

SURVIVING THE ESA:

Oregon's Farmers and the Streaked Horned Lark

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PUBLIC SERVICE ANNOUNCEMENT:

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Streaked Horned Lark

Streaked Horned Larks are small, ground-dwelling birds, approximately 6–8 inches in length that are pale brown, with a dark brown back, yellowish underparts, a walnut brown nape and yellow eyebrow stripe and throat with, black feathers on their head that look like “horns”.



Habitat

- Primarily Western Oregon and Western Washington.
- Prefer substantial areas of bare ground and sparse low-stature vegetation primarily comprised of grasses and forbs, including:
 - Airports
 - Sandy beaches with bunch grass
 - Ag fields (in or near)
 - Streaked horned larks use fallow or recently burned agricultural fields and grass seed farms.
 - Grasslands—both rare native prairies and grass seed fields—are important habitats for streaked horned larks in the Willamette Valley; open areas within the grasslands are used for both breeding and wintering habitat

History

- In 2001, the Service determined that the Streaked Horned Lark (SHL) warranted listing and placed them on the candidate list and evaluated the SHL on an annual basis.
- 10 years later in July of 2011, the Service filed a multiyear work plan as part of a proposed settlement agreement with the Center for Biological Diversity (CBD) and others, which required the Service to systematically review and address the conservation needs of more than 250 candidate species, over a period of 6 years, including the SHL.
- A year later, in October 2012, the USFWS proposed listing the SHL as Threatened and included a special 4(d) rule limiting Section 9 take prohibitions to certain agriculture and airport management activities.
- In 2018, CBD filed a lawsuit challenging USFWS listing.

Center for Biological Diversity v Ryan Zinke, et al:

- CBD: Challenge the Service's decision to list the lark as "threatened" rather than affording it the more protective status of "endangered." An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range" 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 USC § 1532(6).
- CBD: Challenge the "special" regulation issued by the FWS pursuant to section 4(d) of the Act arguing that the service failed to demonstrate that the special rule is necessary and advisable to provide for the conservation of threatened species.
- Principle Question (for this presentation): Whether the Service had a rational basis for concluding that the specific prohibitions and exceptions set forth in its Special Rule are necessary and advisable to provide for the conservation of the SHL.

15 U.S.C 1533(d)

(d) Protective Regulations

*“Whenever any species is listed as a threatened species***the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1)[take prohibition]***”*

Section 4(d)

- A “4(d) Rule” is one of many tools found within the Endangered Species Act (ESA) for protecting species listed as “threatened.” This rule gets its name from section 4(d) of the ESA, which directs the Service to issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.” US Fish and Wildlife Service
- Section 4(d) of the ESA authorizes the Service to extend **any or all** of the Section 9 take prohibitions, as well as the necessary protective measures, to any threatened species. 50 CFR 17.31
 - USFWS and NMFS regulations differ
- Elements
 - Applies to species listed as “threatened” (not endangered)
 - Blanket section 9(a) protections (possible rule change under the current administration)
 - Exception to the take prohibitions in section 9(a).
 - Necessary and advisable for the conservation of the species:
 - Conservation: the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. 16 U.S.C. § 1532(3).
- According to CBD, 75 domestic 4(d) rules have been issued, including 17 under the previous administration.

Habitat Loss

- Loss and fragmentation of habitat, including destruction of 98 percent of native grasslands on the West Coast
- Agriculture and urban development, loss of natural disturbance regimes and resulting woody plant encroachment, and incompatible management practices.
 - Example: agricultural field conversions from grass seed to vineyards or are used to produce crops such as blueberries or broccoli.
- Oregon's agricultural burning ban
- Crushing, flushing, and nest loss from plows and other farm vehicles.
- Urbanization

Willamette Valley Agriculture (Lark Habitat)

- Over 170 different crop and livestock items are produced, including grass and legume seeds, tree fruits and nuts, wine grapes, berries, vegetables, nursery, Christmas trees, and field crops such as wheat, oats, mint and hops, hay, livestock and poultry and miscellaneous field crops.
- Grass seed capital of the world.
- Increasing number of acres to wine grapes and hazelnuts.

OFB Argument

- In Oregon, the two most significant threats to maintaining open landscapes suitable for streaked horned lark habitat is pressure from urbanization and unprofitable grass seed farms that lead to cropping conversions. Growing grass seed is good for the SHL – even with some take.
- The Conflict - Grass seed production
 - Harvest (July – August)
 - Nesting Activities (through mid-to-late August)
- Section 9 protections will make farming grass seed unprofitable and require farms to convert to new crops providing less suitable habitat.
- 4(d) is necessary for the continued existence and conservation of SHLs and preferable agricultural field habitat that will also discourage urbanization.
 - OFB is a staunch defender of Oregon's land use system that protects productive farm land from urbanization.

Necessary and Advisable for Conservation of the Species

While some agricultural activities may harm or kill streaked horned larks, maintenance of extensive agricultural lands in the Willamette Valley is crucial to maintaining a large, stable population of streaked horned larks in the valley. ***[A] special [4(d)] rule will further conservation of the species by discouraging conversions of the agricultural landscape into habitats unsuitable for the streaked horned lark and encouraging landowners to continue managing the remaining landscape in ways that meet the needs of their operation as well as providing suitable habitat for the streaked horned lark.

- (USFWS <https://www.federalregister.gov/d/2012-24465/p-374>)

A special rule will promote the conservation efforts and private lands partnerships critical for species recovery (*citing* Bean and Wilcove 1997)

Special 4(d) Rule

- *Agriculture*: Narrow 4(d) rule for “accepted farming practices”, which include, but are not limited to all “[p]lanting, harvesting, rotation, mowing, tilling, discing, burning, and herbicide application of crops”; “transportation activities”; “[l]ivestock grazing according to normally acceptable and established levels”; and “[m]aintenance of irrigation and drainage systems.” 78 Fed. Reg. at 61,503
 - Consistent with Oregon’s definition of “accepted farming practice” as defined by ORS 308A.056
 - Ensure grass seed farmers can continue to grow grass seed without burdensome regulation
- *Airports*: exempts activities, such as mowing or other management to deter hazardous wildlife, that would result in take under section 9 of the Act, would eliminate the incentive for airports to reduce or eliminate populations of streaked horned larks from the airfields

Center for Biological Diversity v Ryan Zinke, et al:

- Whether the Service had a rational basis for concluding that the specific prohibitions and exceptions set forth in its Special Rule are necessary and advisable to provide for the conservation of the SHL.

Considerations:

- Congress provided broad delegation of authority to the Secretary to determine what measures are necessary and advisable to provide for the conservation of threatened species.
- Nothing in the regulation, or in the ESA itself, requires the agency to demonstrate a conservation basis for *not* applying the general regulation at 50 C.F.R. § 17.31(a). *In Re Polar Bear*, 818 F. Supp. 2d 214 (D.D.C. 2011)
- Section 4(d) does not require regulations protecting threatened species from take and that “[t]he combination of the discretionary ‘may’ and the phrase ‘necessary and advisable’ grant [the Service] much leeway in crafting regulations”; *Trout Unlimited v. Lohn*, 559 F.3d 946, *230 962 n. 12 (9th Cir.2009).
- The Secretary may, but is not required to, extend prohibitions of Section 9 to threatened species *Defenders of Wildlife v. Kempthorne*, No. 04-1230, 2006 WL 2844232, at *2, 2006 U.S. Dist. LEXIS 71137, at *7-8 (D.D.C. Sept. 29, 2006)).

Conclusion

- Courts provide considerable discretion to FWS and often uphold Special 4(d) Rules
- USFWS has a tough job balancing competing interests/needs
- 4(d) is a useful tool to bring environmental interests together with landowners
 - As opposed to a gun to the head of a landowner
- Removing the blanket rule would help drive better conversations between landowner and conservation groups around protecting threatened species, but may not avoid litigation.



QUESTIONS?

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