

**CANDIDATE CONSERVATION AGREEMENTS AND ESA
LISTING DECISIONS: UNDERLYING INCENTIVES THAT
DRIVE STAKEHOLDER BEHAVIOR**

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INTRODUCTION

When Congress passed the Endangered Species Act (ESA) in 1976, it created a binary statutory system of listed and unlisted species.¹ Listed species received certain protections under the ESA that regulate human activities in order to reduce the likelihood of the species's extinction and provide for its recovery.² Unlisted species, however, receive no protection.³ This system is administered by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively “the Services”) under the auspices of the Secretary of the Department of the Interior (Secretary or Interior).⁴ Unlike most other provisions of the ESA, the Services’ determination of whether to list a species must occur in the absence of economic considerations.⁵

Stakeholders whose interests would be affected by listing can become heavily invested in the outcome of that ESA listing decision. A stakeholder is anyone whose interests would be substantively affected by a decision to list or not list a species.⁶ For example, stakeholders often include, among others: species advocates, private landowners, private parties with an economic interest in species habitat, and federal or state agencies responsible for management of the species.⁷

In order to reduce or eliminate the possibility that a species will be listed, those whose activities would be affected by listing can pledge to undertake voluntary conservation measures and enter into what are known as Candidate Conservation Agreements (CCAs) for a species.⁸ On the one hand, species advocates have expressed concern that these agreements are

1. Endangered Species Act, 16 U.S.C. § 1533(a)(1)–(2) (2012).

2. *Id.* § 1531(b).

3. *But see id.* (only providing protection for listed species).

4. *Id.* § 1533(a)(1)–(2); *Endangered Species Act Overview*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/laws-policies/> [<https://perma.cc/B5Z7-N3ZX>] (last visited May 3, 2017).

5. 16 U.S.C. § 1533(b)(1)(A).

6. *Id.*

7. *See Endangered Species Glossary*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/about/glossary.html> [<https://perma.cc/68YM-UXAU>] (last updated May 28, 2015) (defining stakeholder).

8. *Id.*

unenforceable and that the effectiveness of included conservation measures are almost always untested.⁹ On the other hand, stakeholders with economic interests in a species' habitat want the opportunity to implement conservation measures in the CCA and prove the effectiveness of these measures before the species is listed.¹⁰ These circumstances have led to litigation over ESA listing decisions based on CCAs.¹¹

The discussion that follows will examine the impact of CCAs on the ESA listing procedure and compare existing cases that substantively discuss CCAs in this context. The analysis will (1) demonstrate that federal courts have not applied a consistent standard of review to these cases and (2) explain the incentives that drive stakeholder behavior in these types of disputes.

I. THE ENDANGERED SPECIES ACT

A. Overview

Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for [these species’] conservation.”¹² Once listed as endangered or threatened, the protections afforded a species under the Act neatly follow its stated purpose.¹³ Listing triggers consideration of critical habitat,¹⁴ restrictions on taking or otherwise harming the species,¹⁵ agency consultation to avoid jeopardy,¹⁶ habitat conservation planning,¹⁷ and programs for recovery.¹⁸ Unlisted species do not receive these protections.

9. *Id.*

10. *Id.*

11. *See generally* Defs. of Wildlife v. Jewell, 815 F.3d 1 (D.C. Cir. 2016); Permian Basin Petroleum Ass’n v. Dep’t of Interior, 127 F. Supp. 3d 700 (W.D. Tex. 2015); Otter v. Salazar, 2012 WL 3257843, at *1 (D. Idaho Aug. 8, 2012) (listing decisions disputed in court).

12. 16 U.S.C. § 1531(b) (2012).

13. *Id.*

14. *Id.* § 1533(a)(3)(A).

15. *Id.* § 1538(a).

16. *Id.* § 1536.

17. *Id.* § 1539.

18. *Id.* § 1533(f).

B. Listing: Threshold of the Endangered Species Act

Threshold identification of threatened or endangered species for purposes of statutory listing functions as the nucleus of the ESA.¹⁹ There are only two categories: listed and unlisted species.²⁰

The ESA defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range” and a threatened species as one likely to become endangered “within the foreseeable future.”²¹ In the 1970s and 1980s, Congress provided five statutory factors meant to guide determinations of a species’s status as endangered or threatened.²² The Secretary is authorized to list a species as threatened or endangered under any of the following factors—none of which is dispositive:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.²³

The Secretary must make the listing decisions “solely on the basis of the best scientific and commercial data available . . . taking into account those efforts, if any, being made by any State . . . to protect such species whether by predator control, protection of habitat and food supply, or other conservation practices.”²⁴ A listing decision must take into account existing conservation efforts like CCAs; however, the ESA is unclear as to how much weight these voluntary conservation measures should receive relative to the five statutory factors.²⁵

Listing of species is to occur according to a statutorily fixed timeline.²⁶ When the Services receive a petition, they have three months to determine whether it contains “substantial scientific or commercial information [that

19. *Id.* § 1533(a).

20. *Id.*

21. *Id.* § 1532(6), (20).

22. *Id.* § 1533(a)(1)(A)–(E).

23. *Id.*

24. *Id.* § 1533(b)(1)(A).

25. *Id.* (failing to specify how the factors should be considered).

26. *Id.* § 1533(b)(3)(A).

indicates listing] may be warranted.”²⁷ If so, the Services have at most an additional 24 months to issue a finding that the petitioned listing is either: (1) warranted, (2) not warranted, or (3) warranted but precluded by higher-priority listing decisions.²⁸

If the Secretary determines the petition contains evidence demonstrating that the listing is warranted, the Services must publish a proposed rule for the species and invite public comment.²⁹ Within 12 months, the Secretary must issue a final regulation implementing either the proposed rule or a notice of its withdrawal.³⁰ But if the Services solicit additional scientific data, this deadline may be extended to 18 months.³¹

The Services recognize the non-discretionary deadlines of the ESA but must contend with practical difficulties, such as limits on agency resources and manpower that often delay the process.³² However, failure to meet a deadline does not relieve the Services of their duty to determine whether the petitioned species is endangered or threatened.³³ Courts have held that the deadlines in the ESA “are designed to be an impetus to act rather than a prohibition on action after the time expires,” and thus, listing decisions cannot be challenged solely based on the interval between petition and listing.³⁴

C. Unlisted and Warranted but Precluded Species

The Secretary can determine that a species is warranted for listing but precluded by other pending proposals.³⁵ Although this provides the Secretary with the ability to prioritize listing decisions, courts have emphasized that “the warranted-but-precluded determination is a safety valve for the Service,” not a separate listing category.³⁶

27. *Id.*

28. *Id.* § 1533(b)(3)(B).

29. *Id.* § 1533(b)(3)(B)(ii), (5)(A)(ii).

30. *Id.* § 1533(b)(6)(A).

31. *Id.* § 1533(b)(6)(B)(i).

32. Lawrence Hurley, *Obama Plan to Cap Funding for Endangered Species Act* *Petitions Angers Litigants*, N.Y. TIMES (Mar. 11, 2011), <http://www.nytimes.com/gwire/2011/03/24/24greenwire-obama-plan-to-cap-funding-for-endangered-speci-79833.html> [<https://perma.cc/8ERF-YLPB>].

33. Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 GA. L. REV. 413, 435 (1999).

34. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995); *see also* *Building Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893, 903–04 (D.D.C. 1997) (holding that failing to list species after proposal does not necessarily bar listing).

35. *In re Endangered Species Act*, 704 F.3d 972, 974 (D.D.C. 2014).

36. *Nat'l Ass'n of Homebuilders v. U.S. Fish & Wildlife Serv.*, 786 F.3d 1050, 1053 (D.C. Cir. 2015).

A warranted-but-precluded finding requires a showing that “expeditious progress is being made to add qualified species to either of the lists.”³⁷ The ESA also requires that the Services establish a ranking system that would identify highest priority candidate species.³⁸ The Services vacillated between different methods of categorization until 1996 when the Interior introduced the listing priority number (LPN) system to classify warranted-but-precluded candidate species from Category 1 through 12.³⁹ The Interior classified the species “based on the magnitude and immediacy of threats and the species’ taxonomic uniqueness” with Category 1 being the most at risk.⁴⁰

Warranted-but-precluded species are identified for risk of extinction but remain unlisted and receive zero statutory protections until their status is resolved. As the D.C. Circuit has reiterated, “[n]either the ESA nor the implementing regulations prohibit hunting of species prior to formal listing, including those [currently under review or] determined to be warranted-but-precluded candidates.”⁴¹

D. Candidate Conservation Agreements

The uncertain legal status of a candidate species is highly relevant to stakeholders due to the possibility of future listing. Although scientific evidence typically indicates that these species are at risk of extinction, candidates are legally indistinguishable from other unlisted species.⁴² The decision whether to list a candidate species affects the interests of all stakeholders including relevant federal or state agencies, private landowners, species advocates, and private companies seeking permits to use public land.⁴³

In the 1980s, the Services began to develop a policy to promote voluntary conservation measures in advance of listing.⁴⁴ However, promotion of these voluntary conservation measures soon began to significantly impact listing decisions made by the Services and otherwise

37. *In re Endangered Species Act*, 704 F.3d at 974.

38. *Endangered Status for Dunes and Sagebrush Lizard*, 75 Fed. Reg. 77,801, 77,802 (Dec. 14, 2010) (to be codified at 50 C.F.R. pt. 17).

39. *Endangered Species Glossary*, *supra* note 7.

40. *Endangered Status for Dunes and Sagebrush Lizard*, 75 Fed. Reg. at 77,802.

41. *In re Endangered Species Act*, 704 F.3d at 974.

42. *Id.*

43. Ortiz, *supra* note 33, at 435.

44. *See generally id.* (discussing voluntary conservation measures and associated litigation from 1980 to 1999).

influence the operation of the ESA.⁴⁵ Additionally, it was unclear how these conservation measures were considered by the Services and how they would affect ESA decisions, most importantly, listing.⁴⁶ This led to considerable litigation, which challenged various aspects of the Services approach to these conservation measures.⁴⁷ As discussed by other commentators, these cases exemplified problems associated with the Services' consideration of voluntary conservation measures and subsequent implementation of their listing obligations.⁴⁸ Thus, in the late 1990s, the Services began drafting a procedure that would provide a firm policy basis for promotion and evaluation of voluntary conservation measures under the ESA.⁴⁹

As a result, in 1999, the Services implemented a set of delineated policies for CCAs.⁵⁰ These are agreements between the Services and interested parties, such as state agencies or industry associations that pledge to undertake voluntary conservation measures on behalf of a candidate species.⁵¹ CCAs are designed to prevent listing of a species that would otherwise qualify as endangered or threatened.⁵² If the species improves due to these conservation measures, the CCA is serving its purpose of moving the species toward recovery without formal listing under the ESA.⁵³ However, a CCA is unenforceable and the conservation measures it contains unproven, so it is possible that continued decline will lead to future listing of the species.⁵⁴

1. Candidate Conservation Agreements with Assurances (CCAAs)

For private landowners, the Services promulgated a final regulation introducing a distinct category of CCAs, Candidate Conservation Agreements with Assurances (CCAAs).⁵⁵ Under these agreements:

45. *See id.* at 470–72 (describing the changes that the policy would make to the ESA's operations).

46. *Id.* at 473.

47. *Id.* at 474–75.

48. *Id.* at 476.

49. *See* Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999) (announcing the resulting agreement).

50. *Id.*

51. *Id.*

52. *Id.* at 32,733.

53. *Id.* at 32,728–29.

54. *See generally id.* (responding to public comments regarding issues like the discretion of parties to enter and leave a CCA and the reliability of conservation measures).

55. *Id.* at 32,734–35.

non-Federal property owners, who enter into [CCAAs] that commit them to implement voluntary conservation measures for proposed or candidate species, or species likely to become candidates or proposed in the near future, will receive assurances from the Services that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the species become listed [and critical habitat designated] in the future.⁵⁶

Landowners are thus issued § 10 incidental take permits from the Services permitting them to continue activities allowed under the terms of the CCAA even if the species is listed and their land is designated as critical habitat.⁵⁷

At this point, it is important to emphasize that the application of this policy functionally removes private landowners from the disputes in this analysis.⁵⁸ Depending on the species, CCAAs could provide almost every private landowner with the ability to negotiate and then commit to voluntary conservation measures that will allow a reasonable level of security in the future of their land.⁵⁹ Once a 90-day substantial finding comes out, private landowners have at least a year, probably longer, to execute a CCAA with the Services.⁶⁰ The benefits of doing so are practical, even if other CCAAs with states or federal agencies are deemed inadequate and the species is listed, their agreement does not change.⁶¹ Thus, no private landowner or representative group is a party on either side of the litigation in the cases discussed in this analysis because a private landowner's obligations under a CCAA do not change if a species is listed.⁶²

2. Policy for Evaluation of Conservation Efforts (PECE)

Due to the unknown success of agreed upon conservation measures, in 2003, the Services published the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) to evaluate the legitimacy

56. *Id.* at 32,733.

57. *Id.* at 32,727; 16 U.S.C. § 1539(a)(1)(A) (2012).

58. Kristina Fugate, *One Bird Causing a Big Conflict: Can Conservation Agreements Keep Sage Grouse off the Endangered Species List?*, 49 IDAHO L. REV. 621, 630 (2013).

59. Letter from Defs. of Wildlife, to Dan Ashe, Dir. Public Comments Processing, U.S. Fish & Wildlife Serv. (Mar. 15, 2012).

60. Fugate, *supra* note 58, at 630 n.66.

61. *Id.* at 630.

62. *Id.*

of future CCAs, CCAAs, or any other formalized agreement with stakeholder parties.⁶³ At its core, the PECE “establishes two basic criteria: (1) The certainty that the conservation efforts will be implemented, and, (2) the certainty that the efforts will be effective.”⁶⁴ This remains the guiding policy for the Services when considering voluntary conservation measures during the listing process.⁶⁵

To evaluate the certainty of implementation, the PECE lists nine non-exclusive criteria, such as the type of regulatory mechanisms needed for implementation and the level of funding required for the proposed conservation measures.⁶⁶ Similarly, to evaluate the certainty of effectiveness, the PECE lists six non-exclusive criteria that not only look at the substance of conservation measures in light of threats to the species, but also look for provisions providing for monitoring progress on implementation.⁶⁷

In the PECE there are guidelines on how the Services will evaluate existing CCAs and monitor a species’s status in the future.⁶⁸ The PECE lists four scenarios that would cause the Services to reconsider the status of an unlisted species currently covered by CCAs:

- (1) a failure to implement the conservation effort in accordance with the implementation schedule;
- (2) a failure to achieve objectives;

63. Policy for Evaluation of Conservation Efforts when Making Listing Decisions, 68 Fed. Reg. 15,100, 15,100–01 (Mar. 28, 2003).

64. *Id.* at 15,101.

65. *Id.*

66. *Jewell*, 815 F.3d at 4 n.1 (D.C. Cir. 2016). As summarized by the D.C. Circuit, to evaluate the certainty of implementation, “the Service identified nine, non-exclusive criteria: (1) ‘[t]he conservation effort, the party(ies) to the agreement or plan that will implement the effort, and the staffing, funding level, funding source, and other resources necessary to implement the effort,’ (2) the legal authority to implement the effort and the commitment to do so, (3) the status of legal procedural requirements (e.g., environmental review) that must be done to implement, (4) whether necessary authorizations—like permits—have been identified and the likelihood of obtaining them, (5) the type and level of voluntary participation needed to implement is both identified and likely to occur (including review of incentives to join the plan), (6) regulatory mechanisms needed for implementation, (7) funding requirements, (8) implementation schedule, and (9) approval by parties involved.” *Id.*

67. *Id.* (“To evaluate the effectiveness of implementation, the six non-exclusive criteria are: (1) the nature and extent of the threats to the species and the efforts designed to reduce them, (2) explicit incremental objectives for achieving those goals, (3) the steps necessary to implement the effort, (4) scientific factors that can be used to measure achievement objectives and the standard against which success will be measured, (5) provisions for monitoring progress on implementation and effectiveness, (6) how adaptive management principles will be implemented.”)

68. Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. at 15,114.

- (3) a failure to modify the conservation effort to adequately address an increase in the severity of a threat or to address other new information on threats; or
- (4) we receive any other new information indicating a possible change in the status of the species, then we will reevaluate the status of the species and consider whether initiating the listing process is necessary.⁶⁹

It has been more than a decade since the Services announced the PECE, but the Services have not yet reconsidered listing a species that is subject to CCAs.⁷⁰ As a result, there are no empirical examples of how the Services would approach this reevaluation of a species and its CCAs.

II. CURRENT STATUS OF CCAs: FEDERAL CASE LAW ON THREE SPECIES

While most stakeholders and species advocates would agree that CCAs are beneficial, there has been significant disagreement over, not only the content of many CCAs, but also the amount of weight the Services assign to this analysis. The three species considered in this section and their administrative histories illustrate the process of agency consideration of CCAs when making listing determinations. Decisions by stakeholders in these cases can be traced to incentives created under this existing system. Additionally, litigation surrounding these species has led to some confusion over CCAs and the appropriate standard of judicial review.

A. Slickspot Peppergrass

1. Background

In the early 1990s, slickspot peppergrass became a warranted-but-precluded candidate species but remained in this category for more than two decades.⁷¹ During that time, the species became the subject of several CCAs.⁷² In 2002, the Services proposed to list the species but withdrew the proposed rule in 2004.⁷³

69. *Id.*

70. *See id.* at 15,100 (becoming effective April of 2003 and followed by no consideration of listing a species that is subject to CCAs).

71. Withdrawal of Proposed Rule to List *Lepidium papilliferum* (Slickspot Peppergrass) as Endangered, 69 Fed. Reg. 3,094, 3,098 (Jan. 22, 2004).

72. *See id.* at 3,099 (discussing a CCA developed by the Idaho Governor's Office of Species Conservation, the Idaho Department of Agriculture, the Idaho Department of Lands, the

Advocates for the species sued, and in 2005, the Idaho district court found the Services withdrawal of the proposed rule arbitrary, remanding the case to the Interior for reconsideration.⁷⁴ In 2009, the Services issued a final rule that acknowledged benefits from existing CCAs but identified other significant threats that compelled their decision to list the slickspot peppergrass as threatened.⁷⁵

2. *Otter v. Salazar*

As a result of this listing decision, the Governor of Idaho, Butch Otter, sued the Interior.⁷⁶ One plaintiff's primary argument was that the Services "improperly discounted the significance of [] conservation efforts" under existing CCAs.⁷⁷ The Idaho district court in *Otter v. Salazar* rejected plaintiffs' claim that existing CCAs should have been given more weight in the listing decision but ultimately decided the case on other grounds.⁷⁸ This was the first federal case to substantively discuss CCAs in the context of an ESA listing decision.

Plaintiffs specifically maintained that under (b)(1)(A), the Interior had not adequately considered the CCAs, which they argued "should have been given more weight in the listing determination."⁷⁹ To support this argument, plaintiffs "note[d] that the Service relied upon the CCA as a basis for withdrawing its proposed listing in 2004 and again referenced the CCA in its 2007 notice of withdrawal."⁸⁰

But, the court agreed with the Services that the CCAs and other "conservation efforts were given consideration in the listing determination and that, in light of recently updated information about threats to the species, the conservation efforts were found not to have adequately addressed (or [not] capable of addressing in the future) [several significant] threats."⁸¹ The Services determined that the CCAs were providing a conservation benefit for the slickspot peppergrass, but these conservation

IDARNG, the BLM, and several private property owners who held grazing permits on BLM-managed and maintained lands designed to implement conservation measures for slickspot peppergrass).

73. *Id.* at 3,094.

74. *W. Watersheds Project v. Foss*, No. CV 04-168-MHW, 2005 WL 2002473, at *4-5 (D. Idaho Aug. 19, 2005).

75. Listing *Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range; Final Rule, 74 Fed. Reg. 52,014 (Oct. 8, 2009).

76. *Otter*, 2012 WL 3257843, at *1.

77. *Id.*

78. *Id.*

79. *Id.* at 40.

80. *Id.*

81. *Id.*

efforts alone were insufficient to prevent listing in light of better-understood risks to the species.⁸²

As a result, the court held that “it was reasonable for the Service to conclude that the CCA’s ‘effectiveness in reducing or eliminating the most significant threats has not been demonstrated,’” and thus, it was proper to list the species as threatened.⁸³ The court explained that, under the relevant standard of review, the Services’ decision to list a species is “entitled to deference” provided that the scientific basis for this decision is supported by the administrative record.⁸⁴

B. Dunes Sagebrush Lizard

1. Background

The dunes sagebrush lizard (dunes lizard) inhabits ecosystems found in the Permian Basin, a geological formation on the border of Texas and New Mexico.⁸⁵ It was first identified as a possible candidate species in 1982.⁸⁶ The dunes lizard is unique to the Permian Basin—this species is found nowhere else in the world.⁸⁷

Throughout the 1980s and 90s, the dunes lizard was classified as warranted but precluded and reclassified to lower and then to higher priority categories.⁸⁸ But, “[h]aving noted significant habitat loss in the 1980s and 1990s, the [FWS] identified the lizard in 2001 as a candidate species.”⁸⁹ The dunes lizard was formally added to the candidate list in 2001 and assigned an LPN of 2, the second highest level of threat.⁹⁰

82. *Id.*

83. *Id.*

84. *Id.* at 35.

85. Charles Sartain, *The Lizard that (Almost) Shut Down the Permian Basin*, ENERGY & L. (June 20, 2012), <http://www.energyandthelaw.com/2012/06/20/the-lizard-that-almost-shut-down-the-permian-basin/> [<https://perma.cc/Q5KJ-EAJP>].

86. *Dunes Sagebrush Lizard Sceloporus arenicolus ESA Status: None*, WILDEARTH GUARDIANS, http://www.wildearthguardians.org/site/PageServer?pagename=species_reptiles_sand_dune_lizard&AdInterest=1103#WMSHxtLyvcs [<https://perma.cc/AMV5-JZQU>] (last visited Mar. 11, 2017).

87. Nathaniel Gronewold, *Can the Oil Industry Save a Threatened Species? Texas Tries It Out*, ENERGY WIRE (Jan. 10, 2014), <http://www.eenews.net/energywire/stories/1059992662> [<https://perma.cc/8AZC-8AWZ>].

88. *Defs. of Wildlife v. Jewell*, 70 F. Supp. 3d 183, 187–88 (D.D.C. 2014).

89. *Id.* at 188.

90. Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Species that Are Candidates or Proposed for Listing as Endangered or Threatened, Annual Notice of Findings on Recycled Petitions, and Annual Description of Progress on Listing Actions, 66 Fed. Reg. 54,808, 54,811 (Oct. 30, 2001) (to be codified at 50 C.F.R. pt. 17).

In 2002, species advocates petitioned for emergency listing of the species.⁹¹ Responding to the petition, the Services issued a 12-month warranted-but-precluded finding in 2004.⁹² Species advocates petitioned for emergency listing again in 2008, but the Services found it warranted but precluded.⁹³ The dunes lizard has been an LPN 2 candidate for decades.⁹⁴

2. Proposal to List the Species

In 2010, FWS issued a proposed rule to list the dunes lizard as endangered “based on the immediacy, severity, and scope of the ongoing significant threats.”⁹⁵ FWS proposed this rule, in part, because while habitat in New Mexico was covered by several existing CCA(A)s, there were no similar agreements for habitat in Texas.⁹⁶ FWS then reopened the 60-day comment period for the listing proposal.⁹⁷ Faced with a now real possibility that the dunes lizard could be listed and restrict human activities, stakeholders in Texas immediately began to work with FWS to put together their own CCAs for the species.⁹⁸

The 60-day comment period was left open until Texas developed CCAs for the dunes lizard.⁹⁹ By February of 2012, Texas had finalized its CCAs.¹⁰⁰ Within a month, FWS closed the comment period, and two months later in June of 2012, FWS withdrew the proposed rule, citing “significant ongoing and future conservation efforts.”¹⁰¹ Litigation ensued.

91. *Dunes Sagebrush Lizard Named One of 10 U.S. Species Most Threatened by Fossil Fuel Development*, CTR. FOR BIOLOGICAL DIVERSITY (Jan. 19, 2012), http://www.biologicaldiversity.org/news/press_releases/2012/dunes-sagebrush-lizard-01-19-2012.html [<https://perma.cc/MD6N-7XQU>].

92. *Jewell*, 815 F.3d at 5.

93. Letter from Jay Lininger, Ecologist, Ctr. for Biological Diversity, to U.S. Fish & Wildlife Serv. (Mar. 12, 2012), http://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/CBD_cmt_DSL_list_031212.pdf [<https://perma.cc/5MHA-SKEC>]; *Sand Dune Lizard Proposed for Federal Protection*, WILDEARTH GUARDIANS (Dec. 13, 2010), <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=6419#.WMSPwtIrLcs> [<https://perma.cc/JR8F-29C5>].

94. Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,987 (June 19, 2012) (to be codified at 50 CFR pt. 17).

95. *Jewell*, 70 F. Supp. 3d at 188.

96. Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. at 77,811.

97. *Jewell*, 70 F. Supp. 3d at 188.

98. Sartain, *supra* note 85.

99. *Jewell*, 70 F. Supp. 3d at 188.

100. *Id.*

101. *Id.*

3. Defenders of Wildlife v. Jewell

a. District Court Decision

Defenders of Wildlife sued the Interior after the proposal to list the dunes lizard was withdrawn.¹⁰² First, plaintiffs argued that FWS did not properly consider the cumulative impacts of the five listing factors in its withdrawal decision and analogized a prior case in the D.C. District Court where the Services' listing analysis was found deficient for that reason.¹⁰³ But, the court rejected plaintiffs' comparison, explaining that FWS considered the various conservation agreements and that "while the FWS's cumulative impacts analysis [was] rather terse, it [was] based on more than an unsupported conclusion, as in [the prior case]."¹⁰⁴ Thus, the court held, "[g]iven that the FWS thoroughly assessed a wide range of conservation efforts, its withdrawal decision [was] not arbitrary and capricious."¹⁰⁵ Furthermore, the court held that the withdrawal decision complied with the "best available science" requirement, reasoning that FWS undertook PECE evaluations of both the state plans and otherwise "considered extensive scientific studies" of the dunes lizard.¹⁰⁶

Plaintiffs further challenged the determination by FWS that the Texas Plan displayed the requisite levels of certainty in effectiveness and implementation in its PECE analysis.¹⁰⁷ The court also rejected this claim, holding that FWS properly "analyzed each factor required by [] PECE" and thus "reasonably concluded" that the dunes lizard CAs were sufficient to avoid listing.¹⁰⁸

b. Circuit Court Decision

Defenders of Wildlife appealed to the D.C. Circuit, claiming that the district court had erred in upholding the FWS withdrawal decision.¹⁰⁹ As a preliminary matter, the D.C. Circuit held that appellants had waived any statutory challenge or argument that the PECE was operating to substitute or supplement the ESA listing criteria.¹¹⁰ Turning to the Services'

102. *Id.* at 185–86.

103. *Id.* at 191.

104. *Id.* at 193.

105. *Id.* at 194.

106. *Id.*

107. *Id.* at 195.

108. *Id.* at 199.

109. *Jewell*, 815 F.3d at 7.

110. *Id.* at 8.

consideration of the state CCAs, the D.C. Circuit reiterated that the arbitrary and capricious standard of review applied to the withdrawal decision, noting that “[s]uch review is ‘highly deferential’ and ‘presumes agency action to be valid.’”¹¹¹

Appellants’ main arguments focused on alleged deficiencies in the FWS evaluation of the Texas CCA(A)s *vis-à-vis* sufficient certainty of implementation and effectiveness under PECE.¹¹² Appellants argued that the Texas CCA(A)s’ lack of an implementation schedule would permit habitat loss to continue and that there was an “absence of evidence [that] the necessary level of voluntary participation would be achieved.”¹¹³ The court disagreed and held that, although the Texas plan did not include an implementation schedule and relied on speculative future enrollment, the FWS was not unreasonable to find implementation sufficiently certain as explained in its PECE analysis.¹¹⁴

Appellants also argued that the FWS PECE analysis was deficient because “the Texas plan’s limit on habitat destruction was insufficient to ensure its effectiveness in protecting the lizard . . . [and] state confidentiality laws would interfere with the Service receiving the information on enrolled properties . . . including the actual conservation measures that enrollees agreed to undertake.”¹¹⁵ However, the court found the FWS analysis reasonable because, among other provisions, the plan limited the habitat loss over the 30-year plan to a maximum of 7.5%, required those causing habitat loss to include mitigation measures, incorporated goals and evaluation requirements, and included enforcement provisions under terms of individual agreements for participation in the plan.¹¹⁶

C. Prairie Chicken

1. Background

The lesser prairie chicken (prairie chicken) was petitioned for listing in 1995, and in 1997, Services found the species warranted but precluded,

111. *Id.* at 9.

112. *Jewell*, 70 F. Supp. 3d at 194.

113. *Jewell*, 815 F.3d at 9.

114. *Id.* at 12.

115. *Id.* at 13.

116. *See id.* at 6 (explaining the Texas plan to guide development away from lizard habitat).

giving it an LPN of 8.¹¹⁷ Ten years later, in 2008, the LPN was changed from 8 to 2 to reflect the gravity of the threats.¹¹⁸ Still, the prairie chicken remained a warranted-but-precluded candidate.¹¹⁹

In 2010, WildEarth Guardians sued to compel listing.¹²⁰ The case was consolidated with other candidate cases and was thus part of a 2011 settlement that required the Services to make final listing decisions for hundreds of species that had been warranted but precluded for an unreasonable amount of time.¹²¹

Due to the imminence of the listing decision, many stakeholders, who for decades appeared uninterested in voluntary conservation efforts, now found that arrangement quite attractive as compared to the protective provisions of the ESA. Thus, in 2013, a multi-state conservation effort, known as the rangewide plan (RWP), was announced and included various CCA(A)s.¹²² However, FWS determined that while the RWP and CCAs might benefit the species, it nonetheless faced a high risk of extinction, and in 2014, FWS promulgated a final rule listing the prairie chicken as a threatened species.¹²³

2. Permian Basin Petroleum Ass'n v. Department of Interior

As a result of the listing, the Permian Basin Petroleum Association, a group representing the oil industry, sued FWS in the Western District of Texas, challenging the final rule.¹²⁴ Using a different standard of review than other circuits, the court first held that FWS's "PECE evaluation [was] entitled to only 'some' deference . . . [and] not controlling."¹²⁵ Applying

117. *Questions and Answers for the Lesser Prairie Chicken*, U.S. FISH & WILDLIFE SERV. (July 2012), https://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf [<https://perma.cc/7AGC-3EQ6>].

118. *Id.*

119. *Id.*

120. Petition for Review of Agency Action, *WildEarth Guardians v. Salazar*, No. 10-cv-02129-JLK (D. Colo. Aug. 31, 2010), http://www.wildearthguardians.org/site/DocServer/August_2010_Petition_for_Lesser_Prairie-Chicken.pdf?docID=922&AddInterest=1059 [<https://perma.cc/8M23-DYG2>].

121. *In re Endangered Species Act*, 406 F.3d at 974–75.

122. SEAN KYLE ET AL., *THE LESSER PRAIRIE-CHICKEN RANGE-WIDE CONSERVATION PLAN* 46–48 (2013), <http://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/Initiatives/2013LPCRWPfinalfor4drule12092013.pdf> [<https://perma.cc/TAF6-PJHK>].

123. Press Release, U.S. Fish & Wildlife Serv. Lists Lesser Prairie-Chicken as Threatened Species and Finalizes Special Rule Endorsing Landmark State Conservation Plan (Mar. 27, 2014), <https://www.fws.gov/news/ShowNews.cfm?ID=04F68986-AE41-6EEE-5B07E1154C2FB2E7> [<https://perma.cc/6STQ-9PLP>].

124. *Permian Basin Petroleum Ass'n*, 127 F. Supp. 3d at 703.

125. *Id.* at 711.

this standard of review, the court next held that because the “PECE itself was an unambiguous policy, weight is only given to FWS’s application of the PECE to the RWP to the extent it is persuasive.”¹²⁶ The district court reinforced these positions by holding that, even under a more deferential standard of review, the listing decision was arbitrary and capricious.¹²⁷

After establishing the standard of review, the court turned to plaintiffs’ claims.¹²⁸ These plaintiffs challenged FWS’s application of PECE criteria to the RWP and argued that FWS failed to “carry out the rigorous, comprehensive evaluation of conservation efforts that it committed itself to undertake.”¹²⁹ The court agreed with the plaintiffs and held that, although FWS had considered each of the PECE criteria in its analysis of the RWP and CCAs, this analysis was not rigorous and the rule should be vacated.¹³⁰

The court’s analysis proceeded by individually considering each of the 15 PECE criteria for implementation and effectiveness against FWS’s provided reasoning in its analysis.¹³¹ The judge discussed the 15 PECE criteria separately in order to evaluate FWS’s reasoning under each.¹³² Among many deficiencies, the judge found that the FWS was required to predict future enrollment in the RWP and, thus, failed to properly apply the PECE.¹³³

Next, in its PECE evaluation, the FWS stated that in order to avoid listing, they must be able to show that the CCAs in the RWP contributed to the elimination of one or more threats under ESA § 4.¹³⁴ The court rejected this and held that “the added requirement that the RWP eliminate or even adequately reduce a specific threat at the time of the listing was improper.”¹³⁵ As a result, the court vacated the listing decision.¹³⁶

126. *Id.* at 725 n.9.

127. *Id.* at 714.

128. *Id.* at 707.

129. Memorandum in Support of Plaintiffs’ Motion for Summary Judgement at 2, Permian Basin Petroleum Ass’n v. Dep’t of Interior, 127 F. Supp. 3d 700 (W.D. Tex. 2015) (No. 7:14-cv-50-RAJ).

130. *Permian Basin Petroleum Ass’n*, 127 F. Supp. 3d at 708.

131. *See id.* at 708–24 (providing a PECE overview and explaining the requirements under PECE’s 15 criteria).

132. *See id.* (analyzing each PECE criteria individually with FWS’s reasoning to determine sufficiency of FWS action).

133. *Id.* at 714.

134. *Id.* at 722.

135. *Id.*

136. *Id.* at 725.

III. ANALYSIS

The administrative history of these three species illustrates important empirical realities of the listing process and exemplifies current tensions between stakeholders and the Services regarding CCAs. With the notable exception of private landowners, most stakeholders are dissatisfied with the existing legal relationship between CCAs and listing decisions.¹³⁷ Still, these same stakeholders would likely acknowledge some of the practical benefits of CCAs.¹³⁸ For example, other commentators have explained that because “efforts to conserve a species are often much less costly to [private and public] landowners the earlier conservation efforts begin, early protection makes sense from an economic standpoint.”¹³⁹

The analysis that follows has two parts. The first part will briefly discuss conflicts among federal circuits regarding the proper standard of review for ESA listing decisions that are based on CCAs. The second part will discuss the imbalance of incentives that motivate stakeholder behavior in these types of disputes.

A. Standard of Review

The standard of review for ESA listing decisions is straightforward: a decision to list or not list a species is entitled to deference and will be upheld if it is scientifically sound.¹⁴⁰ However, the court in *Permian Basin* applied a different standard of review than prior cases, which has created a split in authority.¹⁴¹ In *Defenders*, the D.C. Circuit held that these types of listing decisions are entitled to deference, provided that the Services’ final determination is based on scientific evidence and supported by the administrative record.¹⁴² That standard was also applied by the Idaho District Court in *Otter v. Salazar*.¹⁴³ Alternatively, the Texas district court in *Permian Basin* held that these listing decisions are “entitled to only ‘some’ deference.”¹⁴⁴

However, the substance of the decision in *Permian Basin* demonstrates problems encountered when courts attempt to apply this standard. Most

137. U.S. FISH & WILDLIFE SERV., IMPROVING ESA IMPLEMENTATION THROUGH REGULATION REVIEW (2015), https://www.fws.gov/endangered/improving_ESA/improving_ESA.pdf [<https://perma.cc/3X2C-QKPP>].

138. *Id.*

139. Ortiz, *supra* note 33, at 463.

140. *Permian Basin Petroleum Ass’n*, 127 F. Supp. 3d at 706.

141. *Id.* at 711.

142. *Jewell*, 70 F. Supp. 3d at 194.

143. *Otter*, 2012 WL 3257843, at *10.

144. *Permian Basin Petroleum Ass’n*, 127 F. Supp. 3d at 711.

importantly, this standard of review led the court to scrutinize the Services' specific reasoning under each of the 15 PECE factors and issue individual rulings instead of considering whether the listing decision was, as a whole, scientifically sound.¹⁴⁵ This also required pages of tedious analysis in the opinion. If the court had applied the proper standard of review, these problems would not have inured.

B. Imbalance of Incentives: Motivations Underlying Stakeholder Behavior

The circumstances relevant to this discussion can be simplified as follows: the Services review a petition from species advocates and, as they issue findings bringing the species closer to a likely final listing rule, those whose activities or interests would be affected begin to negotiate and draft CCAs for the purposes of avoiding this outcome. The longer the species has been under review for listing, particularly if warranted but precluded, the higher the stakes in these listing decisions.

The plaintiffs in each of the cases took positions that reflect fundamentally similar concerns.¹⁴⁶ Thus, the behavior of stakeholders before a final listing decision and their corresponding litigiousness when faced with an unfavorable result can be understood as a function of an imbalance of incentives during the listing process.¹⁴⁷ This imbalance has incentivized stakeholders to become disproportionately invested in the Services' PECE analysis.

If not listed because of a CCA, species advocates must initiate the listing process from the beginning in order to change the species's status. If listed, activities affecting species may be subject to ESA restrictions and CCA participants must similarly initiate the delisting process for any change in status. In both scenarios, the practical reality of listing or delisting species, paired with the administrative delay associated with these processes, creates a powerful incentive for stakeholders at this stage.

Potential CCA participants are incentivized to enter into agreements that will prevent listing;¹⁴⁸ however, these incentives may be retroactively diminished if that species is then listed.¹⁴⁹ As in *Permian Basin*, most CCA

145. *Id.* at 708.

146. See generally *Idaho Farm*, 58 F.3d at 1397; *W. Watershed Projects*, 2005 WL 2002473, at *1; *Otter*, 2012 WL 3257843, at *1; *Jewell*, 815 F.3d at 1; *Jewell*, 70 F. Supp. 3d at 183; *Permian Basin Petroleum Ass'n*, 127 F. Supp. 3d at 703 (identifying plaintiff claims).

147. See generally *Idaho Farm*, 58 F.3d 1392; *W. Watershed Projects*, 2005 WL 2002473; *Otter*, 2012 WL 3257843; *Jewell*, 815 F.3d 1; *Jewell*, 70 F. Supp. 3d 183; *Permian Basin Petroleum Ass'n*, 127 F. Supp. 3d 700 (identifying dissatisfied plaintiffs with final listing decisions and choosing litigation as a solution).

148. *Ortiz*, *supra* note 33, at 476.

149. *Fugate*, *supra* note 58, at 630.

participants have worked with the Services to enter into agreements with the express purpose of avoiding listing and are incentivized to litigate for the opportunity to prove that their conservation efforts are sufficient for this purpose.¹⁵⁰

On the other hand, as shown in *Defenders*, species advocates are incentivized to ensure through litigation that when a CCA prevents listing, the conservation measures included are, in fact, sufficient.¹⁵¹ For many species, it has taken decades of regulatory reclassification to even be considered for listing, and to abandon the process based on unproven voluntary conservation efforts would undermine the ESA. Requiring species already identified as at risk but not listed due to a CCA to join the queue with newly petitioned species would arguably be inconsistent with the ESA.¹⁵² With the uncertain success of conservation measures, species advocates are incentivized to err on the side of caution and litigate.¹⁵³

For all stakeholders, it is this uncertainty with respect to future determinations of species' status that forms the nucleus of their incentives.¹⁵⁴ The resulting imbalance is best illustrated by the observation that, although stakeholders are obviously motivated to achieve their desired outcome, they appear equally motivated to avoid the undesired result.

Under the PECE, those participating in a CCA are well aware that, while voluntary conservation efforts may make listing unnecessary, "[i]n some cases, even if the parties fully implement all of the conservation efforts outlined in a particular agreement or plan, [the Services] may still need to list the species."¹⁵⁵ While not affecting private landowners,¹⁵⁶ uncertainty with respect to future listing is problematic for federal land management agencies, other private participants in the CCA, and species advocates.¹⁵⁷

Though not yet applied by the Services, the PECE also includes guidelines on monitoring CCA implementation and factors that would cause the Services to reevaluate the status of the species, including the

150. Sartain, *supra* note 85.

151. Ortiz, *supra* note 33, at 440.

152. *Id.* at 474.

153. See generally *Jewell*, 815 F.3d 1 (litigating whether conservation measures were sufficient).

154. See generally *id.* (finding stakeholders actions dependent on listing decisions).

155. Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. at 15,114.

156. See *id.* at 15,106 (noting that participation in a CCA is voluntary and thus private landowners may not be affected). Private landowners covered by a CCAA enjoy certainty regarding future uses of their land and are covered by an incidental take permit should listing occur. *Id.*

157. See generally *id.* at 15,100 (responding to public comments concerned about the uncertainty of the future status of a species).

catch-all: “any new information.”¹⁵⁸ However, while stakeholders know that existing conservation measures must be considered during any future listing or delisting decision, it is unclear how much weight they will receive.¹⁵⁹

Although stakeholders represent seemingly disparate sensibilities, these positions can nonetheless be reconciled upon consideration of their underlying motivations.¹⁶⁰ This discussion means to suggest that such a reconciliation is possible and could be achieved. For example, a CCA could provide a scientific baseline: (1) based on measureable and objective criteria, (2) monitored by a third party, and (3) agreed on by the stakeholders, which would trigger listing. As a result, species advocates would be less likely to sue over CCAs they deem questionable, and CCA participants would be allowed to prove the effectiveness of their agreement.

CONCLUSION

In November of 2016, the United States Geological Survey announced the largest estimate of continuous oil deposits they had ever assessed in the United States.¹⁶¹ This untapped oil was discovered in the Permian Basin, habitat of the prairie chicken and dunes lizard.¹⁶² Within a few weeks, more than half a dozen new oil drilling rigs had been added in the region.¹⁶³ Under these circumstances, the CCAs for these two species could be tested. The existence of CCAs prevented the listing of the prairie chicken and dunes lizard, but it is important to remember that parties to a CCA can abandon agreed upon conservation measures without fear of punishment.¹⁶⁴ The only possible consequence is that the Services might then restart the listing process and list the species.¹⁶⁵ But, the ESA does not

158. *Id.* at 15,104.

159. *See id.* at 15,101 (discussing situations in which the FWS would reevaluate the status of a species).

160. *See generally id.* at 15,100 (responding to public comments and stakeholder concerns generally).

161. Rebecca Hersher, *USGS Announces Largest Oil and Gas Deposit Ever Assessed in U.S.*, NPR (Nov. 16, 2016, 5:40 PM), <http://www.npr.org/sections/thetwo-way/2016/11/16/502337471/usgs-announces-its-largest-oil-and-gas-discovery-ever> [<https://perma.cc/372Q-8ZEL>].

162. *Id.*

163. *Id.*

164. *See Endangered Species Glossary*, *supra* note 7 (defining CCAs as voluntary agreements).

165. *See* 16 U.S.C. § 1533(a)(3)(A) (2012) (authorizing the Secretary to revise endangered or threatened species designation).

work retroactively and restricts human activities only after the species is listed.¹⁶⁶

The resolution of these issues will prove a definitive factor in the future of the ESA. The resulting outcome could not be more important as affecting—perhaps determinatively—the most basic consideration under the ESA, whether to list a species. The ESA envisions a binary system where species in danger of extinction are listed and brought into the system.¹⁶⁷ Thus, the importance of CCAs cannot be overstated as directly affecting the fundamental threshold determination under the ESA, listing.

166. *See id.* § 1533(b)(8) (requiring the Secretary, to the extent possible, to include a brief description and evaluation of activities affecting species designation).

167. *Id.* § 1533(a).