LEGAL MEMORANDUM

TO: Laurie Fowler  
FROM: Kathleen Nelson  
DATE: October 6, 2009  

QUESTION PRESENTED

Under the Endangered Species Act, would a project to create artificial shoals for the shortnose sturgeon be supported by its recovery plan, various agencies and/or Congress?

BREIF ANSWER

Yes. The Endangered Species Act (ESA) focuses primarily on protecting listed species facing invasive action, which thereby places them or their habitat in ‘jeopardy,’ of extinction. The ESA affords protection to ‘listed’ species through the promulgation of Section 4 requirements for Agencies to designate critical habitat and develop recovery plans for species specific conservation plans. The ESA also grants the Secretary the ability to acquire land and water rights and enforce penalties to meet these ends. The majority of the case law on this subject centers on enforcing protections afforded by the ESA, not supporting conservation or rehabilitation measures. Agencies are then delegated the responsibility of ensuring endangered species are protected and their rehabilitation fostered thru the provisions of …. Agencies in fact develop the recovery plans, which here maybe used to support the Savannah River Basin Project because specific elements of the plan call for (… rehabilitation of spawning habitat, and research)…Which are the goals of this project presented by the southeastern natural sciences academy.

DISCUSSION

The Endangered Species Act (ESA) of 1973 imposes a duty on federal agencies to conserve listed threatened and endangered species. 16 U.S.C.A. § 1531-44, 25 Envtl. L. 1107. The shortnose sturgeon was listed as endangered in 1967. 32 FR 4001. The shortnose sturgeon populates rivers along the east coast, including the Savannah river. Recovery Plan 1998 (proper cite?). The United States Army Corp of Engineers constructed cuts in the river between oxbows for easier navigation of the channel as part of the River and Harbor Act of 1959, between 1959 and 1962, and then again in 1976. (Bill Bailey – cite???). The Savannah River Basin Restoration Using Artificial Shoals for Habitat Creation and Oxygenation Project seeks to discover the ecological and legal considerations of re-connecting one of these historic oxbows and installing an artificial shoal in the cut out. (Work Plan – cite???). This paper seeks to identify how the Endangered Species Act could be used to foster a project that creates habitat for the endangered shortnose sturgeon, through the creation of artificial shoals, while simultaneously increasing water quality by redirecting the Savannah River through a historic oxbow. 

SHOULD I MAKE THE ABOVE SECTION FACTS AND THEN THE BELOW SECTION THE GENERAL AREA UNDER DISCUSSION?
I. The Endangered Species Act – What does it mean to be Endangered?

The Endangered Species Act is the legal mechanism through which Congress seeks to protect species from extinction. 22 Temp. Env. L. & Tech. J. 65 – cite page???.

Congress recognized that un-tempered growth has lead to extinction of species and that conservation of these rare species, through the Endangered Species Act, is important to the United States because they provide unique esthetic, ecological, educational, historical, recreational and scientific value to the Nation. 16 U.S.C.A. § 1531. Section 3, definitions, provides that “conservation” means means to all methods “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.A § 1532 (3). This definition further provides an unexhausted list of possible methods including: scientific resources management, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation. Id. The language, history and structure of the ESA "indicate beyond a doubt that Congress intended endangered species to be afforded the highest of priorities." 


Transition why this is important:

II. The Endangered Species Act – Section 4

Section 4 of the Endangered Species Act is one of most important provisions in the statute because it establishes the criteria and procedures for listing species and designating critical habitat.

A. Listing Sets in Motion The Act’s Other Provisions

The ESA commands the secretary to identify species that are in danger of extinction and to publish a list of his determinations from time to time. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 115 S.Ct. 2407 – cite page???.

Congress has said that listing is critically important because it sets in motion the Act's other provisions, including the protective regulations, consultation requirements and recovery efforts. S. Rep. No. 97-418 (1982) at 16. Section 16, U.S.C.A. § 1533 (b)(1)(A) vests in the Secretary [i.e., FWS or NMFS] the responsibility of determining whether a species should be listed as threatened or endangered under the provisions of 16 U.S.C.A. § 1533 (a)(1) “based solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation.” In American Wildlands v. Kempthorne the court found that this requirement merely prohibits an agency from disregarding superior scientific evidence than the evidence relied on. 530 F.3d 991 – cite page???. Economic impacts should not be factored into the listing decision. Fisher v. Salazar, 2009 WL 3030736 – cite page???.

A species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C.A § 1532(6). A species is “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. at § 1532(20). The shortnose sturgeon was listed as endangered in 1967 by the FWS under the Endangered Species Preservation Act. 63 FR 242. The National Marine Fisheries Service assumed jurisdiction for the shortnose sturgeon under a 1974 government reorganization plan. Id.
B. No Critical Habitat Has Been Designated for the Shortnose Sturgeon, Yet Courts Have Upheld Agency Action Fostering Habitat Restoration and Species Rehabilitation.

*** Is this too much? Should this just be title Critical habitat or is this ok?

Section 4 states that the secretary, in concurrence with listing a species, shall to the maximum extent prudent and determinable designate critical habitat of such listed species. 16 U.S.C.A § 1533(a)(3)(A). Unlike the decision to list, the designation of critical habitat does require consideration of the economic impacts associated with such a designation under Section (b)(2). Designation of critical habitat under the Endangered Species Act effectively prohibits all subsequent federal or federally funded or directed actions likely to destroy or disrupt habitat. Middle Rio Grande Conservancy Dist. v. Babbitt, 206 F.Supp.2d 1156 – cite page???. Such designation may include private land. Id. According to Conservation Council for Hawai‘i v. Babbitt, supra, the FWS or NMFS should designate habitat unless it would not be beneficial. 2 F. Supp.2d. 1280 – cite page???. The designation of geographic areas promises to give species added protection from federally authorized actions and provide additional notice to parties who may run afoul of Endangered Species Act prohibitions. Cheever, The Road to Recovery: A New Way of Thinking About the Endangered Species Act, 23 Ecology L.Q. 1, 53, 60 (1996) – cite page???. Despite the requirement that critical habitat be designated concurrently with the listing decision, only sixteen percent of listed species had any form of critical habitat designated for them in September of 1991. Id. Yet, "Critical habitat," is defined with recovery in mind. Id.

Under NMFS published regulations, critical habitat is broadly defined to include "the entire habitat or any portion thereof, if, and only if, any constituent element is necessary to the normal needs and survival of that species." To designate a critical habitat for salmon, for example, NMFS needed to assess which geographic habitat is within the historic use necessary to sustain the fish and the physical or biological features essential to the species that may require special management needs, including adequate stream flow. 9 Alb. L. Envtl. Outlook 245.

Currently the shortnose sturgeon appears to have no designated critical habitat. The U.S. Fish and Wildlife Services website, species profile of the shortnose sturgeon says “No critical habitat rules have been published for the shortnose sturgeon”. (website cite) I have been unable to speak with a representative at NMFS to confirm this as of yet.

The following cases seek to illustrate the case law available in which the creation of or rehabilitation of habitat for an endangered or threatened species was sought.

i. Similar projects which sought to create habitat and conserve species

In Miccosukee Tribe of Indians of Florida v. U.S., a tribe of Indians brought suit under the endangered species act challenging the USACE’s plan to restrict water flow for the benefit of an endangered species. 566 F.3d 1257. The flooding is being done in an effort to avoid the extinction of an endangered sparrow in the area. Id. The aim is to eventually restore the natural flow of the Everglades, a restoration that hopefully will benefit both the endangered kite and the endangered sparrow. Id. The court tends to be very deferential to an agencies decisions regarding biological opinions, when made within their realm of expertise. Id. “Any biological opinion that plans to allow short-term habitat degradation-presumably, as part of a longer-term plan that anticipates the species' future recovery-must carefully consider the life cycles and behavioral patterns of the species to avoid crippling that recovery. It is not enough that the habitat will recover in the future if there is a serious risk that when that future arrives the species will be history.” Id.
In *In re Operation of the Missouri River System Litigation* multiple states and conservation organizations sought injunctive relief from federal management of the Missouri river which they claimed were violating environmental standards. 363 F.Supp.2d 1145. As a part of this project the EIS recommended and the Corps included construction of artificial shallow sandbar water habitat for various endangered fish. *Id.* Plaintiff’s argued that the artificial construction of sandbar habitat was an unproven mitigation measure, and thus reliance on such construction was arbitrary and capricious. *Id.* The court rejected this, reasoning that the FWS knew, considered and evaluated both the negative and positive effects of artificial sandbar habitat construction and made a determination within their discretion, which the USACE would then follow through with. *Id.* The court said uncertainty about the result of this artificial habitat was not sufficient, there is always some uncertainty in agency action. *Id.*

In *National Wilderness Institute v. U.S. Army Corps or Engineers* plaintiff’s sought to enjoin defendants from continuing the Washington Aqueduct project for violation of the endangered species act, including the effective ‘taking’ of shortnose sturgeon. 2005 WL 691775. The NMFS recognize the possible presence on the sturgeon in the river and recommended precautions to be taken to effectively protect the fish from the construction project, including cofferdams. *Id.* Cofferdam’s perform a very similar function to artificial shoals. (INFO on Cofferdams)

In *Central Delta Water Agency v. U.S. Fish and Wildlife Service* a project to restore the Sacramento-San Joaquin Delta ecosystem, while also protecting water supplies, was under review. 2009 WL 2915151. The project included habitat restoration and enhancement to increase the quality and quantity of habitat in the Delta. *Id.* One of the major elements of the plan was to restore important habitats to improve the ecological productivity and sustainability of the Delta. *Id.* “Allowing this claim to proceed would unwarrantedly interfere with ongoing administrative scoping, planning and formulation activities, which would make it impossible for the agency to “correct its own mistakes and ... apply its expertise.” *Id.*

**ii. Conclusions from case law regarding Critical Habitat**

The majority of the case law available on the ESA centers on preventing the destruction of critical habitat of a species. The shortnose sturgeon has no designated critical habitat and we are not trying to prevent an agency or any private entity from jeopardizing such critical habitat. Critical habitat is a term of art. It does not encompass only the habitat in which a species lives or only the habitat which is most populated by a species, it is that habitat for which “is necessary for the normal needs and survival of the species.” (cited – from above).

So, what this project seeks to create, is a habitat for this endangered species, which could one day be designated critical habitat for the shortnose sturgeon. The Southeastern Natural Sciences Academy is a non-profit organization, which addresses natural resource management, thus they developed this project for the benefit of not only the shortnose sturgeon, but also the overall benefit to the river. Their goals are not, in this instance, to argue in court that the ESA supports the protection of this habitat for the sturgeon. The case law that is available merely seems to support the idea that Agency’s are supposed to act to protect species and that the court’s have upheld projects in which an Agency did take action to construct or restore habitat for other endangered species.

Although, there is no case law which directly addresses our issue there was project done on the Rouge River which received congressional funding and sought very similar goals..... Should I include this project? Should I put it under funding?
- To obtain relief, petitioners seeking preliminary injunction under Endangered Species Act (ESA) must show: (1) that wildlife at issue is protected under Act, and (2) that there is reasonable likelihood that defendant will commit future violations of Act. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq. Loggerhead turtle case.

C. The General Agency Obligation to Implement Recovery Plans Maybe Used to Support a Project Which Fosters a Specific Recovery Plans Goals.

Section 4 of the ESA provides, the Secretary “shall develop and implement” what is known as a “recovery plan” for each endangered species, unless he finds that it “would not promote the conservation” of the species to do so. 16 U.S.C. § 1533(f)(1). Priority is to be given to species whose survival is in conflict with development or other economic activities. 16 U.S.C. § 1533(f)(2). Recovery plans provide a roadmap for agencies to follow to bring the listed species back from the brink of extinction. Courts have generally not found recovery plans to be enforceable. Cheever, 23 Ecology L.Q. 1, 53, 60 (1996) at 59. At least three cases, National Wildlife Federation v. National Park Service, National Audubon Society v. Hester, and Defenders of Wildlife v. Lujan support this conclusion. Id. Courts have refused to require implementation of specific terms of recovery plans even when agency actions have directly contradicted recovery plan recommendations. In National Audubon v. Hester, the U.S. District Court for the District of Columbia upheld a USFWS decision to reverse its recovery plan policy of supporting the remaining wild population of California Condors in favor of a captive breeding strategy. P 61

However, in Sierra Club v. Lujan, a Texas District Court case, the court accepted the notion that broadly defined "recovery duties" are enforceable. Id. The court held that the USFWS had unlawfully refused or unreasonably delayed implementation of recovery plan measures to protect the endangered fountain darter, there by causing a “taking,” by failing to pursue a systematic procedure of consolation with concerned parties and by failing to define minimum continuous springflows. Id. at 14, 23, 25. The court stated that the ESA commands the Secretary to “develop” and “implement” recovery plans and that “an abuse of discretion occurs when an agency which Congress mandates ‘shall develop and implement a recovery plan’ refuses to act on the behalf of species the USFWS knows were in “imminent peril” in 1989 and 1990.” Id. at 10. The Federal Defendants failed to implement the existing San Marcos Recovery Plan for eight years, arguing that severe budget constraints should lend to leaving this decision to the Agencies discretion. Citing to Northern Spotted Owl v. Lujan, in which budgetary excuses were insufficient to justify the lack of designation of critical habitat for the northern spotted owl, the court said that in this case “the ESA § 4 duty to develop and implement a plan is mandatory, not discretionary.” Id. at 11, 758 F. Supp. 621.

Recovery Plans are critical to the recovery of species because they provide the necessary information to take action for the protection of species. Although specific terms of recovery plans are not considered directly enforceable, an Agencies general duty to "develop" and "implement" a recovery plan may be a tool which could be utilized in pursuing an action for the implementation of a plan that calls for assisted “propagation” of a species through the creation of habitat, or spawning ground, such as the artificial shoals suggested for the shortnose sturgeon.

i. The Final Recovery Plan for the Shortnosed Sturgeon Supports the Savannah River Basin Project

The Final Recovery Plan for the shortnose sturgeon was completed in December 1998.
The FWS initially identified pollution and overharvesting as reasons for their listing in 1967. Id. at 44. The recovery plan relates the population status and biological characteristics of the species, as well as presents factors affecting recovery and a strategy for recovery of the shortnose sturgeon. Id. at iii. 

Spawning success depends heavily on appropriate river conditions during the season. Id. At 32. In the Savannah River, the focus of this inquiry, spawning occurs in upper freshwater area’s in early-February to Mid-March. Id. at 31. Shortnose sturgeon are most prone to incidental capture during their spawning season. Id. at 45. Hydroelectric dams are listed under factors affecting recovery of the sturgeon because they restrict habitat, and alter water flows and temperatures. Id. at 49. Additionally low dissolved oxygen is presumed to negatively affect the aquatic life of the sturgeon. Id. at 52. “In Georgia, several rivers exhibit low oxygen levels (<2.5 mg/l) at the saltwater/freshwater interface, an area that normally aggregates both juveniles and adults.” Id. at 52. The environmental tolerances and the various consequences of dams, thermal discharges and pollution on the shortnose sturgeon are largely unknown. Id. at 44.

The goal of the recovery plan, as is the goal of the ESA, is to bring the shortnose sturgeon population to such a point as to no longer need protection under the ESA. Id. at 57. The recovery plan states that identifying and maintaining essential habitats is key to the recovery of the shortnose sturgeon Id. “The Shortnosed Sturgeon Recovery Team designed an Implementation Schedule that specifies recovery task priorities for each population segment and suggests recovery tasks which may be conducted most cost-effectively on a rangewide or regional basis.” Id. at 59. The outline lays out a plan of projects that need to be undertaken to better understand how to protect the shortnose sturgeon including: determining if critical habitat designations are prudent for shortnose sturgeon population segments; restoring spawning habitat; and evaluating the acceptability of artificial substrate to spawning females Id. at 60 – 61, and 82. When natural substrate is degraded, natural rehabilitation or artificial rehabilitation should be evaluated using appropriate methods (regulated flows or addition of new material).” Id. at 82. There is an implementation plan at the endm including a timeline for the completion of these goal. Id. at 94.

ii. Does the recovery plan support the Savannah River Basin project?

Yes. The recovery plan identified various threats to the shortnose sturgeon as well as a plan for future research and rehabilitation of the species in accordance with the previsions of the ESA. The recovery plan supports research to determine the effects of pollution, low dissolved oxygen, and artificial rehabilitation of spawning grounds on the shortnosed sturgeon. The Implementation Schedule charges the Federal Energy Regulatory Commission (FERC), NMFS, Army Corp of Engineers, and the states with the responsibility of restoring regulated stream flows and rehabilitating spawning substrate. Id. at 96. The duration for this in “ongoing.” Id. The overall goals of the recovery plan, in addition to some of the specific objectives for further research and restoration support the conclusion that the recovery plan for the shortnose sturgeon would support the Savannah River Basin Project’s artificial shoal plan which would create a spawning habitat for the endangered species.

The recovery coordinator is tasked with seeking funding for the recovery activities under the plan. Should I put the stuff about funding up here or in the funding section???
III. The Endangered Species Act – Section 5

Section 5, 16 U.S.C. § 1534, authorizes the Secretary, in cooperation with the States, see § 1535, to acquire land to aid in preserving such species. Both the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of § 1534, while § 1538 solved a different problem altogether—the problem of takings. All public lands are subject to habitat-modification restrictions. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 115 S.Ct. 2407.

- Loggerhead Turtle v. County Council of Volusia County, Florida
92 F.Supp.2d 1296 - To implement his conservation programs, the Secretary is authorized to use the land acquisition authority vested in him by Congress and, in addition to this authority, the Secretary may acquire by purchase, donation, or otherwise, lands, waters, or interest therein, in order to conserve listed species. See 16 U.S.C. § 1534(a)(2). County's adoption of allegedly ineffective beachfront lighting ordinance was not cause of harm to endangered sea turtle hatchlings, and thus did not violate Endangered Species Act (ESA); county could not be held liable under ESA for beach residents' failure to comply with its voluntarily adopted ordinance.

- Sierra Club v. Marsh, 692 F.Supp. 1210, 16 U.S.C. § 1534(a) provides: The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary- shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended [16 U.S.C.A. § 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C.A. § 661 et seq.] and the migratory Bird Conservation Act [16 U.S.C.A. § 715 et seq.], as appropriate; and (2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

- This case warrants the application of the exception established in Little Lake Misere and North Dakota v. United States. The federal government is trying to discharge its obligations under a high priority federal program to protect endangered species. A private landowner wants to donate the land to the government to effectuate these purposes. The City of Chula Vista has passed a local resolution in an attempt to stymie any transfer of the property which it believes does not serve the City's interests, which it has defined as development in strict accordance with its LCP. The court will not allow the City to use its permit authority to obtain an injunction barring the transfer of land except on terms consistent with its LCP, as requested in the cross-claim.

- Boundary Backpackers v. Boundary County, Idaho 1996, 913 P.2d 1141, 128 Idaho 371, Provisions of county ordinance requiring county's concurrence prior to any federal land adjustments, and requiring that before federal land agencies could change land use, adverse impact studies on uses had to be conducted and mitigation measures adopted with concurrence from county, were contrary to provisions of Endangered Species Act authorizing federal officials to acquire land to carry purposes of Act, and portion of Act requiring federal officials to develop and implement recovery plans for endangered species, and county veto power stood as obstacle to accomplishment of full purposes and objectives of Congress, such that those portions of ordinance were preempted by federal law and were unconstitutional. In order to achieve the objectives of the ESA, Congress authorized the Secretaries of the Interior and Agriculture...
to purchase water rights. Id. § 1534(a)(2). The Secretaries may purchase water rights with funds from the Land and Water Conservation Fund Act of 1965. Id. § 1534(b). Before acquiring any water rights, however, the appropriate Secretary is required to consult with the states. Id. § 1535(a).

- Calf Island Community Trust, Inc. v. Young Mens Christian Assoc. of Greenwich, 392 F.Supp.2d 241

the Fish and Wildlife Act, 16 U.S.C. § 742f(a)(4) (authorizing the Secretary to take steps “for the development, advancement, management, conservation and protection of fish and wildlife resources including ... acquisition by purchase or exchange of land and water, or interest therein”); and (3) 16 U.S.C. § 1534(a)(2) (authorizing the Secretary to acquire by purchase “lands, waters, or interest therein, ... in addition to any other land acquisition authority.”). Thus, these statutes, as well as 40 U.S.C. § 3113, 16 U.S.C. § 742F(a)(4), and 16 U.S.C. § 1534(a)(2), give the Secretary the authority to acquire Calf Island by eminent domain for inclusion in the McKinney Refuge.

IV. The Endangered Species Act – Section 7

16 U.S.C.A § 1536 prohibits habitat modification by federal agencies. Under this section agencies are required to consult with one another with regards to protecting endangered species. NMFS and USACE will need to work together on this particular project. (2 articles on agency cooperation). The purpose of consultation is to identify conflicts between proposed Federal actions and the "jeopardy" standard of section 7(a)(2). Cheever, 23 Ecology L.Q. 1, 53, 60 (1996) (citing 16 U.S.C. § 1536(a)(1)).

Section 7 requires federal agencies to ensure that none of their activities, including the granting of licenses and permits, will jeopardize the continued existence of endangered species "or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical." 16 U.S.C. § 1536(a)(2).

- 7(a)(2) Consultation provisions: Each Fed agency shall in consultation with agency ensure action carried out by agency is not likely to jeopardize the continued existence of any listed species. --- Jeopardy Standard. (substantive component)

Procedural do this by consulting with sec. - NEPA process with substantive goal of not jeopardizing the species.

- Look at class notes
- TVA v. Hill

- In this project USACE would be doing the work but may need to consult with FWS and NMFS for EA, EIS and/or other pertinent information on the potential effects to species and ecology of the region chosen.

V. The Endangered Species Act – Section 11

Section 11 is the Enforcement and Penalties provision and gives blanket permission to agencies from Congress to protect species. Blank permission to protect through regulations. Case law on this, maybe don’t need congressional approval for this project?

an express grant of authority to the Secretary of the Interior “to promulgate such regulations as may be appropriate to enforce [chapter 35 of this title].” 16 U.S.C.A. § 1540(f). applying Chrysler to determine whether Customs Service, United States Fish and Wildlife Department, and Department of Agriculture regulations had "force and effect of law"

VI.  What Kind of Approval is Necessary? ****

Does this project require congressional approval before any work could begin? How do I find this out (not much in case law), already in contact with Bill Bailey at USACE, should I ask him? If it does have to be submitted for approval who does it – FWS, NMFS, USACE, the Southeastern Science Academy? What would we have to prove? How do I ask Bill Bailey about this? Would he know the statute or law that gives him this power? Why would USACOE want to help? What’s in it for them? (Email Oscar)

- USACE’s mission: Provide vital public engineering services in peace and war to strengthen our Nations security, energize the economy, and reduce risks from disasters. The U.S. Army Corps of Engineers environmental programs fall under the umbrella of the Environmental Community of Practice, which provides the public with a central access to news and information about the environment. The Corps supports or manages numerous environmental initiatives including Ecosystem Restoration. https://environment.usace.army.mil/

- In re Tri-State Water Rights Litigation
F.Supp.2d ----, 2009 WL 2371506
Holding: The District Court, Paul A. Magnuson, J., held that reallocation of reservoir's water storage capacity for local consumption without prior congressional approval violated WSA.

- Alabama v. U.S. Army Corps of Engineers
424 F.3d 1117
FN4. In the Georgia case, Georgia maintains that the Corps has the authority to reallocate use without further congressional approval.

- Seattle Audubon Soc. v. Lyons
871 F.Supp. 1291
Designation of late-successional and riparian reserves on Bureau of Land Management (BLM) lands as part of forest management plan did not require congressional approval under FLPMA section requiring such approval for “withdrawal” exceeding 5,000 acres; action was merely exercise of Secretary of Interior's multiple-use planning responsibilities.

VII.  Funding

Is there a provision in the act for funding creation or restoration of habitat such as this, will you please describe that and provide more detailed info on how to go about applying for that funding? Will be critical section, if there is a section providing for funding.
Spoke with Sandy Tucker at NMS, see recommended - Grant.gov – and referred me to Steph Bolden at NMFS b.c. they have jurisdiction over the shortnose sturgeon. Still waiting to here from here about possible plans for designating critical habitat for sturgeon and other ways to get funding…. *** haven’t heard anything. (Call tomorrow!!)
Process: submit to USACE and see how interested they are in doing this b.c. the ESA does support protection of the species. Or pass onto congressmen for funding/approval?

- The NMFS should inform federal agencies of their responsibilities under the ESA and encourage federal agencies to adopt programs that support shortnose sturgeon recovery. In addition, the NMFS should establish Section 6 cooperative agreements with appropriate states to promote increased state oversight of sturgeon conservation activities and provide a funding resource for state agents to conduct research on shortnose sturgeon. State actions may include identifying shortnose sturgeon habitat within state Coastal Zone Management Plans, promotion of Best Management Practices to reduce non-point source impacts. Recovery plan p 70.
- A Recovery Coordinator and a Recovery Implementation Team, or several regional Implementation Teams, should be appointed to stimulate implementation of recovery tasks and focus recovery objectives within specific regions. The Recovery Coordinator should establish a means, or maintain an existing forum (e.g., Sturgeon Notes), for communicating shortnose sturgeon research results, management/recovery actions, and availability of recent publications.

**The Recovery Coordinator will also be responsible for monitoring recovery progress and seeking funds** to reach the ultimate goal of de-listing all shortnose sturgeon population segments. The Recovery Coordinator could advance sturgeon conservation by identifying potential funding sources for sturgeon research proposals and investigating long-term strategies to support sturgeon recovery needs. Using the Implementation Schedule, the Recovery Coordinator should bring together researchers seeking funding with agencies responsible for funding proposed research activities. P. 80

Coordinator for sturgeon recovery: South atlantic fisheries coordination service, R. Wilson Laney.  
http://www.fws.gov/southeast/southatlantic/

**CONCLUSION**

The current case law support a finding that the Endangered Species Act, along with the recovery plan developed for the endangered shortnose sturgeon, provide some leverage for pursuing a project that seeks to create habitat for the endangered shortnose sturgeon. Although, there is nothing in the endangered species act which directly fosters the implementation of a project which creates habitat, such as the Savannah River Basin Project, the species recovery plan and the general goals of the ESA support a project that (quote from recovery plan about spawning ground rehabilitation). The next step is to contact the USACE and find out how interested that are in this project. To do this it the over all goals and mission of the USA CE should be taken into account. What’s in it for them? If they are interested, would they be willing to contribute funds, from where? Or should other methods be pursued, such as contacting congressmen, or applying through grants. Gov.?

Overall I conclude that the ESA itself supports projects that protect species but doesn’t itself foster mandated or discretionary implementation of projects to restore habitat, nor has there been any case law supporting such a conclusion.
*Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).* Beyond any doubt, “Congress intended endangered species to be afforded the highest of priorities.” *Id. at 174.* “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id. at 184.* The ESA reflects “an explicit Congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species” and “a conscious decision by Congress to give endangered species priority over the ‘primary missions' of federal agencies.” *Id. at 185.*