⁹ “The BLM reported an average of 228 calendar days, or about 7.5 months, to process an Application for a Permit to Drill (APD) during FY 2012. In contrast, state governments purport to take eighty days or less to process an APD.” OFFICE OF THE INSPECTOR GEN., DEP’T OF THE INTERIOR, ONSHORE OIL AND GAS PERMITTING, U.S. DEP’T OF THE INTERIOR, CR-EV-MOA-0003-2013, 6 (2014); see also, Average Application for Permit to Drill (APD) Approval Timeframes: FY2005 - FY2014, BUREAU OF LAND MGMT., DEP’T OF THE INTERIOR, (showing that during FY 2014 it took an average of 133 days to for industry to resolve any deficiencies in an APD) http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics/apd_chart.html (last visited May 21, 2015).

were formerly public lands without either raising taxes or cutting into funding of other government programs. These fiscal impacts are potentially significant because, as of November 10, 2015, there were 12,185 producing oil and natural gas wells within Utah, 6,744 of which were located on federal land that would presumably transfer to the state if TPLA-based claims succeed.¹⁰

Crude oil, natural gas, and natural gas liquids produced within Utah during 2014 had a total sale value of over \$5 billion,¹¹ which contributed directly to the state economy. Under the Mineral Leasing Act, revenue from wells tapping federally owned minerals is shared with the state.¹² During fiscal year 2014, revenue sharing from oil and gas wells on federal land provided Utah with over \$216 million in direct revenue.¹³ In addition, as of November 10, 2015, there were 2,199 producing oil and gas wells on state lands,¹⁴ that during 2014 generated over \$93 million in revenue for the state.¹⁵ Severance taxes on minerals extracted within Utah during 2014 were estimated to provide the state with upwards of \$68 million in additional revenue.¹⁶ A change in land ownership, such as the change contemplated under the TPLA, could impact ESA compliance, and potentially impact this revenue stream.

This paper is comprised of five parts. Part II describes the procedural and substantive requirements under the ESA's sections seven, nine, and ten. Part III quantifies the number of existing and proposed oil and natural gas wells in Utah that are located within areas known to contain threatened or endangered species, and that therefore could be impacted by changing ESA procedural requirements if lands are transferred out of federal ownership. Part IV describes the unintended consequences that transferring public lands out of federal ownership could create through ESA permitting. Lastly, in Part V, we conclude that public land transfers could result in suspension of existing activities and increased costs and delays

¹⁰ Well Counts, UTAH DIVISION OF OIL, GAS & MINING, http://oilgas.ogm.utah.gov/Statistics/Well_counts.cfm (last visited Mar. 13, 2016).

¹¹ *Utah Production Sales Value*, DIVISION OF OIL, GAS, AND MINING, UTAH DEPT. OF NATURAL RESOURCES, http://oilgas.ogm.utah.gov/Statistics/PROD_Value.htm (last visited Mar. 12, 2016).

¹² 30 U.S.C. § 191 (2014).

¹³ Economic Profile System, HEADWATERS ECONOMICS, <http://headwaterseconomics.org/tools/economic-profile-system#amenities-report-section> (last visited Mar. 12, 2016). Quoted figures do not include rental or bonus bid payments.

¹⁴ Well Counts, UTAH DIVISION OF OIL, GAS & MINING, http://oilgas.ogm.utah.gov/Statistics/Well_counts.cfm (last visited Mar. 13, 2016).

¹⁵ STATE OF UTAH SCHOOL & INSTITUTIONAL TR. LANDS ADMIN., FISCAL YEAR 2014 ANNUAL REPORT 4 (2014). Revenue is for wells on land managed by the School and Institutional Trust Lands Administration only. Any production occurring on state lands managed by another state agency would be in addition to the quoted figures, though such additional production is believed to be negligible.

¹⁶ LYLE W. HILLYARD & MELVIN R. BROWN, OFFICE OF THE LEGISLATIVE FISCAL ANALYST, 2014-2015 BUDGET OF THE STATE OF UTAH AND RELATED APPROPRIATIONS, 14 (June 2014), <http://le.utah.gov/interim/2014/pdf/00003542.pdf>. Severance tax figures are for all oil and gas development within Utah, without regard to land ownership.

associated with the permitting of new oil and gas wells.

II. ENDANGERED SPECIES ACT REQUIREMENTS

The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.”¹⁷ As a means to achieving these goals, the ESA contains substantive and procedural requirements designed to protect endangered species and their habitat.¹⁸ The ESA’s goals are accomplished in part by section nine’s prohibition on the “take” of listed animals,¹⁹ except when the take is specifically authorized in a federal permit.²⁰ “Take,” under the ESA, means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”²¹ Through regulation, “harm” is defined as “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”²² An unauthorized take can result in severe civil or criminal penalties, including imprisonment for not more than one year or fines of up to \$50,000 per violation, or both.²³ One avoids liability under the ESA by complying with the Act’s procedural requirements and avoiding, reducing or mitigating direct impacts to endangered species.²⁴ The ESA’s procedural requirements apply differently, depending on whether there is a federal agency nexus to projects likely to impact an ESA listed species.

¹⁷ 16 U.S.C. § 1531(b) (2012).

¹⁸ 16 U.S.C. §§ 1531–1543 (2012).

¹⁹ Under the ESA, species may be listed as either endangered or threatened: “Endangered” species are in danger of extinction throughout all or a significant portion of their range, 16 U.S.C. § 1532(6) (2012). “Threatened” species are likely to become endangered within the foreseeable future. *Id.* § 1532(20). Section 4 of the ESA requires species to be listed based solely on their biological status and threats to their existence; economic impacts of a listing decision are not considered. *Id.* § 1533(a)(1). The U.S. Fish and Wildlife Service also maintains a list of “candidate” species which warrant listing, but whose listing is precluded by higher listing priorities. The candidate species list is available at http://ecos.fws.gov/tess_public/reports/candidate-species-report.

²⁰ 16 U.S.C. § 1538(a)(1)(B). Section nine of the ESA provides lesser protections for listed plants. On federal lands, it is unlawful to “remove and reduce to possession any [plant] species from areas under Federal jurisdiction [or to] maliciously damage or destroy any [plant] species on any such area.” *Id.* § 1538(a)(2). However, listed plants on non-federal lands receive no ESA protection unless the activity, injuring the plant, was conducted in knowing violation of state law. *Id.* § 1538(a)(2)(B). In contrast to section nine, section seven of the ESA treats plant and animal species equally, as section 7 consultation applies to “any endangered species or threatened species.” *Id.* § 1536(a)(2).

²¹ 16 U.S.C. § 1532(19) (2012).

²² 50 C.F.R. § 222.102 (2015).

²³ *See* 16 U.S.C. § 1540(a)-(b) (2012).

²⁴ *See* 16 U.S.C. § 1538(a) (2012).

A. Federal Nexus

Actions on federal land, as well as those requiring federal authorization or receiving federal funding, are subject to section 7(a)(2) of the ESA. Section 7(a)(2) requires federal agencies to consult with the U.S. Fish and Wildlife Service (“FWS”)²⁵ to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat.”²⁶

Consultation under section 7(a)(2) can be informal or formal.²⁷ Informal consultation entails discussions and correspondence between the FWS and the action agency, and is designed to determine whether the federal agency’s proposed action is likely to adversely affect listed species or critical habitat.²⁸ If the action agency determines during informal consultation that the proposed action may affect but is “not likely to adversely affect any listed species or critical habitat,” and the FWS concurs with that finding, formal consultation is not required and the process ends.²⁹ On average, informal consultation is completed in thirteen days.³⁰ If, on the other hand, the action agency determines that the proposed action may affect and is “likely to adversely affect a listed species or its critical habitat,” then formal consultation is required.³¹ However, formal consultation is comparatively rare, with FWS informal consultations outnumbering formal consultations by nearly twelve to one between 2008 and 2015.³²

When necessary, the action agency initiates formal consultation by completing and submitting a biological assessment to the FWS.³³ The biological assessment must “evaluate the potential effects of the action” on listed species and that species’ critical habitat.³⁴ After receiving the biological assessment, the FWS prepares and issues a biological opinion. The biological opinion addresses

²⁵ 50 C.F.R. § 402.01(b) (2015). The FWS administers the ESA with respect to terrestrial plant and animal species; National Marine Fisheries Service administers the ESA with respect to marine and anadromous species. We limit our discussion to the FWS because this article is interested primarily with activities within the Intermountain West.

²⁶ 15 U.S.C. § 1536(a)(2) (2012).

²⁷ 50 C.F.R. §§ 402.13–14 (2015).

²⁸ 50 C.F.R. § 402.13(a) (2015).

²⁹ *Id.*

³⁰ Jacob W. Malcom and Ya-Wei Li, *Data Contradicts Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, PROC. OF THE NAT’L ACAD. OF SCI. EARLY EDITION, at 15,844, 15,845 (2015).

³¹ 50 C.F.R. § 402.14 (2015).

³² Malcom & Li, *supra* note 30, at 15,845.

³³ 50 C.F.R. § 402.14(c) (2015).

³⁴ 50 C.F.R. § 402.12(a) (2015).

whether the proposed action is likely to result in jeopardy for any listed species, and if so, whether “reasonable and prudent alternatives” exist to avoid jeopardy.³⁵ Jeopardy opinions are rare, and are becoming even less common. Between 1979 and 1981, just 1.8 percent of FWS consultations resulted in a jeopardy opinion.³⁶ Between 2005 and 2009, Owen reported that 7.2 percent of FWS biological opinions involving threatened or endangered fish resulted in jeopardy opinions.³⁷ Most recently, Malcom and Li report that of the 6,289 formal consultations completed by the FWS from January 2008 through April 2015, only two consultations resulted in jeopardy opinions.³⁸

If the FWS concludes in their biological opinion that jeopardy is not likely and that there will not be an adverse modification of critical habitat, the FWS issues a written statement, known as an “incidental take statement” (“ITS”).³⁹ Incidental take is defined as a take that results from, but is not the purpose of, carrying out an otherwise lawful activity.⁴⁰ If the action agency complies with the ITS’ terms and conditions, that agency is shielded from section nine liability for the inadvertent taking of a threatened or endangered species.⁴¹ The ITS must include terms and conditions for minimizing the project’s impact on the species.⁴² If the FWS determines that the action would jeopardize a listed species, the FWS then offers reasonable and prudent alternatives to avoid species jeopardy.⁴³ If these alternatives are incorporated into the project approval, the FWS proceeds to issue an ITS.⁴⁴

Significantly, the ITS shields “all persons” acting in compliance with the ITS from liability for taking listed fish or wildlife, as long as the action conforms with the requirements of the biological opinion.⁴⁵ Thus, in the case of oil and gas development, a private oil and gas lessee operating on federal lands would be

³⁵ 16 U.S.C. § 1536(b)(3)(A) (2012).

³⁶ H.R. REP. NO. 97-567, pt. 1 (1982).

³⁷ Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 164 (2012). Note that 7.2 percent appears to overstate the rate of jeopardy opinions nationally while understating the rate of jeopardy opinions that occurred in Utah. From 2005 through November 2008, a Utah Field Office “issued jeopardy and adverse modifications with anomalous frequency.” With the Utah opinions eliminated, just 2.4 percent of biological opinions resulted in a jeopardy opinion. *Id.*

³⁸ Malcom & Li, *supra* note 30, at 15,845.

³⁹ 16 U.S.C. § 1536(b)(4) (2012).

⁴⁰ 50 C.F.R. § 402.02 (2015).

⁴¹ 16 U.S.C. § 1536(o)(2) (2012).

⁴² 16 U.S.C. § 1536(b)(4)(C)(ii) (2012).

⁴³ 50 C.F.R. § 402.14(g)(5) (2015).

⁴⁴ 50 C.F.R. § 402.14(i) (2015).

⁴⁵ *Dow AgroSciences, LLC v. National Marine Fisheries Serv.*, 637 F.3d 259, 266 (4th Cir. 2011) (citing 16 U.S.C. § 1536(o)(2)); *see Ramsey v. Kantor*, 96 F.3d 434, 441 (9th Cir. 1996) (“[A]ny taking — whether by a federal agency, private applicant, or other party — that complies with the conditions set forth in the incidental take statement is permitted.”).

shielded from liability, provided that operator is acting in compliance with an ITS issued to the federal land management agency, which is generally the Bureau of Land Management (“BLM”) or the U.S. Forest Service (“FS”).

Any deviation from the terms and conditions contained in the ITS may result in ITS revocation, or loss of the liability shield provided by the ITS.⁴⁶ The FWS Endangered Species Handbook instructs that every ITS should include, among other necessary conditions, the following requirement: “[t]he [action] agency must undertake the required actions to minimize incidental take, or require these actions as conditions of the permit or grant. The agency has a continuing duty to regulate the activity covered by the [ITS]; otherwise the protective coverage of [the ITS] may lapse.”⁴⁷ Further, the ITS requires that the action agency reinstate consultation if the proposed action “is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.”⁴⁸ “When reinstatement of consultation is required, the original biological opinion loses its validity, and the accompanying ITS no longer shields the action agency from penalties for takings.”⁴⁹

The formal consultation process must be completed within 90 days of initiation,⁵⁰ and the FWS must deliver a biological opinion within 45 days of completing the consultation.⁵¹ This means that, from the date that the action agency initiates formal consultation, the FWS has 135 days to deliver its biological opinion. The FWS may extend the formal consultation period if the action agency agrees to the extension.⁵² A Government Accountability Office report determined that the National Marine Fisheries Service completed 75 percent of its formal consultations on time and that the Portland office of the FWS delivered biological opinions within the 135-day period 86-percent of the time.⁵³ Recent studies puts the median time required to complete formal consultation at

⁴⁶ See 50 C.F.R. § 402.14 (2014); *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001) (“[I]f the terms and conditions of the Incidental Take Statement are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under Section 9.”).

⁴⁷ U.S. FISH & WILDLIFE SERV. & NAT. MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT, at 2-12 (1998), http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

⁴⁸ 50 C.F.R. § 402.16 (2015).

⁴⁹ *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012).

⁵⁰ 16 U.S.C. § 1536(b)(1)(A) (2012).

⁵¹ 50 C.F.R. § 402.14(e) (2015).

⁵² *Id.*

⁵³ U.S. GOV’T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS, ENDANGERED SPECIES, MORE FEDERAL MANAGEMENT ATTENTION IS NEEDED TO IMPROVE THE CONSULTATION PROCESS, GAO-04-93, 14 (2004).

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62 days.⁵⁴

B. No Federal Nexus

Actions that are not undertaken by a federal agency, that do not require federal authorization, and that do not involve federal funding do not fall under the consultation requirements contained in section seven.⁵⁵ Such actions, however, remain subject to the prohibition against “take” contained in section nine of the ESA.⁵⁶ Section nine, as already noted, prohibits actions that indirectly or directly harm listed species or their habitat. A section nine violation can result in severe penalties, including criminal prosecution, for any injury to an endangered or threatened species.⁵⁷ Furthermore, if the action occurs on state lands with state authorization, the state may be liable for injuries to listed species.⁵⁸

ESA section ten lays out the process under which a permit may be issued to authorize non-federal activities that are otherwise prohibited by section nine. Under section ten, an Incidental Take Permit (“ITP”) is issued to private parties undertaking otherwise lawful projects that might result in the unintended take of an endangered or threatened species. While similar in purpose and effect to an ITS, an ITP is subject to differing procedural and regulatory requirements. To apply for an ITP, the action proponent must prepare a detailed application, known as a Habitat Conservation Plan (“HCP”). The HCP must contain specific information including:

- (i) the impact which will likely result from such taking [to the proposed activity];
- (ii) what steps the applicant will take to minimize and mitigate such impacts,

⁵⁴ Malcom & Li, *supra* note 30, at 15,845.

⁵⁵ The ESA provides that section 7 consultation is only available for actions with a federal nexus. See 16 U.S.C. § 1536(a)(2) (2012). See also, Christopher H.M. Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENVTL. AFF. L. REV. 135, 153-54 (1991) (“[T]he Secretary applies a “but for” test when determining whether a proposed private or state activity properly falls within section 7: if the activity could not proceed but for federal permitting or funding, then the activity [has a federal nexus and] proceeds through a section 7 consultation.”).

⁵⁶ 16 U.S.C. § 1538(a) (2012).

⁵⁷ See generally 16 U.S.C. §§ 1540(a), (b) (2012).

⁵⁸ See *Loggerhead Turtle v. Volusia Cty.*, 148 F.3d 1231, 1258 (11th Cir. 1998) (finding that county’s beach access regulations during turtle mating season resulted in taking of the loggerhead turtles in violation of the ESA); *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) (holding the State Division of Marine Fisheries’ permitting of gillnets and lobster pots resulted in taking of Northern Right whales in violation of the ESA); *Red Wolf Coal v. N. Carolina Wildlife Res. Comm’n*, No. 2:13-CV-60-BO, 2014 WL 1922234, at *8 (E.D.N.C. May 13, 2014) (holding that the state may “be liable for the unauthorized take of red wolves where its actions have greatly increased the likelihood of the take” of red wolves); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008) (finding the Minnesota Department of Natural Resources may be liable under section 9 of the ESA for authorizing traps that could result in take of listed Canada Lynx).

and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.⁵⁹

After reviewing the HCP and providing an opportunity for public comment, the FWS will issue an ITP if:

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required [by the FWS] . . . will be met.⁶⁰

The FWS' issuance of an ITP is a federal action that occurs independent of the underlying non-federal action driving HCP development. The FWS is therefore required to comply with section seven of the ESA as well as the National Environmental Policy Act ("NEPA") independent of the analysis completed in association with the non-federal project for which the HCP was originally developed.⁶¹ Under section seven, the FWS is thus required to consult with itself, following the same process as described above prior to issuing the ITP.⁶² Compliance with NEPA often requires preparation of an environmental assessment or an environmental impact statement ("EIS").⁶³ "In many cases it is prudent to prepare an EIS in order to protect the plan from avoidable litigation risks."⁶⁴ Unlike section seven consultations, there is no statutory timeframe for HCP approval.

⁵⁹ 16 U.S.C. § 1539(a)(2)(A)(i)-(iv) (2012).

⁶⁰ 16 U.S.C. § 1539(a)(2)(B)(i)-(v) (2012).

⁶¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370a (2012); *see* Carter, *supra* note 55, at 161 ("By sanctioning [a HCP], the Secretary allows other parties to take actions that could significantly affect the quality of the environment.").

⁶² Because plants receive less protection under section nine of the ESA when they occur on non-federal lands, potential project impacts to listed plants would not create liability and therefore not necessitate an HCP. *Compare* 16 U.S.C. §§ 1538(a)(1)(B) with 1538(a)(2) (2012). However, because the FWS must conduct section seven consultation prior to approving an HCP, projects that impacted both a listed animal and a listed plant would likely be required to mitigate impacts to plants as well as animal species.

⁶³ *See* Carter, *supra* note 55, at 161.

⁶⁴ Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 651 (1991).

III. GIS ANALYSIS

To better assess how a transfer of public lands from the federal government to the State of Utah might affect ESA compliance and projects that contribute to the state economy, we utilized geospatial modeling to identify oil and gas operations within areas with known threatened and endangered species occurrences. Our analysis proceeded in three steps. First, we mapped the location and status of all oil and natural gas wells in Utah. We then overlaid threatened and endangered species occurrence data on to oil and gas well locations. Last, we identified wells in areas with known endangered species occurrences. Our analysis shows that if Utah's transfer demands are met, operators of thousands of oil and gas wells are likely to experience higher ESA compliance costs.

Oil and gas wells were identified by utilizing the Utah Division of Oil, Gas and Mining's oil and gas well dataset.⁶⁵ This dataset contains, among other information, well location coordinates, mineral resource ownership, well type and status, and total cumulative production for the 23,991 oil and gas wells in Utah existing as of November 10, 2015. According to this data, there were 12,185 producing oil and gas wells in Utah on that date. In addition to producing oil and gas wells, there are 3,504 approved Applications for a Permit to Drill ("APDs") for which drilling has yet to commence, 71 pending APDs, and 2,071 active service wells (primarily injection wells associated with secondary or tertiary production, and product water disposal wells).⁶⁶ Most of these wells are concentrated in Duchesne, Uintah, Carbon, Emery, Grand, and San Juan counties. Well status and mineral lease type is shown in Table 1.⁶⁷

⁶⁵ *Oil and Gas*, UTAH AUTOMATED GEOGRAPHIC REFERENCE CTR., <http://gis.utah.gov/data/energy/oil-gas/> (last visited Nov. 10, 2015).

⁶⁶ *Id.*

⁶⁷ *Well Counts*, UTAH DIVISION OF OIL, GAS & MINING, http://oilgas.ogm.utah.gov/Statistics/Well_counts.cfm (Nov. 10, 2015) (Thirty-one additional plugged and abandoned wells exist but were not included in Table 1 because of unknown ownership).

Table 1. Well and Well Permit Status

Well Status	Number of Wells	Mineral Lease Type			
		Federal	Native American	State	Private
Producing Oil Wells	4878	1782	1877	282	937
Producing Gas Wells	7307	4962	173	1917	255
Shut-in Oil Wells	1028	459	365	57	147
Shut-in Gas Wells	761	546	27	116	72
Active Water Injection Wells	1949	1360	437	148	4
Active Gas Injection Wells	3	1	1	0	1
Active Water Disposal Wells	119	38	9	26	46
Active Gas Storage Wells	65	46	0	7	12
Active Water Source Wells	7	5	0	1	1
Active Test Holes	13	3	0	10	0
Inactive Water Injection Wells	32	8	23	1	0
Inactive Gas Injection Wells	3	1	0	0	2
Inactive Water Disposal Wells	4	1	1	1	1
Inactive Gas Storage Wells	1	0	0	1	0
Inactive Water Source Wells	2	2	0	0	0
Inactive Test Holes	4	2	0	0	2
Temporarily-Abandoned Wells	138	108	7	13	10
Plugged and Abandoned Wells	7677	4157	1069	1075	1376
Drilling Activity					
New Permits – Approval Pending	71	12	17	10	32
Permits Approved – Drilling Not Yet Commenced	3504	1931	1111	111	351
Drilling Commenced but Not Completed	183	124	21	7	31
Drilling Operations Suspended	161	83	45	8	25

Turning to species protected under the ESA, we acquired threatened and endangered species occurrence data from the Utah Division of Wildlife Resource’s spatial database of known state sensitive and ESA threatened, endangered, and candidate species (“TES”) occurrences.⁶⁸ The TES database

⁶⁸ UTAH DIVISION OF WILDLIFE RESOURCES, NATURAL HERITAGE PROGRAM, TES_20140808 [shapefile], (2014) (Utah’s federally and state threatened, endangered, and sensitive animal and plant

2016]

Shooting the Albatross

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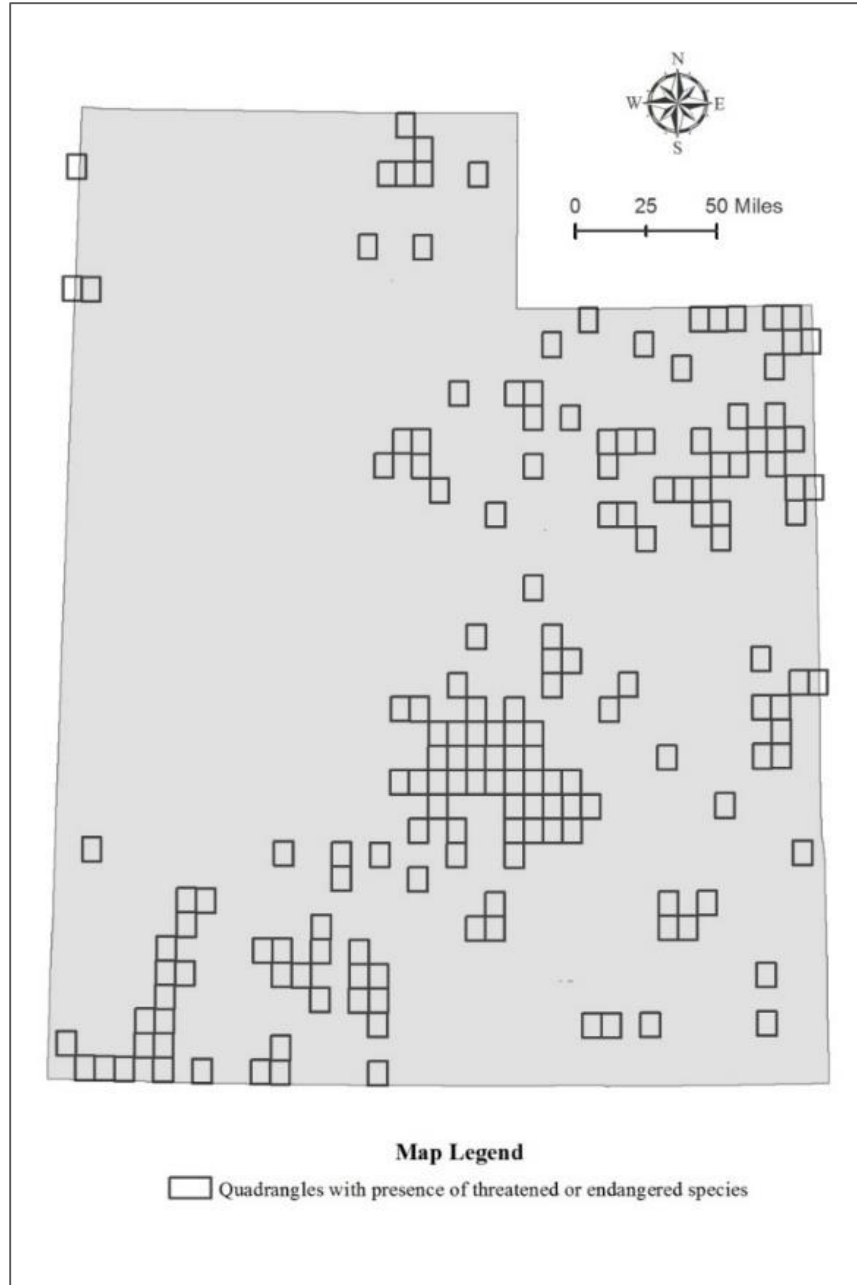
represents the highest resolution publicly available data regarding threatened and endangered species locations, and encompasses all listed species in Utah.⁶⁹ This database divides the state into 1,512 polygons corresponding to U.S. Geological Survey 7.5 minute topographic quadrangle maps that overlap at least a portion of Utah. The TES database then identifies endangered, threatened, candidate, and state sensitive species occurrences within each quadrangle.

ESA candidate species and state sensitive species do not trigger the substantive and procedural requirements detailed above. We therefore excluded ESA candidate and state sensitive species from our analysis. Of the 1,512 quadrangles in the state, 170 contain one or more threatened or endangered species. *See* Figure 1.

species occurrences), <http://dwrcdc.nr.utah.gov/ucdc/downloadgis/disclaim.htm>.

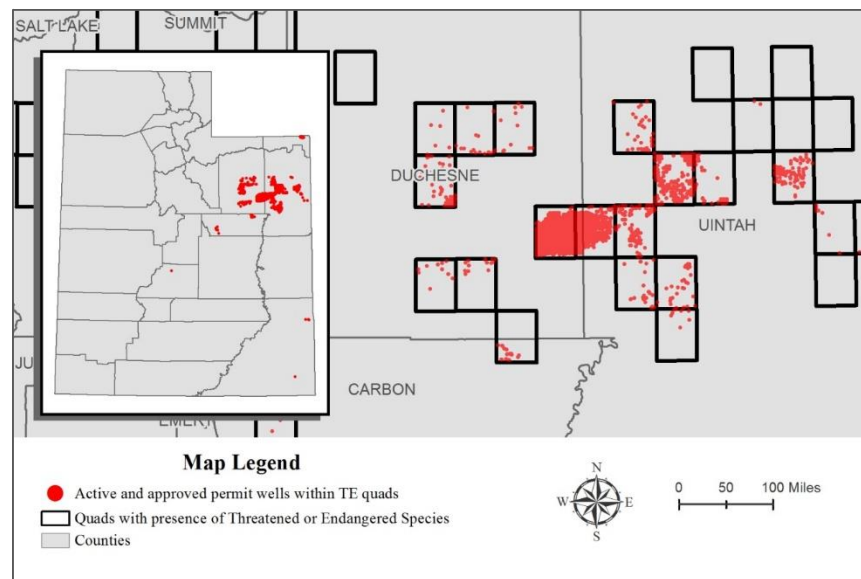
⁶⁹ We considered using the U.S. Fish and Wildlife Service's Information for Planning and Conservation ("IPaC") database to identify threatened and endangered species habitat. <https://ecos.fws.gov/ipac/>. IPaC allows users to input the location of a potential project and obtain a list of plant and animal species that could be affected by the proposed action. However, because the IPaC dataset is based on county level species occurrence data, the IPaC dataset would have overstated potential species impacts.

Figure 1. 7.5 Minute Quadrangles with Threatened or Endangered Species Occurrences



To quantify the potential conflict between oil and gas development and ESA listed species protection we overlaid threatened and endangered species occurrence data onto well and APD locations obtained from the Utah Division of Oil, Gas, and Mining. Figure 2 depicts the results of this query for the Uinta Basin, an area of Utah where federally managed public lands are targeted for transfer under the TPLA, and where both a high level of oil and gas development and threatened and endangered species occurrences exists. Wells within quadrangles associated with threatened or endangered species occurrences are summarized in Table 2.⁷⁰

Figure 2. Active and Approved Wells in Quadrangles with Threatened or Endangered Species Occurrences



⁷⁰ Figures are as of November 10, 2015. *Well Counts*, UTAH DIVISION OF OIL, GAS & MINING, http://oilgas.ogm.utah.gov/Statistics/Well_counts.cfm (Nov. 10, 2015) (Two additional plugged and abandoned wells exist but were not included in Table 2 because of unknown ownership).

Table 2. Well and Well Permit Status in Areas with Threatened or Endangered Species Occurrences

Well Status	Number of Wells	Mineral Lease Type			
		Federal	Native American	State	Private
Producing Oil Wells	1951	1225	200	185	341
Producing Gas Wells	1289	930	15	294	50
Shut-in Oil Wells	313	179	53	24	57
Shut-in Gas Wells	107	88	2	13	4
Active Water Injection Wells	1048	934	1	109	4
Active Gas Injection Wells	1	0	0	0	1
Active Water Disposal Wells	27	8	1	3	15
Active Gas Storage Wells	44	38	0	5	1
Active Water Source Wells	0	0	0	0	0
Active Test Holes	1	1	0	0	0
Inactive Water Injection Wells	1	1	0	0	0
Inactive Gas Injection Wells	0	0	0	0	0
Inactive Water Disposal Wells	0	0	0	0	0
Inactive Gas Storage Wells	0	0	0	0	0
Inactive Water Source Wells	0	0	0	0	0
Inactive Test Holes	0	0	0	0	0
Temporarily-Abandoned Wells	50	46	0	4	0
Plugged and Abandoned Wells	1499	930	77	206	286
Drilling Activity					
New Permits – Approval Pending	36	10	5	8	13
Permits Approved – Drilling Not Yet Commenced	1103	774	160	73	96
Drilling Commenced but Not Completed	43	25	6	2	10
Drilling Operations Suspended	56	45	1	4	6

IV. THE ESA AND LANDS TARGETED FOR TRANSFER

A. Unintended Consequences to Ongoing Land Uses

Under the TPLA, Utah stakes claim to 31.2 million acres of the public domain — lands overseen primarily by the U.S. Forest Service and Bureau of Land

Management.⁷¹ Transferring millions of acres of the public domain from the federal government to a non-federal owner has important ESA compliance implications. A transfer of lands from the federal government, absent express federal legislation to the contrary, is likely to invalidate existing section seven consultations and any associated ITSs because the federal action agencies would no longer possess jurisdiction over the transferred land. The BLM and the FS, for example, would be unable to require compliance with the non-discretionary terms and conditions contained in their respective ITSs.⁷² As already noted, “[t]he [federal action] agency has a continuing duty to regulate the activity covered by the incidental take permit; otherwise the protective coverage of [the ITS] may lapse.”⁷³

If states succeed in their efforts to seize control of the public domain, all activities that have the potential to “take” an ESA-listed species on former federal public lands will risk ESA civil and criminal penalties. These activities, formerly covered by section seven consultations and associated ITSs, could thus only be shielded from ESA liability through an HCP. Until the HCP is approved by the FWS, proponents would be liable for any “take” their activities might cause.

Federal and state lands within Utah are home to 6,744 and 2,199 producing oil and gas wells, respectively.⁷⁴ There are an additional 1,192 producing oil and gas wells located on private lands within Utah.⁷⁵ Although many of these wells are not in areas with a high likelihood of threatened or endangered species occurrence, the loss of a federal nexus could impact the 3,240 wells that are currently producing oil or natural gas within a quadrangle known to contain a threatened or endangered species — 2,155 of these wells are on federal land, the vast majority of which would be targeted for transfer under the TPLA.⁷⁶

Other aspects of oil and gas operations would be subject to the same permitting considerations as producing wells. Oil and gas wells frequently generate

⁷¹ See generally UTAH CODE ANN. §§ 63L-6-102,–103 (2014).

⁷² *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (“[T]he Biological Opinion’s Incidental Take Statement constitutes a permit authorizing the action agency to ‘take’ the endangered or threatened species so long as it respects the Service’s ‘terms and conditions.’”) (“[T]he Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions”); *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife, Bureau of Land Mgt.*, 273 F.3d 1229, 1239 (9th Cir. 2001); *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir.1996) (Actions “contemplated by an incidental take statement issued under Section 7 of the ESA and . . . conducted in compliance with the requirements of that statement” do not violate section 9.).

⁷³ ENDANGERED SPECIES CONSULTATION HANDBOOK, *supra* note 47, at 2-12.

⁷⁴ *Supra*, Table 1.

⁷⁵ *Id.*

⁷⁶ *Supra*, Table 2. See generally UTAH CODE ANN. §§ 63L-6-102–103 (2014) (The TPLA targets multiple-use lands, excluding from its transfer demands only National Parks, Wilderness Areas, Department of Defense lands, Indian Reservations, and select National Monuments.). The vast majority of oil and gas production occurs outside of these areas.

wastewater as a byproduct of production, and this product water is often disposed of in underground injection wells.⁷⁷ Additionally, water or carbon dioxide are frequently injected into hydrocarbon producing formations to increase reservoir pressure and stimulate hydrocarbon production.⁷⁸ As of November 10, 2015, there were 1,076 such active service wells within a quadrangle known to contain a threatened or endangered species.⁷⁹ Eighty-eight percent of these wells are on federal lands likely to be impacted by public land transfer demands made under the TPLA.⁸⁰ These wells too would be subject to changing ESA compliance requirements.

Wells on lands that are not currently part of the federal public domain and which therefore would not be subject to a change in ownership under the TPLA would also be impacted. When the FWS conducts section seven consultation on a large project involving a mix of federal and non-federal land, such as an oil or natural gas field development, the FWS analyzes the non-federal lands as part of the consultation process because the FWS is required to consider the entire “action area” of a proposed project, not just the federally permitted portion.⁸¹ Action areas include the entire area directly or indirectly effected by the proposed action, which is often larger than the project footprint, and which may encompass multiple landowners.⁸² It appears likely that the majority of producing wells on what is currently non-federal lands that contain threatened or endangered species were considered by the FWS as part of a larger field development.

Treating activities on the non-federal lands as part of the larger federal action means that the non-federal landowner does not need to independently develop an HCP for the non-federal portion of the larger project, and can rely instead on the ITS for protection from civil or criminal liability for incidental takes. Eliminating federal land ownership and the federal nexus could invalidate an ITS for large oil and gas projects that encompass federal, state, and private land. This invalidation would therefore impact not only the lands conveyed out of federal ownership, but those state and private lands that are shielded from liability because they are part of the larger “action area.”

⁷⁷ See 40 C.F.R. §§ 146.5(b)(1) and 146.21—146.24 (2015) (regulating reinjection of fluids which are “brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection.”).

⁷⁸ See 40 C.F.R. §§ 146.5(b)(2) and 146.21—146.24 (2015) (regulating injection of fluids for “enhanced recovery of oil and natural gas.”). See also “enhanced oil recovery” SCHLUMBERGER OILFIELD GLOSSARY http://www.glossary.oilfield.slb.com/Terms/e/enhanced_oil_recovery.aspx.

⁷⁹ *Supra*, Table 2.

⁸⁰ *Id.*, see also *supra* note 77.

⁸¹ 50 C.F.R. § 402.14(g)(1) (2015).

⁸² 50 C.F.R. § 402.02 (2015).

During 2014, Utah received \$191,513,113⁸³ in royalty revenue from the 6,744 producing oil and gas wells on federal lands within the state. That equates to \$28,398 per well, not including severance or property tax revenue attributed to each well. With 3,240 producing wells located within quadrangles known to contain threatened or endangered species, roughly \$92 million in existing revenue would be subject to increased risk, if Utah prevails in its TPLA claims.

The potential liability risk could prove particularly problematic to the state agencies administering school and institutional trust lands. School trust lands were granted to the western states by the federal government upon each states' admission to the Union. In Utah, for example, the School and Institutional Trust Lands Administration ("SITLA") today manages 3.4 million acres of trust lands, much of which is in insolated 640-acre blocks.⁸⁴ With 2,199 producing wells on state land — 479 of which are in quadrangles with known threatened or endangered species occurrences — SITLA generates roughly three-quarters of its total revenue from oil, natural gas, and mineral development.⁸⁵

If state school and institutional trust lands are part of a producing oil, natural gas, or mineral development involving federal public lands upon which section seven consultation was completed and an ITS issued, and the base federal public lands are conveyed to the state as demanded by the TPLA, the state trust lands administrators may lose their ongoing protection from incidental take. The loss of ITS protection could force state trust lands administrators to either assume the risk of a take, or expend precious resources to rapidly develop multiple HCPs. The new HCPs may, in turn, necessitate operational changes that could negatively impact revenue generation. Either scenario could impede trust land managers' ability to generate revenue for trust beneficiaries.

Wells that are concentrated in one geographic area could potentially be covered under a common HCP. However, increasing the number of wells or the geographic extent of the area covered by an HCP would likely increase HCP complexity, leading to longer permitting times. It is also possible that where wells were subjected to section seven consultation, the FWS could conclude that a legally binding commitment to comply with the requirements that were in place and analyzed during consultation would form the foundation for an HCP. If so, HCP development time could be reduced.⁸⁶ However, it is also possible that additional requirements would be applied based on new information or changed conditions raised either by the FWS or through the NEPA analysis required for

⁸³ Economic Profile System, *supra* note 13. Quoted figures do not include rental or bonus bid payments.

⁸⁴ *See generally* STATE OF UTAH SCH. & INSTITUTIONAL TR. LANDS ADMIN., *supra* note 15.

⁸⁵ *See id.* at 6.

⁸⁶ However, reliance on an earlier section seven consultation would not eliminate the need for NEPA compliance and any delays associated with public notice and comment requirements.

the HCP. The uncertainty, cost, and potential liability should therefore concern all oil and gas operators across the West.

B. Unintended Consequences to Future Land Uses

As of November 10, 2015, there were 1,103 wells within Utah in quadrangles with known threatened or endangered species occurrences that were approved, but where drilling had not commenced. There were an additional 36 wells in quadrangles with known threatened or endangered species occurrences for which an Application for a Permit to Drill (“APD”) was submitted, but where approval has not yet been granted. For these and other future wells, with no federal nexus, operators and landowners can only be shielded from section nine liability by developing an HCP.

Of these pending wells, 784 are located on what is currently federal land. Assuming that each pending well would generate \$28,398 in royalties for the state,⁸⁷ the average per-well royalty revenue produced from wells on federal land during 2014, \$22.3 million in annual revenue would be put at increased risk if federal lands are transferred to the state.

As with existing wells, it is likely that HCPs would be developed for a group of wells rather than individual facilities. It is also likely that at least some of these future wells would be developed in areas that are already undergoing development and that HCP development for existing fields could address future infill development. While this approach would create economies of scale, it would also result in larger, more complex HCPs that could take longer to complete and which may require more careful analysis by the FWS. It is also possible that increasing the level of infill development could change the conditions upon which an HCP is based so much that HCP revision would be required.

C. The Cost of HCP Preparation

Even though section seven consultations and the HCP process apply similar standards for species protection,⁸⁸ the two mechanisms “present enormously different procedural demands.”⁸⁹ This difference reflects Congress’ efforts, through several amendments to the ESA, to streamline section seven consultations by establishing statutory deadlines, simplifying the process, and describing in

⁸⁷ See HEADWATERS ECONOMICS, *supra* note 13.

⁸⁸ Endangered and Threatened Wildlife and Plants; Prohibitions and Permits, 50 Fed. Reg. 39,681, 39,683 (1989); *see also* H.R. REP. NO. 97-835, at 29 (1982) (Conf. Rep.) (indicating Congressional intent that the HCP process apply the same no jeopardy standard as used in section seven consultation).

⁸⁹ Carter, *supra* note 55, at 162; *see supra* notes 23-61 and associated text.

detail each step in the process.⁹⁰ In contrast, Congress has not made the same changes to the HCP process.⁹¹ As a result, HCP permitting in almost all cases will require more time to complete than section seven consultation.

To assess the potential effect of the TPLA and its progeny on both producing wells, wells subject to pending approvals or development, and wells that may be proposed at some future point in time, we can compare NEPA and ESA compliance times for projects with and without a federal nexus. Under existing conditions, where the lands are federally controlled, NEPA and ESA compliance time represents the time necessary to complete section seven permitting as well as any associated NEPA analysis. Under a scenario where public lands are transferred to the states, we consider the time necessary to complete HCP permitting and the NEPA analysis required for HCP approval and ITP issuance. To facilitate this comparison, we divide projects into three categories based on the level of NEPA compliance required: (1) environmental impact statements (“EISs”), (2) environmental assessments (“EAs”), and (3) categorical exclusions (“CEs”).⁹²

Because section seven consultation generally occurs simultaneously with NEPA analysis, and because agency policy directs that “section 7 consultation should be completed” prior to the completion of NEPA,⁹³ we consider the time necessary to complete the NEPA analysis as including section seven consultation. Accordingly, we sought information regarding the BLM and FS’s average completion times for EISs, EAs, and CEs. BLM completion time data was available only for EISs. Consequently, for both EAs and CEs, we limit our analysis to Forest Service data.⁹⁴ Based on our review of published data, the

⁹⁰ Carter, *supra* note 55, at 162.

⁹¹ *Id.*

⁹² An EIS is required for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2012). An EIS must evaluate the proposed action and its direct, indirect, and cumulative environmental impacts and compares the proposed action with reasonable alternatives and a “no action” alternative. 40 C.F.R. § 1502.14 (2015). An EA may be completed in circumstances where the project will not have significant impacts or the agency is unsure whether the project will have a significant impact. 40 C.F.R. §§ 1501.3, 1501.4(a)-(c) (2015). The EA is a “concise public document” that “[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1508.9 (2015). If the action falls under a CE, then the agency need not prepare an EIS or an EA. 40 C.F.R. § 1508.4 (2015). CEs cover specific types of actions, identified by the agency through rulemaking, “which do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4 (2015).

⁹³ ENDANGERED SPECIES CONSULTATION HANDBOOK, *supra* note 47, at 4-11 (“[T]he action agency should be encouraged to initiate informal consultation prior to NEPA public scoping. Biological assessments may be completed prior to the release of the Draft Environmental Impact Statement (DEIS) and formal consultation, if required should be initiated at the time of release of the DEIS.”).

⁹⁴ Forest Service compliance times are a reasonable indicator of BLM compliance times because the two agencies operate under similar multiple-use, sustained-yield mandates. *See* 43 U.S.C. §§ 1701(a)(7) (2012) (addressing compliance times for the BLM); *see also* 16 U.S.C. § 529 (2012)

estimated time for completion for EISs, EAs, and CEs, is 4.4 years,⁹⁵ 1.5 years,⁹⁶ and 0.5 years,⁹⁷ respectively.

For projects without a federal nexus, we used a 2009 report on FWS HCP implementation to estimate the average time necessary to complete HCP permitting.⁹⁸ The HCP compliance time information includes NEPA compliance as well as the time necessary to draft and finalize the HCP document. As in our analysis of permitting on federal lands, we divide HCPs into three categories based on the level of NEPA review required. HCPs approved using a CE require, on average, 1.7 years to complete.⁹⁹ HCPs undergoing EA review commonly required four to six years to complete.¹⁰⁰ HCPs undergoing EIS review commonly required eight to twelve years to complete.¹⁰¹ Time to complete an ITS is summarized in Table 3. These estimates are consistent with other scholarly work on HCPs,¹⁰² and indicate that loss of a federal nexus is likely to more than double ESA compliance times.

Table 3. Time to ITS/ITP Completion

Level of NEPA Analysis	Federal Lands	Non-Federal Lands
CE	0.5 years	1.7 years
EA	1.5 years	4-6 years
EIS	4.4 years	8-12 years

Transfer advocates should also note that where a federal nexus exists, the expenses incurred through section seven consultation are generally borne by the

(addressing compliance times for the Forest Service).

⁹⁵ John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7-1 GEO. WASH. J. ENERGY & ENVTL. L. 39 (2016).

⁹⁶ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, NATIONAL ENVIRONMENTAL POLICY ACT, LITTLE INFORMATION EXISTS ON NEPA ANALYSES, 14 (2014).

⁹⁷ *Id.* at 15.

⁹⁸ See DAVID CALLIHAN ET AL., AN INDEPENDENT EVALUATION OF THE U.S. FISH & WILDLIFE SERVICE'S HABITAT CONSERVATION PLAN PROGRAM *passim* (1999).

⁹⁹ *Id.* at 31. The time necessary for completion of HCPs approved through a categorical exclusion is measured from when the applicant's first request for assistance from the FWS until when the HCP was finalized and the ITS was issued. Therefore, completion times for categorically excluded projects may not include time spent by the proponent preparing the HCP document before contacting the FWS.

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.*

¹⁰² See, e.g., Albert C. Lin, *Participants' Experiences With Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOL. L.Q. 369, 411 (1996) (documenting a wide range of HCP completion times ranging from two years for relatively simple HCPs to as long as fourteen years for more complex ones).

lead federal agency.¹⁰³ In contrast, non-federal entities are responsible for the entire cost of HCP development.¹⁰⁴ Good HCP cost data is not available, but anecdotal evidence indicates that HCP preparation can be quite expensive.¹⁰⁵ A transfer of public lands out of federal ownership therefore could, in addition to dramatically increasing the time required to obtain project approvals, increase significantly the financial cost of ESA compliance.

D. Limitations

Our goal in completing this analysis is to present a conservative assessment of the nature and extent of the ESA compliance challenge that would arise if Utah prevails in its efforts to seize federal public lands. Our estimate of the number of oil and gas wells that could impact threatened or endangered species habitat and therefore require new or amended ESA compliance efforts is illustrative of a broader challenge. A host of other industries and activities could impact ESA listed species and face challenges similar to those discussed above.

Our assessment of wells within potentially impacted quadrangles should be viewed as an indicator rather than as a precise quantification. Each quadrangle covers many square miles and can contain significant changes in topography, vegetation, and habitat type. Accordingly, a well within a quadrangle known to contain a threatened or endangered species may be miles away from the habitat that species requires. Where this is the case, our results may overstate the need to develop an HCP. However, given the potential for conflict and potential liability for “taking” an ESA listed species, informal consultation would appear prudent within quadrangles with known threatened or endangered species.

Conversely, our analysis considers only species occurrence data, and threatened

¹⁰³ The lead federal agency’s permittees may fund some of the necessary work in order to expedite the analysis. See BUREAU OF LAND MGMT., DEP’T OF THE INTERIOR, BLM NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK H-1790-1, § 13.5 (2008).

¹⁰⁴ “In their current form, section 10(a) regulations impose relatively heavy burdens on parties seeking to obtain incidental take permits. For example, whereas a section 7 consultation occurs almost exclusively between the Secretary and a federal agency, under section 10(a) a state or private applicant assumes sole responsibility for preparing a conservation plan that meets the Secretary’s approval. An applicant under section 10(a) assumes the cost of collecting biological data on listed species potentially affected by a proposed project, determining the appropriate scope of the conservation plan, and making funds available to implement required mitigation measures.” Carter, *supra* note 55, at 162.

¹⁰⁵ Proponents of an HCP can spend several hundred thousand dollars to more than one million dollars for legal and technical advice in the planning phase alone. Lin, *supra* note 102, at 403, n. 201 (“Murray Pacific Corp. spent an estimated \$650,000 to develop a spotted owl HCP and over \$1 million to develop a multispecies HCP...”). After planning, mitigation fees for HCPs range between “\$250/acre for the interim Clark County, Nevada HCP; \$600/acre for the Coachella Valley, California HCP; proposed \$1000-\$1250/acre for the Bakersfield, California HCP; and \$1,950/acre for the short-term Riverside County, California HCP.” *Id.* at 404, n. 202. The cost of HCP implementation, for large regional HCPs, can reach \$25 million, as in the case of the Coachella Valley HCP, and almost \$50 million in the Riverside County HCP. *Id.* at 404, n. 204.

and endangered species are, by definition, quite rare. The lack of observational data may not indicate the lack of species presence, and HCP development may need to consider potential habitat in addition to occupied habitat. Specifically, critical habitat has been designated for ten of the nineteen listed animal species within Utah.¹⁰⁶ Since critical habitat designations include potential habitat as well as occupied habitat, designated critical habitat will extend beyond the quadrangles identified in our analysis, and operators should consider initiating informal consultation with the FWS before undertaking actions that may impact critical habitat. As our analysis does not include critical habitat data, it may understate the need for HCP development, should a transfer of public lands occur.

While a transfer of public lands subject to critical habitat designations for terrestrial species could require HCP development, this risk should not be overstated, as critical habitat designations have been finalized for only three terrestrial species within Utah — Desert Tortoise, Mexican Spotted Owl, and Southwest Willow Flycatcher.¹⁰⁷ Rivers account for much of the critical habitat within Utah, and there are three reasons why transferring public lands that are subject to a critical habitat designation out of federal ownership would not result in a significant change in consultation for listed fish.

First, while rivers within Utah are designated critical habitat for seven ESA listed fishes,¹⁰⁸ the bed beneath “navigable” rivers belongs to the state.¹⁰⁹ The Colorado River and its major tributaries account for most of the designated critical fish habitat within Utah, and these waters are considered navigable. Land beneath these rivers therefore already belongs to the state and would be unaffected by a public land transfer.

Second, a project impacting wetlands or waters of the United States, whether through placement of fill in a wetland or placement of a structure in a water of the US, would still require federal authorization pursuant to section 404 of the Clean Water Act.¹¹⁰ Permits under section 404 are issued by the U.S. Army Corps of Engineers,¹¹¹ and the permitting process would trigger section seven consultation regardless of who owns the land. So a change in ownership would result in no change in ESA compliance processes.

Third, within Colorado, Utah, and Wyoming, projects that propose to withdraw water from a tributary to the Colorado River are covered by programmatic section

¹⁰⁶ Information for Planning and Conservation (IPaC) Database, U.S. FISH & WILDLIFE SERV., DEPT. OF THE INTERIOR, <http://ecos.fws.gov/ipac/> (last visited Jan. 26, 2016). Critical habitat designations for the Yellow-billed cuckoo have been proposed but not finalized. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) (holding that title to the bed of navigable waters transfers to the state upon admission to the Union).

¹¹⁰ 33 U.S.C. § 1344 (2012).

¹¹¹ 33 U.S.C. § 1344(d) (2012).

seven consultation as part of the Upper Colorado River Endangered Fish Recovery Program.¹¹² Colorado, Utah, and Wyoming are parties to the recovery program, which establishes programmatic mitigation.¹¹³ Changes in land ownership would not change the mitigation requirements, or necessitate changes in section seven compliance processes.

In light of the scope of our analysis (considering only occupied habitat and only the oil and gas industry), our results should be seen not as a precise quantification of the number of projects that would be impacted by a transfer, but rather, as a conservative indicator of the minimum number of impacted oil and gas projects. While our analysis is limited to one industrial sector, it should serve as a caution to others operating on what are now federally administered public lands.

V. CONCLUSION

The goals underpinning state efforts to seize control of federal lands — to reduce regulatory complexity and accelerate resource development — are at odds with changes in the ESA compliance process that a wholesale land transfer would bring about. Any state that prevails in its efforts to take over federal public lands, and all of the private citizens and corporations that would subsequently lease those lands, will still have to comply with the ESA. By removing a federal nexus, states are inadvertently increasing the amount of time and money needed to complete ESA permitting, and with it, the lead time required for the development activity for which ESA compliance is required. These costs and delays could be significant, especially when extended to thousands of wells. It is hard to imagine how increased compliance costs and lengthened permitting times would produce anything other than a chilling effect on state and local economies — precisely the opposite result of what transfer advocates seek.

¹¹² Upper Colorado River Endangered Fish Recovery Program, Recovery Implementation Program Section 7 Consultation, Sufficient Progress, and Historic Projects Agreement (Oct. 15, 1993) (revised Mar. 8, 2000) and Recovery Implementation Program Recovery Action Plan (RIPRAP) (Mar. 24, 2015), <http://www.coloradoriverrecovery.org/documents-publications/foundational-documents/2009extension.pdf>.

¹¹³ Upper Colorado River Endangered Fish Recovery Program, Extension of the Cooperative Agreement for the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (2009), <http://www.coloradoriverrecovery.org/documents-publications/foundational-documents/2009extension.pdf>.