

**ONE BIRD CAUSING A BIG CONFLICT:
CAN CONSERVATION AGREEMENTS
KEEP SAGE GROUSE OFF THE
ENDANGERED SPECIES LIST?**

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I. INTRODUCTION

The West is a mythical space of cowboys and prospectors, of deer and antelope. Historically it was a space that included the sage grouse.¹ The bird lived in the sagebrush steppe habitat in sixteen western states.² Today, sage grouse are found in only eleven of those states.³ This decline is due in part to habitat fragmentation caused by urbanization, industrial development, grazing, and replacement of sagebrush by

1. Kristina Alexander & M. Lynne Corn, Cong. Research Serv., R40865, Sage Grouse and the Endangered Species Act 1 (2010).

2. *Id.*

3. *Id.*

exotic species.⁴ The species' decline led conservation groups to petition the Fish and Wildlife Service ("FWS") to list the species under the Endangered Species Act ("ESA"). FWS ultimately decided that listing the grouse as threatened was warranted but precluded by higher priority listings.⁵ The decision gave FWS and landowners time to search for solutions to keep the sage grouse from being listed.

One tool used to avoid listing is a conservation agreement ("CA"). A CA is a formal agreement between the listing agency and another party who promises to take actions that address the conservation needs of the species.⁶ The listing agencies' track record on CAs is mixed. Their reliance on CAs in species with small geographic ranges and limited threats has been mostly successful.⁷ However, listing agencies have not been as successful with CAs for species with diverse threats over a large geographic range.⁸ At times the listing agencies have relied on CAs that were recently implemented or had not been proven effective.⁹ CAs cannot be used to keep sage grouse off the endangered species list because the current agreements are too uncertain given the geographic range of the species.¹⁰

This comment begins with a discussion of the ESA's structure and its process for listing at-risk species. It then turns to different types of CAs that the listing agencies have developed and the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE"), which the listing agencies promulgated to justify reliance upon these agreements. Part III examines the skepticism with which courts have viewed CAs. This skepticism reflects the conclusion that CAs are too uncertain to substitute for the ESA given two recurrent problems: (1) lack of historical data and a minimal proven track record; and (2) an inability of the parties to commit to and implement the agreement. Part IV evaluates FWS's reaction to court decisions, focusing in particular on the problems that arise with CAs when the at-risk species is threatened over large geographical areas. This analysis is then applied to the sage grouse. FWS is currently urging states, other federal agencies, energy companies, ranchers, and many other interests to create CAs to protect

4. *Id.*

5. Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed.Reg. 13,910 (Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 17).

6. *Candidate Conservation / Candidate Conservation Agreements (CCAs & CCAAs)*, U.S. FISH & WILDLIFE SERV.: ENDANGERED SPECIES PROGRAM, <http://www.fws.gov/endangered/what-we-do/cca.html> (last updated Aug. 28, 2012).

7. Hadassah M. Reimer & Murray D. Feldman, *Give PECE a Chance: Evaluating Conservation Programs to Avoid Endangered Species Act Listings*, 56 ROCKY MTN. MIN. L. INST. 21-1 (2010).

8. *Id.*

9. *Id.* at 21-19.

10. *Id.* at 21-24.

the grouse and thus to avoid listing the bird.¹¹ The Bureau of Land Management (“BLM”), Wyoming, and Idaho have responded by drafting conservation plans to address threats to the species.¹² The efforts, however, have problems. Although each effort addresses some threats and includes some measures that can be easily implemented, overall the plans are inadequate to address diverse and widespread threats facing the grouse.

II. THE ENDANGERED SPECIES ACT

The ESA’s purpose is to “conserve” at-risk species and the ecosystems they depend upon.¹³ The Act defines “conservation” as the use of “all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to this [Act] are no longer necessary.”¹⁴ Thus, conservation is “recovery.”¹⁵ The listing agencies¹⁶ explicitly acknowledge this in their definition of “conservation,” which is improving a listed species’ status “to the point at which the listing is no longer appropriate.”¹⁷ Therefore, the ESA is more than a tool to keep a certain number of any species alive. Instead, the Act’s ultimate goal is to bring species back to a population level and distribution that will remain sustainable after the Act no longer protects the species.

11. FISH & WILDLIFE SERV., U.S. DEP’T OF THE INTERIOR, GREATER SAGE-GROUSE CONSERVATION OBJECTIVES: FINAL REPORT (2013), *available at* <http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/COT/COT-Report-with-Dear-Interested-Reader-Letter.pdf>.

12. *See* BUREAU OF LAND MGMT., NATIONAL GREATER SAGE-GROUSE PLANNING STRATEGY (2011), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2012.Par.9299.File.dat/IM%202012-044%20Att%202.pdf; IDAHO FISH & GAME, CONSERVATION PLAN FOR THE GREATER SAGE-GROUSE IN IDAHO (2006), *available at* <http://fishandgame.idaho.gov/public/wildlife/sageGrouse/conservPlan.pdf>; WYOMING GAME & FISH DEP’T, WYOMING GREATER SAGE-GROUSE CONSERVATION PLAN (2003), *available at* http://gf.state.wy.us/web2011/Departments/Wildlife/pdfs/SG_WGFDFINALPLAN0000653.pdf.

13. 16 U.S.C. §1531 (2012). The Supreme Court recognized that Congress’s purpose in passing the Act “was to halt and reverse the trend towards species extinction, whatever the cost.” The Court emphasized this by noting that Congress assigned great value to saving species that was reflected “in literally every section of the statute.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

14. 16 U.S.C. §1532(3).

15. Dale D. Goble, *The Endangered Species Act: What We Talk About When We Talk About Recovery*, 49 NAT. RESOURCES J. 1, 2 (2009).

16. The ESA gave the power to list to the Secretary of the Department of Interior and the Secretary for the Department of Commerce. 16 U.S.C. at §1532(15). The listing agencies are FWS for Interior and NOAA for Commerce; FWS primarily lists terrestrial species and the National Oceanic and Atmospheric Administration (NOAA) lists marine species. 35A AM. JUR. 2d *Fish, Game, and Wildlife Conservation* § 64 (2013).

17. *Id.* at 2 (*citing* 50 C.F.R. §402.02 (2009)).

To achieve these goals, the Act's drafters created a linear structure.¹⁸ The ESA first assesses threats, then attempts to eliminate those threats, and finally envisions recovery and delisting. The process begins with a risk assessment,¹⁹ where the Service assesses threats through five factors: (A) habitat loss; (B) overutilization; (C) disease or predation; (D) the adequacy of existing regulations; and (E) any "other natural or manmade factors."²⁰ Based on only the "best scientific and commercial data available," the Service evaluates how these threats impact a species' risk of extinction. A species is listed as endangered when it is "in danger of extinction throughout all or a significant portion of its range"; a species is threatened when it is "likely to become [endangered] within the foreseeable future."²¹

Listing triggers the ESA's protections. From that point on the Act tries to manage risk. The Act does this by imposing risk management provisions that include substantive and procedural requirements designed to (1) prevent extinction and (2) facilitate recovery.²² For example, the Act prevents extinction by prohibiting anyone from taking, harming, or engaging in commercial activity involving a listed species without a permit.²³ Other requirements facilitate recovery. For instance, a listing agency's authority to re-establish species in historical habitat facilitates species recovery by increasing a species range and population.²⁴ Ultimately, most of these actions are guided by an agency-created recovery plan that sets a species' population goal and guides future federal agency action.²⁵ Ideally, that recovery plan will successfully eliminate threats to a species and result in a recovering population.

The next step is delisting, where the listing agency assesses risk using the same five factors used in the initial listing decision. In theory, by this point all threats to a species are removed and the species will be delisted. Where regulations can remove threats entirely, this approach works. However, most species are threatened by habitat loss, which is an ongoing threat that usually cannot be eliminated. Thus, these species require ongoing management and monitoring after delisting. In order to delist these species, regulatory mechanisms must protect the species well enough to bring the risk of extinction down to an acceptable level

18. Dale D. Goble, *A Fish Tale: A Small Fish, the ESA, and Our Shared Future*, 40 ENVTL. L. 339, 341 (2010).

19. ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 242 (2009).

20. 16 U.S.C. §1533(a)(1)(A)–(E).

21. *Id.* §1532.

22. *See* 16 U.S.C. §§ 1533(f), 1536, 1538 (2012); Goble, *supra* note 15, at 3.

23. 16 U.S.C. §1538(a) (2012). Section 7 also requires consultation for all federal government actions that might adversely modify a species' critical habitat or jeopardize its continued existence. 16 U.S.C. §1536.

24. 16 U.S.C. §1539(j); Goble, *supra* note 15, at 3–5. Additionally, federal agencies are required to recover species "by carrying out programs for the conservation of [listed] species." 16 U.S.C. §1536 (a)(1); Goble *supra* note 15, at 4.

25. 16 U.S.C. §1533(f); Goble, *supra* note 15, at 3–5.

and keep the risk at that level.²⁶ When the agency decides whether this risk is acceptable, it looks specifically at whether the change in legal status from listed to delisted will remove a species' protections.

A. Addressing Pre-listing Issues: Conservation Agreements

The pre-listing risk assessment analyzes the same five factors before the species benefits from the ESA's protection. So the listing agency must decide whether a regulation is enough to mitigate risk before it knows how the ESA's mandates apply to the species. This is challenging because the listing agency often will not know a regulation's track record and may not have conclusive data that the regulation will protect a species. If a species is not listed, then the Act's strict protections do not apply. Because most species put on the list remain on the list, agencies and private parties are beginning to focus on the pre-listing process and mechanisms that can protect species before they are listed.

1. The Act's Language

The ESA's language offers guidance on how to deal with the challenges of pre-listing risk analysis. First, "the inadequacy of existing regulatory mechanisms" listing factor in section 4(a)(1) requires the listing agency to determine whether current laws and regulations adequately protect a species.²⁷ Under this factor, the listing agency analyzes enforceable laws individually. The agency also considers the impact each regulation has on the threats addressed by the other factors. This is because adequate regulations can reduce habitat loss, overutilization, and other threats. Thus, existing regulations can actually function as a solution to the other four listing factors.

Congress imposed an additional requirement through section 4(b)(1)(A): the listing agency makes listing decisions "after taking into account" state and local government conservation efforts intended to protect a species.²⁸ In other words, if the agency finds states already have conservation efforts that will protect the species, listing the species may be unnecessary when the efforts mitigate the threats under the other factors.²⁹ The listing agencies explain that this section and section 4(a)(1) require the agencies to consider formalized conservation efforts when making listing decisions.³⁰ Section 4(b)(1)(A) does not expressly

26. Goble, *supra* note 18, at 343.

27. 16 U.S.C. §1533(a)(1)(D).

28. 16 U.S.C. §1533(b)(1)(A).

29. FREYFOGLE & GOBLE, *supra* note 19, at 246.

30. Policy for the Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,113 (Mar. 28, 2003) [hereinafter PECE].

require that these efforts be regulatory in nature, which opens the door for the agency to consider a wider range of conservation efforts beyond just laws and regulations.

The listing agencies interpret section 4(b)(1)(A) to include a broad selection of these state and local conservation efforts.³¹ The agencies define formalized conservation efforts broadly as “conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document.”³² Examples include state and local government-created CAs that lay out management plans and actions the parties will take. While enforceable CAs may also mitigate “the inadequacy of existing regulatory mechanisms” listing factor, conservation efforts that are not regulations may still be considered under section 4(b)(1)(A). Thus, before listing a species FWS considers whether conservation efforts are enough to reduce threats to a species.

2. Policy for Evaluation of Conservation Efforts When Making Listing Decisions (“PECE”)

The listing agencies have attempted to further integrate conservation efforts into the ESA. When Bruce Babbitt was appointed Secretary of the Interior during the Clinton Administration, Babbitt attempted to “engineer[] administrative conservation tools not expressly sanctioned by the Act.”³³ In response to the Act’s strict requirements, Babbitt developed agreements that favored compromise in order to encourage state and private participation in conservation.³⁴ The listing agencies further integrated these efforts into the ESA’s structure when they proposed PECE in 2000. PECE instructs the listing agencies about when they should consider conservation efforts in listing decisions.³⁵ In 2003, FWS and NOAA issued the final policy to ensure that they had “a consistent set of criteria to evaluate formalized conservation efforts” and to give states a framework to use when setting up their own conservation efforts.³⁶

In order “to address situations similar to those in which some courts found past conservation efforts insufficient,” PECE outlines specific evaluative criteria to determine a conservation effort’s certainty.³⁷ The agencies use these criteria to ensure agency reliance on that effort is reasonable. Indeed, the main stated purpose of PECE is to “ensure consistent and adequate evaluation of formalized conservation efforts”

31. *See id.* at 15,100.

32. *Id.*

33. Kirsten Uchitel, *PECE and Cooperative Conservation: Innovation or Subversion under the Endangered Species Act?*, 26 J. LAND RESOURCES & ENVTL. L. 233, 241 (2006).

34. *Id.* at 233.

35. Announcement of Draft Policy for Evaluation of Conservation Efforts when Making Listing Decisions, 65 Fed. Reg. 37,102 (June 13, 2000).

36. PECE, 68 Fed. Reg. at 15,101.

37. *Id.* at 15,106.

in listing decisions.³⁸ In other words, PECE operates as a method to “pre-certify” a conservation effort so that the agency knows the agreement is reliable enough to use in a listing decision.

Understanding PECE begins with its definition of “conservation efforts.” The policy defines “conservation efforts” as “specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species.”³⁹ Written agreements that do this are “formal conservation efforts.”⁴⁰ Thus, this definition requires that a written agreement contain efforts that actually take some sort of specific action. Broad words that implicate general actions are insufficient. PECE also includes not only efforts developed by federal, state, local, and tribal governments, but encompasses efforts by businesses, organizations, and individuals.⁴¹ Thus almost anyone can begin conservation efforts under PECE, as long as those efforts have specific actions aimed to reduce threats to a species.

Most of PECE explains how to use the policy as a tool to evaluate efforts and determine whether agencies can rely on those efforts in a listing decision. PECE requires that FWS evaluate two main criteria: the certainty an effort will be (1) implemented and (2) effective.⁴² Both criteria contain a set of factors the agency analyzes. For example, implementation factors include considering the parties’ funding, legal authority, type of involvement, and implementation schedule.⁴³ Additionally, the effectiveness criteria include factors assessing whether the agreement addresses the nature and extent of the threats, whether it has explicit incremental objectives, and whether it provides implementation monitoring.⁴⁴ The listing agency considers how an agreement meets each of these factors, and then decides whether those factors make the effort “certain” enough under both criteria to meet PECE’s requirements. A formal effort that meets PECE then qualifies as an agreement the agencies can consider in listing.

PECE promises that when an agreement meets PECE’s requirements and the agency relies on it in a decision not to list, the agency will provide ongoing monitoring of the effort.⁴⁵ Thus, FWS reevaluates agreements where a party fails to implement an effort in time, fails to

38. *Id.* at 15,102.

39. *Id.* at 15,113.

40. *Id.*

41. *Id.* at 15,100.

42. *Id.*

43. *Id.* at 15,113–14.

44. *Id.*

45. *Id.* at 15,110 (FWS states that if it decides not to list based partially on a formal conservation effort, “we will monitor the status of the effort, including the progress of implementation of the formalized conservation effort.”).

achieve its goals, or has any new information indicating a change in the species' status.⁴⁶ Ongoing monitoring is thus an additional assurance that the agency will only rely on agreements that actually work.

Taken together, PECE's requirements attempt to provide the listing agencies with a rigorous structure to evaluate conservation efforts. However, PECE may not be as rigid as it appears. The policy notes that "these criteria should not be considered comprehensive" because the certainty of implementation and effectiveness also depend on facts specific to the species, habitat, location, or effort.⁴⁷ Instead the criteria are a starting point to "direct" agency analysis of conservation efforts,⁴⁸ which gives agencies flexibility as to the efforts for each species.

PECE's criteria encourage parties to create specific actions and schedules as part of their agreement.⁴⁹ Encouraging specificity is an attempt to increase the certainty of approved efforts. Efforts that are not implemented and have not proven effective can still pass PECE's criteria as long as the agency finds their level of certainty is high enough.⁵⁰ Although when the agencies wrote PECE they conceded that they could not rely "on speculative promises of future action" in listing decisions,⁵¹ in practice PECE appears to say that agencies still can rely on future actions as long as the PECE's criteria and factors show that action is not speculative. Indeed, PECE has encouraged many entities to use collaborative conservation plans to protect species.⁵²

3. Types of Conservation Agreements (CCAs and CCAAs)

As conservation efforts became more wide-spread, the listing agencies began to articulate what these efforts should look like. One effort listing agencies promote is Conservation Agreements ("CAs"). CAs are voluntary agreements between a listing agency and one or more parties, such as a federal agency, state government, a non-profit organization, or a private individual.⁵³ The agreement is like a contract. Usually the CA will focus on management plans and conservation actions for a particular piece of property. Specifically, FWS recommends that CAs include descriptions of known and anticipated threats to a species, a description

46. *Id.* at 15,114.

47. *Id.* at 15,115.

48. *Id.* at 15,114.

49. *Id.* at 15,112. The criteria are meant to "guide the development of conservation efforts that sufficiently improve a species' status." *Id.*

50. *Id.* at 15,114–15.

51. *Id.* at 15,106.

52. Uchitel, *supra* note 33, at 244.

53. *Candidate Conservation*, U.S. FISH & WILDLIFE SERV., *supra* note 6. CAs can also be called Memorandums of Understanding or Memorandums of Agreement. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED 93-152, ENDANGERED SPECIES: FACTORS ASSOCIATED WITH DELAYED LISTING DECISIONS 1 n.2 (1993), available at <http://www.gao.gov/assets/220/218327.pdf>. Parties to a CA can be landowners (e.g., private individuals, NGOs, or local governments), land managers (e.g., federal agencies), or regulators (e.g., state or local governments).

of specific conservation efforts (i.e., a schedule and identification of who implements the efforts), and a monitoring plan to report progress to the agency.⁵⁴ No specific criteria are required, but CAs with few protections probably will not do much to protect a species.

Although agencies can create a CA to protect any species, in practice many CAs focus on species on the ESA's candidate species list because those species are likely to be listed.⁵⁵ Candidate Conservation Agreements ("CCAs") are agreements that protect a candidate species.⁵⁶ A species becomes a candidate when the listing agency has enough information about threats to determine that listing "may be warranted,"⁵⁷ but is precluded by other species with higher listing priorities.⁵⁸ In other words, candidate species are at-risk species that are publically "flagged" to be listed soon. Candidate species are not protected by the ESA.⁵⁹

Even without the ESA's protection, the candidate list serves several purposes. One is to inform the public certain species are at risk and thus "stimulate and guide conservation efforts" to reduce threats to those species.⁶⁰ After all, the idea is that "full implementation of the measures in the CCA would likely make the protections of the ESA unnecessary."⁶¹ In other words, when a CCA works a land owner commits to nothing beyond what he has already voluntarily committed to.⁶² Indeed, many CCAs grow from the hope of avoiding all of the additional requirements associated with a listed species.⁶³

However, land owners and managers had concerns about the regulatory consequences of encouraging a listed species to live on their land. Imagine a rancher initiating efforts to help sage grouse to survive on his land, only to later have the species listed and subject to the ESA's "take"

54. U.S. Fish & Wildlife Serv., *Using Existing Tools to Expand Cooperative Conservation for Candidate Species Across Federal and Non-Federal Lands 3–4* (2008) [hereinafter *Using Existing Tools*], available at <http://www.fws.gov/endangered/esa-library/pdf/CCACCA%20%20final%20guidance%20signed%208Sept08.PDF>.

55. U.S. FISH & WILDLIFE SERV., *CANDIDATE CONSERVATION AGREEMENTS*, 1 (2011), available at <http://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf>.

56. *Id.* at 2.

57. 16 U.S.C. §1533(b)(3)(A) (2012).

58. *Id.* at §1533(b)(3)(B)(iii).

59. *Candidate Conservation*, *supra* note 6.

60. *Review of Native Species That Are Candidates for Listing as Threatened or Endangered*, 76 Fed Reg. 66,370 (Oct. 26, 2011).

61. *Using Existing Tools*, *supra* note 54, at 2.

62. *See id.*

63. *See* U.S. FISH & WILDLIFE SERV., *WORKING TOGETHER: TOOLS FOR HELPING IMPERILED WILDLIFE ON FEDERAL LANDS 14–17* (2005), available at <http://www.fws.gov/endangered/esa-library/pdf/ImperiledWildlifeFinalDec2005.pdf>. FWS's brochure gives property owners options. The question "Would you like to conserve the species to prevent the need to list under the ESA?" points to CCAs and CCAs as tools that accomplish this need. *Id.* at 5.

prohibition. Now the rancher would need to make sure his activities would not subject him to liability, and would probably incur extra costs to do this. Meanwhile, if he had instead destroyed all sage grouse that lived on his property and their habitat, he could do what he wished on his land. Offering incentives to conserve species would instead encourage landowners to participate. This realization led FWS to create Candidate Conservation Agreements with Assurances (“CCAA”) to give landowners “regulatory certainty.”⁶⁴

CCAAs allow non-federal landowners to voluntarily agree to implement specific conservation measures in exchange for assurance that if a species is listed, the landowner’s obligations will be limited. Assurance comes in the form of a permit issued under the authority of the ESA’s section 10.⁶⁵ The permit promises that FWS will not impose any additional conservation measures or use restrictions.⁶⁶ Indeed, once a CCAA is in place the only way FWS can require additional conservation measures is when the original agreement mentions the possibility of additional measures due to changed circumstances.⁶⁷ Rather than just a desire to avoid listing entirely, the reason landowners participate in CCAAs is often for the assurance a permit brings to their land use.⁶⁸

Overall, landowners have been receptive to CCAs. In June 2005 FWS reported that participants had signed more than 100 CCAs for over 140 candidate and at-risk species and twenty-four CCAAs.⁶⁹ In 2011 CCAs still protected over 140 candidate species on almost five million acres of habitat.⁷⁰ However, just because a landowner signs a CA does not mean listing the species is precluded. While these agreements

64. Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726, 32,733 (June 17, 1999).

65. 50 C.F.R §§17.22(d), 17.32(d) (2012).

66. See 50 C.F.R. §17.22(d) (permits for endangered species) & 50 C.F.R §17.32 (d) (permits for threatened species). Thus, CCAAs operate within three distinct time periods. First, there is the time before an agreement is signed, where a rancher could choose to use his land how he wants. Second, there is the time period after the agreement is signed, where the rancher implements efforts for sage grouse. Third, there is the time period after the species is listed, where the rancher who signs a CCAA can continue to operate the farm as he did under the agreement before listing. He can do this because he has a permit to “take” the species as long as he follows the CCAA for his property.

67. 50 CFR §17.32 (d)(5)(i)–(iii) (2012). The FWS also provided a narrow exception for “unforeseen” circumstances: “Additional measures must comport with the agreement to the maximum extent possible, and the Director has the burden of proving unforeseen circumstances exist according to factors listed in the agreement.” *Id.* at (iii).

68. Michael J. Bean, *Landowner Incentives and the Endangered Species Act*, in *ENDANGERED SPECIES ACT: LAW, POLICIES, PERSPECTIVES* 206, 212 (Donald C. Baur & WM. Robert Irvin, eds., 2d ed. 2010).

69. Review of Native Species That Are Candidates or Proposed for Listing as Threatened or Endangered, 70 Fed. Reg. 24,870 (May 11, 2005) (to be codified at 50 C.F.R. pt. 17).

70. Review of Native Species That Are Candidates for Listing as Threatened or Endangered, 76 Fed Reg. 66,370, 66,386 (Oct. 26, 2011) (to be codified at 50 C.F.R. pt. 17).

may have significance in listing decisions, the listing agency must still consider all the Act's listing criteria.⁷¹

B. Sage Grouse as a Listing Example

Despite CAs, sage grouse are still in trouble. Sage grouse are the largest grouse in North America, weigh two to seven pounds, are about two feet tall, and live mostly on the ground.⁷² However, most of these facts are not the reason the bird is currently so well-known. Instead, the continuing drama over listing the sage grouse under the ESA is what has put the bird front and center in Western politics.⁷³

Sage grouse rely on sagebrush year-round for water, shelter, and food. The bird survives the winter by eating almost exclusively sagebrush that stays above the snow.⁷⁴ In the spring, sage grouse often lay their eggs under a sagebrush overhang or some other vertical cover.⁷⁵ Therefore it is no surprise that the bird needs large areas of sagebrush to survive.⁷⁶ However, land use, fire, and invasive species have split continuous swaths of sage brush into smaller, fragmented pieces. Indeed, over half of the historical sagebrush habitat is gone, leaving remaining habitat fragmented.⁷⁷ Because sage grouse depend on sagebrush to survive, habitat fragmentation is the most significant threat that faces the sage grouse today.

The sage grouse's recent listing history started in 2004 when FWS decided in its ninety-day finding that several listing petitions had substantial evidence supporting listing. FWS looked at the ESA's five listing factors to make this decision, particularly habitat fragmentation.⁷⁸ FWS found habitat loss was due to human actions like agriculture, herbicides, grazing, fire, and development.⁷⁹ FWS also found trouble under the inadequate regulatory mechanisms factor, noting that it did not

71. Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726, 32,727 (June 17, 1999).

72. Kristina Alexander & M. Lynne Corn, Cong. Research Serv., R40865, Sage Grouse and the Endangered Species Act 1 (2010).

73. See Elizabeth A. Schulte, *The Sage Grouse Rebellion*, NAT. RESOURCES & ENV'T 59 (2011).

74. Twelve-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910, 13,916 (Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 17).

75. U.S. GEOLOGICAL SERVICE, Greater Sage-Grouse Overview: Briefing Paper, (Sept. 29, 2009), available at <http://sagemap.wr.usgs.gov/Docs/SAGRBriefingPaper2.pdf>.

76. Twelve-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. at 13,923–13,927. Sage grouse can have home ranges of greater than 230 square miles. *Id.*

77. *Id.* at 13,986.

78. 90-Day Finding for Petitions to List the Greater Sage Grouse as Threatened or Endangered, 69 Fed. Reg. 21,484 (April 21, 2004) (to be codified at 50 C.F.R. pt. 17).

79. *Id.* at 21,488–90.

know of any state or BLM plans targeted toward the species.⁸⁰ This triggered a twelve-month review.

However, FWS decided not to list the sage grouse in that twelve month review.⁸¹ FWS first decided which conservation efforts it could consider using a PECE analysis. After evaluating the certainty over 300 individual conservation efforts contained in twenty-seven conservation plans, FWS decided it could use twenty of those efforts in its listing decision.⁸² Next, FWS used an expert panel to evaluate threats under the five-factor risk analysis. While FWS noted these threats, it concluded listing was not warranted because the population was stable and these threats were greatly uncertain. Western Watersheds Project quickly challenged FWS's decision in an Idaho Federal District Court in *Western Watersheds Project v. Fish & Wildlife Service*.⁸³ The court found FWS's decision arbitrary and capricious and remanded the finding to the agency because FWS did not use the best available science and a high level official in the Department of Interior manipulated the listing decision.⁸⁴ The court also held that FWS did not coherently consider the adequacy of regulatory mechanisms factor.⁸⁵ This was because FWS stated that it was "encouraged" that conservation efforts would slow habitat loss, but never explained how it was possible to be encouraged given the lack of information about how states and BLM were protecting sage grouse habitat.⁸⁶

Subsequently FWS decided in 2010 that listing the sage grouse was warranted but precluded and added the grouse to the candidate list.⁸⁷ FWS decided the sage grouse should be listed based on several threats. Habitat fragmentation (Factor A) was the most significant factor, and FWS noted that invasive plants, energy development, fires, agriculture, urbanization, grazing, and infrastructure had fragmented sage grouse habitat.⁸⁸ Also, these threats would increase due to climate change.⁸⁹ Under the overutilization factor (B) FWS found hunting was not a significant threat, but mentioned that hunting was causing negative impacts on local populations.⁹⁰ As to disease and predation (Factor C), FWS noted that West Nile was sporadic and that predation would only

80. *Id.* at 21,492.

81. 12-Month Finding for Petitions To List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed Reg. 2244 (Jan. 12, 2005) (to be codified at 50 C.F.R. pt. 17).

82. *Id.* at 2251.

83. *W. Watersheds Project v. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007).

84. *Id.*

85. *Id.* at 1187.

86. *Id.*

87. Twelve-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910 (Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 17).

88. *Id.* at 13,957.

89. *Id.*

90. *Id.* at 13,966.

become a threat as habitat became increasingly fragmented.⁹¹ Factor E included pesticides, which FWS determined was a not significant threat.⁹² Under the adequacy of regulatory mechanisms factor (D), FWS considered state laws, local laws, federal land management, and energy regulations; FWS concluded that the regulatory mechanisms were inadequate and a significant threat to the sage grouse.⁹³ Thus, two main factors caused FWS to list the sage grouse: habitat fragmentation and inadequate regulatory mechanisms. Federal agencies and states have since engaged in a flurry of activities to put conservation efforts into place that they hope can mitigate these threats and preclude listing.

III. JUDICIAL REVIEW OF CAS

When courts evaluate CAs they usually focus on common factors. Some of the first challenges to CAs were instances where FWS relied on agreements between federal agencies despite documented, undisputed, and serious concerns about threats to a species.⁹⁴ For example, FWS did not list the Queen Charlotte Goshawk because of the possibility the Forest Service would create a new plan that would help the bird.⁹⁵ In spite of evidence that the current plan's timber harvesting harmfully impacted habitat, the FWS gave weight to the fact that Forest Service assessed goshawk biology and promised to use that assessment to manage land to conserve goshawk habitat.⁹⁶ Similarly, the FWS declined another listing proposal when it relied on ongoing forest plan changes that were expected to benefit bull trout.⁹⁷ In both instances, the reviewing courts reasoned that the FWS could not rely on future promises when making a listing decision.⁹⁸

While future promises from a federal agency were not enough, the courts had not applied this holding to any cases that involved agreements with states or private landowners. Given ESA section 4(b)(1)(A)'s requirement to consider state efforts, courts could have viewed non-

91. *Id.* at 13,972.

92. *Id.* at 13,983–85.

93. *Id.* at 13982.

94. Uchitel, *supra* note 33 at 245–46.

95. *Sw. Ctr. for Biological Diversity v. Babbitt*, 939 F. Supp. 49 (D.D.C. 1996).

96. *Id.*

97. *Friends of the Wild Swan v. U.S. Fish & Wildlife Serv.*, 945 F. Supp. 1388 (D. Or. 1996).

98. *Sw. Ctr. for Biological Diversity*, 939 F. Supp. at 52 (stating the Secretary “cannot use promises of future actions as an excuse for not making a determination based on the existing record.”); *Friends of the Wild Swan*, 945 F. Supp. at 1388 (The court held that FWS must base its listing decisions on existing threats and thus could not rely on “its own speculations as to the future efforts as to another agency’s management plans to put off listing a species.”).

federal CAs differently. However, courts that evaluated other CAs acknowledge that future promises are not enough. Many courts also criticize implemented CAs for similar problems. Two factors appear repeatedly in these opinions: the need for (1) historical data and a proven track record and (2) parties with the ability and commitment to implement an agreement.

A. Historical Data & Track Record

Courts want data about species over time, which can cut in two different directions. First, courts look backwards at historical data that is collected before a CA is created.⁹⁹ An example of this type of data includes studies of population trends and which threats impact a species the most. In theory, the more information the parties know before they implement a CA the more effective a CA will be. This is because lots of data may increase FWS's knowledge of which threats are the most significant and may give insight as to how to mitigate those threats. This increases assurance of a CA's efficacy and supports an agency's decision to rely on that CA. More data makes an agency's chosen method of addressing threats less risky.

Second, courts look forward from the moment parties created a CA to see if the CA has an established "track record."¹⁰⁰ After all, the longer a CA is in place, the more information the agency has about how it impacts threats to a species. In addition, track records also show whether the actions proposed will be effective and whether the population will respond to these efforts. Indeed, time is a major factor in both types of data. Thus, the more data an agency has from either before or after an agreement is implemented, the more likely the agency can rely on that CA.

For instance, the court in *Save Our Springs v. Babbitt* emphasized in detail the need for historical data and a track record.¹⁰¹ There, several plaintiffs challenged the Service's decision to withdraw a listing proposal for the Barton Springs Salamander.¹⁰² This small, aquatic salamander lived in just one park in Austin, Texas.¹⁰³ After missing several deadlines, the Service issued a proposed rule to list the salamander as endangered primarily because of the threat of water contamination from urban runoff to the salamander's habitat.¹⁰⁴ Before the final listing decision, three Texas state agencies and the Department of Interior signed a

99. See, e.g., *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 741 (W.D. Tex. 1997).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 742.

CA.¹⁰⁵ The agreement listed twenty-eight actions that the agencies would implement immediately.¹⁰⁶

Only a month later, the FWS decided not to list the salamander because the agency found Texas's commitment to implement the CA reduced the risk of extinction enough to withdraw the listing.¹⁰⁷ The court reasoned that the CA was the sole reason that FWS did not list the salamander.¹⁰⁸ This meant the one-month-old agreement's efficacy in reducing threats was a major focus of the court's examination of whether the agency made a reasoned decision.

The court held that it was arbitrary and capricious for FWS to rely on the CA because there was no proof the agreement would succeed.¹⁰⁹ The court stated that FWS "cannot use promises of proposed future actions as an excuse for not making a determination based on the existing record."¹¹⁰ The court went on to emphasize the fact that the CA lacked a track record and historical data, which made the agency's reliance unreasonable.¹¹¹

First, the court recognized that conservation efforts could not add reliable information to FWS's listing decision unless the agency could observe how each action worked for a longer time period.¹¹² The court stated that listing decisions considering the agreement would "be arbitrary and capricious until sufficient time has elapsed to permit the Secretary to determine its effectiveness in protecting the species."¹¹³ Without any further reasoning, the court stated that the appropriate time frame was two years.¹¹⁴ With these statements the court points out that it believed CAs need time to prove a track record. Thus, FWS could not rely on the CA.

Next, the court repeatedly emphasized the need for data and facts that demonstrated this CA was likely to succeed. The court stated that FWS placed "the continued existence of a species, found only one place in the natural world, in the hands of state agencies and a Conservation Agreement with no proven track record for success."¹¹⁵ For the agreement to "pass[] with flying colors" and decrease the extinction risk, the court needed "some historical data to back the decision" that the agree-

105. *Id.* The CA had two objectives: first, the CA would "eliminate or significantly reduce the threats to the species," and second, it would create a captive breeding program.

106. *Id.* at 744.

107. *Id.* at 742-43.

108. *Id.* at 743.

109. *Id.*

110. *Id.* at 747.

111. *Id.* at 748.

112. *Id.* at 748-49.

113. *Id.* at 749.

114. *Id.* at 748

115. *Id.*

ment could protect the salamander.¹¹⁶ The court needed proof that what the agreement promised would actually work, and was unwilling to settle for hope. Without historical data or a “track record,” the agreement was not enough.¹¹⁷ Instead, the court wanted an agreement that created data. In other words, some proof of a CA’s effectiveness was necessary before the agency could rely on it. This CA did not offer any proof, and thus the court found agency reliance unreasonable.

Another court needed both data and a proven track record when it held FWS’s decision not to list slickspot peppergrass was improper.¹¹⁸ That CA was only finalized a month before the proposed listing,¹¹⁹ so no matter how “certain” FWS found the agreement through PECE, there was not data to support FWS’s effectiveness forecast.¹²⁰ The court emphasized the importance of time and a track record when it speculated that the latest CA should be implemented is when a species first becomes a category two species.¹²¹ Even then, agreements should be implemented “before a species stands so near the precipice of extinction.”¹²² Thus, when the court stated it wanted efforts to be implemented when a species is first designated as a candidate,¹²³ it was likely prompted by a need for data and some assurance that the agreement would work.

Both courts suggested minimum time frames, but courts would probably view CAs implemented even earlier in a more positive light. While the species-specific nature of evaluating threats under the ESA means that courts should not set general time standards,¹²⁴ the emphasis on time implies that the longer an agreement is implemented, the more likely an agency will have data to rely on it.

Conversely, another court suggested FWS could consider a CA without a track record.¹²⁵ There, FWS withdrew its proposed rule to list the flat-tailed horned lizard as a threatened species in part because a CA would protect the lizard on public lands.¹²⁶ First, the court found FWS had adequately considered a variety of threats to the lizard and showed evidence that those threats were declining.¹²⁷ Next, the court distinguished *Save Our Springs* and reasoned that the ESA never speci-

116. *Id.* at 749.

117. *Id.* at 748.

118. *Western Watersheds Project v. Foss*, No. CV 04-168-MHW, 2005 WL 2002473, (D. Idaho Aug 19, 2005).

119. *Id.* at *9.

120. *Id.*

121. *Id.* at *18.

122. *Id.*

123. *Id.*

124. Malaika M. Eaton, Note, *Of Salmon, Salamander, and Lizards: Can State and Local Conservation Plans “Pre-empt” the Endangered Species Act?*, 87 CORNELL L. REV. 185, 224 (2001).

125. *Defenders of Wildlife v. Babbitt*, No. 97-CV-2330 TW (LSP), 1999 WL 33537981 (S.D. Cal. 1999).

126. *Id.* at *1–2.

127. *Id.* at *5.

fies how long a conservation effort must be implemented before FWS can rely on it¹²⁸ and thus implied that agreements do not necessarily need to be implemented before FWS relies on them.

The court then explained why this was the better policy. Initially it noted that if FWS could not consider the CA, three years of hard work by state and federal agencies would be wasted.¹²⁹ Ignoring hard work would in turn discourage states from conservation efforts and instead encourage states to save money by avoiding FWS.¹³⁰ The court concluded its opinion by pointing out that the ESA encourages states to work with others to protect wildlife over time, and while the ESA “may represent many species’ last chance at survival, Congress surely did not intend to make it the *only* chance at survival.”¹³¹ However, on appeal the Ninth Circuit reversed the decision, in part because it was unclear how the CA’s benefits affected portions of the land.¹³² Overall, however, courts have found that agreements without any data to prove their effectiveness are not certain enough to rely on in listing. This makes sense because without any data or track record to prove CAs are effective, the agreements cannot prove that they reduce other threats to a species.

B. The Parties’ Ability and Commitment to Implement Conservation Measures

Courts also focus on the ability and commitment of the parties to implement an agreement. After all, if an agency has no authority, it cannot implement the agreement and FWS cannot rely on the CA. In addition, this factor goes to the mandatory nature of the actions the parties have agreed on, whether the parties have a future monitoring plan, and the parties’ ability to finance the agreement. Long-term agreements with specific language and continuous funding are much more likely to effectively address threats to a species.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* *Defenders of Wildlife v. Babbitt*, No. 97-CV-2330 TW (LSP), 1999 WL 33537981 (S.D. Cal. 1999). The court found that FWS relied on an improper standard and failed to consider relevant factors. One issue was whether FWS adequately addressed whether the lizard was extinct throughout a significant portion of its range. *Id.* at 1140. The CA had five management areas on public land, and FWS did not focus on private land in its listing decision. *Id.* at 1142. The court held the FWS’s reliance on the CA was improper because FWS did not consider the public versus private land distinction. *Id.* at 1146. In addition, FWS did not explain how the failure to implement measures in three of the CA’s areas would impact the lizard. *Id.* This made it “unclear how the benefits assuredly flowing from the CA affected any particular portion of the lizard’s habitats” and thus unclear how the CA mitigated effects in a significant portion of the lizards range. *Id.*

The *Save Our Springs* court focused on this factor. That agreement involved three different agencies with the ability to implement the CA because they all had “the responsibility, authority, and funding mechanisms to implement the provisions of the Agreement.”¹³³ The court instead focused on the agencies’ commitment when it found all of the agreement’s twenty-eight actions would not immediately or significantly reduce threats.¹³⁴ The court noted that this was partly because the agreement’s promised actions did not take “tangible steps to reduce the immediate threat to the species.”¹³⁵ For example, the agreement used words like “identify,” “evaluate,” “develop,” and “work with”—none of these words described any concrete action.¹³⁶ As a result the proposed actions gave the court “no assurances the measures will be carried out” or that the CA would eliminate threats to the salamander.¹³⁷

Other courts also reject the idea that the listing agencies could rely on conservation efforts without tangible actions.¹³⁸ In *Oregon Natural Resources Council v. Daley*,¹³⁹ environmental plaintiffs challenged National Marine Fisheries Service’s (“NMFS”)¹⁴⁰ decision that the Oregon Coast population of salmon did not warrant listing.¹⁴¹ NMFS based at least part of its decision not to list that salmon population on Oregon’s newly adopted conservation plan, and the plaintiffs claimed this was inappropriate because most measures in the plan were voluntary and unimplemented at the time NMFS made its decision.¹⁴² Relying largely on this plan, NMFS found the Oregon Coast salmon was not likely to become endangered in the time between the listing decision and when the plan implemented its habitat measures.¹⁴³

That court held this agreement was inadequate and implied that the agency was not committed enough to the plan.¹⁴⁴ First, most of the actions implemented were voluntary.¹⁴⁵ Indeed, this court echoed that “voluntary actions, like those planned in the future, are necessarily speculative” and cannot assure that a species will be protected.¹⁴⁶ Second, there was a scientific split as to whether the actions actually would positively impact salmon,¹⁴⁷ and thus those actions did not give FWS

133. *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 741 (W.D. Tex. 1997).

134. *Id.*

135. *Id.* at 744.

136. *Id.*

137. *Id.*

138. Uchitel, *supra* note 33, at 242.

139. *Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1142 (D. Or. 1998).

140. NOAA is the agency that oversees NMFS, also referred to as NOAA Fisheries. See *NOAA Fisheries*, NAT’L OCEANIC AND ATMOSPHERIC ASS’N, <http://www.nmfs.noaa.gov/> (last visited Apr. 3, 2013).

141. *Daley*, 6 F. Supp. at 1142.

142. *Id.* at 1155.

143. *Id.* at 1150.

144. *Id.* at 1160.

145. *Id.* at 1155.

146. *Id.*

147. *Id.* at 1146.

enough hope that they could address threats like habitat degradation, timber harvest, and agriculture practices.¹⁴⁸ Third, one of the plan's memorandum of agreement ("MOA") could be terminated unilaterally and the agency's obligations depended exclusively on funding.¹⁴⁹ All of these problems indicated a lack of agency commitment to the plan, and therefore the court found this plan inadequate.¹⁵⁰

The *Daley* court's holding that NMFS could use only enforceable measures in a listing decision thus emphasized similar concepts as *Save Our Springs*. Because some of the state plan's efforts were not yet implemented, the agreement did not have the data necessary to prove with some certainty the species would be protected. In addition, because Oregon could withdraw its plan at any time, the agreement's actions were speculative because there was no guarantee the actions would occur or continue to be implemented. Both courts shared a common emphasis that data and agency commitment are required for the agency to rely on a conservation agreement.

In a later case involving a slickspot peppergrass listing decision, FWS emphasized how each conservation effort was specific and tied to threats to the species. FWS did this with a "threats analysis table" that listed every threat to peppergrass and then described how individual conservation measures addressed each threat.¹⁵¹ In addition, FWS noted that the CCA's actions were widespread and had over 200 individual conservation efforts compiled into a table that identified the responsible party for each effort.¹⁵² These facts showed that the CCA addressed individual threats, which led the defendants to argue the CCA was certain enough for FWS to rely on the agreement in its decision not to list the peppergrass.¹⁵³ While the court there never decided whether the CCA was certain enough for FWS to rely on, the fact that the parties emphasized these actions in their briefs indicates the importance of the parties' ability to implement CAs.

Overall, most courts confronted with CAs have looked at data and the parties' commitment for assurances that agency reliance is proper.¹⁵⁴

148. *Id.*

149. *Id.* at 1157.

150. *Id.* at 1158.

151. *Western Watersheds Project v. Foss*, No.CV 04-168-MHW, 2005 WL 2002473, at *7 (D. Idaho 2005).

152. *Id.*

153. Federal Defendant's Opening Brief in Support of Cross-Service, Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, *Western Watersheds Project v. Foss*, 2005 WL 2002473 (D. Idaho Aug 19, 2005) (No. CV 04-168-MHW), 2005 WL 6173532.

154. *See also Fed'n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000). In listing a steelhead population the court found reliance on an unimplemented conservation plan "inconsistent with the aggressive preventive posture of the ESA" because the

Thus, the listing agencies have been unsuccessful in most listing decisions where they relied on recently implemented CAs to withdraw listing a species. This means that for the listing agencies to successfully use CAs in listing decisions, agreements must have a proven track record and agency commitment. Because most at-risk species are overlooked until they are at the brink of extinction, these are difficult things to accomplish.

IV. CCAS & THE LISTING AGENCIES: THEIR REACTIONS TO COURT DECISIONS?

Despite the negative court holdings and the difficulty in using CAs in listing decisions, the listing agencies still support CCAs as an important tool to conserve candidate species.¹⁵⁵ For instance, FWS publically advertises successful CCAs on its website.¹⁵⁶ FWS also notes that signing a CCA has benefits even if the species is listed.¹⁵⁷ Besides advertising, FWS relied on CAs in several listing decisions. In some instances, FWS has ultimately decided a species should be listed despite CAs.¹⁵⁸ In contrast, FWS has declined to list several species based mainly on conservation efforts that (1) met PECE and (2) eliminated significant threats from the five listing factors.¹⁵⁹ The listing agencies have discretion to decide whether CAs are certain enough, and thus it is important to understand how FWS has analyzed CAs in listing decisions.

A CA's certainty is affected by the geographic range of the species, the size of its population, and the amount and type of threats a species faces.¹⁶⁰ FWS has successfully used CAs to remove small species that live in limited geographic ranges from the candidate list. For example, FWS removed the Warm Spring Zaitzevian Riffle Beetle after a CA was signed to protect the beetle's habitat.¹⁶¹ The agreement protected the beetle's only habitat—land managed by FWS—by water monitoring, removing debris from a cement box, educational signage, and other measures that protected this small area.¹⁶² The CA was already implemented and scheduled to continue for another five years, so FWS concluded that threats to the beetle would not increase in the foreseeable future.¹⁶³ Similarly, FWS decided that recently implemented CAs would

court did not have assurances of when the agreement would be implemented and how effective it would be. *Id.*

155. See U.S. FISH & WILDLIFE SERV., *supra* note 55.

156. *Candidate Conservation*, *supra* note 6.

157. See Review of Native Species That Are Candidates for Listing as Threatened or Endangered, 76 Fed. Reg. 66,370, 66,386–87 (Oct. 26, 2011).

158. See Reimer & Feldman, *supra* note 7, at 21-8 to -10.

159. *Id.* at 21-7 to -8.

160. *Id.* at 21-8.

161. Review of Native Species That Are Candidates for Listing as Endangered or Threatened, 72 Fed. Reg. 69,034, 69,045–46 (Dec. 6, 2007).

162. *Id.*

163. *Id.*

eliminate threats to the Camp Shelby burrowing crayfish and the Beaver Cave beetle; therefore FWS removed each of these species from the candidate list.¹⁶⁴ These CAs addressed specific threats and were unique because a CA could protect almost all the species' habitat. Thus, FWS relied heavily on them in its decisions not to list the species.

A. How FWS Uses CAs to Decide Listing Proposals: Focus on Slickspot
Peppergrass

While CAs can preclude listing in species with threats that are limited and defined,¹⁶⁵ many geographically widespread species are threatened by multiple, range-wide threats like habitat fragmentation.¹⁶⁶ Courts that have analyzed the uncertainty that surrounds a CA's ability to address multiple threats suggest that FWS must use CAs that demonstrate a track record and parties committed to implementation.¹⁶⁷ The listing agencies have struggled with this. In response, FWS has backed away from relying so heavily on CAs in decisions not list. For example, FWS has decreased its reliance on slickspot peppergrass CAs as a reaction to courts overturning reliance on other CAs.¹⁶⁸ Peppergrass has a diverse set of threats and a geographically larger range than the insects mentioned above.¹⁶⁹ Therefore, peppergrass is relevant to how FWS might handle CAs in other similar cases.

The peppergrass's ESA journey began when FWS first proposed to list the species as endangered in July of 2002.¹⁷⁰ After that proposal, every time FWS analyzed whether peppergrass should be listed, the agency discussed the CCAs signed after that 2002 proposal.¹⁷¹ FWS withdrew a listing proposal for the peppergrass in 2004 only months after BLM, Idaho, and other parties signed a CCA.¹⁷² However, a court

164. Revised 12-Month Finding for the Beaver Cave Beetle, 71 Fed. Reg. 59,711, 59,713-14. (Oct. 11, 2006).

165. See Reimer & Feldman, *supra* note 7, at 21-8.

166. See *id.*

167. *E.g.*, W. Watersheds Project v. Foss, CV 04-168-MHW, 2005 WL 2002473 (D. Idaho Aug. 19, 2005).

168. Withdrawal of Proposed Rule to List *Lepidium papilliferum* (Slickspot Peppergrass) as Endangered, 69 Fed. Reg. 3094 (Jan. 22, 2004).

169. Listing the Plant *Lepidium papilliferum* (Slickspot Peppergrass) as Endangered, 67 Fed. Reg. 46,441 (July 15, 2002).

170. *Id.*

171. Withdrawal of Proposed Rule to List *Lepidium papilliferum* (Slickspot Peppergrass) as Endangered, 69 Fed. Reg. at 3105.

172. Other parties include the Idaho Army National Guard ("IDARNG") and the Bureau of Land Management ("BLM") permit holders. FWS worked on the CCA with BLM for seven years before it was signed. This also includes Memoranda of Understandings ("MOUs") that private landowners signed with Idaho in addition to the agreement itself. These MOUs included over 17,000 acres of private land. *Id.*

found the withdrawal arbitrary and capricious, and FWS had to reconsider listing.¹⁷³ In 2007 FWS again withdrew a proposed listing, this time relying mostly on a manager panel and new information that the peppergrass population was not declining as much as previously thought.¹⁷⁴ However, a year later a federal court remanded FWS's decision.¹⁷⁵ FWS reopened public comment on the original 2002 listing proposal and finally, in 2009, FWS published a final rule to list the slick-spot peppergrass as threatened.¹⁷⁶

These decisions suggest FWS is decreasing its emphasis on CAs in listing decisions. First, in the initial 2004 withdrawal FWS relied heavily on CCAs. In particular, FWS concluded that the "conservation plans have contributed to reducing the overall threats to the species."¹⁷⁷ The major threat FWS addressed was habitat destruction.¹⁷⁸ In its analysis of that threat and several others, FWS mentioned specific CCA provisions it believed would partially reduce these threats. For instance, BLM committed to use no-till drills that would minimize soil disturbance in order to keep suitable habitat intact during wildfire restoration.¹⁷⁹ Additionally, FWS noted that the CCA applied an aggressive policy to suppress ninety percent of fires to less than 100 acres.¹⁸⁰ This doubled BLM's fire suppression efforts, which FWS concluded would contribute to substantially reducing fire's threat to peppergrass.¹⁸¹ These and other similar CCA measures were explicit reasons FWS withdrew its proposal to list the species.¹⁸²

FWS also expressly stated its support for CAs, noting that "we strongly support utilizing a collaborative conservation effort to address" threats to peppergrass.¹⁸³ FWS emphasized that "[w]e believe the implementation of the CCA[s] . . . adequately conserves [peppergrass] and precludes the need to list the species."¹⁸⁴ By citing the CCA's measures throughout its decision and using those measures in its analysis, FWS

173. *W. Watersheds Project v. Foss*, CV 04-168-MHW, 2005 WL 2002473 at *18 (D. Idaho Aug. 19, 2005).

174. *Withdrawal of Proposed Rule to List Lepidium papilliferum (Slickspot Peppergrass)* 72 Fed. Reg. 1622 (Jan. 12, 2007).

175. *Listing Lepidium papilliferum (Slickspot Peppergrass) as an Endangered Species Throughout its Range*, 74 Fed. Reg. 52,014, 52,014 (Oct. 8, 2009).

176. *Id.* After publishing several proposed rules for critical habitat, FWS's next step is to establish critical habitat.

177. *Withdrawal of Proposed Rule to List Lepidium papilliferum as Endangered*, 69 Fed. Reg. at 3105.

178. *Id.* at 3105–08.

179. *Id.* at 3107.

180. *Id.* 3094, 3108.

181. *Id.*

182. *Id.* at 3116. On a broader level, FWS also noted that the CCA applied to ninety-seven percent of peppergrass habitat and thus its measures would cover almost all the plant's habitat. FWS also did a detailed PECE analysis on the CCA to explain why it was certain to be implemented and certain to be effective. *Id.* at 3113–16.

183. *Id.* at 3102.

184. *Id.*

made it obvious that it relied on the CCA to withdraw this listing. FWS even used a PECE analysis to find the efforts would be effective; thus FWS choose to base much of its listing withdrawal on the CCA.¹⁸⁵

Nevertheless, the *Western Watersheds* court remanded the withdrawal to FWS. Three years later FWS stepped back from relying heavily on CAs when it choose not to consider some of the CCA's measures in the threat analysis.¹⁸⁶ For example, FWS did not consider the CCA's unimplemented measures.¹⁸⁷ However, the agency still "strongly encouraged" conservation measures because "they can contribute to maintaining or improving" the peppergrass's status.¹⁸⁸ FWS instead did not list the plant because of new information, including data that habitat degradation was not impacting specific slickspot "microsites."¹⁸⁹ Thus, the agency still mentioned some of the CCA's measures and encouraged CCAs, but it did not rely on the CCA.¹⁹⁰

By 2009 FWS discovered that wildfire and nonnative plants were threats too large for the CCA to solve quickly and listed the plan as threatened. FWS therefore focused its risk analysis on these now significant threats.¹⁹¹ The FWS still acknowledged that the CCA had measures that decreased adverse habitat effects: for instance that educating the public, vehicle wash points, and weed control would reduce the effects of invasive plants.¹⁹² However, despite these positive impacts, new information showed a statistically significant negative association between peppergrass, fire, and non-native plants.¹⁹³ Because these threats were of even greater concern, FWS listed the species despite the CCA.¹⁹⁴ Although most measures in the CCA were implemented at that time, many still had not proven effective enough to offset the plant's

185. *Id.* at 3105. Because this decision took place so closely after PECE was created, FWS may have used it to test whether PECE made reliance on unproven conservation agreements possible.

186. *See* Withdrawal of Proposed Rule to List *Lepidium papilliferum* (Slickspot Peppergrass), 72 Fed. Reg. 1622.

187. *Id.* at 1630.

188. *Id.* at 1630.

189. *Id.* at 1622. Microsites are small, visually distinct areas of high sodium content and several different layers of clay. These unique areas are the only place this plant lives. *Id.* at 1624. FWS also noted that new data indicated the plant's population numbers correlated with precipitation and that was one reason for the decline. *Id.* at 1622.

190. One example where the FWS expressly discussed the CCAs was when it mentioned the CCA's measures applied to ninety-six percent of the land and that the BLM had set wildfire goals in the CCA. *Id.*

191. Listing *Lepidium papilliferum* (Slickspot Peppergrass) as an Endangered Species Throughout its Range, 74 Fed. Reg. 52,014 (Oct. 8, 2009) (to be codified at 50 C.F.R. pt. 17).

192. *Id.* at 52,033.

193. *Id.* at 52,035.

194. *Id.* at 52,035-36.

significant threats.¹⁹⁵ The CCA was therefore limited in its ability to reduce long-term habitat degradation, which FWS probably recognized by not referring to CCA much in the decision. Although FWS called conservation efforts “a positive step” that could reduce the severity of some threats,¹⁹⁶ FWS recognized that those efforts were not enough to adequately manage threats. Instead, this decision implies that CAs are now just a step in the right direction and difficult to use to preclude listing in species with a wide range of threats.

Thus, FWS appears to be moving away from relying on CAs in some listing decisions. FWS’s move may be of its own initiative—perhaps the agency recognizes that CAs are not always multi-dimensional enough to solve multiple threats over a large geographic range. Peppergrass’s threats may have at first appeared to be quickly solvable by changing grazing practices and quickly putting out wildfires, but over time FWS got enough information to discover that threats to the plant were more complex. However, FWS’s change in its three peppergrass listing decisions is more likely a reaction to the *Western Watersheds Project v. Foss* court’s language: that while CAs are laudable endeavors, agreements used in listing must be implemented earlier.¹⁹⁷ FWS often must wait years for proof that CAs can reduce threats to a species, which means CAs will not have the immediate impact that some hope for. However, FWS has used CAs in another way to keep species off the endangered species list.

B. CCAs in the Candidate Notice of Review: New Possibilities?

CCAs also influence listing decisions in a less obvious way. Instead of only using CAs in listing decisions, FWS uses CAs to change a candidate species’ Listing Priority Number (“LPN”). LPNs indicate a species’ priority on the candidate list and are assessed annually in the FWS’s Candidate Notice of Review (“CNOR”). Species with a lower LPN have the highest listing priority. Each species is assigned an LPN numbered one through twelve, and species with an LPN of one are the first in line

195. *Id.* at 52,043.

196. *Id.*

197. *See* *W. Watersheds Project v. Foss*, No. CV 04-168-MHW, 2005 WL 2002473, *9 (D. Idaho Aug 19, 2005). (The court stated it did “not want to discourage or undermine conservation agreements undertaken outside the auspices of the ESA,” and found the CCA’s efforts “laudable.” The court “commended the efforts and hard work undertaken by the many different parties” who developed the CCA. Also, CCAs “can be very effective in arresting the decline of a species in need of monitoring.” Although the court recognized the utility of CCAs, the court also made several suggestions. First, it was appropriate to implement CCAs when a species is a category two candidate species. Second, the court pointed out that “this case demonstrates [conservation agreements] should be implemented before a species stands so close to the precipice of extinction.” The court finished by expressing its hope that the CCA conserved peppergrass “within the mandate of the ESA” and could “serve as a solid foundation upon which to build additional protection provided by the ESA.” In the end, the court’s review of CCAs under the ESA was mixed.)

for the endangered species list.¹⁹⁸ When FWS changes a species' LPN, the agency effectively moves a species further down the candidate list and gives the species more time before it will be listed.¹⁹⁹ FWS has often relied on CAs in moving species down to a lower priority on the candidate list.

Species are added to the candidate list yearly, which makes it important to conserve species without listing them. Every year some candidate species are either listed or removed from the list, but in 2011 there were still over 200 species on the candidate list.²⁰⁰ Because a candidate species' LPN influences when it will be listed, assigning a species a lower priority LPN can be almost as important as a decision not to list. Indeed, a higher LPN postpones the ESA's substantive provisions. The hope of avoiding these provisions may give FWS incentive to emphasize the importance of CAs in the CNOR. FWS indicated this when it stated in the 2011 CNOR that sometimes implementing "strategically designed conservation efforts . . . culminates in making listing unnecessary" for candidate species.²⁰¹

The agency probably emphasizes CCAs for several reasons. First, using CCAs in the CNOR avoids expensive and time consuming legal battles that may occur when FWS decides not to list a species. Second, changing a species LPN is preferable because it does not require a complex and time consuming PECE analysis. Third, using CCAs to shuffle a species' candidate list priority gives landowners greater incentive to enter into CCAs. Even if it is difficult to use CCAs to get a species off the candidate list, a CCA can give landowners more time to prepare for a species' ultimate ESA listing.

Sometimes CCAs are the main reason for raising an LPN and thus lowering listing priority. For example, the FWS raised the Page Springsnail's LPN from a two up to an eight based mainly on a CA.²⁰² FWS originally set the snail's LPN at a two because habitat modification was an imminent and high magnitude threat due to problems from agriculture, ranching, recreation, and groundwater withdrawal.²⁰³ While the Arizona Game and Fish Department had made progress on a CCA,

198. Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098, 43,102-04 (Sept. 21, 1983).

199. *Id.*

200. Review of Native Species That Are Candidates for Listing as Threatened or Endangered, 76 Fed. Reg. 66,370, 66,372 (Oct. 26, 2011).

201. *Id.* at 66,386-87.

202. See Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 72 Fed. Reg. 69,034, 69,040 (Dec. 6, 2007) [hereinafter Review of Native Species that Are Candidates for Listing as Endangered or Threatened].

203. *Id.*

at the time the agency could not prove the agreement would be effective.²⁰⁴ Thus, the FWS left the LPN at two for two years while the CCA was drafted and finalized.²⁰⁵ The next year FWS relied on the CCA to decrease the magnitude of threats to the species to moderate.²⁰⁶ Because the agreement was partially implemented, would restore the springs overall, and the Forest Service recently purchased another piece of habitat, the agency changed the LPN from a two to an eight.²⁰⁷ This was a dramatic move in the snail's listing priority, and a CCA was responsible.

FWS also lowered the Southern Idaho Ground Squirrel in priority based partly on CCAs. The ground squirrel had a high priority when it was added to the candidate list in 2002.²⁰⁸ At that time the FWS assigned an LPN of three because invasive plants had degraded the squirrel's historic habitat.²⁰⁹ Two years later FWS increased the LPN from a three to a six based on several conservation efforts.²¹⁰ One effort had squirrels at the Weiser Golf Course in Idaho captured and released on lands covered by a CCA.²¹¹ In addition, scientists undertook new research efforts.²¹² The FWS observed, "there is now some commitment by various agencies and parties to initiate and implement conservation actions on behalf of the southern Idaho ground squirrel"; this new commitment coupled with the CCA made threats to the squirrel non-imminent, causing the LPN change.²¹³ The squirrel's LPN changed again in 2005 and CCAs played a role, although the discovery of a new population also was a factor.²¹⁴ By changing both the Ground Squirrel's and the Springsnail's listing priority based at least partially on CCAs, the FWS shows its willingness to use CCAs to shuffle species down the candidate list.²¹⁵ Because FWS appears to do this with relative ease, CCAs may have more impact on where a species stands on the candidate

204. *Id.*

205. Review of Native Species That Are Candidates for Listing as Endangered or Threatened, 74 Fed. Reg. 57,804, 57,840 (Nov. 9, 2009) (to be codified at 50 C.F.R. pt. 17).

206. Review of Native Species That Are Candidates for Listing as Endangered or Threatened, 75 Fed. Reg. 69,222, 69,226 (Nov. 10, 2010) (to be codified at 50 C.F.R. pt. 17).

207. *Id.*

208. Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of findings on Recycled Petitions; Annual Description of Progress on Listing Actions, 67 Fed. Reg. 40,657, 40,666 (June 13, 2002) (to be codified at 50 C.F.R. pt. 17) [hereinafter Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened].

209. *Id.*

210. Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened, 69 Fed. Reg. 24,876, 24,881 (May 4, 2004) (to be codified at 50 C.F.R. pt. 17).

211. *Id.*

212. *Id.*

213. *Id.*

214. Endangered and Threatened Wildlife and Plants; 12-Month Findings on Re-submitted Petitions To List the Southern Idaho Ground Squirrel, Sand Dune Lizard, and Tahoe Yellow Cress, 69 Fed. Reg. 77,167 (Dec. 27, 2004) (to be codified at 50 C.F.R. pt. 17).

215. The FWS has relied on CCAs for other Candidate species. *See e.g.*, Tahoe Yellowcress, Guadalupe Fescue, and Washington Ground Squirrel.

list than in keeping the species from being listed. Thus, the uncertainty surrounding CCAs means the listing agencies now rely on those agreements in the CNOR.

However, FWS does not seem to shift species arbitrarily. FWS still assesses the conservation impact of each agreement and does not rely on every CCA to adjust LPNs. In some instances FWS recognized that while agreements make a positive impact on some threats, the CA was not enough to give a species a lower listing priority. For instance, in 2005 the FWS changed the Louisiana Pine Snake's LPN from a five to an eight based primarily on a 2003 CCAA that protected the snake's habitat on federal land and reduced the magnitude of threats to moderate.²¹⁶ However, FWS recognized that the threat of private land habitat degradation remained, and this threat and others were still imminent.²¹⁷ When the FWS re-evaluated the Pine Snake it changed the snake's LPN back to a five.²¹⁸ While FWS noticed the CCA's positive effects on the snake's long-leaf pine ecosystem, FWS confronted the CCA's limits. FWS stated that "while conservation actions have produced needed results, they have not yet adequately reduced threats to the species, particularly on private land."²¹⁹ This left the threat's magnitude high and forced the agency to give the snake a lower LPN in spite of the CCA's success. Although FWS relies on CAs to change a species' priority number, the agency still considers the overall effect of the agreement.²²⁰

FWS's dependence on CAs is not absolute, but the agency definitely considers CAs in its annual candidate reviews. FWS should continue to give updates on these efforts because the agency and others are making huge financial and time investments in the agreements. Indeed, with courts making it difficult to rely on CAs in listing and FWS itself moving away from relying on CAs in listing decisions, relying on CCAs in CNOR is the next logical place for CAs to impact listing.

This is exactly where the sage grouse is. After FWS found listing the grouse was "warranted but precluded," the agency added the sage grouse to the Candidate list.²²¹ FWS assigned it an LPN of eight because the sage grouse faced threats that were only of moderate magnitude and

216. Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened, 70 Fed. Reg. 24,870, 24,894 (May 11, 2005).

217. *Id.*

218. Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened, 71 Fed. Reg. 53,756, 53,762 (Sept. 12, 2006).

219. Review of Native Species That Are Candidates for Listing as Endangered or Threatened, 72 Fed. Reg. 69,034, 69,039 (Dec. 6, 2007).

220. Other species that present similar examples include the Columbia spotted frog, Eastern Massagua, and the Relict Leopard Frog.

221. Twelve-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910 (Mar. 23, 2010).

were imminent.²²² The threats were habitat fragmentation and a lack of regulatory mechanisms. FWS explained that these threats were only moderate because the level of each threat varied widely across the sage grouse's range.²²³ For example, oil and gas development is prevalent in the grouse's eastern range, while agricultural development is more common in the western part of the range.²²⁴ This all added up to the sage grouse getting a much lower priority LPN than species with LPN's of two, which kept the sage grouse behind many other species in priority. However, those involved in sage grouse conservation efforts cannot passively count on the CNOR to keep the bird off the list. They must instead quickly implement what courts require in order to avoid listing the grouse under the ESA.

V. HOW COULD CAS IMPACT LISTING THE SAGE GROUSE?

Some federal agencies have already taken steps to protect the sage grouse. Most sage grouse habitat is on BLM land, and thus BLM has been the federal agency developing most of the grouse's conservation measures. BLM issued two instructional memorandum ("IM") with new management plans for the sage grouse.²²⁵ The IMs are interim policies that add to current federal and state efforts to protect the grouse.²²⁶ These policies aim to mitigate adverse effects on the grouse and its habitat while BLM adds long-term measures into its resource management plans.²²⁷ Whether these efforts are protective enough to keep FWS from listing the sage grouse is uncertain.

Wyoming took the lead in state conservation measures when its governor created a Sage Grouse Implementation Team in 2007 to develop a plan that promoted both sage grouse conservation and the economy.²²⁸ The team developed "core areas," which are areas where sage grouse are the dominant interest over other development, including energy resources. These core areas cover fourteen million acres of state land that make up eighty-two percent of Wyoming's sage grouse habi-

222. *Id.* at 14008.

223. *Id.* at 14008-09.

224. *Id.*

225. See Bureau of Land Mgmt., Instructional Memorandum No. 2012-043, GREATER SAGE-GROUSE INTERIM MANAGEMENT POLICIES AND PROCEDURES (Dec. 22, 2011) [hereinafter GREATER SAGE-GROUSE INTERIM MANAGEMENT]; Bureau of Land Mgmt., Instructional Memorandum No. 2012-044, BLM National Greater Sage-Grouse Land Use Planning Strategy (Dec. 27, 2011).

226. Greater Sage-Grouse Interim Management, *supra* note 225, at 14. Some BLM past efforts the IMs builds upon are its National Sage Grouse Conservation Strategy (which declared the sage grouse as a "sensitive species" and outlines how the agency would work within its multiple use mandate to manage land and conserve the grouse), and the 2010 IM requiring land managers to withhold and defer some leases on priority habitat; state offices are also publishing maps, revising RMPs, etc. Schulte, *supra* note 73, at 59.

227. GREATER SAGE-GROUSE INTERIM MANAGEMENT, *supra* note 225, at 14.

228. Schulte, *supra* note 73, at 59.

tat.²²⁹ Permit applicants and the BLM both must determine that new activities will not threaten the grouse population.²³⁰ In 2010 the Governor issued a five-year executive order that includes more conservation measures Wyoming will take to protect sage-grouse.²³¹ Examples include restrictions on development and prioritizing CCAs, which the state has done in developing a comprehensive CCAA for ranchers.²³² Wyoming maintained its core-areas strategy through a governor change in 2011,²³³ so the state continues to protect sage grouse. Idaho is among other western states with similar programs.

Previously these efforts might have been enough to keep the sage grouse on the candidate list for some time. After all, the candidate list had 305 species in 2009, and most of those species had higher priority LPNs than the grouse.²³⁴ However, a recent settlement agreement between FWS and WildEarth Guardians makes this approach unlikely to be successful.²³⁵ That settlement requires FWS to list species on the candidate list within certain time frames, and the sage grouse was one of over 200 species included.²³⁶ FWS also entered into a similar settlement with the Center for Biological Diversity that covered additional species.²³⁷ Now FWS must act and either propose listing or a not-warranted finding for the sage grouse by 2015.²³⁸ This makes it more important for conservation efforts to meet the standard of certainty that courts require. Thus, the question remains: Can current efforts and CAs keep the grouse off the endangered species list?

229. Scott Streater, *Wyo. wind power boom could drive sage grouse to endangered list*, N.Y. TIMES (June 4, 2009) available at <http://governor.wy.gov/Documents/Sage%20Grouse%20Executive%20Order.pdf>.

230. *Id.*

231. Wy. Exec. Order No. 2011-5, available at <http://www-wsl.state.wy.us/sis/wydocs/EO2011-05.pdf>

232. *Id.*

233. *Wyoming sticks with sage grouse 'core areas' strategy*, BILLINGS GAZETTE, June 3, 2011, at 1, available at http://billingsgazette.com/news/state-and-regional/wyoming/article_14651e6a-8e29-11e0-9a37-001cc4c002e0.html.

234. Kristina Alexander & M. Lynne Corn, Cong. Research Serv., R40865, Sage Grouse and the Endangered Species Act 5 (2010).

235. Joint Motion for the Approval of a Settlement Agreement, WildEarth Guardians v. Salazar, (No. 10-01174) (D. D.C. July 12, 2011), available at http://www.fws.gov/endangered/improving_ESA/joint_motion_re_settlement_approval_FILE_D.PDF

236. *Id.*

237. Stipulated Settlement Agreement, Center for Biological Diversity v. Salazar, (No. 10-CV-0230), available at http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf.

238. *Id.*

A. Current Conservation Efforts

Although the push for conservation efforts is encouraging, FWS will probably still list the sage grouse because the efforts have not yet proved they can protect the species. Fully addressing widespread and diverse threats is difficult, and courts likely will not accept a decision not to list the species based on CAs without a track record that were created by parties that have not demonstrated their ability to effectively implement their agreements.²³⁹ Thus, state and federal agencies and private landowners must quickly create effective agreements so they can demonstrate that these conservation efforts actually work.

The sage grouse faces many threats over a large geographic range, which makes it almost impossible for broad CAs and regulations to address enough threats to help the species. Instead, large-scale CAs and management plans are most effective as building blocks for smaller, local efforts that target specific threats to a specific population. Sage grouse conservation efforts should be evaluated with these problems in mind.

One example of a sage grouse conservation effort is the BLM's IMs. As temporary federal land use guidance, these IMs are evaluated under the "adequate regulatory mechanisms" factor. While these IMs are not currently part of a CA, an effective CA will probably want to include BLM land because it occupies so much of the sage grouse's range. In fact, the large amount of BLM land in the grouse's range is part of the reason FWS was still reluctant to rely on CAs implemented under a larger regulatory policy, like Wyoming's "core areas" program. While FWS found Wyoming's plan was a substantial regulatory protection, the agency also said the plan did not do enough to eliminate threats and benefit the grouse because the policy applied only to state lands that were scattered into small sections of habitat.²⁴⁰ BLM published these IMs to the regions in late 2011, so any conservation actions are recently implemented.

Also, BLM has few tangible actions in its Management IM. Most of the measures are broad, in part because the IMs are to apply range-wide to all BLM field offices. Field offices are responsible for taking more specific actions consistent with these nationwide goals. However, the lack of specific actions makes it difficult for FWS to rely on these measures right now. For example, the IM says BLM must evaluate land treatments in a landscape-scale context to address habitat fragmentation and coordinate land treatment with adjacent landowners as part of vegetation management.²⁴¹ While these efforts are more specific than just evaluating land treatment in general, they still do not say how to "eval-

239. *See supra* pp. 10–15.

240. Twelve-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910, 13,974 (Mar. 23, 2010).

241. GREATER SAGE-GROUSE INTERIM MANAGEMENT, *supra* note 225, at 2 (emphasis added).

uate” or “coordinate.” The field offices make this decision, which leaves it largely up to their discretion. Actions could thus vary widely in effectiveness depending on how proactive the office is.

Additionally, some of the IM measures lack a strong commitment to implement because they are followed by language that puts the measure directly within agency discretion. For instance, the IM also requires BLM to “implement management actions, *where appropriate*, to improve degraded Greater Sage-Grouse habitats” encroached by woodland species.²⁴² The IM therefore tells BLM to do something, and then tells the agency not to implement actions if those actions are not “appropriate.” While measures like these are often necessary for multiple-use land planning, too many measures that come within agency discretion weaken BLM’s commitment. This makes it harder for FWS to find these regulations are certain enough to manage threats and preclude listing.

In contrast, other measures seem more enforceable. For example, right-of-way projects approved through sage grouse habitat must “cumulatively maintain or enhance” this habitat, and if the project does not, BLM must continue to work towards mitigation unless the Director decides otherwise.²⁴³ While the agency can decide what cumulatively maintain means, this definition can be supported with scientific data and analysis—which makes it more defined. Also, the IM for BLM’s land use planning strategy has mandatory language, requiring that “BLM must consider all applicable conservation measures when revising or amending its RMPs” in grouse habitat.²⁴⁴ The land use IM then provides a list of conservation measures BLM can take,²⁴⁵ which gives field offices direction in making their Regional Management Plans (“RMPs”) comply with the national plan. While BLM’s IMs appear to be headed in the right direction because they provide some specifics and enforceable measures, future CAs must take some of these ideas and then make them more specific and enforceable.

Wyoming is also implementing a CCAA that proposes actions specific to threats and tailored to each landowner’s property. This CCAA covers less land than BLM’s IMs, which makes it easier to address threats specifically. The CCAA gives ranchers choices on how to proceed for multiple threats to sage grouse. For example, those with infrastructure on their property that draws in predators can choose to convert their pumps and windmills to solar energy, avoid building within 0.6

242. *Id.* at 3.

243. *Id.* at 5.

244. Bureau of Land Mgmt., Instructional Memorandum No. 2012-044, BLM National Greater Sage-Grouse Land Use Planning Strategy (Dec. 27, 2011).

245. *Id.* at Attachment 1.

miles of breeding leks, or bury power lines.²⁴⁶ In addition, if someone owns property where grazing alters the grasses sage grouse need, the CCAA requires ranchers to develop a plan with a rangeland specialist and implement this plan within eighteen months.²⁴⁷ This measure requires a schedule and specifies a person the property owner will work with; thus it describes a specific and tangible action. These conservation measures are designed specifically for threats to sage grouse and thus are more likely to protect sage grouse. The more likely that a CCA protects against specific threats, the more likely FWS could eventually rely on it in a listing decision. Therefore Wyoming is taking steps in the right direction.

Even after implementing specific efforts, FWS needs more than anecdotal data. Only time can prove whether conservation efforts are actually removing threats to the sage grouse. Even showing that a CA works for several years in one location may not even be enough. Perhaps the sage grouse population in that area has stabilized because the weather has been conducive to native plants for several years. The results may not be the same when balanced against a drought year. The sooner these types of efforts are implemented, the more likely FWS will have enough data to prove the agreements are effective and withstand any court challenge.

B. Idaho's Conservation Efforts

Recently Idaho added to its conservation efforts. The state created a voluntary statewide management plan in 2006 that identified nineteen threats to sage grouse and provided a toolbox of conservation measures to address these threats.²⁴⁸ The plan centered on Local Working Groups ("LWG"), which are local groups that develop plans for smaller chunks of habitat. The plan's purpose was to provide guidance, tools, and resources so these groups could develop new plans.²⁴⁹

Idaho's Governor created a Sage-Grouse Task Force in March 2012 to develop a state-specific plan that could become a regulatory mechanism on federal land.²⁵⁰ The Governor's order recognized that this was necessary to keep the bird off the ESA's list.²⁵¹ In September of 2012 the

246. Fish and Wildlife Service, Greater Sage Grouse Candidate Conservation Agreement for Ranch Management Issue 4, 2 (Apr. 2011).

247. *Id.*

248. IDAHO FISH & GAME, CONSERVATION PLAN FOR THE GREATER SAGE-GROUSE IN IDAHO iii (July 2006), available at <http://fishandgame.idaho.gov/public/wildlife/sageGrouse/conservPlan.pdf>. The 2006 plan replaced the 1997 plan and "provides the overarching scientific and management framework within which the completed LWG plans will function."

249. *Id.* at iv.

250. *Id.* Exec. Order No. 2012-02, available at <http://fishandgame.idaho.gov/public/wildlife/SGtaskForce/execOrder.pdf>. The Governor appointed fifteen individuals from a variety of interests. *Id.* at 2.

251. *Id.*

state submitted this management plan to BLM in hopes that this would become part of BLM's land use plans and thus enforceable.²⁵² Idaho's objective was to address specific points from FWS's 2010 warranted decision. The plan states that "[t]he Service's 2010 decision cited lack of regulatory mechanisms and habitat loss as the primary drivers for its decision."²⁵³ Accordingly, Idaho's plan proposed regulatory mechanisms addressing fire, invasive species, and infrastructure.²⁵⁴ The plan also includes an emergency clause as a "regulatory backstop" to account for unexpected events that might take the population into dangerously low levels.²⁵⁵ The plan only applies to federal land in Idaho.²⁵⁶

Idaho's plan takes a similar approach to Wyoming by structuring its goals into different geographic areas called Sage Grouse Management Areas. These areas are divided into three zones that all have slightly different plans for how to tackle threats to the sage grouse: Core Habitat Zones, Important Habitat Zones, and General Habitat.²⁵⁷ The 9.7 million acres of Core and Important Zones contain over ninety percent of the breeding leks in Idaho.²⁵⁸ The General Habitat Zone contains 5.4 million acres, but only ten percent of Idaho's breeding sage grouse population.²⁵⁹ Idaho's plan thus uses population information to enact stricter protections in the Core and Important areas, which ensures that tougher restrictions are aimed at areas where sage grouse need them the most. The plan also allows the state to keep land open to development where disruptive activity would be less likely to put a substantial dent in the grouse's population.

Idaho's plan lists actions for each threat and states how those actions address the threat. Overall the plan takes a broad approach with the idea that LWG's will decide how to accomplish these conservation efforts on the local level.²⁶⁰ Some threats are fairly easy to solve and the plan probably can greatly reduce them without any additional effort.

252. Federal Alternative Plan of Governor "C.L." Butch Otter for Greater Sage Grouse Management in Idaho (Sept. 5, 2012), *available at* [http://fishandgame.idaho.gov/public/wild life/SGtaskForce/alternative.pdf](http://fishandgame.idaho.gov/public/wild%20life/SGtaskForce/alternative.pdf) [hereinafter Federal Alternative Plan]. The Office of Species Conservation drafted this plan after the Sage Grouse Task Force's recommendation. *Id.* The draft plan was available for public comment in July 2012. Draft Federal Alternative Plan of Governor "C.L." Butch Otter for Greater Sage Grouse Management in Idaho (June 29, 2012) 4, *available at* <https://fishandgame.idaho.gov/content/sites/default/files/CLBO-Draft-Sage-Grouse-Alternative.pdf> [hereinafter Draft Federal Alternative Plan].

253. Federal Alternative Plan, *supra* note 252, at 4.

254. *Id.* at 5.

255. *Id.* at 9.

256. *Id.* at 3.

257. *Id.* at 2.

258. *Id.* at 23.

259. *Id.*

260. *See id.* at 10.

For example, the plan proposes to fit a ramp on all water troughs, which will allow trapped sage grouse to climb out of the trough.²⁶¹ This is a threat with a simple solution. However, other threats like grazing are more complicated because they require widespread management and there isn't much data available on the proper approach to take.²⁶² These more complex threats usually can't be fixed with a broad "one-size fits all" solution. In addition, limited financial resources may require targeting certain areas. Idaho utilizes its geographic designations to address difficult threats like these.

Fire is one threat where the plan requires different approaches in different habitat areas. In Core Zones the goal is to decrease BLM response times by twenty-five percent.²⁶³ Important Habitat Zones have a slightly smaller goal to decrease most response times by fifteen percent.²⁶⁴ Both zones allow only human and structural protection to come before sage grouse habitat.²⁶⁵ In contrast, in General Habitat Zones "efforts should be emphasized, recognizing that other local, regional, and national fire suppression priorities may take precedent."²⁶⁶ Thus, in General Zones fire suppression on behalf of the sage grouse is not nearly as important as it is in other zones. While variation in fire suppression goals across habitats seems logical, it is only the beginning of adequately addressing fire as a threat.

Indeed, variation between habitat areas is how Idaho hopes to focus resources on the wide range of threats to sage grouse populations while balancing the State's other interests. However, currently Idaho's plan still does not address threats with enough certainty to make it an adequate regulatory mechanism, or for it to have enough certainty as a "state or local effort" under PECE. Idaho's approach has the same problems that courts found with other CAs. Right now Idaho does not have much data on how each factor specifically affects the sage grouse. Idaho Fish and Game ("IDFG") has conducted lek counts and other groups have done research, but Idaho has limited funding and manpower.²⁶⁷ Even if BLM approves Idaho's plan, any measures the agency implements will be recently implemented, and probably will not have had an opportunity to demonstrate any improvement in sage grouse populations by the 2015 listing deadline.

261. *Id.* at 48.

262. *Id.* at 12–18.

263. *Id.* at 31. Interestingly, the Draft plan had a more specific goal to limit response time to .5 hour and keep the fire to 1,000 acres in Critical Habitat Zones. *Draft Federal Alternative Plan*, *supra* note 252, at 31. Intermediate Habitat Zones had a slightly longer response time of 1 hour, and wanted to keep the size of the fire to 2,000 acres. *Id.* These goals are not present in the final plan. *Federal Alternative Plan*, *supra* note 252.

264. *Id.* at 32.

265. *Id.* at 31, 37.

266. *Id.* at 42.

267. IDAHO FISH & GAME, CONSERVATION PLAN FOR THE GREATER SAGE-GROUSE IN IDAHO, *supra* note 248, at 5-9.

Also, the measures in Idaho's plans do not demonstrate the state and federal commitment to implement that plan. For example, the fire suppression guidelines sound helpful, but Idaho gives no concrete suggestion for how BLM will get the funding and manpower to cut down on its response time by twenty-five percent. The final plan suggests new fire centers and fire breaks²⁶⁸ but it does not outlaw fireworks in Core Habitat Zones, or offer a plan to increase public outreach on the effects of fire on sage grouse. All of these problems indicate that the plan's ability to be implemented might not be strong, and the commitment of those who are implementing may not be certain. Thus, while Idaho's plan offers more targeted efforts to save the sage grouse, it still is too uncertain to rely upon in listing under the ESA.

However, some aspects of the plan are definite improvements over previous plans. Indeed, these improvements could eventually reach the level of certainty courts require with enough time to prove their effectiveness. For example, the plan includes a three-year assessment of progress towards threats.²⁶⁹ An assessment will ensure that the listing agency has the data it needs to prove the plan is working, and it is a defined commitment that the parties are held to. The plan also explains its method for scientific monitoring so that the parties will know exactly how to assess these threats and gather consistent data.²⁷⁰ Idaho's plan also has some specific and measureable goals. For instance, the plan seeks to limit habitat loss due to infrastructure development to ten percent.²⁷¹ If a ten-percent loss occurs, then IDFG, the Idaho Office of Species Conservation, and the BLM will assess causal factors of decline and "assess" Best Management Practices.²⁷² While IDFG probably lacks funding and the plan does not mention where the agency would get the money, this is a binding commitment that would force Idaho and the BLM to act should the ten percent habitat loss occur. Idaho's Governor has even said that if BLM incorporates Idaho's plan into its RMPs, then he will by EO create a Task Force to ensure it is implemented.²⁷³

In general, Idaho's current conservation efforts are moving in the right direction by working quickly to directly address specific threats and implement tangible goals. However, courts require some measure of certainty before FWS can base a decision not to list on conservation efforts. Current sage grouse efforts still lack the strong track record and commitment to implement that agencies need. These efforts are an ef-

268. Federal Alternative Plan, *supra* note 252, at 32.

269. *Id.* at 7 (conducted by IDFG as lead, Idaho Office of Species Conservation and federal agencies also involved).

270. *Id.* at 8.

271. *Id.* at 7.

272. *Id.*

273. *Id.* at 19.

fective framework, but they must be even more specific, enforceable, and have more supporting data before FWS can find the efforts support a decision not the list the sage grouse.

To do this Idaho needs to ensure that smaller and more specific plans are in fact promulgated under its Local Working Groups (“LWGs”). LWGs need to quickly add to their conservation efforts and sign programmatic CAs to make these efforts enforceable. While nine working groups have plans in place, few have signed CAs with definite and enforceable actions.²⁷⁴ Idaho also needs the data to prove LWG’s address enough threats to provide the certainty that courts require. Idaho’s Federal plan does not create any efforts on state and private land, which means that that the state, LWGs, and others need to fill the gap with effective conservation agreements and regulations. But time is running out. Because the FWS must make a decision on listing by 2015, Idaho’s plan probably cannot accomplish these things in time.

VI. CONCLUSION

Federal, state, and private efforts to protect the sage grouse demonstrate that CAs are important to at-risk species. Not only can CAs prevent a species from declining towards extinction, but they are an important financial tool that allows FWS to defer costs to landowners and others with greater financial resources, which in turn brings quality data and conservation suggestions. For example, the USDA has contributed \$21.8 million towards sage grouse conservation efforts for farmers and ranchers in Wyoming for forty different measures, including tearing down collision-prone fences.²⁷⁵ Power companies looking at renewable energy, mining companies looking to preserve opportunity on public lands, and others with a financial interest in keeping the bird off the list often have financial resources and can do a better job funding research, data collection, and conservation efforts than FWS. Thus, FWS and others do not want to give up on CAs because they so important to at-risk species.

However, courts have required that parties demonstrate commitment to implement CAs and have supporting data in order to preclude

274. Sage-grouse Advisory Committee Technical Assistance Team, *Idaho Sage-grouse Local Working Groups: Statewide Annual Report 2012*, (Mar. 29, 2013), <http://fishandgame.idaho.gov/public/wildlife/sageGrouse/LWGannualReport12.pdf>, at 3. The West-Central Sage Grouse Local Working Group developed a programmatic CCAA with FWS. This programmatic agreement sets out basic threats and conservation measures that address those threats. Once in place, IDFG became the programmatic permit holder, which means the agency can sign individual site-specific plans property owners. IDFG can do this as long as the measures included are consistent with the CCAA. Idaho Dept. of Fish & Game & Fish & Wildlife Serv., Candidate Conservation Agreement with Assurances for Greater Sage-grouse in the West Central Planning Area, (Feb. 2010), <http://www.fws.gov/idaho/ConservationPartners/WestCentralIdahoSagegrouseCCAA.pdf> at 6.

275. Amanda Peterka, *USDA to help Wyo. landowners protect sage grouse*, E & E NEWS, Aug. 11, 2011 at 1, available at www.eenews.net/eenewspm/print/2011/08/11/7.

listing a species. FWS has thus moved away from relying on CAs in listing because CAs usually cannot fully accomplish these requirements for species that occupy larger areas and face diverse threats. States have noticed the limits, problems, and successes of existing conservation efforts. Idaho's push to create a sage grouse plan that is enforceable and targets specific threats to the sage grouse is a direct result of the fact that previous conservation efforts are not providing the certainty needed under the ESA. Idaho's Sage Grouse Task Force even drafted their plan in response to federal officials telling the Governor that voluntary efforts would not be enough.²⁷⁶

Unfortunately, Idaho and other state efforts may have started too late. While Idaho's 2006 plan was a good start, it was entirely voluntary. Idaho's recent federal alternative incorporates the 2006 plan and requires additional conservation measures, but is still too broad and thus cannot completely address threats on a local level. Instead, LWGs must find funding sources, create tangible actions, continue gathering data, and identify other commitments that can convince FWS and the courts that a plan to protect sage grouse meets the ESA's risk assessment. However, species spread over a large area often have diverse threats that require larger agreements followed up with more local and specific CAs. Agreements and detailed plans often do not happen overnight, and it takes years to gather enough data to demonstrate conservation measures are successful. Since the sage grouse listing decision must be made by 2015, Idaho's plan probably does not give local groups enough time to accomplish this. Thus, Idaho and FWS must face a tough reality: these conservation efforts are a little too late to keep the sage grouse off the endangered species list.

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276. Rocky Barker, *Idaho Pushes for its own Plan to Protect Sage Grouse*, *ADVOCATES FOR THE WEST*, (Feb. 14, 2012) http://www.advocateswest.org/sites/default/files/bulletin/Press%20on%20SageGrouse%20Protections/ID%20sage%20grouse%20protection%20plan_Rocky%20Barker_20120214.pdf, at 1.

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