

CANDIDATE CONSERVATION AGREEMENTS UNDER THE ENDANGERED SPECIES ACT: PROSPECTS AND PERILS OF AN ADMINISTRATIVE EXPERIMENT

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I. INTRODUCTION

The Endangered Species Act (ESA or the Act) has been called the pit bull of environmental legislation.¹ The United States Supreme Court has stated that, through the ESA, Congress intended to give endangered species the highest of priorities, calling the Act "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."² However, the rigidity of the ESA is both its greatest strength and its greatest weakness. Two decades of strict judicial enforcement of the ESA have built resentment and resistance from ranchers, developers, and private property rights advocates.³ The backlash against the ESA following the controversy over the Northern Spotted Owl in the old-growth forests of the Pacific Northwest⁴ has given encouragement to states and private industries trying to broker agreements with the U.S. Fish & Wildlife Service⁵ (FWS or

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¹ See Eric Fisher, Comment, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371, 371 (1996).

² See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 180 (1978).

³ See, e.g., David Seideman, *Out of the Woods*, AUDUBON, July-Aug. 1996, 66, 67.

⁴ See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 692 (1995).

⁵ The ESA gives authority to the Department of the Interior, Fish and Wildlife Service, overland and freshwater species, and to the Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, over marine species. 50 C.F.R.

the Service) to keep their endangered species off the list.⁶ For example, in 1995, Secretary of the Interior Bruce Babbitt signed an agreement with Governor Roy Romer of Colorado.⁷ The agreement allows Colorado to develop and implement its own plans to protect endangered and threatened species throughout the state, by encouraging voluntary compliance from private property owners, municipalities, and Indian nations.⁸ In exchange, Coloradans will be subject to less of what many see as the additional restrictions on land use imposed by the ESA.⁹

In 1992, the Service reinstituted a previously abandoned policy to guide FWS officials in entering into these agreements, known as Candidate Conservation Agreements or Conservation Agreements, with states and private parties as a way to allow states to protect their own species and keep them off the federal list.¹⁰ In November 1994, the FWS developed a draft guidance document (hereinafter Draft Guidance) on candidate species, which included guidance on Conservation Agreements; and in June 1997, the Service announced a draft policy for Candidate Conservation Agreements in the Federal Register.¹¹ Although parties to these Conservation Agreements must abide by the agreed-upon conservation plans, the plans are typically devised with competing interests in mind.¹² Conservation Agreements

§ 17.2 (1995). For the purposes of this Comment I will refer only to the FWS as the acting Service involved in ESA decisions.

⁶ See, e.g., Andrew Melnykovych, *Save the Copperbelly*, COURIER-JOURNAL (Louisville, Ky.), Sept. 4, 1996, at 11A; *Governor Romer and Secretary Babbitt Outline Unprecedented Federal-State Partnership Under Endangered Species Act*, News Release, Nov. 29, 1995, at *1; available in 1995 WL 705351 (D.O.I.) [hereinafter D.O.I. News Release].

⁷ See Gary Gerhardt, *New Way to Save Species: Plan to Save Threatened Wildlife Could Become U.S. Model*, *Officials Say*, ROCKY MOUNTAIN NEWS, Nov. 30, 1995, available in 1995 WL 10620166.

⁸ *Id.*

⁹ See D.O.I. News Release, *supra* note 6. The Secretary stated for the public, "Our aim is to prevent the listing of species. However, if species must be listed . . . [t]his agreement will take the sting out of the listing process." *Id.*

¹⁰ Telephone interview with Susan Lawrence, Division of Endangered Species, U.S. Fish & Wildlife Service (Feb. 13, 1997); RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISIONS, UNITED STATES GENERAL ACCOUNTING OFFICE, *Endangered Species: Factors Associated with Delayed Listing Decisions*, 9 [hereinafter GAO Report].

¹¹ Division of Endangered Species, U.S. Fish & Wildlife Service, Draft, Endangered Species Program: Candidate Species Guidance, 13-18 (Nov. 1994) (on file with the author) [hereinafter Draft Guidance]; Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183 (1997).

¹² For example, Colorado Governor Roy Romer has said, "[w]e have lost sight of the importance of protecting species and yet do so in a way that does not seriously infringe on property rights and economic growth." D.O.I. News Release, *supra* note 6, at *1.

are only enforceable under contract law by the parties to the agreement, and do not carry the force of the ESA, a comprehensive piece of federal legislation under which any interested party can petition for listing or bring a suit for enforcement.¹³

The FWS bases its authority for Conservation Agreements on several provisions of the Act, all of which seem questionable at best in terms of authorizing private agreements to avoid listing. Additionally, the decisions of the FWS not to list otherwise endangered or threatened species based on the existence of a Conservation Agreement are subject to administrative law analysis under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁴ Although judicial review of agency decisionmaking is typically highly deferential, there has been an increase in judicial activity in this area since *Chevron*. The FWS's interpretation of the ESA as authorizing the use of Conservation Agreements to obviate a need to list endangered or threatened species may not be considered reasonable if challenged.¹⁵ Finally, in using these agreements to avoid listing, the FWS may be violating the intent of Congress in creating the ESA by evading the spirit if not the letter of the Act.¹⁶

This Comment examines recent use of Conservation Agreements by the FWS to substitute for listing endangered or threatened species. Section II of the Comment focuses on the listing process and the protections afforded endangered and threatened species under the ESA. Section III briefly relates the background and use of Conservation Agreements and describes the legal mechanism that allows a Conservation Agreement to circumvent the listing process. Section IV describes some administrative law doctrine and case law applicable to Conservation Agreements. Finally, Section V argues that Conservation Agreements are not authorized by the ESA, evade the spirit if not the letter of the Act, and violate administrative law doctrine and procedure.

II. THE ENDANGERED SPECIES ACT

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species de-

¹³ 16 U.S.C. § 1533(b)(3)(A) (1994); 16 U.S.C. § 1540(g).

¹⁴ See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703 (1995) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984)).

¹⁵ See discussion *infra* Section V.B.

¹⁶ See discussion *infra* Section V.C.

pend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”¹⁷ The legislative history surrounding the ESA is meager but clear.¹⁸ Congress passed the statute at a time when species were being lost at the rate of one per year, a pace that was accelerating rapidly.¹⁹ Additionally, a statement to Congress by the Assistant Secretary of the Interior revealed that humans and human technological advances were the direct cause of many extinctions.²⁰ Rising public sentiment surrounding endangered species and the growth of the environmental movement further influenced Congress to act.²¹ In this context, and believing that species biodiversity held unknown scientific and medical benefits for humankind, Congress passed the ESA in 1973.²² The Supreme Court has stated that “the language, history, and structure of [the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”²³ The ESA’s main strength is in its protective provisions against actions of federal agencies and against the “taking” of individual members of a species.²⁴ Additionally, the Act provides for the assessment of civil and criminal penalties against those who violate the ESA.²⁵ These protective and enforcement provisions apply to species that have been officially listed by the Service as endangered.²⁶

A. Listing

To list a species as endangered or threatened, the Secretary of the Interior (Secretary), or his or her designee, the Service, must first determine that the animal or plant in question fits the statutory definition of a species.²⁷ According to the ESA, a species “includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which

¹⁷ 16 U.S.C. § 1531(b).

¹⁸ See DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION*, at 23–24 (1989); see also S. REP. NO. 93–307, at 252 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989.

¹⁹ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 176 (1978).

²⁰ *Id.*

²¹ See ROHLF, *supra* note 18, at 22–25.

²² See *TVA v. Hill*, 437 U.S. at 177–79.

²³ See *id.* at 174.

²⁴ 16 U.S.C. §§ 1536, 1538 (1994).

²⁵ See *id.* § 1540.

²⁶ See *id.* § 1533.

²⁷ See *id.*

interbreeds when mature.”²⁸ Whether a population is considered a DPS depends upon discreteness and significance of the population in relation to the remainder of the species to which it belongs.²⁹

Any interested party may petition the Service for a proposal to list a species as endangered or threatened.³⁰ An endangered species is one that is in danger of extinction throughout all or a significant portion of its range.³¹ A threatened species is one that is likely to be in danger of extinction throughout all or some of its range within the foreseeable future.³² Within ninety days of receiving such a petition, the Secretary is required, “to the maximum extent practicable,” to determine whether the petition presents enough scientific or commercial data to meet the threshold test, a finding that the listing may be warranted.³³ If the Secretary finds that the listing may be warranted, he or she is to promptly begin a status review of the species in question.³⁴ If the Secretary determines that the listing of a species may be warranted, he or she has twelve months from the date of receiving the original petition to make a determination on listing the species.³⁵ In addition, if the Secretary finds that there is a question as to the data relevant to a listing decision, he or she may extend the twelve-month period by six months for the purpose of soliciting more data.³⁶ The Act explicitly requires that any regulations promulgated under it shall comply with the notice and comment rulemaking requirements of the Administrative Procedure Act (APA).³⁷ This means that general notice of proposed rulemaking must be published in the Federal Register.³⁸ Practically speaking, any time the Service wishes to propose a species for listing, it must publish a summary of the information relevant to the proposal in the Federal Register.³⁹

In determining whether a species is qualified for threatened or endangered status, the Secretary is bound to consider only the best

²⁸ *Id.* § 1532 (16).

²⁹ *See* Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (1996).

³⁰ 5 U.S.C. § 553(e) (1994).

³¹ 16 U.S.C. § 1532(6).

³² *See id.* § 1532(20).

³³ *See id.* § 1533(b)(3)(A).

³⁴ *Id.*

³⁵ *See id.* § 1533(b)(3)(B).

³⁶ 16 U.S.C. § 1533(b)(6)(B)(i).

³⁷ *See id.* § 1533(b)(4); 5 U.S.C. § 553 (1994).

³⁸ 5 U.S.C. § 553(b).

³⁹ *Id.*

scientific and commercial data available.⁴⁰ The statute lays out five factors that the Secretary may consider in determining whether a species is threatened or endangered: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence."⁴¹

Courts have held that the Secretary's determination regarding a potentially endangered or threatened species is limited to consideration of these five factors.⁴² Specifically, courts have held that the Secretary may not take into account the possibility of future conservation plans for a species when making a listing decision.⁴³ In *Southwest Center for Biological Diversity v. Babbitt*, for example, plaintiffs sued the Secretary to challenge a decision that a proposal to list the Queen Charlotte goshawk was not warranted.⁴⁴ The United States District Court for the District of Columbia found that in determining whether to list the goshawk, the agency relied on a promise from the Forest Service that the Forest Service would "address land management options to ensure goshawk habitat conservation."⁴⁵ In invalidating the Service's decision on the goshawk listing, the court stated that the Service may not take promises of proposed future actions to protect a species into account when determining a listing, in the absence of an existing plan.⁴⁶ Significantly, however, the court went further than it needed to go and stated explicitly, "[c]learly, if the Forest Service had an existing plan that would protect the goshawk to the standards required by the ESA, then FWS would not have to enact its own plan," by listing the species as endangered or threatened.⁴⁷

In another case a few weeks later based on similar facts, the same court used the same reasoning to reach the same result.⁴⁸ In *Biodiversity Legal Foundation v. Babbitt*, plaintiffs prevailed on a theory

⁴⁰ 16 U.S.C. § 1533(b)(1)(A).

⁴¹ See *id.* § 1533(a)(1).

⁴² See, e.g., *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 839 n.12 (6th Cir. 1981).

⁴³ See, e.g., *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996); *Southwest Ctr. for Biological Diversity v. Babbitt*, 939 F. Supp. 49, 52 (D.D.C. 1996).

⁴⁴ See *Southwest Ctr.*, 939 F. Supp. at 50.

⁴⁵ *Id.* at 51.

⁴⁶ *Id.* at 52.

⁴⁷ See *id.*

⁴⁸ See *Biodiversity Legal Found.*, 943 F. Supp. at 26.

that the Secretary should not be able to rely on a future, unimplemented promise of the Forest Service when making a determination on listing of the Alexander Archipelago wolf.⁴⁹ As in *Southwest Center*, however, the court held in dicta that an existing plan of the Forest Service that afforded protections to the wolf would be relevant to a listing decision.⁵⁰

In addition, at least one court has held that the Secretary may not be influenced by political factors in his or her decision.⁵¹ In *Save Our Springs v. Babbitt*, the United States District Court for the Western District of Texas held that the Secretary's decision not to list the Barton Springs salamander was invalid, in part because he was subject to political pressure in the decisionmaking process.⁵² This same court also held that the Secretary violated the ESA when he considered a Conservation Agreement in making his listing decision.⁵³

The Secretary has an affirmative duty to officially list any species or DPS determined by the Service to be endangered or threatened.⁵⁴ Courts have found that Congress intended the Secretary's duty to list a species in these circumstances to be mandatory, not discretionary.⁵⁵ In *Pacific Legal Foundation v. Andrus*, for example, the United States Court of Appeals for the Sixth Circuit held that the legislative history of the ESA indicated that Congress intended the duty to list to be mandatory.⁵⁶ The court concluded that because Congress included a provision in the Act that exempted the Secretary from compulsory listing of certain insect pests, Congress did not intend the duty to list to be discretionary.⁵⁷

The Service also may list a species that is subject to "any emergency posing a significant risk to [its] well being" under an emergency listing provision.⁵⁸ The emergency listing provision allows the Service to list the species immediately without adhering to the notice and comment rulemaking provisions of the APA⁵⁹ or the ESA's own time frame for publishing notice of proposed and final rules in the Federal

⁴⁹ *Id.* at 23, 26.

⁵⁰ *See id.* at 26.

⁵¹ *See Save Our Springs v. Babbitt*, No. MO-96-CA-168 (W.D. Tex. Mar. 25, 1997).

⁵² *Id.*, slip op. at 18.

⁵³ *Id.*

⁵⁴ *See, e.g., Pacific Legal Found. v. Andrus*, 657 F.2d 829, 839 (6th Cir. 1981).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 839 n.12.

⁵⁸ 16 U.S.C. § 1533(b)(7) (1994).

⁵⁹ 5 U.S.C. § 553.

Register.⁶⁰ To get around these provisions the Service must publish with the regulation detailed reasons why the emergency listing is necessary, and give actual notice of the emergency listing to authorities in those states where the species occurs.⁶¹ The listing will be effective upon immediate publication of the rule in the Federal Register, and will last for 240 days.⁶² The 240-day period gives the Service a chance to go through the standard (non-emergency) listing procedure for the species if the listing is to be permanent.⁶³

B. *Substantive Protections*

Once the Service has listed a species or DPS as endangered, a number of substantive protections apply under the ESA immediately. For example, concurrent with listing a species, the Secretary must also designate critical habitat for that species.⁶⁴ According to the definitions section of the statute, critical habitat means:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features I) essential to the conservation of the species and II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.⁶⁵

The Secretary does have some discretion in the designation of critical habitat.⁶⁶ The statute requires only that the Secretary designate such habitat "to the maximum extent prudent and determinable."⁶⁷ However, courts have held that the Service has a duty to designate critical habitat concurrently with listing.⁶⁸

For example, in *Northern Spotted Owl v. Lujan*, the United States District Court for the Western District of Washington held that the

⁶⁰ 16 U.S.C. § 1533(b)(7).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.* (extending period of protection if Secretary complies with regular listing procedures).

⁶⁴ 16 U.S.C. § 1533(a)(3)(A).

⁶⁵ *Id.* § 1532 (5)(A).

⁶⁶ *See id.* § 1533(a)(3)(A); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 104 (D.D.C. 1995).

⁶⁷ 16 U.S.C. § 1533(a)(3)(A).

⁶⁸ *See, e.g., Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 625-29 (W.D. Wash. 1991) (interpreting prudent and determinable exceptions).

Secretary had abused his discretion by not designating critical habitat for the spotted owl concurrently with its listing.⁶⁹ The court held that, absent extraordinary circumstances, the designation of critical habitat must coincide with the final listing decision on a species.⁷⁰ Once a species has had critical habitat designated for it, the species is subject to the additional protections involving critical habitat in section 7, discussed in more detail below.

The Secretary must create a recovery plan "for the conservation and survival of" all listed species.⁷¹ The recovery plan is designed to be a "basic road map to recovery," enumerating the specific steps needed to get the species from the brink of extinction back to a healthy population that can eventually be delisted.⁷² Courts have held that the duty to create a recovery plan is mandatory under the statute, although there is no time limit imposed in which the Secretary must come up with the plan.⁷³

For example, in *Oregon Natural Resource Council v. Turner*, the United States District Court for the District of Oregon held that although the Secretary is required to develop and implement a recovery plan for each listed species, the ESA allows the Secretary to establish a priority system for these plans.⁷⁴ The priority system gives the Secretary "broad discretion to allocate scarce resources to those species that he or she determines would most likely benefit from development of a recovery plan."⁷⁵ The court went on to hold explicitly that the statute imposes no time constraint on the Secretary in developing and implementing recovery plans.⁷⁶

Neither the statute nor the regulations promulgated under it provide guidelines for drawing up a recovery plan. However, a typical plan includes a report on the current status of the species; threats to the species' survival; specific actions needed to conserve the species and the means for implementation; and a target population at which the species could be delisted.⁷⁷

⁶⁹ *Northern Spotted Owl*, 758 F. Supp. at 629.

⁷⁰ See *id.* at 626, 629.

⁷¹ 16 U.S.C. § 1533(f).

⁷² See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 103 (D.D.C. 1995).

⁷³ See, e.g., *Oregon Natural Resource Council v. Turner*, 863 F. Supp. 1277, 1279-80 (D. Or. 1994).

⁷⁴ *Id.* at 1283.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See ROHLF, *supra* note 18, at 87-88.

Section 7 of the Act protects listed species against threatening or potentially harmful acts of government agencies.⁷⁸ This section provides two specific protections for endangered species: federal agencies may not jeopardize the continued existence of the species, and may not destroy or adversely modify the species' critical habitat.⁷⁹ The United States Supreme Court has stated that the requirements of this section are mandatory and binding on all federal agencies:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species" This language admits of no exception.⁸⁰

The ESA does not define "jeopardize," but the Secretary has promulgated regulations stating that "jeopardize the continued existence of" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."⁸¹ According to Professor Rohlf, the no-jeopardy provision is one of the most frequently applied substantive protections in the ESA.⁸²

Once a species has had critical habitat designated for it, all federal agencies have an affirmative duty to ensure that any actions under their control ("authorized, funded, or carried out by" a federal agency) do not destroy or adversely modify the critical habitat.⁸³ The landmark case *Tennessee Valley Authority v. Hill* involved a section 7 violation by the TVA, and in this case the United States Supreme Court established the restriction as absolute, saying:

[M]andatory provisions of section 7 were not casually or inadvertently included. . . . [S]ection 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omis-

⁷⁸ 16 U.S.C. § 1536 (1994).

⁷⁹ *Id.*

⁸⁰ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (citation omitted) (quoting 16 U.S.C. § 1536).

⁸¹ 50 C.F.R. § 402.02 (1996).

⁸² See ROHLF, *supra* note 18, at 148.

⁸³ 16 U.S.C. § 1536(a)(2).

sion of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.⁸⁴

Another protection for endangered species under the ESA is found in section 9 of the Act.⁸⁵ Section 9 prohibits a number of activities involving endangered and threatened species, including the import or export, sale or receipt in interstate or foreign commerce, possession or transport, or taking of any species.⁸⁶ According to the definitions section of the statute, "to take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁸⁷ According to the regulations accompanying the ESA, the definition of "harm" includes "an act which actually kills or injures wildlife. Such 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."⁸⁸ The United States Supreme Court has upheld the Secretary's interpretation of the term "harm" as expressed in these regulations, which includes habitat modification in the definition of "harm," and hence in "take."⁸⁹

Section 10 of the Act allows for a broad exception to the protections of section 9.⁹⁰ According to section 10, the Secretary can grant an "incidental take permit," which authorizes any "take" referred to in section 9, as long as the take is incidental to and not the purpose of the otherwise lawful activity.⁹¹ Before receiving such a permit, however, the party seeking the permit must prepare and submit a conservation plan laying out specific effects likely to occur as a result of the planned activity, and specific procedures for minimizing and mitigating those effects.⁹²

⁸⁴ *TVA v. Hill*, 437 U.S. at 183-85.

⁸⁵ 16 U.S.C. § 1538(a).

⁸⁶ *Id.*

⁸⁷ *Id.* § 1532 (19).

⁸⁸ 50 C.F.R. § 17.3 (1995).

⁸⁹ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 707-08 (1995).

⁹⁰ 16 U.S.C. § 1539(a)(1)(B).

⁹¹ *Id.*

⁹² *Id.* § 1539(a)(2).

C. Enforcement

Section 11 of the ESA provides for civil and criminal penalties to be assessed against those in violation of the Act.⁹³ The Secretary can impose civil penalties of up to \$10,000 per violation on someone who knowingly violates any of the provisions of the Act.⁹⁴ An unknowing violation of any provision may cost a person up to \$500 per violation in civil penalties.⁹⁵ The Secretary must provide notice and opportunity for a hearing prior to the assessment of any fines.⁹⁶ The Act also makes provisions for the Secretary to bring a civil action against a person who fails to pay the penalty assessed.⁹⁷

Section 11(b) of the Act provides for penalties for criminal violations of any of the provisions of the Act.⁹⁸ Upon conviction, a person may be fined as much as \$20,000 or imprisoned for not more than one year, or both.⁹⁹

Section 11(g) of the Act provides for citizen suits against violators of the Act, including the government.¹⁰⁰ According to the provision, any person may bring a civil suit on her own behalf 1) to enjoin a person or a government official or agency alleged to be in violation of the Act; 2) to compel the Secretary to apply the prohibitions against takings of listed species; or 3) to compel the Secretary to perform any nondiscretionary act or duty under section 4.¹⁰¹

The citizen suit provisions of the ESA provide an important function in allowing individuals to act as watchdogs by bringing suit to compel the Secretary to list species that have been deemed endangered or threatened, to designate critical habitat for species that have been listed, and to make final determinations on whether to list species in the statutory time limit, for example.¹⁰² The citizen suit provisions also play an instrumental role by allowing citizens to bring suit and get injunctions against potential violators of the Act.¹⁰³

⁹³ *Id.* § 1540.

⁹⁴ *Id.* § 1540(a).

⁹⁵ 16 U.S.C. § 1540(a)(1).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* § 1540(b)(1).

⁹⁹ *Id.*

¹⁰⁰ 16 U.S.C. § 1540(g)(1).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See id.*; see also ROHLF, *supra* note 18, at 182.

The Act's three strongest features, listing, protections, and enforcement, work together in a strategy devised by Congress to afford strict protection to species.¹⁰⁴ Two of these features, listing and protections, have been held to be mandatory.¹⁰⁵ The third feature, enforcement, allows private citizens to act as watchdogs over the Service and sue for listing of species or violations of the Act.¹⁰⁶ These three features together make up a comprehensive statutory scheme that as a whole is stronger than the sum of its parts. Newer protective measures designed by the FWS, such as the Conservation Agreement, reduce the protections offered to species by retaining only one of these three features of the ESA, substantive protections.¹⁰⁷ Conservation Agreements leave species unlisted and hence not subject to any protective measures not specifically enumerated in a Conservation Agreement. As private agreements, they are enforceable only through suits in court and only by the parties to the Agreement; such suits may not represent effective or efficient enforcement.

III. CONSERVATION AGREEMENTS

A. *How and Why Conservation Agreements Developed*

The FWS began using Conservation Agreements (CAs) in the early 1980s, officially phased them out in 1985, and reintroduced them in 1992.¹⁰⁸ Since the internal Draft Guidance document came out in November 1994, the FWS has used CAs increasingly as a substitute for listing.

The number of species officially listed and awaiting implementation of recovery plans is unmanageable.¹⁰⁹ Because the Act provides that

¹⁰⁴ See ROHLF, *supra* note 18, at 25.

¹⁰⁵ See *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 839 (6th Cir. 1981); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991).

¹⁰⁶ 16 U.S.C. § 1540.

¹⁰⁷ See generally Copperbelly Water Snake Conservation Agreement and Strategy, Dec. 5, 1996 (on file with the author) [hereinafter CWS Agreement]; Barton Springs Salamander Conservation Agreement and Strategy, Aug. 13, 1996 (on file with the author) [hereinafter BSS Agreement]; Virgin Spinedace Conservation Agreement & Strategy, Apr. 11, 1995 (on file with author) [hereinafter VS Agreement].

¹⁰⁸ GAO Report, *supra* note 10, at 9. However, the report notes that during the period when the FWS had discontinued the policy of using Conservation Agreements as an alternative for listing, at least two CAs were developed, for the Bruneau Hot Springsnail and the Jemez Mountain Salamander. See *id.* at 9-10. The GAO report notes that both these CAs were also inconsistent with FWS's policy and guidance. *Id.*

¹⁰⁹ See Tod R. Hamachek, *Endangered Species Act Failing Its Mission*, THE SEATTLE TIMES,

the Service can prioritize the species according to those that will benefit most from implementation of a recovery plan, there are a growing number of species that may languish and finally disappear completely after a length of time on the list with no improvement in their status. Additionally, the Service is constrained by appropriations.¹¹⁰ Not every species on the list is guaranteed funding for its recovery plan.¹¹¹ The prioritization system for appropriations works in the same way, and a significant percentage of species on the list may never be helped for lack of funds.

The backlash against the ESA following the controversy over the Northern Spotted Owl in the old-growth forests of the Pacific Northwest has manifested itself as a general antagonism to the ESA among private property owners.¹¹² Individuals, industry leaders, and state and federal politicians have lent their voices to the growing movement against ESA protection for species.¹¹³ From this perspective, protective provisions to save species are nothing more than unwanted government regulation of private property—in the worst-case scenario, unconstitutional “takings” of private property by the government.¹¹⁴

For example, U.S. Senator Kay Bailey Hutchison, R-Texas, who sponsored the ultimately successful bill imposing a year-long moratorium on listing, said at the time that she hoped it would “prevent further erosion of private property rights.”¹¹⁵ Upon her re-election, she stated that she expected the new Congress to implement changes to the ESA that would reverse “the regulatory harassment of our small businesses.”¹¹⁶ Representative Helen Chenoweth, R-Idaho, has become notorious for her harsh criticisms of the ESA, and has called the environmental movement “[t]his religion, a cloudy mixture of New Age mysticism, Native American folklore and primitive earth worship . . . [which] is being promoted and enforced by the Clinton

Nov. 21, 1993, at B9. Hamachek states that as of 1993, almost one-half of all listed species were awaiting recovery plans. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also Mark O. Hatfield, *A Hollow Salmon Plan Means Politics as Usual*, THE SEATTLE TIMES, May 20, 1994, B7.

¹¹² See Robert H. Nelson, *Shoot, Shovel, and Shut Up*, FORBES, Dec. 4, 1995, 82.

¹¹³ See, e.g., Seideman, *supra* note 3, at 67.

¹¹⁴ See Nelson, *supra* note 112, at 82.

¹¹⁵ David Parrish, *Environmental Dilemma: Central Valley Farmers United in Fight Over Endangered Species Laws that Impact Water Availability, Land Rights*, L.A. DAILY NEWS, Mar. 19, 1995, available in 1995 WL 5389881.

¹¹⁶ David Jackson, *GOP Lawmakers Must Deliver, Hutchison Says*, DALLAS MORNING NEWS, Nov. 10, 1994, available in 1994 WL 6867023.

administration in violation of our rights and freedoms.”¹¹⁷ Significantly, then Senator William S. Cohen of Maine made his antagonism toward the ESA clear in threats to withhold his vote for reauthorization of the Act if the Services approved a petition to list the Atlantic salmon throughout its historic range.¹¹⁸ In letters to Secretary of the Interior Bruce Babbitt and Commerce Secretary Ron Brown, the Senator stated: “[t]he disposition of this petition will greatly affect my views regarding . . . changes to the Endangered Species Act that might be warranted.”¹¹⁹

The year-long moratorium on listing and delays in implementing recovery plans for listed species because of administrative and funding backlogs contributed to the belief within the Service that an alternative to listing that would protect species was desirable.¹²⁰ The public and political opposition to the ESA has made the Secretary and the Service more willing to take part in cooperative efforts at conservation with the states.¹²¹ The Conservation Agreement is a prime example of this new willingness to allow states and private parties to have more input and more influence in listing decisions.

B. *Internal Policy on CAs*

According to a 1993 report of the General Accounting Office (GAO), the policy within the FWS on using CAs in lieu of listing has varied since 1983.¹²² The GAO report states that the FWS adopted a policy

¹¹⁷ Bill Lambrecht, *Whose Earth Is It, Anyway?* ST. LOUIS POST-DISPATCH, Apr. 21, 1996, available in 1996 WL 2764133.

¹¹⁸ Telephone interview with D.C. “Jasper” Carlton, Director, Biodiversity Legal Found. (Feb. 10, 1997). Ironically, because Sen. Cohen was later appointed as Secretary of Defense, he did not get a chance to make good on his threat—at least not directly.

¹¹⁹ Andrew Kekacs & Clayton Beal, *Salmon May Get U.S. Protection*, BANGOR DAILY NEWS, Mar. 15, 1995, available in 1995 WL 5819837; see also Andrew K. Weegar, *Did Politics Sink the Salmon Listing?*, MAINE TIMES, Mar. 30, 1995, available in 1995 WL 8258562. Indeed, following the Spotted Owl case, the ESA became such a political hot button that then-President George Bush relied on anti-environmental sentiment in his campaign against President Clinton. In a campaign stop in the Northwest in 1992, Mr. Bush called the ESA a “sword aimed at the jobs, families, and communities of entire regions like the Northwest.” Seideman, *supra* note 3, at 67. Even the backlash itself has not been immune to political mud-slinging. Vice President Al Gore has said that Republicans in general are engaged in a jihad against the environment. Nelson, *supra* note 112, at 82. One hopes that Mr. Gore’s evocation of a holy war against infidels was unintentional.

¹²⁰ Telephone interview with Toni Ann Baca, Southwest Regional Solicitor’s Office, Dep’t of the Interior (Feb. 10, 1997).

¹²¹ Telephone interview with Paul Nickerson, Chief, Division of Endangered Species, U.S. Fish & Wildlife Service (Jan. 27, 1997).

¹²² See GAO Report, *supra* note 10, at 9.

in 1983 allowing the use of CAs in lieu of listing, where the CA effectively removed all threats to the species that would otherwise warrant listing.¹²³ This policy contemplated that a CA so relied upon would be in place at the time that a listing decision was required by statute.¹²⁴ However, this policy was discontinued as of 1985, and a new policy for CAs was not instituted until February 1992.¹²⁵ Following November 1994, FWS officials were working in compliance with draft guidance on CAs.¹²⁶ The Draft Guidance was announced to the public and public comments were sought on it as of December 1994.¹²⁷ No formal policy or regulation has yet been promulgated by the FWS, but in June 1997, the Service announced a new draft policy in the Federal Register (hereinafter Draft Policy).¹²⁸ And according to Leslie Dieroff, Policy Coordinator, Albuquerque Regional FWS Office, the FWS is working on developing a formal policy on CAs and hopes to have a policy guidance document finalized soon.¹²⁹ According to the FWS, "[t]he Service characterizes conservation agreements as positive opportunities for landowners and managers to voluntarily take actions to conserve species being considered for listing and alleviate the need for listing and any resulting regulatory requirements."¹³⁰

The June 1997 Draft Policy describes Candidate Conservation Agreements as "a collaborative approach for the conservation of proposed and candidate species, or species likely to become candidate or proposed species in the near future."¹³¹ A candidate species, according to the FWS, is one "for which the FWS has sufficient information on file relative to status and threats to support issuance of a proposed listing rule."¹³² The document describes a CA as:

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Telephone interview with Susan Lawrence, *supra* note 10.

¹²⁷ See Draft Guidance for Candidate Species Under the Endangered Species Act for Review and Comment, 59 Fed. Reg. 65,780 (1994) (notice of availability Dec. 21, 1994); Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183 (1997).

¹²⁸ Telephone interview with Leslie Dieroff, Policy Coordinator, Division of Endangered Species, U.S. Fish & Wildlife Service (Feb. 11, 1997).

¹²⁹ *Id.*

¹³⁰ See Determination of Endangered Status for Three Wetland Species Found in Southern Arizona and Northern Sonora, Mexico, 62 Fed. Reg. 665, 670 (1997).

¹³¹ Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183, 32,184 (1997).

¹³² *Id.* at 32,186.

an Agreement signed by either Service, or both Services jointly, and a property owner, and any other cooperator, if appropriate, or with a State or local land management agency, that: (a) Sets forth specific management activities that the private or non-Federal property owner, or State or local land management agency, will voluntarily undertake to conserve the covered species; (b) specifies management activities that are adequate to remove the need to list the covered species, if such actions were undertaken by other property owners similarly situated within the range of the species; and (c) for agreements with assurances, provides the property owner or State or local land management agency with the Candidate Conservation assurances described within the Agreement.¹³³

The Draft Policy distinguishes between Candidate Conservation Agreements without assurances and Candidate Conservation Agreements with assurances.¹³⁴ A CA with assurances “would provide assurances that, if covered species are eventually listed, the property owners or agencies [that are parties to the CA] would not be required to do more than those actions agreed to in the Candidate Conservation Agreement”; these assurances are “guaranteed” through the issuance of an incidental take permit for continuing land management activities that is dated as of the date of listing of any of the covered species.¹³⁵ The assurances are provided, at least in part “as a way of rewarding [the private parties’] proactive voluntary conservation efforts and shielding such persons from any additional restrictions which might otherwise affect them if a species is subsequently listed.”¹³⁶

The stated goal of the Service through Candidate Conservation Agreements is “to encourage . . . the removal of threats to the covered species so as to nullify the need to list them as threatened or endangered under the Act.”¹³⁷ The Service must be satisfied that the actions agreed to in the CA will factor in to a determination of the threats to a species in such a way as to do away with the need to list:

The Services must reasonably expect that the management actions agreed to and included in any Agreement, if performed by all landowners in similar situations, will be adequate to remove

¹³³ *Id.*

¹³⁴ *See id.* at 32,183.

¹³⁵ *Id.*

¹³⁶ Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183, 32,187 (1997).

¹³⁷ *Id.* at 32,185.

the threat(s) to proposed, candidate, and species likely to become a candidate or proposed species in the near future and are [sic] covered by the Agreement, thereby eliminating the need to list the covered species.¹³⁸

Additionally, before entering into a Conservation Agreement, the Service will be required to make a written finding that "species included in such an Agreement will receive a sufficient conservation benefit from the activities conducted under the Agreement."¹³⁹ The benefit to the species should be enough to overcome the need for listing, and includes specific listed benefits.¹⁴⁰ These benefits include a reduction in habitat fragmentation rates; restoration and enhancement of habitats; maintenance of or increase in population numbers; and reduction of the effects of catastrophic events.¹⁴¹ Finally, the Draft Policy states that if the Service cannot agree with the other potential parties to the Agreement as to the specific land management actions necessary to remove the threat to a species, it will not enter into a CA.¹⁴²

Although the primary purpose of the Service's new Candidate Conservation Agreement Draft Policy purports to be the stabilization and recovery of candidate and proposed species and their ecosystems, there is a heavy emphasis on making sure that listing does not become a high priority.¹⁴³ The subgoals of avoiding administrative backlog, avoiding conflict with states and private property owners, and minimizing the costs of recovery are prominently featured in the Draft Policy.¹⁴⁴

C. *Anatomy of a Conservation Agreement*

Conservation Agreements are voluntary, private agreements between the Service and other federal agencies, states, state agencies, and private industry members to protect a species.¹⁴⁵ According to the Draft Guidance, all CAs "should contain explicit milestones for accom-

¹³⁸ *Id.*

¹³⁹ *Id.* at 32,187.

¹⁴⁰ *Id.*

¹⁴¹ See Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183, 32,187 (1997).

¹⁴² See *id.*

¹⁴³ See generally *id.*

¹⁴⁴ See generally *id.*

¹⁴⁵ See *id.* at 14; see also CWS Agreement, *supra* note 107, at 2-3; BSS Agreement, *supra* note 107, at 1-2.

plishment of recovery objectives, as well as identification of funding mechanisms."¹⁴⁶ A CA should be reviewed at least annually, and may be terminated at any time by any of the parties.¹⁴⁷ Additionally, the CA should be designed to require or promote monitoring of a species' status.¹⁴⁸

A CA usually includes background on the species itself, including a description of the status and distribution of the species.¹⁴⁹ The background is followed by sections on problems facing the species and conservation actions to be implemented.¹⁵⁰ In some cases the CA may explicitly discuss the effect of the agreement in the event of a listing decision.¹⁵¹

Where other federal statutes, such as the National Environmental Policy Act or the Surface Mining Control and Reclamation Act, are implicated, a Conservation Agreement will include a section on compliance with the law.¹⁵² Additionally, where actions to be carried out under a Conservation Agreement will affect other, listed, species, a CA may include a section on incidental takes.¹⁵³

Attached to a CA is an appendix, called a Conservation Strategy, which lays out the specifics of the plan for recovery of the species.¹⁵⁴ In addition, this appendix includes longer sections on background, status, and distribution of the species, and discusses in detail the threats to the species.¹⁵⁵ Finally, the appendix includes a section on the plan's desired outcome.¹⁵⁶

¹⁴⁶ See Draft Guidance, *supra* note 11, at 17.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 18.

¹⁴⁹ See, e.g., CWS Agreement, *supra* note 107, at 3-4; BSS Agreement, *supra* note 107, at 2-3; VS Agreement, *supra* note 107, at 3-4.

¹⁵⁰ See CWS Agreement, *supra* note 107, at 4-5; BSS Agreement, *supra* note 107, at 4-15; VS Agreement, *supra* note 107, at 4-6.

¹⁵¹ See, e.g., CWS Agreement, *supra* note 107, at 6.

¹⁵² See, e.g., BSS Agreement, *supra* note 107, at 5; CWS Agreement, *supra* note 107, at 9 attachment E.

¹⁵³ See CWS Agreement, *supra* note 107, at 9 attachment E.

¹⁵⁴ See CWS Agreement, *supra* note 107, at 9 attachment A; BSS Agreement, *supra* note 107, at 9 attachment A; VS Agreement, *supra* note 107, at 12 attachment A.

¹⁵⁵ See *id.*

¹⁵⁶ See CWS Agreement, *supra* note 107, at 9 attachment A at 13; BSS Agreement, *supra* note 107, at 9 attachment A at 15; VS Agreement, *supra* note 107, at 12 attachment A at 15.

D. *Procedural Matters*

The first step for the FWS in creating a Conservation Agreement is to propose the species for listing and publish a notice to that effect in the Federal Register.¹⁵⁷ As noted above, the FWS then has the statutory twelve-month period in which to make a decision on the species.¹⁵⁸ This period may be extended by up to six months for the Secretary to collect more data relevant to a listing decision.¹⁵⁹ Under the new Draft Policy, the next step for the FWS is to make the CA draft available for public review.¹⁶⁰ The Draft Policy does not state how this is to be accomplished in future cases, but in the past this has been done, in some cases, through a notice of availability in the Federal Register.¹⁶¹ In the past, the practice of making draft CAs available for public review and comment has not been strictly followed, however, and since there have been no regulations on CAs, this particular procedure has been treated as discretionary.¹⁶²

After a Conservation Agreement has been executed, the next step for the FWS is to formally withdraw the proposal to list the species, again through a notice in the Federal Register.¹⁶³ This notice usually mentions the Conservation Agreement as the deciding factor in the decision not to list.¹⁶⁴ In pre-Draft Policy cases, if a notice of availability had not been published, the public first became aware that the FWS had entered into a Conservation Agreement to protect the species with the publication of the withdrawal notice.¹⁶⁵ Because the

¹⁵⁷ See, e.g., Proposal to List the Fish Virgin Spinedace as a Threatened Species, 59 Fed. Reg. 25,875 (1994) (proposed May 18, 1994).

¹⁵⁸ 16 U.S.C. § 1533(b)(6)(A) (1994).

¹⁵⁹ *Id.* § 1533(b)(6)(B).

¹⁶⁰ See Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183, 32,187 (1997).

¹⁶¹ See, e.g., Draft Conservation Agreement for the Coral Pink Sand Dunes Tiger Beetle, 61 Fed. Reg. 59,889 (1996) (notice of availability Nov. 25, 1996); Draft Conservation Agreements for the Bonneville Cutthroat Trout and the Colorado River Cutthroat Trout, 61 Fed. Reg. 48,500 (1996) (notice of availability Sept. 13, 1996); Draft Conservation Agreement for the Virgin Spinedace, 60 Fed. Reg. 5435 (1995) (notice of availability Jan. 27, 1995).

¹⁶² For example, the Barton Springs salamander and the copperbelly water snake were both subjects of Conservation Agreements with the FWS (in the case of the copperbelly, the CA still stands); both were proposed for listing, but neither plan was subject to public review and comment via a notice in the Federal Register.

¹⁶³ See, e.g., Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608 (1996) (withdrawn Sept. 4, 1996); Proposed Rule to List the Fish Virgin Spinedace as Threatened, 61 Fed. Reg. 4401 (1996) (withdrawn Feb. 6, 1996).

¹⁶⁴ See *id.*

¹⁶⁵ See, e.g., Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608 (1996) (withdrawn).

proposal to list is withdrawn and the Conservation Agreement itself is not the explicit subject of a proposed rule, no final rule on the matter is promulgated.¹⁶⁶

CAs are thus created in reference to a species that has been proposed by the Service for endangered or threatened status.¹⁶⁷ Because the species at issue has been proposed for listing, the threats to its existence have usually been determined.¹⁶⁸ Hence, the parties (usually a state agency or private industry member or both, along with the FWS and/or other federal agencies) promise in the CA itself to take measures that will reduce the previously determined threats to the species such that listing will become unwarranted or less likely to be warranted.¹⁶⁹ In this way a CA is factored in to the Service's assessment of threats to a species and acts as an alternative to listing.¹⁷⁰

The existence of a Conservation Agreement regarding a particular species has the ability to change the outcome of a consideration of the five factors taken into account in a listing decision. Of the five factors that FWS must take into account when considering a listing decision, the existence of a Conservation Agreement when fully implemented may affect several.¹⁷¹ In fact, a CA could conceivably affect all of the five factors. For example, a CA that addresses strip mining practices or restricts strip mining to a relatively limited area could affect the first factor—present or threatened destruction, modification, or curtailment of habitat—and also the fifth factor—other natural or man-made factors affecting the species' continued existence.¹⁷² An Agreement that addresses water resource management in an area where a fish is in danger of losing its habitat because of water diversion for agricultural practices could be seen as affecting the first factor, as well as the fourth and fifth factors.¹⁷³ Likewise an agreement addressing water quality for a species that is physically isolated to several closely grouped springheads and depends upon a constant stream of fresh uncontaminated water could be considered to affect the first, fourth, and fifth factors.¹⁷⁴ For example, CAs may impose regulations on use

¹⁶⁶ See *id.*

¹⁶⁷ See BSS Agreement, *supra* note 107, at 1; VS Agreement, *supra* note 107, at 1.

¹⁶⁸ See, e.g., Proposal to List the Fish Virgin Spinedace as a Threatened Species, 59 Fed. Reg. 25,875 (1994) (proposed May 18, 1994).

¹⁶⁹ See CWS Agreement, *supra* note 107, at 2; BSS Agreement, *supra* note 107, at 1.

¹⁷⁰ Telephone interview with Scott Pruitt, Biologist, U.S. Fish & Wildlife Service (Feb. 3, 1997).

¹⁷¹ Telephone interview with Ben Jessup, Solicitor's Office, Dep't of the Interior (Feb. 3, 1997).

¹⁷² See, e.g., CWS Agreement, *supra* note 107, at 9 attachment A at 13.

¹⁷³ See, e.g., VS Agreement, *supra* note 107, at 12 attachment A at 5-7.

¹⁷⁴ See, e.g., BSS Agreement, *supra* note 107, at 9 attachment A at 4-6.

of water resources.¹⁷⁵ Often they will include provisions that control or manage predator or competitor species that are nonindigenous or introduced.¹⁷⁶ A key provision of CAs may be habitat designation.¹⁷⁷ Additionally, CAs may seek to manage potential man-made catastrophes, such as toxic spills.¹⁷⁸ In cases of extreme danger of imminent extinction, a CA may provide for the establishment of a captive breeding/refugium program.¹⁷⁹

E. *Authority for Conservation Agreements*

In entering into Conservation Agreements with states and private parties, the FWS relies exclusively on certain provisions of the ESA for authority.¹⁸⁰ Conservation Agreements that involve species reliant on water invariably cite section 2 for authority.¹⁸¹ This section states, in part, "[i]t is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."¹⁸² This policy statement appears under the "Congressional findings and declaration of purposes and policy" section of the ESA, which is the first section.¹⁸³ Another provision cited generally for authority in Conservation Agreements is section 6(a), which states, "[i]n carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States."¹⁸⁴ The final provision of the ESA cited as authority in Conservation Agreements is section 6(c), which states, "In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species."¹⁸⁵

¹⁷⁵ See, e.g., VS Agreement, *supra* note 107, at 12 attachment A at 10.

¹⁷⁶ See *id.* at 12 attachment A at 10-13.

¹⁷⁷ See, e.g., CWS Agreement, *supra* note 107, at 9 attachment A at 12.

¹⁷⁸ See, e.g., BSS Agreement, *supra* note 107, at 9 attachment A at 12.

¹⁷⁹ See *id.* at 9 attachment A at 14-15.

¹⁸⁰ See, e.g., CSW Agreement, *supra* note 107, at 3; BSS Agreement, *supra* note 107, at 2; VS Agreement, *supra* note 107, at 3.

¹⁸¹ See, e.g., BSS Agreement, *supra* note 107, at 2; VS Agreement, *supra* note 107, at 3.

¹⁸² 16 U.S.C. § 1531(c)(2) (1994).

¹⁸³ *Id.* § 1531.

¹⁸⁴ *Id.* § 1535(a).

¹⁸⁵ *Id.* § 1535(c)(1).

F. *Enforceability of Conservation Agreements*

A Conservation Agreement is a private contract, and as such is enforceable in breach only by the parties to the Agreement or by an interested third party who can prove that she is a third-party beneficiary.¹⁸⁶ According to Professor Farnsworth, a person who is not a party to a contract would have to show that she was an intended third-party beneficiary of the agreement in order to have a right to enforce the contract.¹⁸⁷ To be an intended beneficiary of the agreement, a person would have to meet two requirements: she would have to show that 1) "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties"; and 2) "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."¹⁸⁸

In the case of Conservation Agreements, this means that to sue for enforcement of protections afforded under a CA, a person who was not a party to the agreement would have to show that the intent of the parties was to benefit the public, and that the parties intended to make a "gift" of the protections to the public.¹⁸⁹ The only real avenue for enforcement of Conservation Agreements is by the parties, with the incurring of time and money in a lawsuit. In practical terms, the enforcement provisions of CAs may be so minimal as to be useless. In contrast, under the ESA the Secretary has the authority to assess fines, and private citizens can bring suit for enforcement under section 11. The real threat that FWS holds over parties to the Agreements in case of breach is not enforcement through damages or specific performance, but rather initiation of emergency listing procedures; however, with the addition of "assurances" to a CA, the FWS gives up even this tool for enforcing compliance.

G. *Examples of Conservation Agreements*

In April of 1995, the U.S. Fish & Wildlife Service entered into an agreement with the Utah Department of Natural Resources, the Bureau of Land Management (BLM), the National Park Service, the Nevada Department of Conservation and Natural Resources, the Washington County, Utah, Water Conservancy District, and the Ari-

¹⁸⁶ See E. ALLAN FARNSWORTH, *CONTRACTS*, § 10.3 (2d ed. 1990).

¹⁸⁷ *Id.* at 748-49.

¹⁸⁸ *Id.* at 749.

¹⁸⁹ See *id.*

zona Game and Fish Department, to protect the Virgin spinedace, a rare desert minnow.¹⁹⁰ The agreement cited as authority section 2(c)(2) of the ESA, which reads, “[i]t is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”¹⁹¹ The FWS interprets this policy statement in the statute to mean that the Service has a “special obligation” to cooperate with states in applying the ESA.¹⁹² The agreement is accompanied by a conservation strategy for the species, in which the various parties lay out their plans for funding, implementation, and oversight of specific actions to protect the spinedace.¹⁹³

The Virgin spinedace, a small minnow, occurs in Utah portions of the Virgin River, which begins in Utah, flows through Arizona, and empties into Lake Mead on the Colorado River in Nevada.¹⁹⁴ The chief threat to the spinedace is habitat modification or destruction through dams, water diversion, and agricultural practices.¹⁹⁵ The river itself and its tributaries are used by local farmers for irrigation, and the agreement is seen as a way to “help farmers conserve enough water that the . . . [r]iver’s flows are sufficient to reverse the decline” of the spinedace.¹⁹⁶ At the time the agreement was made, the late Mollie Beattie, then director of the FWS, said that it “obviate[d] the need to list a species under the Endangered Species Act.”¹⁹⁷

About a year after the parties implemented the spinedace Conservation Agreement & Strategy, the spinedace population suffered a significant setback.¹⁹⁸ In the heat of July, a sinkhole swallowed up La Verkin Creek, a branch of the Virgin River where the spinedace lives; more than five miles of the fish’s habitat—mainly on BLM land—were completely dried up.¹⁹⁹ A private landowner using heavy equipment made a repair that was unauthorized by BLM, by building a dam and

¹⁹⁰ See VS Agreement, *supra* note 107, at 2.

¹⁹¹ 16 U.S.C. § 1531(c)(2) (1994).

¹⁹² Telephone interview with Toni Ann Baca, *supra* note 120.

¹⁹³ See VS Agreement, *supra* note 107, at 12 attachment A at 4–6.

¹⁹⁴ See generally VS Agreement, *supra* note 107.

¹⁹⁵ See *id.* at 12 attachment A at 5.

¹⁹⁶ See Mike Gorrell, *Can New Approach Save the Minnow?*, SALT LAKE TRIBUNE, Feb. 12, 1996, at D1.

¹⁹⁷ See *States Keep Minnow off Endangered List*, LAS VEGAS REVIEW-JOURNAL, Apr. 12, 1995, at 5B.

¹⁹⁸ See Jim Woolf, *Sinkhole Swallows Up Creek, Spits Out Wilderness Controversy*, SALT LAKE TRIBUNE, Jul. 18, 1996, at A1.

¹⁹⁹ See *id.*

using a plastic pipe to divert the water around the sinkhole.²⁰⁰ Local environmentalists were outraged because of possible damage to the surrounding area, and called for sanctions against the renegade repairman.²⁰¹ The BLM refused to bring charges or assess damages against the individual, saying that he went through an approval process with another agency and believed he was acting legally.²⁰² However, the question remains whether the emergency repairs harmed the fish or were vital to the fish's survival because of their timeliness. It took officials a month to come up with a plan for repair of the creek, and six weeks longer for actual implementation.²⁰³

On August 13, 1996, the FWS entered into an agreement with the Texas Parks & Wildlife Department, the Texas Natural Resource Conservation Commission, and the Texas Department of Transportation to protect the Barton Springs salamander, an endangered aquatic salamander whose range is limited to several closely located springs in Austin, Texas.²⁰⁴ The species was proposed for listing in February of 1994 and was the subject of a lawsuit between then and August of 1996, when the CA was announced.²⁰⁵ After extending deadlines for listing several times, and developing the CA with the state of Texas, the FWS withdrew the proposed rule to list the salamander as endangered.²⁰⁶

Like the Virgin spinedace, the Barton Springs salamander population suffered a setback after the implementation of the agreement.²⁰⁷ The agreement was entered into in August of 1996; in December of that year, twelve salamanders were found dead in a spring near the Barton Springs pool shortly after the pool had been cleaned.²⁰⁸ The next month, sixteen more dead salamanders were discovered, again after the pool was cleaned.²⁰⁹ Officials soon discovered the cause of the

²⁰⁰ See *id.*

²⁰¹ See *id.*; see also Jim Woolf, *Sinkhole that Drains Creek to Be Plugged*, SALT LAKE TRIBUNE, Aug. 13, 1996, at B1.

²⁰² Woolf, *supra* note 201, at B1.

²⁰³ *Id.*

²⁰⁴ See BSS Agreement, *supra* note 107, at 1-2.

²⁰⁵ See Ralph K.M. Haurwitz, *Inaction Imperils Species, Suit Says*, AUSTIN AMERICAN-STATESMAN, Oct. 21, 1995, at B1.

²⁰⁶ See Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608 (1996) (withdrawn Sept. 4, 1996).

²⁰⁷ See Ralph K.M. Haurwitz, *Salamanders Alive, Barton Pool Clean after New Procedure*, AUSTIN AMERICAN-STATESMAN, Jan. 24, 1997, B8.

²⁰⁸ See *Texas, Feds Spar over Salamanders: Deaths Renew Endangered-Species Debate*, DENVER POST, Jan. 17, 1997, at A28.

²⁰⁹ See Haurwitz, *supra* note 205.

deaths: city crews had allowed a nearby spring to dry up when they drained the Barton Springs pool in the cleaning process.²¹⁰ The loss of twenty-eight salamanders is potentially fatal to the population, according to D.C. "Jasper" Carlton, director of the Biodiversity Legal Foundation in Colorado; about forty-five salamanders were believed to make up the entire population earlier in 1996.²¹¹

In March of 1997, however, Save Our Springs and Dr. Mark Kirkpatrick won a victory against the Secretary of the Interior in the United States District Court for the Western District of Texas.²¹² In *Save Our Springs v. Babbitt*, Judge Lucius D. Bunton III denied defendant's motion for summary judgment and ordered the Secretary to reconsider the listing decision on the salamander.²¹³ The court found that the Conservation Agreement was the reason the Secretary decided not to list the salamander, and that "strong political pressure was applied to the Secretary to withdraw the proposed listing of the salamander."²¹⁴ The court also found that the Secretary did not follow the notice and comment procedures required by the APA in considering the Conservation Agreement.²¹⁵ Because the Secretary considered a CA as the primary factor in the listing decision, was influenced by political forces, and violated both the ESA and the APA by disallowing public comment, the judge struck down the Conservation Agreement as invalid, saying:

When the Secretary permitted an Agreement, with no proven track record for effectiveness in protecting the species, to play the pivotal role in his listing decision and when he considered political factors in making his listing decision, he acted arbitrarily and capriciously. Any listing decision that considers the Conservation Agreement will be deemed by this Court to be arbitrary and capricious until sufficient time has elapsed to permit the Secretary to determine its effectiveness in protecting the species. This Court considers a sufficient track record to be two years. If the Secretary then determines the Agreement will be effective in eliminating the threats to the species, he can delist the species—if in fact it has been listed. The Secretary's reliance on facts outside the record coupled with the inability of interested persons to

²¹⁰ See *id.*

²¹¹ Telephone interview with D.C. "Jasper" Carlton, *supra* note 118; see *Texas, Feds Spar over Salamanders*, *supra* note 208, at A28.

²¹² See *Save Our Springs v. Babbitt*, No. MO-96-CA-168 (W.D. Tex. Mar. 25, 1997).

²¹³ *Id.*, slip op. at 20.

²¹⁴ *Id.*, slip op. at 7, 11.

²¹⁵ *Id.*, slip op. at 8.

participate and comment on relevant matters critical to the final decision to withdraw the listing was not in compliance with the APA and ESA.²¹⁶

In ruling for the plaintiffs, the judge gave the Secretary 30 days to make a decision on the salamander, and when the Secretary requested a 120-day deadline extension, the judge summarily denied it.²¹⁷

Political pressure also came to bear on the Secretary following the decision in district court: Texas Governor George W. Bush accused the Secretary of a "breach of trust," when informed of his decision not to appeal, and issued a statement that "Texans will have a hard time trusting a federal government that makes an agreement, then turns right around and breaks it."²¹⁸ The case has finally resulted in a positive listing decision for the Barton Springs salamander, although environmentalists still fear for the species because of the allowances for development that were built in to the final rule.²¹⁹

At the time of this writing (October 31, 1997), no further information is available about the fate of the Virgin spinedace or the Barton Springs salamander.

IV. JUDICIAL DEFERENCE TO AGENCY DECISIONMAKING

The decisions of the FWS, as are all agency decisions, are subject to review under doctrines and procedures of administrative law. The amount of deference a court will pay to an agency decision can make the difference in whether a decision will ultimately be upheld. In 1984 the United States Supreme Court heard arguments in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²²⁰ The claim involved a regulation promulgated under the Clean Air Act by the Environmental Protection Agency (EPA).²²¹ The regulation allowed states to define the statutory term "stationary source" to mean an entire plant containing many different kinds of pollution-emitting devices (a "bubble") for the purposes of determining the total produc-

²¹⁶ *Id.*, slip op. at 18.

²¹⁷ See *Salamanders: Judge Denies Extension for Listing Decision*, Greenwire, Apr. 18, 1997.

²¹⁸ See Scott S. Greenberger, *Salamander Listing Isn't Breach of Trust with Texas, Feds Say*, AUSTIN AMERICAN-STATESMAN, Apr. 25, 1997; Ralph K.M. Haurwitz, *Salamander Will Be on Endangered List*, AUSTIN AMERICAN-STATESMAN, Apr. 23, 1997, A1.

²¹⁹ See Final Rule to List the Barton Springs Salamander as Endangered, 62 Fed. Reg. 23,377 (1997); see also Ralph K.M. Haurwitz, *Salamander Rule Soothes Developers; Environmentalists Are Agitated*, AUSTIN AMERICAN-STATESMAN, May 1, 1997, A1.

²²⁰ 467 U.S. at 837 (1984).

²²¹ *Id.* at 840.

tion of emissions.²²² The Natural Resources Defense Council challenged EPA's authority to promulgate the regulation. The Supreme Court held that if Congress's intent as to a matter of statutory interpretation is clear, the agency must adhere to that intent.²²³ Where, however, the "statute is silent or ambiguous with respect to the specific issue," the agency must base its interpretation on a permissible construction of the statute.²²⁴ The Court continued its reasoning, saying that an explicit gap left by Congress may be filled by an agency interpretation that is not arbitrary, capricious, or "manifestly contrary to the statute."²²⁵ An implicit gap, on the other hand, may be filled by an agency interpretation that is based on a reasonable interpretation of the statute.²²⁶ The Court upheld the agency interpretation of the Clean Air Act, stating that a challenge based on whether a regulation was wise policy, and not whether it was a reasonable interpretation, must fail.²²⁷

The case seemed to found a modern legacy of judicial deference to agency policymaking.²²⁸ However, commenters note that even in *Chevron*, the Supreme Court did not grant an extremely strong level of deference to the agency.²²⁹ Since *Chevron*, the Supreme Court has increasingly backed away from even this level of deference, in an attempt to reassert some of the judicial power that *Chevron* seemed to deny.²³⁰

In 1995, the United States Supreme Court interpreted *Chevron* in the context of the ESA, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.²³¹ *Sweet Home* involved a regulation promulgated under the ESA concerning the definition of "take" in section 9 of the Act.²³² The Secretary included "harm" in the definition of "take," and "significant habitat modification" in the definition of "harm."²³³ A group of small landowners, logging companies, and fami-

²²² *Id.*

²²³ *Id.* at 842-43.

²²⁴ *Id.* at 843.

²²⁵ *Chevron*, 467 U.S. at 844.

²²⁶ *Id.*

²²⁷ *Id.* at 866.

²²⁸ See Theodore L. Garrett, *Judicial Review after Chevron: The Courts Reassert Their Role*, 10 NAT. RESOURCES & ENV'T. 59, 59 (1995).

²²⁹ *Id.*

²³⁰ See Simona Papazian, Comment, *Sweet Home's Effect on the Chevron Doctrine and the Increased Role of the Judiciary in Reviewing Agency Statutory Interpretations*, 7 FORDHAM ENVTL. L. J. 543, 544 (1996).

²³¹ 515 U.S. 687 (1995).

²³² *Id.* at 687-88.

²³³ *Id.* at 687.

lies dependent on the timber industry in the Pacific Northwest challenged the regulation.²³⁴ The Supreme Court held that the Secretary's definition of "take," which included habitat modification, was justified by three separate textual points of the Act.²³⁵ First, the Court held that an ordinary understanding of the word "harm," as found in a dictionary, supported the view that habitat modification that results in actual injury or death qualifies as "harm."²³⁶ Next, the Court found that the broad purpose of the Act weighed in favor of the Secretary protecting species against the exact type of harms that the Act was intended to address.²³⁷ Finally, the Court said, the language of the 1982 amendment regarding incidental take permits showed that Congress intended to protect species from indirect as well as direct harm.²³⁸

Commenters have argued that *Sweet Home* has weakened the *Chevron* standard of review by placing less emphasis on Congressional intent, in effect regaining a stronger role for the courts in reviewing agency statutory interpretation.²³⁹ If this is so, it means that the Court will have more say in future challenges to agency authority in the context of the Endangered Species Act.

V. ANALYSIS

The FWS relies on explicit statutory provisions within the ESA itself to provide authority for Conservation Agreements.²⁴⁰ However, the provisions it uses to justify the use of private agreements in lieu of listing are either vague policy statements regarding cooperation with states or clear mandates to the Service to cooperate with the states in carrying out the ESA.²⁴¹ The vague policy statement about cooperating with state and local authorities to resolve water resource issues needs to be read in the context of the Act, which commands the Secretary to list and offer protections to endangered species.²⁴² Since the species subject to CAs are not listed species, the FWS is not acting pursuant to the ESA in creating these agreements, and

²³⁴ See *id.* at 692.

²³⁵ *Id.* at 697.

²³⁶ See 515 U.S. at 697.

²³⁷ *Id.* at 698.

²³⁸ *Id.* at 700-01.

²³⁹ See, e.g., Papazian, *supra* note 230, at 544.

²⁴⁰ See, e.g., CWS Agreement, *supra* note 107, at 3; BSS Agreement, *supra* note 107, at 2; VS Agreement, *supra* note 107, at 3.

²⁴¹ 16 U.S.C. §§ 1535(a), (c) (1994).

²⁴² See *id.* § 1531(c)(2).

therefore cannot rely for authority on provisions whose underlying premise is the carrying out of the mandate of the ESA.²⁴³ As a result, the provisions that the FWS recites do not provide adequate authority for using CAs as a mechanism to avoid listing.

The decision of the FWS to use CAs in lieu of listing is subject to a *Chevron* review.²⁴⁴ The language in the statute and in the legislative history seems clear and unambiguous on its face—Congress did not intend for the Service to have discretion to make agreements to avoid listing.²⁴⁵ Even if a court would find that Congress left an implicit gap for the agency to fill in, however, it would probably find that the Service's action was not based on a reasonable interpretation of the Act.²⁴⁶

Finally, Conservation Agreements violate the intent of Congress. By adhering narrowly to the letter of the law in a number of areas, the FWS carefully avoids a myriad of legal challenges on already-decided points of law. The adherence is so narrow, however, as to indicate that in implementing these agreements the FWS evades the spirit if not the letter of the ESA. These issues are considered in more detail below.

A. *ESA Does Not Authorize CAs*

Conservation Agreements may be void for lack of authority.²⁴⁷ The general language of section 2(c)(2) implies that Congress did not want endangered species issues to exacerbate water resource issues.²⁴⁸ However, it is unlikely that Congress intended this to mean that the FWS was authorized to go outside the statute to deal with endangered species that were in potential conflict with water resource needs. In fact, the section refers to resolving water resource issues "in concert with conservation of endangered species."²⁴⁹ This wording refers explicitly to endangered—and hence listed—species. Even if Congress intended the Service to have discretion to create private agreements with states, this section does not authorize such agreements to substitute for listing. The provision must be read in the

²⁴³ See *id.* §§ 1535(a), (c).

²⁴⁴ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).

²⁴⁵ See *id.* at 842–43.

²⁴⁶ See *id.* at 844.

²⁴⁷ See 16 U.S.C. §§ 1531(c)(2), 1535(a), (c).

²⁴⁸ See *id.* § 1531(c)(2).

²⁴⁹ *Id.*

larger context of the ESA, which provides a specific mandate to the Secretary to list and implement protective measures for endangered and threatened species. Because the Legislature intended the duty to list to be mandatory, it would be counter-intuitive to interpret this provision to mean that the Secretary had the discretion to create a private agreement that could then be used in the analysis to effect a negative outcome on a listing decision.

The language of section 6(a) at first seems to give the Secretary broad discretion for interpretation.²⁵⁰ However, in executing private Conservation Agreements, the Secretary is not "carrying out the program authorized by this chapter," since the program authorized by the chapter is the ESA, and Conservation Agreements provide a way around the ESA. From the language of this provision, it would appear that Congress intended that the Service work in cooperation with the states when carrying out the provisions of the ESA.²⁵¹ Since Conservation Agreements technically serve as a way around the requirements of the ESA, and the species protected by them are not subject to protection under the ESA, Congress probably did not intend that this provision would be used to avoid listing a species.

Again, section 6(c) could perhaps be seen as a general authorization for the Secretary to enter into agreements with states; on closer inspection, this provision refers specifically to states that maintain conservation programs for *endangered and threatened species*.²⁵² The statute has defined "endangered species" to mean a species in danger of extinction throughout all or a significant portion of its range, and "threatened species" to mean a species that is likely to become an endangered species within the foreseeable future.²⁵³ Additionally, the Act has been held by courts to specifically command the Secretary to list such species.²⁵⁴ Therefore, in creating this provision, Congress was almost certainly contemplating that the FWS could enter into "cooperative agreements" with states that had implemented their own protections for federally listed (and hence endangered or threatened) species. Key to the survival and legality of Conservation Agreements is the fact that the Secretary has deemed the species protected by the

²⁵⁰ See *id.* § 1535(a) (stating that "the Secretary shall cooperate to the maximum extent practicable with the states").

²⁵¹ See *id.*

²⁵² 16 U.S.C. § 1535(c).

²⁵³ *Id.* § 1532.

²⁵⁴ See *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 839 (6th Cir. 1981).

Agreement *not* endangered or threatened—and hence *not* in need of listing.²⁵⁵ Given this, one could argue that in creating this provision of the Act, Congress contemplated a much different form of cooperative agreement, and certainly one that did not supplant the listing requirement.

B. *Decision to Use CAs Violates Chevron*

Under a *Chevron* analysis, a court would first ask whether Congress had spoken directly on the issue of whether using CAs to avoid listing is permissible.²⁵⁶ If Congress has spoken directly on an issue, the court and the agency must give effect to Congressional intent.²⁵⁷ In this case, there is support in the language of the statute as well as the legislative history for the argument that Congress spoke directly on the issue. Congress made the duty to list an endangered or threatened species mandatory.²⁵⁸ This indicates that Congress did not intend for the agency to have discretion to distinguish from among endangered species those that would benefit most from listing and only list those. The mandatory duty to list also suggests that an agency is not free to create agreements to fine-tune the listing factors in favor of not listing. Congress clearly intended that those species that the agency deemed to be endangered or threatened would be listed.²⁵⁹

The fact that Congress explicitly provided for cooperative agreements with states that maintain programs for protecting listed species also supports the argument that Congress did not sanction Conservation Agreements.²⁶⁰ Congress envisioned the agency entering into a certain type of agreement with states, and the section 6 cooperative agreement involves mainly federal funding of state protection programs for listed species.²⁶¹ Had Congress wanted to add another provision for agreements with states as an alternative to listing, it could have done so.

²⁵⁵ The Services withdrew proposals to list the Barton Springs salamander and the southern population of the copperbelly water snake because the existence of CAs meant they were not endangered or threatened. See *Determination of Threatened Status for the Northern Population of the Copperbelly Water Snake*, 62 Fed. Reg. 4183 (1997); *Proposed Rule to List the Barton Springs Salamander as Endangered* 61 Fed. Reg. 46,608 (1996) (withdrawn Sept. 4, 1996).

²⁵⁶ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842 (1984).

²⁵⁷ *Id.* at 842–43.

²⁵⁸ See *Pacific Legal Found.*, 657 F.2d at 839 (interpreting 16 U.S.C. § 1532(6)).

²⁵⁹ See *id.* (interpreting 16 U.S.C. § 1533(a)(1)).

²⁶⁰ See 16 U.S.C. § 1535(c).

²⁶¹ See *id.* at § 1535(d).

Finally, Congress limited the factors to be taken into account in making a listing determination to five specific factors.²⁶² Congress did not intend for the agency to create a sixth, optional factor: the existence of a Conservation Agreement. Again, if Congress had wanted to include a sixth factor for determining endangered or threatened status, it could have done so.

However, even if a court would find that Congress had not spoken directly on the issue of Conservation Agreements in lieu of listing, it would probably find that the agency's decision to use CAs is based on an unreasonable interpretation of the Act. If a court found that Congress had not directly addressed the issue of Conservation Agreements, the court would then examine whether Congress left an explicit or an implicit gap for FWS to fill.²⁶³ Here, where there is no mention of Conservation Agreements and indeed no mention of avoiding listing through any means, a court would probably find that Congress had left an implicit gap in the statute for the FWS to fill. The court would then defer to the agency's decision as long as it was based on a reasonable interpretation of the statute.²⁶⁴

Here, however, a court would probably find that the decision to use Conservation Agreements in lieu of listing is not based on a reasonable interpretation of the statute. Congress's first priority in passing the Act was to afford protections to species, above all else.²⁶⁵ But Conservation Agreements effectively place endangered and threatened species in a balancing test against economic interests and competing land use. The enforcement provisions of the Act were designed to make it possible for citizens to act as watchdogs over the agency and over other federal, state, and private actors.²⁶⁶ Yet Conservation Agreements make it nearly impossible for citizens to have rights to sue.²⁶⁷ The sections of the statute that the FWS relies on for authority are not strong enough to justify a policy that seems so clearly to contradict Congress's intent.²⁶⁸

²⁶² See *id.* at § 1533(a).

²⁶³ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

²⁶⁴ See *id.* at 844.

²⁶⁵ See 16 U.S.C. § 1531(b); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 183-85 (1978).

²⁶⁶ See 16 U.S.C. § 1540(g).

²⁶⁷ See FARNSWORTH, *supra* note 186, § 10.3.

²⁶⁸ See 16 U.S.C. §§ 1531(c)(2), 1535(a), (c).

C. *Conservation Agreements Violate Spirit If Not Letter of Law*

By carefully adhering to the letter of the law in a number of areas, the FWS makes sure that the use of Conservation Agreements is not subject to challenge on grounds of constitutional law or the Secretary's mandatory duties under the ESA, for example. But in doing so, the Service creates a program that evades the spirit, if not the letter, of the law, by violating the intent of Congress in creating the ESA. In the past, FWS has evaded a sovereign immunity challenge by not promising explicitly to withhold further regulations of species protected by CAs, even though parties to a CA agreed that this was the implicit understanding (the new "assurances" policy would seem to open FWS up to sovereign immunity challenge). Similarly, the decisions to use CAs adhere narrowly to case law that mandates that a decision on listing may not be based on an unimplemented promise, which includes dicta stating that an actual plan, though unimplemented, may support a listing decision.²⁶⁹ Likewise the Service avoids a court challenge on the issue of the Service's mandatory duty to list, by factoring the CA into the equation of threats and protections to a species to end up with a finding of not threatened or endangered.²⁷⁰

1. Sovereign Immunity Doctrine

According to the doctrine of sovereign immunity, an agency does not have the power to bind the government to a promise of no future regulation.²⁷¹ The Supreme Court has held that a contract purporting to bargain away such powers is void unless the government has surrendered the powers to regulate in the future "in unmistakable terms."²⁷²

Conservation Agreements under the Draft Guidance narrowly adhered to the doctrine of sovereign immunity. The promise made by the FWS in earlier Conservation Agreements, while understood by the states, perhaps, as a promise not to list, was in fact not as broad as a promise not to regulate.²⁷³ Instead, a typical Conservation Agree-

²⁶⁹ See *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996); *Southwest Ctr. for Biological Diversity v. Babbitt*, 939 F. Supp. 49, 52 (D.D.C. 1996).

²⁷⁰ See *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 839 (6th Cir. 1981); Proposed Rule to List the Barton Springs Salamander as Endangered, 61 Fed. Reg. 46,608 (1996) (withdrawn Sept. 4, 1996).

²⁷¹ See Fisher, *supra* note 1, at 391.

²⁷² See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

²⁷³ See, e.g., CWS Agreement, *supra* note 107, at 2; VS Agreement, *supra* note 107, at 1.

ment read, “[i]t is the intention and expectation of the parties that the execution and implementation of this Agreement and the Conservation Strategy will reduce potential threats to the [species] . . . and that reduction will be considered by the Secretary when making the . . . listing decision.”²⁷⁴ Others received more definitive treatment: “[f]ull implementation of this agreement and the associated strategy will reduce threats to the [species] that warrant its listing . . . as threatened or endangered under the ESA.”²⁷⁵ Whatever the wording, FWS officials feel strongly that the government reserved its right to regulate in the future should the species become imperiled despite state protections.²⁷⁶ Since there was no explicit promise of withholding federal regulation, there could be no challenge to these Agreements on grounds of sovereign immunity. In practice, however, states that were parties to these CAs had the implicit understanding that the FWS was promising no future regulation, and in fact FWS officials estimate that only in extremely rare cases has the Service listed a species that was subject to a Conservation Agreement.²⁷⁷ Thus the Service has been able to achieve indirectly what it could not achieve directly because of the sovereign immunity doctrine.

The new “assurances” given to private landowners, laid out in the Draft Policy, seem to expose FWS to challenge on sovereign immunity grounds.²⁷⁸ However, under the assurances policy, the mechanism for promising that no future additional responsibilities will be required of landowners is the granting of an incidental take permit.²⁷⁹ This policy, too, seems to narrowly evade the question of sovereign immunity by allowing the agency a way to assure no future regulation to landowners without explicitly making such a promise. Thus, while the FWS technically retains the power to list a species in the future, the use of CAs undermines the spirit of the ESA by effectively removing the authority of the Service over a species that would otherwise be endangered.

²⁷⁴ See CWS Agreement, *supra* note 107, at 6.

²⁷⁵ See VS Agreement, *supra* note 107, at 1.

²⁷⁶ Telephone interview with Scott Pruitt, *supra* note 170.

²⁷⁷ Telephone interview with Susan Lawrence, *supra* note 10.

²⁷⁸ See Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 31,283 (1997).

²⁷⁹ See *id.*

2. Basing a Listing Decision on an Unimplemented Promise or Agreement

The FWS may be violating the statute by basing a listing decision on an unimplemented agreement.²⁸⁰ According to *Southwest Center and Biodiversity Legal Foundation*, the Service may not rely on promises or the future possibility of other agencies or parties implementing protections for a species in making a listing decision.²⁸¹ And in *Save Our Springs*, Judge Bunton held explicitly that a plan must be in place for two years before the Service can make a decision regarding its efficacy in removing threats to a species.²⁸² In the first two cases, however, the court held in dicta that the existence of an actual plan that would protect a species to the standards of the ESA, as opposed to a mere promise of future action, would be sufficient for the FWS to halt listing procedures. These two cases were heard in the same court, and no appeals court has yet ruled on the matter. With the exception of the dicta in these two cases and the opinion of the District Court for the Western District of Texas in *Save Our Springs*, this issue is untested in the courts.

Because courts have held that an unimplemented promise may not be a deciding factor in a listing decision, CAs allow the FWS to evade the spirit of the ESA by basing listing decisions on little more than an unimplemented promise—an unimplemented plan. It remains to be seen whether other courts will follow Judge Bunton's lead and demand a two-year "track record" for Conservation Agreements in future cases.

3. Mandatory Duty to List

By determining that Conservation Agreements do away with critical threats to species, thereby making them not endangered or threatened, the FWS avoids the mandatory duty to list commanded by the ESA.²⁸³ By not listing the species subject to the CAs, the FWS narrowly adheres to the statute as interpreted by courts that have said the Secretary has an affirmative duty to list a species once it has been

²⁸⁰ See *Save Our Springs v. Babbitt*, No. MO-96-CA-168 (W.D. Tex. Mar. 25, 1997); *Biodiversity Legal Found. v. Babbitt*, 943 F. Supp. 23, 26 (D.D.C. 1996); *Southwest Ctr. for Biological Diversity v. Babbitt*, 939 F. Supp. 49, 52 (D.D.C. 1996).

²⁸¹ See *id.*

²⁸² *Save Our Springs v. Babbitt*, No. MO-96-CA-168, slip op. at 18 (W.D. Tex. Mar. 25, 1997).

²⁸³ 16 U.S.C. § 1533 (1994).

determined to be endangered or threatened.²⁸⁴ Because a critical aspect of CAs is that they are factored in to an assessment of threats to a species, they work by obviating the need for listing and ensuring that the species is deemed not endangered or threatened.²⁸⁵ To make this final, the proposed rule is officially withdrawn with a notice in the Federal Register.

By factoring a CA into the complex equation of threats and protections to a species, the FWS is able to find that an otherwise endangered species is not subject to listing under the ESA. However, since the CA allows the FWS to find that the species is not endangered or threatened, the Service does not violate the mandatory duty to list. There can be no duty to list a species that has not been deemed endangered or threatened, and the FWS insulates itself from court challenge on these grounds as well.

VI. CONCLUSION

The Endangered Species Act was created by Congress with the mission of protecting species at whatever cost. Supreme Court interpretations of the statute have held that Congress intended to place endangered species above all other priorities. The anti-environmental movement in the United States has gained popularity among private industry leaders and elected officials alike. Efforts to keep the Endangered Species Act alive in the face of reauthorization battles have led the Department of the Interior to find creative alternatives to what many see as unnecessary and intrusive government regulation of private land. The Conservation Agreement, in use by the FWS off and on since 1983, is one such alternative. Conservation Agreements obviate the need for listing of endangered species by entering into the Secretary's analysis of threats to a species. A species that is subject to such an agreement is almost by definition not endangered, regardless of actual effectiveness or implementation of the plan. The FWS bases its authority for CAs explicitly in the ESA, yet the provisions cited do not provide adequate authority for an agreement that effectively subverts the intent of Congress in creating the Act. A close

²⁸⁴ See *Pacific Legal Found. v. Andrus*, 657 F.2d 829, 839 (6th Cir. 1981).

²⁸⁵ See *Determination of Threatened Status for the Northern Population of the Copperbelly Water Snake*, 62 Fed. Reg. 4183 (1997); *Proposed Rule to List the Barton Springs Salamander as Endangered*, 61 Fed. Reg. 46,608 (1996) (withdrawn Sept. 4, 1996).

reading of the provisions shows that Congress did not contemplate the FWS brokering private agreements with states and private parties to avoid the substantive protections of the Act. Additionally, the decision of the FWS to use Conservation Agreements in lieu of listing is subject to an administrative law review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Under *Chevron*, a court would probably find that Congress had spoken directly to the issue of Conservation Agreements and prohibited their use to substitute for listing. In the alternative, a court would probably find that although Congress left an implicit gap in the statute for the agency to fill, the agency's action was not based on a reasonable interpretation of the Act. Finally, the use of Conservation Agreements by the FWS evades the spirit if not the letter of the law. By narrowly adhering to a number of legal doctrines, the FWS insulates itself from challenge on numerous grounds while still engaging in unauthorized actions in the name of the federal government.