THE OREGON COASTAL SALMON RESTORATION INITIATIVE: A FLAWED ATTEMPT TO AVOID ESA LISTING

CHRISTINE GOLIGHTLY*

INTRODUCTION

In October 1995, Oregon Governor John Kitzhaber announced[1] an unprecedented planning effort to conserve and restore Oregon's rapidly declining wild[2] fish populations of coastal salmon and steelhead trout (*Oncorhynchus mykiss*).[3] This announcement came on the heels of a proposed rule[4] issued by the National Marine Fisheries Service (NMFS) listing three evolutionary significant units (ESUs)[5] (including two in Oregon) of wild coho salmon (*Oncorhynchus kisutch*)[6] as threatened under the Endangered Species Act of 1973 (ESA).[7] Intent on keeping management of Oregon's wildlife under state control, the gover-

* B.S., Ecology and Evolutionary Biology, 1994, University of Arizona; J.D., 1999, Northwestern School of Law of Lewis & Clark College. The author wishes to thank Professor Michael C. Blumm for his assistance and valuable comments.

1 *See* STATE OF OR., OREGON COASTAL SALMON RESTORATION INITIATIVE: EXECUTIVE SUMMARY & OVERVIEW 4 (1997) [hereinafter EXECUTIVE SUMMARY].

2 "Wild" refers to indigenous, naturally spawning fish and is used interchangeably with "indigenous" throughout this Article.

3 Steelhead trout are anadromous fish and part of the salmonid family. *See* Proposed Threatened Status, *infra* note 4.

4 *See* Proposed Threatened Status for Three Contiguous ESUs of Coho Salmon Ranging from Oregon Through Central California, 60 Fed. Reg. 38,011 (1995) (codified in part at 50 C.F.R. pt. 227) (proposed July 25, 1995) [hereinafter Proposed Threatened Status]; *see also infra* Part I.B.

5 A 1991 NMFS policy statement uses "evolutionary significant units," or "ESUs," to differentiate between "distinct populations" of salmon and considers each ESU a separate "species" for purposes of making a listing determination under the ESA. *See* Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,618 (1991). NMFS considers a population or stock of salmon to be a distinguishable ESU if it is "substantially reproductively isolated from other conspecific population units" and "represent[s] an important component in the evolutionary legacy of the species." *Id.*

6 *See* Proposed Threatened Status, *supra* note 4, at 38,029.

7 16 U.S.C. §§ 1531-1544 (1994 & Supp. I 1995).

nor's conservation plan aimed to provide sufficient conservation protection to ward off the impending ESA listing.

In August 1996, the governor's planning team presented the draft Oregon Coastal Salmon Restoration Initiative (OCSRI) to NMFS and the people of Oregon.[8] A congressional moratorium on ESA listings[9] had already extended NMFS's final listing decision deadline for coho salmon to October 25, 1996, and NMFS also invoked a six-month extension of this deadline as authorized by Section 3(b)(6)(B)(i) of the ESA.[10] The final listing decision was thus extended to April 25, 1997, giving the State of Oregon time to obtain recommendations from NMFS for the OCSRI as well as to revise, improve, and provide funding for the program. Additionally, the state negotiated a Memorandum of Agreement (MOA) with NMFS under which the state promised both to implement and improve the OCSRI and under which NMFS promised to guide the state towards those actions that would make a listing unnecessary.[11] It appeared that the state was on its way to avoiding an ESA listing.

In a historic final listing decision, NMFS withdrew the proposed "threatened" listing for the Oregon Coast ESU of coho salmon, finding that the ESU[12] did not warrant listing under the ESA.[13] Never before had a listing agency relied on a state's umimplemented conservation plan to find that a species no

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[8] *See* EXECUTIVE SUMMARY, *supra* note 1.

[9] Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86 (1995); *see also infra* note 49.

[10] 16 U.S.C. § 1533(b)(6)(B)(i).

[11] *See* Memorandum of Agreement Between the State of Oregon and the National Marine Fisheries Service, Apr. 1997 [hereinafter MOA]. For a discussion of the MOA, see *infra* Part II.B.

[12] A 1991 NMFS policy statement uses "evolutionary significant units," or "ESUs," to differentiate between "distinct populations" of salmon and considers each ESU a separate "species" for purposes of making a listing determination under the ESA. *See* Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,618 (1991). NMFS considers a population or stock of salmon to be a distinguishable ESU if it is "substantially reproductively isolated from other conspecific population units" and "represent[s] an important component in the evolutionary legacy of the species." *Id.*

[13] *See* Threatened Status for Southern Oregon/Northern California Coast Evolutionary Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,607-08 (1997) (codified in part at 50 C.F.R. pt. 227) (May 6, 1997) [hereinafter Threatened Status].

longer warranted listing.[14] In rejecting the coho listing, NMFS relied heavily on the state conservation efforts under the OCSRI and on the promises contained in the MOA.[15] Environmental groups immediately filed suit, claiming that NMFS's reliance on the OCSRI violated ESA listing requirements and constituted an arbitrary and capricious action under the Administrative Procedure Act.[16]

The arguments against NMFS's final listing decision stem from the structural and conceptual foundation of the OCSRI. The OCSRI, locally termed "The Oregon Plan," attempts to achieve widespread conservation and restoration without imposing new laws or regulations.[17] Its conservation methods therefore rely upon agency coordination, private volunteer action, and increased enforcement of existing laws and regulations, all supported by public education and increased research and monitoring of the species' needs.[18] Although the drive to assemble the OCSRI engineered an unprecedented amount of statewide coordination and private support, the final product lacks material substance and any assurance that the plan will prevent the coho from becoming endangered in the foreseeable future.[19]

On June 1, 1998, United States Magistrate Judge Janice Stewart agreed with the environmentalists and, in *Oregon Natural Resources Council v. Daley*,[20] ruled that NMFS's reliance on the OCSRI in determining that coastal Oregon coho did not warrant listing violated the ESA and constituted an arbitrary and capricious action.[21] The court held that NMFS applied an improper legal standard in its determination because instead of finding that the species would not likely become endangered "in the foreseeable future," as required by the ESA,[22] the agency concluded only that the coho salmon were not likely to become endangered before the adoption of improved habitat measures

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14 *See* Carlotta Collette, *The Oregon Way*, HIGH COUNTRY NEWS, Oct. 26, 1998, at 8.

15 *See* Threatened Status, *supra* note 13, at 24,607-08.

16 *See* Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1150 (D. Or. 1998).

17 *See* STATE OF OR., OREGON COASTAL SALMON RESTORATION INITIATIVE 7-2 (1997) [hereinafter OCSRI].

18 *See id.* at 10.

19 *See* discussion *infra* Part IV.C.

20 6 F. Supp. 2d 1139 (D. Or. 1998).

21 *See id.* at 1150.

22 *See* 16 U.S.C. § 1532(20) (1994).

under the OCSRI.[23] In addition, the judge ruled that NMFS relied on impermissible factors by using the voluntary and future efforts promised in the OCSRI and MOA as a basis for not listing the coho.[24] Moreover, the court found that the administrative record did not adequately support NMFS's listing determination due to the agency's heavy but unfounded reliance on the OCSRI and MOA.[25]

Using the *Daley* decision as a guidepost, this Article explores the OCSRI in some detail, analyzing the plan in terms of its adequacy as a substitute for an ESA listing and evaluating its ability to conserve and restore native fish populations in general. In addition, the Article assesses the impact of the *Daley* decision not only on the OCSRI but also on listing decisions in general, discussing how future conservation efforts for unlisted species may be affected. The Article also describes the role of the OCSRI following an ESA listing, assessing whether the conservation plan can work in conjunction with the federal statue, even if it cannot prevent a listing.

Part I explains the situation before the OCSRI and the status of coho salmon in Oregon today. Part II introduces the OCSRI by giving detailed descriptions of the motivations and history behind the plan and by summarizing the essential elements contained within it. Part III explains the *Daley* decision and the errors made by NMFS in deferring the coho listing decision based on the conservation efforts of the OCSRI. Part IV considers questions left unanswered by the court in *Daley*, including the requirements under the ESA for state conservation plans. The Part also questions the substantive value of the OCSRI as a conservation plan regardless of the ESA's requirements. Part V briefly applies the lessons learned from the OCSRI to the broader area of "candidate conservation agreements," statewide conservation plans, and the alternative options for state conservation plans once a species is listed. This Article concludes that consideration of state conservation plans violates both the language and the purpose of the ESA if used as a substitute for a listing; only when a state conservation plan actually removes the threats to a species through the implementation of its provisions

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[23] *See Daley*, 6 F. Supp. 2d at 1151-52

[24] *See id.* at 1159.

[25] *See id.*

may an agency determine that the species does not warrant listing.

I
BACKGROUND

The motivation for creating the Oregon Coastal Salmon Restoration Initiative was twofold. First, Pacific salmon species have been in decline for many years, and both historic and current efforts to reverse this decline appeared to be failing. Second, and more eye-catching to the state, was the threat of an ESA listing of coho salmon. A listing would add federal regulation to land use in coastal Oregon and restrict much of the state's authority over its wildlife and water.

A. *Depressed Runs of Pacific Salmon*

Pacific salmon abundance has declined dramatically in comparison to historic levels.[26] Numbers indicate that on average less than ten percent of the historic salmon abundance return each year in runs up and down the Pacific Northwest coast, and most of these returning fish have been artificially raised in hatcheries.[27] The status of indigenous, naturally spawning populations of Pacific salmon is therefore considered extremely depressed.[28] Populations continue to decline[29] despite both historical and present efforts to reverse the downward spiral, including population supplementation through hatcheries, fish barging, and habitat restoration.[30]

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[26] Returning wild adult pacific salmon once numbered more than 8-10 million per year in the Columbia River basin alone. *See* COMMITTEE ON PROTECTION AND MANAGEMENT OF PACIFIC. NORTHWEST ANADROMOUS SALMONIDS ET AL., UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 18 (1996) [hereinafter UPSTREAM].

[27] *See id.*

[28] *See* COASTAL SALMON RESTORATION AND PROD. TASK FORCE, FINAL REPORT 1 (1997) [hereinafter TASK FORCE].

[29] Not all salmon populations are declining: there are a few stable stocks, and some stocks are increasing in numbers. *See id.* at 11.

[30] Salmon restoration began as early as 1875, with the introduction of hatcheries and artificial propagation. Historic and more recent efforts followed, including intergovernmental conventions and agreements, long-term wildlife programs and comprehensive plans, and investigations into and reform of salmon harvest practices. Salmon abundance, however, continued to decline. *See generally* OCSRI, *supra* note 17, at ch. 5; *see also* THE NORTHWEST SALMON CRISIS: A DOCUMENTARY HISTORY 26-87, 320 (Joseph Cone & Sandy Ridlington eds., 1996).

For Oregon coho, the situation appears particularly grim. Estimates indicate that at the beginning of the twentieth century coho salmon in the coastal Oregon region numbered more than 1.4 million fish.[31] Recent estimates place coastal coho abundance at less than five percent of that historic figure,[32] with populations experiencing an especially rapid decline in the last twenty years.[33] Scientists attribute the recent decline to numerous factors, including continued habitat destruction, an extended period of adverse ocean conditions, negative impacts of hatchery fish, and excessive harvest rates in light of ocean and habitat conditions.[34] The coho life history, which includes extended periods of freshwater residency, has made the species particularly vulnerable to human-caused habitat degradation.[35]

B. *The Pending Coho Listing*

Environmentalists petitioned[36] NMFS in 1993 to list various populations of naturally spawning, indigenous coho salmon as threatened or endangered under the ESA.[37] Under Section

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[31] *See* Proposed Threatened Status, *supra* note 4, at 38,021 (citing J.A. Lichatowich, *Habitat Alteration and Changes in Abundance of Coho (Oncorhynchus Kisutch) and Chinook (O. Tshawytscha) Salmon in Oregon's Coastal Streams*, 105 CAN. SPEC. PUB. FISH. AQUAT. SCI. 92 (1989)).

[32] In its proposed coho listing, NMFS estimated that the "current abundance of coho salmon on the Oregon coast may be less than 5 percent of that in the early part of this century." Proposed Threatened Status, *supra* note 4, at 38,021. Another study estimated that coho salmon are extinct in 56% of their historic range, threatened in 20%, of special concern in five percent, and not known to be extinct, declining, depressed, or facing imminent threat in only 6.5% of their historic range. *See* National Marine Fisheries Serv., Status Review of Coho Salmon from Washington, Oregon, and California (1995) (citing WILDERNESS SOC'Y, THE LIVING LANDSCAPE (1993)).

[33] Even during the 1970s, when robust hatchery and wild coho stocks continued to support large fisheries, the run numbers remained depressed compared to historic times. Only after 1978 did both wild and hatchery run returns drop to significantly low numbers, and abundance levels have continued to decline ever since. *See* TASK FORCE, *supra* note 28, at 10 (citing OREGON DEP'T OF FISH AND WILDLIFE, 1995 BIENNIAL REPORT ON THE STATUS OF WILD FISH IN OREGON (1995)); *see also* OCSRI, *supra* note 17, at 4.

[34] *See* OCSRI, *supra* note 17, at 3-3.

[35] *See* Charles Huntington et al., *A Survey of Healthy Native Stocks of Anadromous Salmonids in the Pacific Northwest and California*, FISHERIES, Mar. 1996, at 6, 10.

[36] Any interested person may petition to list a species as threatened or endangered under ESA Section 4. *See* 16 U.S.C. § 1533(b)(3)(A) (1994).

[37] Separate environmental groups filed two petitions in 1993. The July 1993 petition requested listings for various Oregon coho populations, and the October 1993 petition requested a listing for all coho in Washington, Oregon, Cali-

4(b)(3)(B) of the ESA, the NMFS had twelve months following the petition filing to determine whether a listing was warranted.[38] NMFS did not respond or propose listings until July 25, 1995, two years after receipt of the first petition.[39] At that time, the agency identified six different ESUs of coho salmon in the range between southern British Columbia and southern California and proposed to list three of these ESUs as threatened:[40] the Oregon Coast ESU,[41] the southern Oregon/ northern California ESU (also called the Transboundary ESU),[42] and the central California coast ESU.[43]

In the Federal Register publication of the proposed listings, NMFS explained that the three ESUs warranted listing because of the current depressed state of coho abundance in those areas.[44] According to NMFS's investigation, the primary reason for the more recent decline of the species appeared to be extensive destruction, modification, and curtailment of the coho's habitat due to activities such as logging, agricultural practices, urbanization, stream channelization, dams, wetland loss, water withdrawals and unscreened diversions for irrigation, and mining.[45] Other contributing factors included the ill-effects of hatch-

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fornia, and Idaho. *See* Proposed Threatened Status, *supra* note 4, at 38,011. NMFS denied two previous listing petitions because the petitioned populations did not constitute a "species" under the ESA. *See* Coho Salmon in Scott and Waddell Creeks, CA, 59 Fed. Reg. 21,744 (1994) (proposed Apr. 26, 1994) (denying listings); Lower Columbia River Coho Salmon, 56 Fed. Reg. 29,553 (1991) (denying listings); *see also* Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612 (1991) (explaining what constitutes a species when listing salmon under the ESA).

38 *See* 16 U.S.C. § 1533(b)(3)(B)(3).

39 *See* Proposed Threatened Status, *supra* note 4, at 38,011.

40 *See id.* at 38,016.

41 *See id.* (including Oregon coastal drainages from the Columbia River south to Cape Blanco in Oregon).

42 *See id*. (including coastal drainages south of Cape Blanco in Oregon and north of Punta Gorda in California).

43 *See id.* (ranging from Punta Gorda to the San Lorenzo River in Santa Cruz California Coho). Stocks in the lower Columbia River and its tributaries were classified with southwestern Washington Coast stocks to create one ESU. NMFS added this ESU and the Pugent Sound/Strait of Georgia ESU to the candidate list due to the inadequacy of available data and the appearance at the time that a listing was not warranted. *See id.* at 38,021.

44 *See id.*

45 *See id.* at 38,024.

ery production,[46] poor ocean conditions, and, most likely, the current harvest prescriptions.[47]

According to the ESA listing procedures, NMFS's final listing determination for Pacific coho was due on July 23, 1997.[48] However, a congressional moratorium[49] and an agency-invoked time extension[50] pushed the Oregon coastal coho decision deadline back to April 25, 1997. This deadline extension proved to be critical to the development of the OCSRI because it allowed Oregon more time to improve its conservation plan, thereby improving its chance at avoiding the ESA listing.[51]

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[46] Hatchery fish interfere with wild fish survival and production because they compete with wild fish for food and resources, including habitat, and if permitted to spawn with wild fish, they can adversely influence the genetic makeup of a wild fish population. *See* THE NORTHWEST SALMON CRISIS, *supra* note 30, at 131-39.

[47] *See id.* NFMS observed that recent regulations had closed or curtailed many fisheries, but noted that populations were still declining and that it was difficult to assess the effects of continued harvests. *See* Proposed Threatened Status, *supra* note 4, at 38,025.

[48] Under the ESA, a final listing determination must be made within one year of a proposed listing. *See* 16 U.S.C. § 1533(b)(6)(A) (1994). The one-year period runs from the date of publication of the proposed rule regardless of when the proposed rule was issued or when a petition was filed. *See* Oregon Natural Resources Council v. Kantor, 99 F.3d 334 (9th Cir. 1996).

[49] In April 1996, Congress lifted a moratorium it had imposed on evaluating species for final listing and appropriated funds for purposes of the Endangered Species Act, but it prohibited the use of those funds for purposes of section 4(a), (b), (c), (e), (g), or (i) of the ESA until reauthorization of the Act, or until the end of fiscal year 1996 (Sept. 30, 1996). *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

[50] On October 31, 1996, NMFS listed the Central California ESU as threatened. *See* Threatened Status for Central California Coast Coho Salmon Evolutionary Significant Unit (ESU), 60 Fed. Reg. 56,138 (1996). At the same time, the agency invoked a six-month extension of the final listing deadline, as permitted by Section 4(b)(6)(B) of the ESA for the Oregon Coast and Transboundary ESUs, claiming substantial disagreement as to the sufficiency and adequacy of the data concerning those ESUs. *See* Notice of Six Month Extension on the Final Determination on Whether to List the Oregon Coast and Southern Oregon/Northern California Coast Evolutionary Significant Units (ESUs) of Coho Salmon, 61 Fed. Reg. 56,211 (1996).

[51] The first draft of the OCSRI was presented in August 1996, two months *after* the original final listing deadline as calculated from the July 25, 1995 proposed listing publication date. *See* STATE OF OR., OREGON COASTAL SALMON RESTORATION INITIATIVE, REVIEW DRAFT (1996) [hereinafter DRAFT OCSRI]; *see also* 16 U.S.C. § 1533(B).

II
THE OCSRI: AN OVERVIEW

Governor Kitzhaber announced the planning effort to create the OCSRI in October 1995,[52] less than three months after NMFS's publication of a proposed rule to list coho salmon.[53] Oregon completed its first draft of the OCSRI in August 1996 and released it to both NMFS and the public for comments.[54] After making additions and changes, the state presented a revised OCSRI shortly thereafter on March 10, 1997.[55] This revised OCSRI, supplemented by a Memorandum of Agreement (MOA)[56] between NMFS and the State of Oregon, constituted the "state conservation efforts" upon which NMFS relied in making its final listing decision.[57]

A. *The Conservation Plan*

The conservation plan developed by Oregon reflects three of the state's overarching goals: (1) to avoid a coho listing and "retain state authority over management of Oregon's natural resources;"[58] (2) to "restore [the state's] coastal salmon populations and fisheries to productive and sustainable levels that will provide substantial environmental, cultural, and economic benefits;"[59] and (3) to use only existing laws and environ-

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[52] To begin the effort, Kitzhaber created four teams, composed of representatives of key state and federal agencies, departments, and committees, and he charged them with the responsibility of developing a state conservation plan. The Outreach and Education Team gathered advice and ideas; the Science Team provided technical support; the Salmon Strategy Team gathered agency directors to meet biweekly with the governor and report progress; and the Agency Planning and Implementation Team coordinated key state department representatives to develop work plans and identify possible solutions for their respective agency actions. *See* OCSRI, *supra* note 17, at 2-4 to 2-7. In addition, key state agencies worked with stakeholders (e.g., those with special interests such as forestland owners, agricultural interests, the fishing industry, and environmental organizations) and NMFS to develop action plans to address environmental and managerial factors affecting salmon survival. *See* EXECUTIVE SUMMARY, *supra* note 1, at 4.

[53] *See* Proposed Threatened Status, *supra* note 4.

[54] *See* EXECUTIVE SUMMARY, *supra* note 1, at ii.

[55] *See id.*; OCSRI, *supra* note 17, at 3.

[56] *See* MOA, *supra* note 11.

[57] *See* Threatened Status, *supra* note 13, at 24,602-06.

[58] OCSRI, *supra* note 17, at 2-3.

[59] *Id*. at 2-1. This goal is also the OCSRI mission statement and refers to all Northwest salmonid species; however, the plan focuses on the immediate recovery of coho salmon. *See id.* at 2-3 ("The goal of OCSRI is not merely to prevent

mental regulations—rather than new laws—when developing and implementing the conservation plan.[60] Notably, two of the three goals concerned matters other than the health of the salmon.

The state's varied goals framed the OCSRI's basic structure and its approach to conservation. Oregon refers to the method taken as 'The Oregon Approach' and describes it as a new way of restoring natural systems, in contrast to many endangered species recovery plans that rely primarily on rigid regulatory approaches.[61] According to Oregon, this new strategy consists of four essential elements: coordinated agency programs,[62] community-based actions, monitoring of efforts,[63] and the use of appropriate corrective measures in the future.[64] Substantively, the approach focuses on addressing the major factors for the decline of coho and other salmonids and uses an ecosystem approach[65] in order to address collectively the full range of aquatic health attributes.[66] The following sections elaborate on this structure and describe some of the OCSRI's measures.

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the extinction of coho salmon in the coastal region, but to restore populations of salmon, steelhead, and cutthroat trout to levels that are considered *healthy.*").

[60] Goal 3 of the OCSRI states that "[a]chievement of overall OCSRI goals will be based to the greatest extent on existing laws and environmental protections, rather than new laws." *Id.* at 7-2.

[61] *See* EXECUTIVE SUMMARY, *supra* note 1, at 2.

[62] Oregon recognized that agencies needed to coordinate their efforts since the salmonid life cycle crosses agency jurisdictional boundaries and because the previous, independent administration of salmon protective measures failed to address the issue on an ecosystem-wide scale. *See* OCSRI, *supra* note 17, at 12-1.

[63] "Monitoring" refers to continued scientific research on the implementation of conservation measures in order to determine whether efforts are providing the results intended, i.e., whether habitats and salmon populations are responding as expected, and whether any changes or additions should be made to the conservation efforts in order to achieve the intended results. *See id.* at 2-8; *see also* discussion *infra* Part II.A.4.

[64] *See* EXECUTIVE SUMMARY, *supra* note 1, at 1.

[65] Under the OCSRI, an "ecosystem approach" refers to the systematic consideration of all attributes of aquatic health. *See* OCSRI, *supra* note 17, at 2-1.

[66] The OCSRI identifies four key tenets of the plan: an ecosystem approach that requires a systematic consideration of the full range of aquatic health attributes, a focus on reversing factors for decline and meeting objectives that address those factors, the use of adaptive management and a comprehensive monitoring strategy, and the involvement of citizens and constituent groups in the restoration process. *See id.*

1. *State Agency Efforts and Coordination*

State agency efforts constitute the largest section of the OCSRI and provide the most substantive protections for the fish species. As a part of the OCSRI's conservation plan, each state agency with policies or management programs affecting salmonids developed an action plan detailing how that agency would use existing laws and voluntary efforts to address those factors for salmon decline relating to its individual office.[67] The resulting action plans contained a "laundry list" of strategies that the agency could take, short of implementing new regulations, to benefit the fish in any way.[68] The plans all included strategies for increasing enforcement of existing rules and laws within each agency's jurisdiction,[69] and, following the OCSRI's basic mandate for coordinated agency programs, many also included measures identifying how the agencies would work together in a comprehensive manner to accomplish the united goals of the OCSRI.[70]

The Oregon Department of Fish and Wildlife (ODFW), having authority over hatcheries and salmon harvest and being the state's primary technical agency on fish,[71] submitted one of the

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[67] *See* EXECUTIVE SUMMARY, *supra* note 1, at 9. The state agencies involved in the OCSRI include the Oregon Departments of Agriculture, Economic Development, Environmental Quality, Fish and Wildlife, Forestry, Geology and Mineral Industries, Land Conservation and Development, Parks and Recreation, Transportation, and Water Resources, and the Division of State Lands, the State Marine Board, and the Fish and Wildlife Division of the State Police.

[68] For example, the Oregon Department of Transportation said that it would identify culverts interfering with fish passage, create a priority list for replacing those culverts, identify coastal roads with potential detrimental impacts on nearby water systems, create a guideline for the management of the identified roads, develop a handbook on erosion control, and review and revise the guideline on winter road maintenance activities to make it compatible with the OCSRI's recovery goals. *See* OCSRI, *supra* note 17, at 17C-DOT-9, -13, -18.

[69] *See id.* at 9-1; *see also* EXECUTIVE SUMMARY, *supra* note 1, at 11. For example, the Water Resources Department stated in its action plan that it would increase enforcement against illegal water diversions. *See* OCSRI, *supra* note 17, at 17C-WRD-19.

[70] For example, the Department of Land Conservation and Development committed to coordinating with the Department of Environmental Quality and other agencies to implement the federal Coastal Nonpoint Pollution Control Program. *See id.* at 17C-DLCD-1; Coastal Zone Management Act Reauthorization Amendments of 1990 § 6217, 33 U.S.C. § 1455(b) (1994) (establishing a Coastal Nonpoint Pollution Control Program).

[71] *See* OR. REV. STAT. § 506.036 (1997).

more substantive action plans to the OCSRI.[72] ODFW proposed a new strategy for determining escapement goals for coho salmon,[73] announced a schedule to reduce the number of hatchery coho smolts released into Oregon waters each year,[74] and promised to improve confinement of hatchery fish to prevent them from spawning in the wild and interfering with wild fish reproduction.[75] In addition, ODFW promised to provide basic information necessary for all state agency conservation efforts by adding research on coho escapement and juvenile production and by inventorying all coastal streams for habitat, fish presence, and location of habitat restoration projects and artificial barriers.[76]

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[72] *See* OCSRI, *supra* note 17, 17C-ODFW.

[73] *See id.* at 17C-ODFW-1. Escapement is defined as the number of adult salmon that survive or escape capture and return to spawn in freshwater streams. Escapement goals are used when determining allowable fish harvest levels. The new strategy classified coho into four coastal 'Gene Conservation Groups' and established separate escapement goals for each. This strategy would make the escapement goals more population-specific. ODFW also stated that future actions included developing basin-specific goals for all coastal basins. Previously, the agency set one escapement goal for all coho, thus ignoring the varying health of different coho populations. By the time that Oregon submitted the final OCSRI, ODFW had already identified the four Gene Conservation Groups and set escapement targets for the groups. The Pacific Fishery Management Council, regulating harvest levels, still needed to approve the new approach before it could go into effect. *See id.* ODFW also noted recent restrictions on both ocean and river coho fisheries and promised to maintain these restrictions until the coho populations show substantial rebuilding and until identified spawner rebuilding criteria are met. The restrictions began as early as 1990 and neared total prohibition in 1994. *See id.* at 17C-ODFW-25, -27.

[74] *See id.* at 17C-ODFW-20. The plan called for a reduction in the number of hatchery smolts released each year from 6.4 million in 1990 to 2.3 million by 1998. *See id.* Reducing hatchery releases would help reduce the resource competition that occurs between hatchery and wild fish. *See supra* note 46.

[75] *See* OCSRI, *supra* note 17, at 17-ODFW-19. ODFW previously addressed hatchery problems under the 1994 Wild Fish Management Policy and promised to implement the rest of that plan, which called for the complete confinement of hatchery fish. Wild Fish Management Policy, OR. ADMIN. R. 635-07-525 (1998). ODFW noted that all hatcheries had been marking hatchery coho since 1995. *See* OCSRI, *supra* note 17, at 17-ODFW-23.

[76] *See* OCSRI, *supra* note 17, at 17C-ODFW-3 to -12. Additional measures included helping other agencies identify areas of low instream flow, cooperating with landowners to remove fish passage barriers and install fish screens on water diversions (33 had already been installed), and conducting an outreach program under the OCSRI. *See id.* at 17C-ODFW-56 to -61. *See generally id.* ch. 17C-ODFW (listing additional measures).

The Oregon Department of Forestry (ODF) and the Oregon Department of Agriculture (ODA) also played key roles in the OCSRI, since NMFS had identified both logging and agricultural activities as major contributors to the degradation of coho habitat.[77] ODF identified a variety of measures to be taken to improve forest practices on both state and private lands. For coastal state-owned forests, ODF promised to develop a comprehensive forest management plan that would alter forest practices in state forests and provide a high probability of restoration and maintenance of properly functioning aquatic habitats.[78] For private forestlands, however, ODF's measures proved less substan-

[77] *See supra* note 45 and accompanying text. Forest practices and timber harvest adversely impact water quality and aquatic habitats by removing riparian area trees and reducing shade (thus increasing water temperature), removing sources of large woody debris (which might otherwise enter the stream and help increase stream complexity), increasing erosion of sediment (which covers gravel important for salmonid spawning), and reducing the stability of stream banks (which leads to more erosion and changes in the channel morphology). *See* Independent Scientific Group, Return to the River: Restoration of Salmonid Fishes in the Columbia River System 143-44 (Sept. 10, 1996) (unpublished manuscript, *available in* <http://www.nwppc.org/isg_final_report/isgfinal.exe>) [hereinafter Return to the River]. In addition, logging compacts the soil, preventing future vegetation growth, and involves extensive road systems that contribute additional sediment to the water system. *See id.* at 143. Agricultural practices similarly harm riparian areas and the associated stream quality. *See id.* Livestock destroy the riparian vegetation and stream structure, agriculture can invade upon riparian areas, altering the stream's hydrology and causing sedimentation and pollution runoff, and agricultural dams and diversions for irrigation reduce habitat and block fish from their natural migration. *See id.* at 144-46.

[78] *See* OCSRI, *supra* note 17, at 17C-ODF-11. The Northwest Oregon State Forest Management Plan would include provisions for improving roads, fish passage, and riparian conditions, and would include in-stream restoration measures, such as placing large woody debris in the stream. *See id.* ODF started developing the management plan immediately, but at the time of this writing, the plan had yet to be finalized. ODF also promised to develop a habitat conservation plan (HCP) under the ESA on the same state forests; however, the primary species of concern in the HCP would be the federally listed northern spotted owl and marbled murrelet. *See* EXECUTIVE SUMMARY, *supra* note 1, at 9; *see also* OREGON DEPARTMENT OF FORESTRY, WESTERN OREGON DRAFT HABITAT CONSERVATION PLAN, EXECUTIVE SUMMARY, at 2. Since the birds share the same coastal forest range as the coho, ODF promised to focus the birds' needs for old growth forest and added tree retention around fish bearing streams so both bird and fish could benefit. *See, e.g.*, OCSRI, *supra* note 17, at 17C-ODF-31 to -32. An HCP had already been developed for the Elliot State Forest, and so the new HCP would only address the Tillamook and Clatsop State Forests. *See* EXECUTIVE SUMMARY, *supra* note 1, at 9; OCSRI, *supra* note 17, at 17C-ODF-30 to -32.

tive, merely calling for studies of stream and fish habitat,[79] monitoring of current best management practices to determine their effectiveness,[80] increased public education,[81] and the creation of guidelines for stream restoration.[82] The ODF's measures had no direct effects on the private landowner's forest practices. ODF also identified several voluntary efforts agreed to by private landowners, such as commitments from members of the Oregon Forest Industries Council (OFIC)[83] to voluntarily leave more trees than required by the state Forest Practices Act (FPA) regulations, but only under limited and specified circumstances.[84] In addition, the timber industry agreed to an elimination of the state timber tax exemption, which excluded the first 25,000 board feet of timber harvested from state taxes,[85] but did so only on the condition that a listing did not occur.[86]

ODA promised to continue installing fish screens on all irrigation diversions and to create, under Senate Bill 1010, additional water quality management plans.[87] Passed in 1993, the bill allows ODA to develop area water quality management plans and to require agricultural landowners to take actions necessary to carry out the plan.[88] Furthermore, ODA may work with the farmers to identify water quality problem sources and help out-

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[79] *See* OCSRI, *supra* note 17, at 17C-ODF-1 to -5.

[80] *See id.* at 17C-ODF-12 to -20.

[81] *See id.* at 17C-ODF-52.

[82] *See id.* at 17C-ODF-29.

[83] OFIC is an organization of private timber owners.

[84] For example, riparian management under the FPA uses a complex system to determine the number of trees to be left in a riparian stand, and OFIC said it would only harvest 25% of the excess trees (above the normal stand) in coho core areas. *See* OCSRI, *supra* note 17 at 17C-ODF-25, -27. *See generally* Oregon Forest Practices Act, OR. REV. STAT. §§ 527.610-.992 (1998); Board of Forestry Regulations, OR. ADMIN. R. 629-24-101 to -660-060 (1998). Several private timber owners also volunteered to monitor the streams running through their property. *See, e.g.*, OCSRI, *supra* note 17, at 17C-ODF-46 (monitoring for the Coquille, Siletz, and Sixes watersheds).

[85] *See* OCSRI, *supra* note 17, at 17C-ODF-60.

[86] *See id.*; Collette, *supra* note 14, at 9 ("[T]he state tax on timber activities, intended to help fund the recovery effort, had a 'fail-safe' mechanism—if the coho were listed, the tax was terminated the same month.") (referring to the additional timber tax imposed because of the removal of the tax exemption). The governor's budget for the OCSRI immediately incorporated the added revenue even though the voluntary tax change still needed to pass the state legislature (which it subsequently did). *See* OCSRI, *supra* note 17, at 17C-ODF-60.

[87] *See id.* at 17C-ODA-1.

[88] *See* S. 1010, 65th Leg., 1990 Spec. Sess. (Or. 1990) (codified at OR. REV. STAT., §§ 568.900-.933 (1998)).

line ways to correct those problems via changes in agricultural practices or other measures, including crop rotations, buffer strips, and pesticide and fertilizer reductions.[89] ODA also noted that the state would be participating in the federal Conservation Reserve Enhancement Program—a federal-state partnership cost-share program designed to assist and provide funding for willing agricultural landowners to implement conservation measures, such as those that would be needed for landowner compliance with Senate Bill 1010.[90]

The other state agencies involved in the OCSRI submitted similar "laundry lists" of proposed actions. While most of their strategies involved actions that could be taken within the agency to improve salmon habitat, such as increasing enforcement of relevant regulations, a few of the strategies promised to have regulatory impacts on private parties. For instance, the Department of Land Conservation and Development (DLCD) amended Goal 5 of the urban growth area land use goals to require larger development setbacks, which would ultimately affect private activities.[91] The Department of State Lands (DSL) also proposed to affect private parties through its permit system by limiting commercial gravel removal to only the annual gravel recruitment on individual gravel bars,[92] and by revising its general authorization standards for road constructions and fish enhancements to require structures such as larger culverts.[93]

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[89] *See id.*

[90] *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., PAMPHLET NO. PA-1631, THE CONSERVATION RESERVE ENHANCEMENT PROGRAM (1998).

[91] *See* OCSRI, *supra* note 17, at 17C-DLCD-5. DLCD revised Goal 5 in June 1996 during the development of the initial draft of the OCSRI. *See id.* Goal 5 uses a basic setback requirement of 50-100 feet and adjusts this in areas with steeper slopes. *See id.* The larger setback requirements would move development further away from streams and rivers, thereby protecting riparian vegetation and decreasing the amount of sediment that enters the stream as a result of development activity. *See id.* Local land use planning departments would be required to amend their land use rules to conform with the goal before or upon their next periodic review, which could be as far away as seven years. DLCD planned, however, to use any new funding arising out of the OCSRI to help local governments change their rules within two to three years. *See id.*

[92] *See id.* at 17C-DSL-2. DSL would apply the new limit when it renewed gravel permits. *See id.*

[93] *See id.* at 17C-DSL-5 to -8.

Quite notably, the agency action plans identified efforts that would be made in the future, and very few of the measures had actually been implemented to any degree.[94]

2. *Community-Based Actions Through Watershed Councils*

The OCSRI identifies community-based actions as another essential element in its approach to salmon recovery,[95] and the plan relies heavily upon watershed councils to facilitate these actions at the local level.[96] The OCSRI calls for watershed councils to conduct basin-wide watershed assessments to determine the local factors for salmon decline. The councils are then to develop a plan that uses local landowner participation to improve the watershed's health and addresses the factors for decline.[97] Oregon recognized that additional funding was necessary to aid the watershed councils in accomplishing these efforts, including funding for incentives and cost-sharing for local restoration projects on private lands; accordingly, the Governor's budget called for a substantial increase in such funds.[98] The OCSRI admits, however, that watershed councils still lack adequate funding, technical support, and the trusted relationships with local landowners needed to be truly effective.[99] These infrastructural deficiencies, compounded by the fact that most of the substantive restoration efforts would be on a voluntary basis,[100] bring into question the actual benefit received from this type of effort.

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[94] *See id.* at 11; *see also* OCSRI, *supra* note 17, ch. 9.

[95] *See id.* at ch. 17A.

[96] A watershed council "is a locally organized, voluntary, non-regulatory group established to assess the condition of their watershed and build a work plan to implement enhancement and protection activities within their watershed. Watershed councils offer local residents the opportunity to be involved in making decisions at the local level that affect their watershed." *Id.* at 17A-5.

[97] *See id.* at 17A-8, -9, -12. The OCSRI notes that local Soil and Water Conservation Districts would aid the councils in developing watershed plans. *See id.*

[98] *See id.* at 17A-15. The funding would go directly to watershed councils and to the Governor's Watershed Enhancement Board (GWEB), a state grant program established in 1995 to oversee and fund watershed enhancement projects. *See id.* at 17A-10.

[99] *See id.* at 17A-16.

[100] *See* EXECUTIVE SUMMARY, *supra* note 1, at 1. ("[T]he bulk of the work to conserve and restore watersheds will be done by local people.").

3. *Outreach and Education*

Outreach and education measures constitute a part of both agency and watershed work-plans as a means of facilitating private support for, and participation in, the OCSRI conservation strategies.[101] The initial efforts in this area focused on identifying stakeholders[102] and relaying information via workshops, articles, and publications about the importance of salmon and the processes involved in their recovery.[103] By making the public aware of the intricacies of salmon recovery, Oregon believed that private landowners and small municipalities would be more apt to participate in the OCSRI and not expect the state to provide a "quick-fix" for the problem.[104]

4. *Science, Monitoring, and Adaptive Management*

The OCSRI generally bases its conservation efforts on a scientific understanding of salmon *decline* rather than salmon *recovery*.[105] An exception lies in the OCSRI's designation and priority protection of coho "core areas,"[106] defined as areas judged to be of critical importance to the persistence of salmon populations.[107] Protecting critical salmon habitat areas has been identified as a key factor in the recovery of salmonids.[108] By making core area protection a priority in the conservation plan, the OCSRI follows scientific recommendations for salmon recovery.[109]

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101 *See* OCSRI, *supra* note 17, at 8-1.

102 *See supra* note 52.

103 *See* OCSRI, *supra* note 17, at 8-9, -10.

104 *See id*. at 8-1.

105 The OCSRI calls for conservation efforts focusing on factors for salmon decline. *See supra* notes 66-67 and accompanying text.

106 Coho core areas are identified in the OCSRI, *supra* note 17, ch. 15. The state later identified core areas for other salmonids as well. *See id.* at 17E-1.

107 Core areas ideally contain the resources and habitats necessary for the survival of individual populations. *See id.* at 15-1.

108 Several scientific reports identify the protection of salmon stronghold populations as a key factor in the recovery of salmonid species. "Strongholds" are the best remaining populations of a species. *See, e.g*., Return to the River, *supra* note 77, at 518.

109 The OCSRI makes protection of core areas a priority by emphasizing that agencies should focus their efforts first in these areas. *See id.* at 4-1. The OCSRI also sets out other priorities that similarly serve to protect key salmon areas. For instance, ODF was asked to focus its agency efforts on the Tillamook State Forest because of the size of the area, the impending threats of harvest, and the current high quality and use of that habitat by and for salmonids. *See* OCSRI, *supra* note 17, at 4-3. The Tillamook State Forest area suffered a series

The OCSRI recognizes a need for additional science in its conservation efforts and calls for the creation of an Independent Multidisciplinary Science Team (IMST) to aid the different agencies in developing restoration efforts based on the best available science.[110] In addition, the plan calls for scientific monitoring[111] to appraise the biological results of agency efforts and to determine whether salmon habitats and populations have responded as expected to the conservation efforts.[112] Under the OCSRI monitoring program, various agencies, watershed councils, and volunteers perform distinct monitoring tasks in a coordinated effort.[113] The agencies and the IMST would assess monitoring results against the plan's conservation efforts to decide appropriate corrective measures to be taken by the OCSRI to improve the conservation plan.[114] The IMST would also summarize the monitoring results and identify the strengths and weaknesses of the plan in an annual public report on the OCSRI.[115]

5. *Enforcement and Accountability*

A key component of the OCSRI includes increased enforcement of existing regulations, such as ODF enforcement of the Forest Practices Act.[116] However, the OCSRI itself is not enforceable, nor are the other related measures committed to by

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of massive forest fires in the 1930s, and the forest has been recovering since with very little harvest of the then-immature trees. This scenario indirectly created prime salmon habitat, free from most human impacts. Now, sixty years later, the trees have reached harvestable size, and timber sales and the associated degradation of salmonid habitat once again threaten these lands. *See* Don Hamilton, *After the Burn*, PORTLAND OREGONIAN, Nov. 21, 1996, at 1, *available in* 1996 WL 11408065.

110 The IMST would be composed of independent scientists. *See* EXECUTIVE SUMMARY, *supra* note 1, at 7; OCSRI, *supra* note 17, at 13-2.

111 Biological monitoring is generally understood to involve the biological and physical sampling of salmon, their populations, and their habitats.

112 *See* EXECUTIVE SUMMARY, *supra* note 1, at 1.

113 *See id.* at 1, 7; OCSRI, *supra* note 17, at 16-1, -2, -12. ODFW takes the lead role in sampling biological data; however, ODF and the other agencies help to some extent. *See supra* notes 76, 84, 97, 110 and accompanying text. In addition, the plan contemplates training landowners, conservation groups, and even schoolchildren on how to monitor and help the OCSRI. *See* EXECUTIVE SUMMARY, *supra* note 1, at 7.

114 *See* OCSRI, *supra* note 17, at 16-1, -8. This process is also called "adaptive management" in the OCSRI. *See id.*

115 *See* EXECUTIVE SUMMARY, *supra* note 1, at 7.

116 *See id.* at 11; *see also* OCSRI, *supra* note 17, ch. 9.

the participating agencies.[117] The OCSRI states that each agency would be held accountable for implementing the measures it identified,[118] but merely requires that all agencies develop work-plans and meet biweekly with the governor to report their progress in an effort to see that agency promises are carried through.[119] The plan does not offer the opportunity for citizens to enforce the agency promises,[120] nor does it detail any other method of enforcement.

The OCSRI attempts to create a low level of accountability through the monitoring program, which requires agency work-plans[121] and annual reports, in the hope that such reports will keep the agency focused on implementation of proposed measures. In addition, the OCSRI contemplates that the IMST would monitor agency actions and thereby acting as a check on the plan and effectively holding the plan to its goals by maintaining a high profile of the implementing agencies and ensuring more effective use of adaptive management.[122] Neither of these mechanisms provides any sort of penalty or injunctive relief for failure to implement any one of the OCSRI's measures.[123]

6. *Funding and Legislative Support*

The final draft of the OCSRI lacked funding of any sort for all the measures laid out in the plan.[124] On March 25, 1997, a

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117 *See* Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1158 (D. Or. 1998) (stating that the fate of Oregon coho under the OCSRI is tied to the whims of politics and promises of future conservation efforts that may be years or decades away from implementation).

118 The OCSRI "enforcement" measures discuss enforcement of measures *by* state agencies. *See* EXECUTIVE SUMMARY, *supra* note 1, at 11.

119 *See* OCSRI, *supra* note 17, at 12-1.

120 Since the OCSRI is not a legislative mandate, there is no mechanism for citizen enforcement. *See* The Salmon Recovery Initiative, H. 3700, 69th Leg., 1997 Spec. Sess. (Or. 1997); H. 5042, 69th Leg., 1997 Spec. Sess. (Or. 1997); S. 924, 69th Leg., 1997 Spec. Sess. (Or. 1997) (providing funding for the OCSRI efforts, but otherwise not making law out of the Plan).

121 Work-plans describe what actions the agency will take, when, by whom, and when completion is anticipated. *See* EXECUTIVE SUMMARY, supra note 1, at 9.

122 *See* OCSRI, *supra* note 17, at 13-2. The IMST annual report would describe both biological results and agency efforts. *See id*.

123 *See id.*

124 *See* EXECUTIVE SUMMARY, *supra* note 1, at 5. No new funding was identified; however, many of the less cumbersome agency measures involved slight changes in agency administration and therefore did not need new funding. *See id.*

month before the listing decision, the Oregon legislature passed the Oregon Salmon Recovery Initiative into law, providing $30 million of funding for the 1997-1999 biennium.[125] A major portion of this funding was in the form of a rescission of a timber tax exemption agreed to by representatives of the timber industry and conditioned upon the non-listing of the coho.[126]

B. *The Memorandum of Agreement*

As NMFS's April 25, 1997 listing deadline drew near, the agency became concerned that the latest draft of the OCSRI would not prove sufficient to support a "not warranted" listing decision for Oregon coho. Specifically, NMFS believed that the OCSRI's habitat measures failed to secure adequate high-quality habitat for the coho over the long term and that the plan therefore failed to ensure survival of the species.[127] In an effort to improve the OCSRI and to support a decision not to list, NMFS and the State of Oregon signed a Memorandum of Agreement (MOA) concerning the OCSRI in late April 1997.[128] The MOA contained additional measures, not present in the OCSRI, NMFS considered adequate and necessary for habitat protection; thus, the agreement served as a means to add those measures to the state's conservation plan.[129]

The habitat measures identified in the MOA prioritized the OCSRI's habitat measures and identified specific actions to be taken in areas where the OCSRI was lacking in habitat protection. For example, the MOA required Oregon to ensure that the IMST reviewed freshwater habitat needs as its first priority[130]

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125 *See* H. 3700, 69th Leg., 1997 Spec. Sess. (Or. 1997); H. 5042, 69th Leg., 1997 Spec. Sess. (Or. 1997); S. 924, 69th Leg., 1997 Spec. Sess. (Or. 1997).

126 *See* Collette, *supra* note 14, at 9; *see also supra* note 86 and accompanying text.

127 *See* Threatened Status, *supra* note 13, at 24,605.

128 *See* MOA, *supra* note 11, § 12, at 4. Governor Kitzhaber signed for the state on April 22, 1997, and William Stelle, Jr., NMFS's Northwest Regional Administrator, signed for NMFS on April 28, three days after NMFS's announcement of its final decision not to list the Oregon Coast ESU. *See id*. Kitzhaber actually drafted the MOA after receiving a similar agreement proposed by NMFS, which the governor described as "outrageous." *See* Collette, *supra* note 14, at 8.

129 *See generally* MOA, *supra* note 11.

130 *See id.* § 5(c). The IMST needed to identify gaps in the freshwater habitat area and make recommendations to the state as to how to narrow those gaps. Oregon agreed to make every effort to implement the IMST recommendations as rapidly as possible. *See id.*

and reviewed the OCSRI's provisions on gravel removal.[131] In addition, the MOA mandated that Oregon work with NMFS to develop improvements to Oregon's forest practices rules,[132] expedite flow restoration in critical low-flow areas,[133] begin implementation of agricultural efforts in core areas first,[134] use Outstanding Resource Water designation to protect core areas,[135] and restrict fill and removal in core areas.[136]

Under the MOA, Oregon committed to the full implementation of all measures contained in both the MOA and the OCSRI;[137] in return, NMFS promised to provide support, technical advice, and staff assistance to aid in the implementation of the plan.[138] NMFS also promised Oregon that it would work with the state to help avoid a listing;[139] however, NMFS could not guarantee that a listing would not occur, and the MOA made it clear that NMFS could change the ESA status of either Oregon ESU at any later date.[140]

Despite its contract-like appearance, the MOA in effect assured little. Except for a provision calling for changes in forest practices within two years,[141] the MOA failed to establish time

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131 *See id.* § 7(j), at 11. The OCSRI's provisions on gravel removal still allowed commercial gravel removal up to the level of annual recruitment on individual gravel bars. *See supra* note 92 and accompanying text.

132 *See* MOA, *supra* note 11, § 7(f)(1), at 9. In order to adequately protect habitat, NMFS felt that the forest practices rules needed changes in the areas of riparian buffers, activities in areas prone to landslide, and management of cumulative effects. *See id.*

133 *See id.* § 7(h)(2), at 10.

134 *See id.* § 7(h)(3), at 11.

135 Authority to designate Outstanding Resource Waters (ORWs) comes from sections 101 and 303 of the Clean Water Act and related federal rules. *See* 33 U.S.C. §§ 1251, 1313 (1994); 40 C.F.R. §§ 131.10, .12 (1997). ORW designation is intended to protect extraordinary waters and critical habit from water quality degradation by requiring that an antidegradation standard be placed on all ORWs. *See id.*

136 *See* MOA, *supra* note 11, § 7(i)(1), at 11.

137 *See id.* § 4(a), at 5.

138 *See id.* § 4(b)(2), at 5.

139 *See* Collette, *supra* note 14, at 8.

140 *See* MOA, *supra* note 11, § 2.3, at 3. The MOA provided that the agency should notify Oregon of a change in status in advance to allow the state an opportunity to present additional plans that would make the change in listing unnecessary. *See id*.

141 Oregon agreed to consider the changes suggested by NMFS concerning forest practices and to make all necessary changes in the form of laws, rules, or other programs as soon as possible, but not later than June 1, 1999. *See id.* § 7(f)(3), at 9.

limits for the implementation of its provisions and failed to provide any remedy in the event that Oregon did not abide by the agreement.[142] Moreover, under the MOA, either party could terminate the agreement with a mere thirty-day notice.[143] The MOA, therefore, should be thought of as 'NMFS's supplement to the OCSRI,' a document adding NMFS's recommendations to the state conservation plan without actually amending it.

III
An Erroneous Decision Not to List

A. *NMFS's Final Listing Decision*

On April 25, 1997, NMFS withdrew the proposed rule to list the Oregon Coast ESU, stating that it had determined that the ESU did not warrant a threatened listing at that time and instead placing the coho on the candidate species designation list.[144] NMFS supported its determination by citing the harvest, hatchery, and habitat protective measures in the OCSRI, MOA, and federal Northwest Forest Plan, and to an improved spawning escapement trend.[145] NMFS admitted that its determination relied heavily upon the continued implementation of the OCSRI and therefore stated that it intended to review the listing determination in three years.[146] In addition, NMFS noted that under the MOA the agency was to provide the state with proposals for improved habitat protection. If Oregon failed to implement these NMFS proposals (or the equivalent) within two years, the agency would change the listing determination to the extent warranted.[147]

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[142] In its final rule not listing the coho, NMFS did state that it would change the status of the coho to the extent warranted if Oregon did not implement the MOA provisions or their equivalent within two years. *See* Threatened Status, *supra* note 13, at 24,605.

[143] *See* MOA, *supra* note 11, § 12, at 14.

[144] *See* Threatened Status, *supra* note 13. NMFS announced that it would list the Southern Oregon/Northern California Coast ESU as threatened. *See id.* at 24,607.

[145] *See id.*

[146] *See id.*

[147] *See id*.

B. Oregon Natural Resources Council v. Daley*: The District Court's Decision*

Immediately following NMFS's announcement of its decision not to list the Oregon Coast ESU, environmental groups filed suit.[148] These groups claimed that NMFS illegally relied on the OCSRI in making its listing determination.[149] In the complaint, the plaintiffs focused on the legality of NMFS's final listing determination concerning the Oregon Coast ESU. Their claims included, among others,[150] that NMFS violated the ESA by using an improper legal standard and that the agency acted arbitrarily and capriciously under the Administrative Procedure

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[148] *See* Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139 (D. Or. 1998). During the coho listing process, a number of environmental groups monitored NMFS's actions for compliance with the ESA and filed suit claiming that the agency violated the listing procedures set out in that Act. *See id.* at 1143-44 (D. Or. 1998). In July 1995, the groups claimed that NMFS violated Section 4(b)(3)(B) of the ESA by failing to propose listings within one year of a citizen petition. *See id.* at 1143. The court dismissed the complaint as moot following NMFS's issuance of its proposed listing in July 1995. *See id.* at 1144. Subsequently, in September 1995, the plaintiffs filed a complaint seeking a declaratory ruling that the ESA required NMFS to issue a final rule in October 1995, which would be two years following the submission of the original listing petition. *See id.* The court held there that the one-year limit on final listing determinations began to run on the date of the proposed listing. *See id.* at 1142; 16 U.S.C. § 1533(b)(3)(B) (1994). The original parties included Oregon Natural Resources Council, Inc., Oregon Trout, Coast Action Group, Coast Range Association, Environmental Protection Information Center, Friends of the Garcia River, Klamath Forest Alliance, Marbly Mountain Audubon, Mendocino Environmental Center, Mt. Shasta Area Audubon Society, National Audubon Society, Northcoast Environmental Center, Pilchuck Audubon Society, Portland Audubon Society, Save The West, Sierra Club, Siskiyou Audubon Society, Siskiyou Regional Education Project, Tenmile Creek Association, Trout Unlimited, CA, and Western Ancient Forest Campaign.

[149] *See Daley*, 6 F. Supp. 2d at 1143. The Northern District of California, having jurisdiction over the original suits, held that NMFS could rely on the OCSRI in determining whether or not to list the coho, but it transferred to the District of Oregon the question as to whether the OCSRI was adequate to support that decision. *See* Oregon Natural Resources Council v. Brown, No. C-95-1844 SI, 1997 WL 464826, at *5 (N.D. Cal. July 29, 1997).

[150] Additional claims not addressed by the court included the plaintiff's contentions that the ESU was threatened as a matter of "biological fact," that NMFS did not use the best scientific data available, that NMFS's reliance on the OCSRI violated the ESA because the plan was untested and not implemented (the court addressed this under the APA standards instead of the ESA), that NMFS improperly relied on the Northwest Forest Plan, and also that NMFS was arbitrary and capricious in basing its decision on political concerns and not on biological data. *See Daley*, 6 F. Supp. 2d at 1150.

Act (APA)[151] by relying on factors not intended by Congress and by making a decision that ran contrary to the record.[152] On June 1, 1998, the district court, stating that the agency acted illegally when it determined that the ESU did not warrant a listing, held for the plaintiffs and remanded back to NMFS its final listing determination on the Oregon Coast ESU.[153]

1. *An Improper Legal Standard Under the ESA*

Under the ESA, a threatened species is "any species which is likely to become an endangered species within the foreseeable future."[154] In its final rule declaring the Oregon Coast ESU not to be threatened, NMFS stated that the ESU was not likely to become endangered "in the interval between this decision and the adoption of improved habitat measures by the State of Oregon."[155] The district court determined that this interval referred to the habitat measures in the MOA, which, if not adopted within two years, would cause NMFS to amend the species' status to the extent warranted.[156] The court held that this short two-year period did not represent a finding as to the species' status in the "foreseeable future" as required by the ESA; thus, NMFS had employed an improper legal standard in violation of that Act.[157]

NMFS argued that it had met the standard because its finding implied that the improved habitat measures, once implemented, would continue to protect the ESU from becoming endangered in the foreseeable future.[158] The court declared that if this were true, NMFS needed to state so in the final rule and justify its conclusion with evidence in the record in order to meet

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151 5 U.S.C. § 706(2)(A) (1994).

152 *See Daley*, 6 F. Supp. 2d at 1150.

153 *See id.*

154 16 U.S.C. § 1532(20) (1994).

155 Threatened Status, *supra* note 13, at 24,607.

156 *See Daley*, 6 F. Supp. 2d at 1151. In its final rule, NMFS referred to the measures it recommended in the MOA and stated that "[i]f these or equivalent measures are not adopted by Oregon within 2 years, NMFS will promptly change the ESA status of this ESU to the extent warranted." Threatened Status, *supra* note 13, at 24,605-06. The court also found that the language referred to possible amendments to Oregon's forest practices regulations which, under the MOA, were to be implemented by 1999. *See Daley*, 6 F. Supp. 2d at 1151; *see also* MOA, *supra* note 11, § 7(f)(3), at 9-10.

157 *See Daley*, 6 F. Supp. 2d at 1150-52.

158 *See id.* at 1151.

the ESA standard.[159] In any event, the court said that *hoping* for a state to implement improved measures, which *may* be sufficient to protect the species, was an inadequate basis to support a conclusion that the species will not likely become endangered in the foreseeable future.[160]

In dicta, the court stated that NMFS had also violated the ESA's procedural requirements because it effectively deferred the coho listing determination to a later date in violation of listing schedules, waiting an additional two years to see if the coho warranted listing.[161] Further, the court noted that "if the Oregon ESU is likely to become endangered in the foreseeable future unless Oregon implements significant changes in its environmental laws and policies (and even then success by no means is assured), then by definition the Oregon ESU is presently a threatened species."[162] Thus, NMFS's finding not only circumvented ESA procedure, it also demonstrated the present threatened status of the coho because it actually indicated that current protections for the species were not adequate.

2. *Reliance on Impermissible Factors*

The court in *Oregon Natural Resources Council v. Daley* held that, in addition to using an improper legal standard, NMFS acted arbitrarily and capriciously when it determined that the Oregon Coast ESU did not warrant listing because, in making that determination, the agency relied on factors not permitted by the ESA.[163] Section 4(a) of the ESA requires the reviewing Secretary to determine whether a species is endangered or threatened "because of any" of the following factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
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> (B) overutilization for commercial, recreational, scientific, or educational purposes;
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> (C) disease or predation;
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> (D) the inadequacy of existing regulatory mechanisms; or

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159 *See id.* The court was able to avoid the question of what time period constitutes the foreseeable future. *See id*.

160 *See id.*

161 *See id.* The ESA requires that a listing determination be made within 12 months of publication of a proposed rule to list a species. *See* 16 U.S.C. § 1533(b)(6)(A) (1994).

162 *Daley*, 6 F. Supp. 2d at 1152.

163 *See id.*

> (E) other natural or manmade factors affecting its continued existence.[164]

Section 4(b)(1)(A) further requires the Secretary to make this determination solely on the basis of the best scientific and commercial data available, after reviewing the status of the species and taking into account "those efforts, if any, being made by any State . . . or any political subdivision of a state . . . to protect such species," including efforts to control predators or protect the habitat and food supply of the species, or other conservation practices.[165] In its final rule, NMFS specifically stated that in addition to other considerations, its final determination relied heavily on the continued implementation of the OCSRI and the MOA, including the voluntary and prospective measures contained within them.[166] The court concluded that NMFS's reliance on various provisions in these two documents violated the ESA, which did not allow consideration of voluntary and prospective conservation measures due to their overly speculative nature.[167] Because of the prior decision in the United States District Court for the of Northern District of California, which held that NMFS could properly rely on the OCSRI,[168] the court ruled more specifically on the legality of NMFS's reliance on the measures within the OCSRI, not the OCSRI itself.[169]

a. *Plans for Future Actions*

The OCSRI, completed about a month prior to NMFS's final listing deadline, contained mostly unimplemented measures at the time of the final listing determination. In rejecting NMFS's reliance on these prospective provisions, the *Daley* court relied on prior case law which had deemed it improper for an agency making a listing determination to rely on planned future actions to protect a species.[170] In addition, the court determined

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164 16 U.S.C. § 1533(a)(1).

165 *Id.* § 1533(b)(1)(A).

166 *See* Threatened Status, *supra* note 13, at 24,608

167 *See Daley,* 6 F. Supp. 2d at 1153-56.

168 *See supra* note 149 and accompanying discussion.

169 *See Daley,* 6 F. Supp. 2d at 1153.

170 *See id.* at 1154; *see, e.g.*, Save Our Springs v. Babbitt, 27 F. Supp. 2d 739 (W.D. Tex. 1997) (holding that FWS's reliance upon measures contained in a conservation agreement which were speculative and provided no assurances of whether they would be carried out or even be effective was arbitrary and capricious); Friends of the Wild Swan, Inc. v. United States Fish and Wildlife Serv., 945 F. Supp. 1388 (D. Or. 1996) (holding that the FWS could not delay listing

that Section 4(a)(1)(D) of the ESA, which makes "existing regulatory measures" a factor in listing determinations,[171] clearly excluded future regulatory measures[172] and that the language in Section 4(b)(1)(A) of the Act, allowing the agency to consider "efforts, if any, being made by any State,"[173] likewise referred only to present efforts.[174] Accordingly, the court ruled that the plain language of the ESA prohibited a listing agency from relying on plans for future actions. NMFS's reliance on the prospective provisions of the OCSRI was therefore held to be arbitrary and capricious.[175]

The court gave no attention to the MOA in this part of its decision or to whether its contractual promises of future actions made any difference. However, one case relied upon by the court concluded that the Fish and Wildlife Service (FWS) illegally relied on a similar conservation agreement between FWS and several regulatory state agencies.[176] Since the MOA here contained similar prospective measures, as well as a provision allowing termination of the agreement with only thirty days notice,[177] this MOA should also be considered speculative and reliance on it illegal. Moreover, the court in *Daley* specifically ruled that "[t]he NMFS may only consider conservation efforts that are currently operational" under the ESA.[178] In doing so, the district court declared that the prospective nature of a provision precludes any reliance upon it by NMFS, regardless of the assurances provided.

b. *Voluntary Measures*

The more difficult issue addressed by the court concerned NMFS's reliance on various voluntary measures contained in the

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by relying upon its own speculations on the future effects of another agency's management plans); Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23 (D.D.C. 1996) (holding arbitrary and capricious the FWS reliance on promised future actions instead of the existing record); Southwest Ctr. for Biological Diversity, 939 F. Supp. 49 (D.D.C. 1996) (holding the same).

171 16 U.S.C. § 1533(a)(1)(D) (1994).

172 *See Daley*, 6 F. Supp. 2d at 1153-54.

173 16 U.S.C. § 1533(b)(1)(A).

174 *See Daley*, 6 F. Supp. 2d at 1153-54.

175 *See id.*

176 *See* Save Our Springs v. Babbitt, 27 F. Supp. 2d 739 (W.D. Tex. 1997) (cited in *Daley*, 6 F. Supp. 2d at 1154).

177 *See* MOA, *supra* note 11, § 12, at 14.

178 *Daley*, 6 F. Supp. 2d at 1154.

OCSRI.[179] NMFS argued that Section 4(b)(1)(A) of the ESA permitted consideration of the OCSRI's voluntary conservation efforts,[180] because that section requires consideration of the five listing factors only "after 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."[181] While implying that the agency's statutory construction argument appeared to have merit,[182] the court avoided the issue by holding that voluntary actions, like future actions, are too speculative in nature because they are unenforceable and their benefits can never be assured. Thus, an agency cannot rely on voluntary actions during a listing determination since failure to rely on current, enforceable measures is an arbitrary and capricious action.[183]

c. *Reliance on Other Factors*

NMFS's "no list" determination also relied on the Northwest Forest Plan (NFP),[184] harvest and hatchery improvements,

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[179] *See id.* (stating that "the more difficult issue is whether the ESA permits consideration of voluntary actions, as opposed to regulatory actions").

[180] *See id.* at 1153.

[181] 16 U.S.C. § 1533(b)(1)(A) (1994).

[182] The court recognized that there was a question of statutory interpretation at issue concerning NMFS's reliance on non-regulatory protections provided by the state:

> The statutory reference to "existing regulatory mechanisms" in § 1533(a)(1)(D) is precise and unambiguous and, if standing alone, would preclude consideration of any future or voluntary conservation efforts which, by definition, are not "existing" or "regulatory." However, the language of § 1533(b)(1)(B) [sic] concerning "efforts" and "other conservation practices" is much broader and, if standing alone, would permit the Secretary to consider non-regulatory efforts. The question is whether § 1533(b)(1)(B) [sic] should be read merely to clarify what types of "existing regulatory mechanisms" may be considered as the fourth factor in § 1533(a)(1)(D) or whether it should be interpreted to expand upon the five factors by, in effect, adding yet another factor.

Daley, 6 F. Supp. 2d at 1153. The ESA section referred to by the court should be 1533(b)(1)(A), not 1533(b)(1)(B).

[183] *See id.* at 1155.

[184] The Northwest Forest Plan is a forest management plan specifically designed for Pacific Northwest federal forests, including those on both U.S. Forest Service lands and Bureau of Land Management lands. The NFP contains an Aquatic Conservation Plan that, among other measures, provides for large riparian buffers around both fish- and non-fish-bearing streams, thereby protecting water quality and preventing sedimentation. *See* Forest Ecosystem Management Assessment Team, Forest Ecosystem Management: An Ecological, Economic, and Social Assessment (1993). A special team of scientists called the

and the improving escapement trend.[185] The court found consideration of these factors permissible.[186] Unlike the OCSRI, the NFP is regulatory in nature; thus, NMFS properly considered it under Section 4(a)(1)(D) of the ESA, which specifies "adequacy of exiting regulatory measures" as a grounds for not listing species.[187] Similarly, the state harvest and hatchery improvements,[188] already implemented under the OCSRI, and prior efforts constituted existing regulatory measures and could likewise be considered.[189] The improved escapement trend relied upon by NMFS spoke to the status of the ESU itself and could be legally considered in a listing determination as well.[190] However, the court noted that even though the agency could consider these factors, reliance on them for a listing decision must still support the final determination, as discussed below.[191]

3. *An Explanation Contrary to the Record*

The court, in *Daley*, also held that NMFS acted arbitrarily and capriciously in making a listing determination that ran contrary to its administrative record. In its final rule, NMFS listed the following reasons as bases for its "no list" determination: (1) harvest and hatchery improvements, (2) habitat protections provided by the NFP, (3) an improved escapement trend, (4) harvest, hatchery, and habitat measures contained in the OCSRI, and (5) the MOA.[192] When looking at the administrative record, the court found that none of the factors, either alone or collectively, supported the decision not to list.[193] Moreover, the court identified many instances where NMFS's reasoning actually ran contrary to the record before it.

Federal Ecosystem Management Assessment Team (FEMAT) designed the NFP in 1993. *See id.*

185 *See* Threatened Status, *supra* note 13, at 24,607.

186 *See Daley,* 6 F. Supp. 2d at 1155-56.

187 16 U.S.C. §1533(a)(1)(D) (1994); *see also Daley*, 6 F. Supp. 2d at 1156. The court discussed whether Congress intended consideration of federal regulations at all and held that they could be properly considered under ESA § 4(a)(1)(D). *See Daley*, 6 F. Supp. 2d at 1156.

188 *See supra* notes 72-76 and accompanying text.

189 *See Daley*, 6 F. Supp. 2d at 1159.

190 *See id.* at 1160.

191 *See id.* at 1156-60.

192 *See* Threatened Status, *supra* note 13, at 24,607.

193 *See Daley*, 6 F. Supp. 2d at 1156.

a. *Inadequate Support for Habitat Protection*

NMFS supported its decision not to list the coho ESU by citing to the various habitat measures of the OCSRI, MOA, and NFP.[194] NMFS recognized that the OCSRI measures were mostly unimplemented and voluntary, yet still relied upon them.[195] Similarly, NMFS relied on the MOA's provisions–provisions that the court concluded also contained unimplemented measures and were voluntary and unenforceable because they could be terminated with only thirty days notice.[196] As discussed above, NMFS had acted arbitrarily and capriciously by relying on such factors,[197] and so it followed that those same measures proved to be inadequate to support NMFS's conclusion that conservation efforts sufficiently protected coho habitat.[198]

In addition, NMFS's record contradicted itself regarding the use of voluntary and future measures. The court noted that NMFS had declined to rely upon those same types of measures when it listed the California Coast Coho ESU and the Umpqua River cutthroat trout.[199] In fact, NMFS specifically stated that it could not defer the California coho listing "based on the prospect of future developments of conservation measures,"[200] and that it could not decline to list the Umpqua cutthroat because "the [O]CSRI [was] still taking shape."[201] Since the agency failed to explain the difference between those speculative measures and the ones now in the OCSRI, the agency decision proved arbi-

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194 *See* Threatened Status, *supra* note 13, at 24,601-03.

195 NMFS recognized the nature of the measures in its final rule, stating that the Oregon Department of Forestry "is preparing" a forest management plan, that the OCSRI provides *voluntary measures* on private forestlands, and that S. 1010 "addresses" agricultural lands, but the record did not identify any measures implemented at the time of the decision. *See id.* at 24,603. Similarly, the record stated, "[c]ritical components of the OCSRI that *should* contribute to habitat restoration include watershed council programs, monitoring, and adaptive management." *Id.* at 24,604 (emphasis added); *see also Daley*, 6 F. Supp. 2d at 1158 n.9.

196 *See Daley*, 6 F. Supp. 2d at 1158.

197 *See* discussion *supra* Part III.B.2.

198 *See Daley*, 6 F. Supp. 2d at 1159.

199 *See id.*

200 *Id.* (citing Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56,138, 56,140 (1996) (codified at 50 C.F.R. pt. 227)).

201 *Id.* (citing a July 1996 letter from NMFS Northwest Regional Director to Governor Kitzhaber). The OCSRI contained provisions protecting the cutthroat trout in that area at the time. *See id.*

trary.[202] Further, an internal NMFS memorandum stated that the OCSRI "does not successfully" achieve a goal of halting or reversing the downward habitat trend.[203] This memorandum served as evidence that, even if implemented, the OCSRI habitat measures failed to support NMFS's conclusion that conservation efforts adequately protected coho habitat.

Without the support of the OCSRI and MOA habitat measures, the question became whether the habitat measures contained in the NFP alone supported the "not warranted" listing decision. The court concluded that the administrative record supported NMFS's reliance on the NFP habitat measures, because studies revealed that the NFP measures had a high likelihood of allowing coho to stabilize on federal lands.[204] However, the court noted that the NFP applied to only about thirty-five percent of the lands in the Oregon Coast ESU[205] and that the land's fragmented distribution prevented the federal plan from achieving many of its restoration objectives.[206] Thus, the court ruled, that the NFP by itself was insufficient to support a "no list" determination.[207] In addition, the court noted that the NFP existed at the time of NMFS's proposed rule, before the OCSRI, and that at that time the NMFS had determined that the Oregon Coast ESU warranted listing despite the NFP protections.[208] Accordingly, the court found that NMFS's finding of sufficient habitat protection based only on the habitat measures of the NFP contradicted the administrative record and thus was arbitrary and capricious.[209]

b. *Harvest and Hatchery Measures Insufficient to Support Decision Alone*

NMFS tried to argue that the harvest and hatchery measures relied upon during its decision substantially supported the "no

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202 *See id.*

203 Memorandum by Elizabeth Gaar, Director, NMFS Northwest Regional Habitat Conservation Program, to Jacqueline Wyland, Program Director, Northwest Regional Protected Species (Apr. 24, 1997). NMFS drafted the MOA in response to the memorandum and the OCSRI shortcomings identified in it. *See Daley*, 6 F. Supp. 2d at 1149.

204 *See Daley*, 6 F. Supp. 2d. at 1157.

205 *See id.* (citing Threatened Status, *supra* note 13, at 24,602).

206 *See id.*

207 *See id.*

208 *See id.*

209 *See id.*

list" determination despite the court's ruling on the habitat measures.[210] The agency's primary support came from a coho status review completed by NMFS's own Biological Review Team (BRT), a scientific team created in 1993 and charged with reviewing scientific data and conducting a coast-wide status review of the coho.[211] The BRT's 1997 status review, which evaluated the status of the Oregon Coast ESU without considering the OCSRI habitat measures, concluded that if full implementation of the OCSRI harvest and hatchery measures did not occur, the coho would likely become endangered in the foreseeable future.[212] However, under the assumption that Oregon fully implemented all of those measures, the team split as to whether this fact alone would be enough to "move the ESU out of the 'likely to become endangered' category."[213] NMFS took the position that it was free to rely on the scientific opinion of its choice since the record supported both positions.

While acknowledging that NMFS could choose between the two opinions,[214] the court concluded that the agency's final decision proved contrary to weight of the evidence in the record.[215] The court noted that an uncertainty existed as to the future of many of the harvest reforms because, although already implemented, the reforms were only interim measures under the OCSRI and because the MOA's commitments beyond that time could not be assured due to the agreement's thirty-day termination provision.[216] In addition, since the BRT opinion relied upon the assumption that complete implementation of harvest and hatchery measures would be achieved, an assumption which could not be assured, and because the true extent of hatchery influence on wild populations was still unknown, NMFS should have further discounted the opinion of those BRT scientists who felt that the ESU would remain unendangered.[217] In light of ad-

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210 *See id.* at 1159.

211 *See id.* at 1146 (citing NATIONAL MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, STATUS REVIEW OF COHO SALMON 3 (1995) [hereinafter COHO STATUS REVIEW]).

212 *See id.* at 1148 (citing COHO STATUS REVIEW, *supra* note 211, at 113).

213 *Id.* (citing COHO STATUS REVIEW, *supra* note 211, at 113).

214 *See Daley*, 6 F. Supp. 2d at 1159 (stating that it "accepts the proposition that in the event of a scientific disagreement between experts, the Secretary is free to rely on the expert opinion of his choice").

215 *See id.*

216 *See id.* at 1159-60.

217 *See id.* at 1160.

ditional information in the record regarding the decline in Oregon coastal coho, the importance of habitat measures, and the inadequacies of the OCSRI, the court found NMFS's reliance on the BRT opinion to be "disingenuous at best."[218]

c. *Improved Escapement Trend*

The last factor NMFS cited to in support of it final "no list" determination concerned evidence from the BRT of an improving escapement trend. NMFS noted that "natural escapement has been increasing markedly in recent years and reached 80,000 fish in 1996."[219] The agency stated that the improved habitat and harvest measures, together with the improving escapement trends, indicated that the ESU was not threatened.[220] Although true, the court found that in other areas of the record NMFS had also recognized serious reservations about the weight of the escapement trend evidence.[221] In response to a comment, NMFS had noted the BRT findings and stated that (1) "recruitment and recruits-to-spawner ratios have remained low," (2) "[improvement] has been coincident with drastic reductions in harvest," and (3) "significant concerns remain regarding the declining trend in this ESU's productivity."[222] The court therefore concluded that, as indicated in NMFS's finding, the evidence of an improving escapement trend carried minimal weight in record.[223] Thus the harvest, hatchery, and habitat factors were critical, and, as indicated previously, those factors failed to form a rational basis for the final decision.[224]

4. *Summary*

The court in *Oregon Natural Resources Council v. Daley* held that NMFS acted arbitrarily and capriciously in deciding not to list the Oregon Coast ESU because the agency (1) did not use the correct ESA standard when it assessed the status of the ESU and deferred its listing decision to a later date,[225] (2) impermissibly relied upon voluntary and prospective conservation measures

218 *Id.*
219 Threatened Status, *supra* note 13, at 24,607.
220 *See id.*
221 *See Daley*, 6 F. Supp. 2d at 1160.
222 Threatened Status, *supra* note 13, at 24,591.
223 *See Daley*, 6 F. Supp. 2d at 1160.
224 *See id.*
225 *See* discussion *supra* Part III.B.1.

which were too speculative and had no foundation in the ESA language,[226] and (3) failed to provide a rational basis in the administrative record for the decision not to list.[227] Essentially, each of the shortcomings of the agency's decision resulted from NMFS's reliance on the OCSRI and the agency's efforts to help the State of Oregon avoid the listing of coho salmon.

IV
The Unanswered Questions

The court's decision in *Daley* came down to one general conclusion—the OCSRI, the first conservation plan developed by a state in hopes of averting the need to list one of its species, was inadequate under the requirements of the ESA to support a finding that the species was not threatened. Even aided by the MOA, the OCSRI proved too speculative to provide adequate assurance that the coho would not likely become endangered in the foreseeable future, as the ESA requires for a finding that a species is not threatened.[228]

Although the court in *Daley* identified the OCSRI's shortcomings and remanded the case, it did not expand either on what would make a state conservation plan adequate to prevent an ESA listing, nor on whether the OCSRI would have been adequate if it had been implemented and enforceable at the time of listing. This Part explores these unanswered questions. In addition, it analyzes whether the conservation plan detailed in the OCSRI is even sufficient to recover the coho, regardless of an ESA listing.

A. *Implemented?*

Even if Oregon had been able to begin implementation of its conservation measures in advance of NMFS's final listing deadline, most likely the measures still would have been considered speculative and improper for NMFS to rely on. *Save Our Springs v. Babbitt*[229] considered a smaller, but similar, conservation plan

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226 *See* discussion *supra* Part III.B.2.

227 *See* discussion *supra* Part III.B.3.

228 *See id.*

229 Save Our Springs v. Babbitt, 27 F. Supp. 2d 739 (W.D. Tex. 1997). The case involved a conservation agreement between the Fish and Wildlife Service (FWS) and various Texas state regulatory agencies concerning the Barton Springs salamander. *See id.*

for the Barton Springs salamander and held that a plan to remove threats to a species must be in place for *two years* before the listing agency can make a decision regarding the efficiency of the plan.[230]

In contrast, two related district court cases determined, in dicta, that the existence of an "actual plan" would be sufficient for consideration by the agency in a listing determination.[231] The cases concerned "not warranted" findings for the Queen Charlotte goshawk and the Alexander Archipelago wolf in the Tongass National Forest in Alaska, where the FWS had deferred both listings based on a U.S. Forest Service proposal modifying forest practices.[232] Both cases found the agency decisions arbitrary and capricious for their reliance on promises of future actions. The courts stated, however, that a plan that actually protects the species consistent with the standards of the ESA, as opposed to one that merely promises or proposes to do what is required by the statute, could be relied upon.[233] Under this analysis, the OCSRI would have to be considered an "actual plan" that prevents the coho from becoming extinct in the foreseeable future.

Daley recognized the aforementioned cases in its decision but still held that the language of the ESA clearly indicated that an agency may not rely upon "plans for future actions," instead of the statutory language of "existing regulatory measures," in its listing decision.[234] It is unclear whether "plans for future actions," having been found inadequate, would include "actual plans" that protect the species under the standards of the ESA and what the distinguishing factor between the two would be. By using the language "plans for future actions," the court seems to

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230 *See id.* at 748.

231 *See* Biodiversity Legal Found. v. Babbitt, 943 F. Supp. 23, 26 (D.D.C. 1996); Southwest Ctr. for Biological Diversity v. Babbitt, 939 F. Supp. 49, 51 (D.D.C. 1996).

232 *See Biodiversity Legal Found*., 943 F. Supp. at 25 (wolf); *Southwest Ctr. for Biological Diversity*, 939 F. Supp. at 51 (goshawk).

233 *See Biodiversity Legal Found.,* 943 F. Supp. at 26; *Southwest Ctr. for Biological Diversity*, 939 F. Supp. at 51.

234 *See* Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1153-54 (D. Or. 1998) (finding that under Section 4(a)(1)(D) of the ESA, "existing regulatory measures" clearly excluded future regulatory measures, and similarly, under Section 4(b)(1)(A), the language "efforts, if any, being made" also referred only to present efforts); *see also* 16 U.S.C. § 1533(a)(1)(D), (b)(1)(A) (1994).

conclude that the measures must be implemented over some time, but whether that time is two years or two months is still unknown.

B. *Assurance of Continued Implementation*

The OCSRI's second major shortcoming was that it failed to provide any assurance that, once implemented, its measures would be continued into the future. For instance, the *Daley* court found pivotal that the MOA could be terminated with only thirty days notice.[235] The court did not conclude whether an MOA, if not expressly terminable, could assure the continuation of conservation efforts into the future and effectively support a finding that the species is not likely to become endangered in the foreseeable future (assuming that the efforts were already implemented to some extent according to the discussion above, and assuming that the measures were not voluntary in nature).[236] Even if a long-term MOA suffices, the state may encounter difficulties in committing to that type of agreement. As noted by Governor Kitzhaber following the *Daley* ruling, providing legal assurances that conservation measures will remain in place into the future "is extremely difficult for states like Oregon that are constitutionally prohibited from taking actions to bind future legislatures."[237] Thus, according to Governor Kitzhaber, the *Daley* ruling would prohibit any similarly situated state from ever developing an acceptable conservation plan, since the state could not provide legal assurance of the plan's continuation. The only way for a state in this situation to provide assurance, therefore, would be to implement a conservation plan far in advance of a listing determination, as discussed in *Save Our Springs v. Babbitt* and in Part III above.[238]

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[235] *See Daley*, 6 F. Supp. 2d at 1158 ("Although the NMFS has no incentive to terminate the MOA, Oregon might. If the political winds change, and Governor Kitzhaber is replaced by a governor who does not support the OCSRI or MOA, nothing would prevent Oregon from terminating the MOA and not adopting improved habitat measures.").

[236] *See* discussion *supra* Part III.B.2.a.

[237] John A. Kitzhaber, *Governor's Statement on Coastal Coho Decision: State to Appeal Magistrate's Ruling* (June 4, 1998) <http://www.oregon-plan.org/PR-06-04-98.html>.

[238] *See* Save Our Springs v. Babbitt, 321 F. Supp. 2d 739 (W.D. Tex. 1997).

C. *Ability to Provide for Recovery*

Daley held that the voluntary and prospective measures in the OCSRI could not be relied upon by NMFS in its listing decision.[239] The court did not evaluate these, nor the other OCSRI measures, for their substantive adequacy to remove threats to the coho and to assure that the species would not likely become endangered in the foreseeable future. The following Part evaluates the OCSRI as a conservation plan distinct from the requirements of the ESA, and demonstrates the inability of the OCSRI measures to meet the plan's goal of providing a healthy and sustainable coho population.

1. *The Powell Report*

Oregon Trout, a local non-profit organization, commissioned biologist Mark Powell, Ph.D., to do a scientific evaluation of the OCSRI after its first draft. Powell's investigation rated the conservation plan's overall effectiveness, completeness, and scientific credibility.[240] His conclusion was that overall the plan was poor, major factors for salmon decline persisted, and the goal of salmon recovery held a low priority in the plan; he graded it a "D."[241]

Powell identified scientific credibility as the weakest aspect of the plan.[242] Overall, the plan failed to present a scientific recovery plan or to use previous scientific studies indicating what needed to be done to recover salmon.[243] Specifically, Powell criticized the OCSRI's hatchery provisions[244] because they called for the continued production and release of hatchery coho smolts and juveniles despite the known harmful impacts of these practices on wild coho salmon.[245] The continued reliance on hatchery fish, Powell concluded, would interfere with the OCSRI obtaining its goal of sustainable wild fish populations.[246]

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239 *See* discussion *supra* Part III.B.2.

240 *See* Mark Powell, Recovery of Oregon's Coastal Salmonids (Sept. 30, 1996) [hereinafter Powell Report] (on file with author).

241 *See* Mark Powell, Evaluation of Oregon's Coastal Salmon Restoration Initiative 1 (Sept. 30, 1996) (on file with author).

242 *See* Powell Report, *supra* note 240, at 4.

243 *See id. See generally* UPSTREAM, *supra* note 26.

244 *See supra* note 74 and accompanying text.

245 *See* Powell Report, *supra* note 240, at 4, 8.

246 *See id.*

Regarding harvest reforms, Powell again criticized the OCSRI's efforts as inconsistent with scientific recommendations for coho recovery. First, Powell noted that the OCSRI proposals for new fish escapement goals[247] failed to provide any improvements because they were actually well below the then current escapement levels.[248] In addition, Powell noted that the majority of fishing mortalities of wild coho resulted from incidental catch by fisheries that targeted hatchery coho or other species, an issue the OCSRI failed to consider.[249]

Concerning habitat, Powell noted that, for coastal coho, habitat degradation appeared to be the major factor for decline,[250] yet the OCSRI approached this area with the least amount of scientific support.[251] Science indicates that protection of fish and fish habitat must be the foundation of recovery,[252] but the OCSRI proposed few measures to actually protect the fish. Instead, the plan relied on experimental restoration projects accomplished primarily through private efforts, which have the potential to result in expensive failures or to actually harm the recovery process.[253] Moreover, in many situations, such as the logging context, the OCSRI allowed these experimental restoration projects as mitigation measures in lieu of more adequate protections.[254] The OCSRI thus needed to focus more on habitat protection, especially the protection of refuge areas.[255]

Improvements were made to the OCSRI after Powell's September 1996 report, including plans to create restoration guidelines and to more thoroughly research the needs of the species in a regional context.[256] However, the OCSRI still failed to provide

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247 *See supra* note 73 and accompanying text.

248 *See* Powell Report, *supra* note 240, at 8.

249 *See id.* at 4.

250 *See id.* at 7. Coho spend a large amount of their juvenile and adult life in freshwater rivers and streams. Fall chinook salmon spend significantly less time in fresh water, and, as a result, the chinook have relatively stable populations. *See id.*

251 *See id.*

252 *See id.* at 10.

253 *See id.* at 1, 4. Powell noted that artificial fish habitat construction has had little success and has no scientifically proven effect in badly degraded streams. *See id.* at 4.

254 *See id.* at 5.

255 Refuge areas are areas currently providing habitat for and use by the salmon for purposes of any of the salmon's lifecycle stages. *See id.* at 8.

256 *See* OCSRI, *supra* note 17, Part II, Concept I, at 9 (referring to memorandum dated Jan. 29, 1997).

a scientific basis for its goal of overall species restoration. Powell noted that the most important need for salmonid recovery is a comprehensive and scientifically integrated program that links current problems, recovery needs, and recovery activities.[257] The OCSRI did not meet these standards because it merely compiled a list of random proposed measures that focused on direct impacts to fish and fish habitat and not on the recovery needs of the fish.

2. *Other Notable Shortcomings*

Many interested parties identified various shortcomings of the OCSRI conservation plan that prevented it from obtaining its goal of sustaining coho populations. Numerous comments highlighted that the effectiveness of the OCSRI measures could not even be determined because of the plan's vagueness as to the timing, extent, and action to be taken for a given measure.[258] More substantively, the comments identified existing OCSRI measures that could be improved and additional measures that could be added to the plan.[259]

One of the most notable comments concerned the OCSRI's failure to prescribe a specific conservation or protection strategy for the core areas designated by the initiative.[260] Related comments suggested that the OCSRI designate "key watersheds" on state and private lands and establish a system of protected areas to preserve native salmonids in the most productive areas remaining.[261] The latter comments reiterated the need for the OCSRI to provide protection for the species as a priority over restoring it. The OCSRI, however, could not do this without pre-

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[257] *See* Powell Report, *supra* note 240, at 10.

[258] *See, e.g*, Letter from Peter Frost, Counsel, National Wildlife Federation, to Salmon Plan Review (Nov. 1, 1996) (on file with author); Letter from Geoff Pampush, Executive Director, Oregon Trout, to Jim Martin, Salmon Technical Advisor (May 13, 1996) [hereinafter Pampush Letter] (on file with author).

[259] *See, e.g.*, Pampush Letter, *supra* note 258; Letter from William Stelle, Jr., Regional Administrator, National Marine Fisheries Service, to John A. Kitzhaber, Governor of Oregon (Nov. 5, 1996) (on file with Oregon Trout in Portland, Oregon) (describing the strengths and weaknesses of the OCSRI at that date) [hereinafter Stelle Letter].

[260] *See* Stelle Letter, *supra* note 259, at 5; *see also supra* note 106-107 and accompanying text.

[261] *See* Pampush Letter, *supra* note 258.

scribing new regulations;[262] therefore, protective measures were largely left out of the plan.

Many comments also stressed the lack of priorities established within the overall plan and the individual agency action plans.[263] In its critique of the OCSRI, NMFS noted that the initiative lacked identifiable priorities both on a regional scale and for the individual agencies.[264] The lack of priorities in the OCSRI reflected the plan's reliance on random beliefs (rather than scientific reasoning) as to what the species needs. This absence cast further doubt on whether and when the plan's measures would be implemented and whether the plan could effectively *recover* the species. The court in *Daley* even concluded that, "at most, the OCSRI may prevent the Oregon Coast ESU from actually reaching the 'endangered level.'"[265] Thus, the OCSRI lacked both the scientific foundation and the structural strength to assure that coho would be sufficiently protected so as to recover from its depressed state.

V
THE BROADER IMPLICATIONS OF *OREGON NATURAL RESOURCES COUNCIL V. DALEY*

The decision in *Oregon Natural Resources Council v. Daley* will likely affect activities both inside and outside Oregon. The court's conclusions on the factors permitted for consideration during a listing determination will impact future listing determinations and recent efforts by the FWS and NMFS to encourage protections for candidate species. In Oregon, the decision has

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262 Protection of coho habitat would inevitably require protections on private lands. *See* OCSRI, *supra* note 17, Chap. 15 (identifying many core areas on private lands); *see also* Stanley V. Gregory & Peter A. Bisson, *Degradation and Loss of Anadromous Salmonid Habitat in the Pacific Northwest*, *in* PACIFIC SALMON & THEIR ECOSYSTEMS: STATUS AND FUTURE OPTIONS 277, 297 (Deanna J. Strouder et al. eds., 1997) ("[E]ffective habitat management . . . requires incorporation of the entire landscape . . . and integration of management policies for both public and private lands."). Such protections could not be effectively made without new regulation. *See* Christopher A. Frissell et al., *A Resource in Crisis: Changing the Measure of Salmon Management*, *in* PACIFIC SALMON & THEIR ECOSYSTEMS, *supra* at 414 ("[I]t seems unlikely that [a resolution to conflicting values and salmon restoration] could come without some diminishment or major alteration of many vested exploitative activities.").

263 *See* Pampush Letter, *supra* note 258; Stelle Letter, *supra* note 259, at 4.

264 *See* Stelle Letter, *supra* note 259, at 4.

265 Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998).

already led to a coho listing in the fall of 1998.[266] The listing will affect the role of the OCSRI in the state's conservation efforts and relationship of these efforts to the ESA.

A. *Candidate Conservation Agreements*

In a Federal Register entry dated June 12, 1997, FWS and NMFS (collectively, the Services) proposed a new draft policy concerning Candidate Conservation Agreements (CCAs).[267] Under the draft CCA policy, a private landowner or state or local land management agency would voluntarily develop a plan to restore, enhance, or maintain habitats for "covered" species, which include proposed, candidate, and certain other unlisted species that may be proposed for listing in the near future.[268] In return for their voluntary, proactive conservation efforts, the Services would provide the landowner or state agency with both technical assistance and assurances that "if covered species are eventually listed, the property owner or agencies would not be required to do more than those actions agreed to in the [CCA]."[269] Under a CCA, the agency agrees to grant the landowner an enhancement of survival permit under Section 10(a)(1)(A) of the ESA in the event of a covered species' listing.[270] This permit would except

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266 NMFS listed the coho as threatened after the *Daley* court remanded its previous decision. *See* Threatened Status for the Oregon Coast Evolutionary Significant Unit of Coho Salmon, 63 Fed. Reg. 42,587 (1998) (to be codified at 50 C.F.R. pt. 227). The announcement came in August, with an effective date of October. *See id.*

267 *See* Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. 32,183 (1997) [hereinafter Announcement]. As of this writing, the Services have yet to promulgate a final rule implementing the Draft Policy.

268 *See id.* at 32,1836. FWS and NMFS define "candidate species" differently. NMFS defines it as a species for which concerns remain regarding the status, but without enough information to be proposed for listing. *See id.* at 32,186. FWS defines it as a species for which the FWS has sufficient information on file to support the listing of the species. *See id.*

269 *Id.*

270 *See* 16 U.S.C. § 1539(a)(1)(A) (1994). An enhancement of survival permit resembles an incidental take permit (those granted in association with habitat conservation plans (HCPs)), except that enhancement of survival permits may be granted as exceptions to a broad set of Section 9 prohibitions, such as the trade or possession of a listed species, whereas incidental take permits may only except activities from Section 9(a)(1)(B), governing the take of a species within the United States. *See* 16 U.S.C. §§ 1538, 1539(a). Since the CCA policy targets landowners and land managers, the enhancement of survival permit would, in effect, only exempt the taking of a species, as does an incidental take permit; thus, a CCA appears to be no more than an HCP for candidate

the landowner from ESA prohibitions for the listed species and allow continued management of the property in accordance with the CCA.[271]

The 1997 Draft Policy did not create CCAs for the first time;[272] it served as an amendment to a 1994 FWS guidance document on CCAs.[273] The 1997 policy differs from previous ones by including NMFS and by allowing assurances that a Section 10(a)(1)(A) enhancement of survival permit will be granted in the event of a covered species's listing.[274] The Services described the purpose of providing assurances under the new CCA policy as encouragement of non-federal landowners to implement proactive, voluntary conservation measures for declining species "so as to nullify the need to list the species as threatened or endangered under the [ESA]."[275] The policy requires the Service's reasonable expectation that the management actions agreed to in

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rather than listed species. *Cf. infra* note 276 and accompanying text (explaining the different standard applied to CCAs).

[271] *See* Announcement, *supra* note 267, at 32,183; *see also* Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed. Reg. 32,189 (1997) (to be codified at 50 C.F.R. pts. 13, 17) (proposed June 12, 1997) [hereinafter Safe Harbor] (allowing issuance of enhancement of survival permits for CCAs). CCAs differ from safe harbor agreements in that the latter allow for proactive conservation efforts in areas containing an already listed species. *See* Safe Harbor, *supra*, at 32,190.

[272] Evidently, internal FWS policies on CCAs existed as early as 1983 and allowed reliance on CCAs during a listing determination so long as the CCA was in place at that time. The agency instituted another CCA internal policy sometime in 1992 and developed a draft guidance document for that policy at the end of 1994. *See* Martha F. Phelps, Comment, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175, 189-90 (1997); *see also* Notice of Availability of Draft Candidate Species Guidance, 59 Fed. Reg. 65,780 (1994).

[273] *See* Phelps, *supra* note 272, at 190.

[274] The assurances apply only to non-federal landowners, but conservation agreements with federal landowners may still be entered into under the previous policy. *See* Announcement, *supra* note 267, at 32,185.

[275] *Id.* at 32,184. For the Services, the CCAs also address a major shortcoming of the ESA—that it fails to afford protections to candidate species. *See* J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 384 (1998). Further, as proponents argue, CCA assurances reverse the perverse incentive for landowners to manage their property to the disadvantage of covered species in order to avoid attracting those species and possibly subjecting themselves to Section 9 restrictions later when the species is listed. Proponents, including some environmentalists, also note that the CCA policy provides a higher level of protection for candidate species than unlisted species currently receive under HCP policy. *See* Announcement, *supra* note 267, at 32,185; J.B. Ruhl, *While the Cat's Asleep:*

the CCA would be adequate to remove the threats to the covered species if performed by all the landowners in similar situations and that the covered species will receive "sufficient conservation benefits" from the activities under the CCA.[276]

1. *Candidate Conservation Agreements in Lieu of Listing*

Although not explicitly stated in the 1997 CCA policy, previous CCA policies have expressly permitted the listing agency's reliance on CCAs during a listing determination, as long as the CCA was in place at that time.[277] Even with this restriction, there remains the possibility that the Services will defer an otherwise warranted listing based on unfounded reliance on a few CCAs, or worse, that the agency will actually use CCAs in lieu of a listing. Since the nature of CCAs mirrors that of the OCSRI (both involve voluntary conservation plans in an attempt to reduce threats to a species considered for listing) the holding in *Oregon Natural Resources Council v. Daley* may limit the ability of the Services to rely on CCAs when determining whether to list a species.

Many CCAs will undoubtedly, at some point, include unimplemented conservation measures, which *Daley* held to be too speculative in nature to be relied upon during a listing determination.[278] As noted with the OCSRI, 'implemented' for purposes of being legally considered in a listing decision may require a substantial implementation period—up to two years—and not merely the creation of a plan.[279] For a proposed species, this means that implementation of a candidate conservation plan may

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The Making of the "New" ESA, NAT. RESOURCES & ENV'T, Winter 1998, at 187, 189.

[276] Announcement, *supra* note 267, at 32,185, 32,187. This standard is different from and arguably greater than the standard for HCPs, which requires that measures "not appreciably reduce the likelihood of the species' survival and recovery in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv) (1994); 50 C.F.R. pts. 13, 17 (1997) (applying to habitat conservation plans under the ESA).

[277] A 1993 General Accounting Office report revealed that the FWS had a policy allowing the use of conservation agreements in lieu of listing when the agreement effectively removed all the threats to a species. *See* U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES: FACTORS ASSOCIATED WITH DELAYED LISTING DECISIONS 9 (1993).

[278] *See* discussion *supra* Part III.B.2.a.

[279] *See* discussion *supra* Part IV.A. In fact, *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739 (W.D. Tex. 1997), the case relied upon in *Daley,* involved the specific context of a conservation agreement between FWS and various Texas regulatory agencies.

well be impossible because once a Service proposes a listing, it has only a year to make a final determination, and the landowner has a year at maximum to develop and implement a plan under a CCA.[280] Where a species is listed as a "candidate," the landowner may have more time to implement a plan so that the agency could legitimately (under *Daley*) rely on the CCA in a listing decision.

In addition, CCAs may need to provide some level of assurance that their efforts will be continued into the future in light of *Daley*'s finding that the OCSRI measures were speculative due to the plan's lack of enforceability.[281] The regulations proposed by the FWS for implementing the draft CCA policy require that the duration of a CCA be "sufficient to remove threats" to the covered species.[282] The policy states that if a landowner violates its agreement, the Service can take back the enhancement of survival permit.[283] Under *Daley*, this duration and level of enforcement would not be enough to allow the Services to rely upon the CCA, since in effect the landowner can terminate the agreement at will.[284]

Finally, in order to determine that a species no longer warrants listing, the agency must find that the implemented, enforceable CCAs, along with any other measures permitted for consideration under the ESA, have removed all threats to the species so as to assure its recovery.[285] In essence, this addresses the first ESA listing factor—the present or threatened destruction, modification, or curtailment of the species' habitat or range.[286] The final determination is fact-specific depending on the extent of the species' range,[287] but since CCAs can be made only with individual landowners or land management state agencies, it is unlikely that enough CCAs would be in place for any species with a large range.

Although *Daley* set some limits on considering conservation plans for candidate species, if the Services did install the CCA

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[280] *See* 16 U.S.C. § 1533(b)(6)(A).

[281] *See supra* notes 179-181, 192, and accompanying text.

[282] Proposed Rule for Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed. Reg. 32,189, 32,193 (1997) (to be codified at 50 C.F.R. pts. 13, 17) (proposed June 13, 1997).

[283] *See* Announcement, *supra* note 267, at 32,185.

[284] *See* discussion *supra* Part III.B.2.

[285] *See* 16 U.S.C. § 1533(c)(2)(B)(i).

[286] *See id.* § 1533(a)(1)(A).

[287] *See* Announcement, *supra* note 267, at 32,183.

policy, they would likely receive greater deference from the courts than they did with the OCSRI.[288] Still, when using a CCA as a basis not to list a species, the Services would have to show that the CCA fits into the factors allowed for consideration in Section 4 of the ESA. For state agency efforts, CCAs may fall under Section 4(b)(1)(A)—efforts being made by any state;[289] for private effort, the agency will have to show that the CCA speaks to the present or threatened destruction, modification, or curtailment of the species habitat.[290] The Services, therefore, may still enter into CCAs and provide benefits for candidate species in that manner, but *Daley* limits the possibilities for abuse through this the use of this tool.

2. *Statewide Candidate Conservation Plans*

Notably, the draft policy allows only private landowners and state land management agencies to enter into a CCA with assurances.[291] However, under prior policy and the definition of a Candidate Conservation Agreement, a possible party may include "any other cooperator, if appropriate," provided that only landowners or state or local land management agencies receive the assurance.[292] A state candidate conservation plan would fall under the "other cooperator" party, but whether a conservation agreement with a state would be appropriate is unclear. Admittedly, the Services may work with any entity, including a state, to develop protections for a candidate or proposed listed species. However, under the CCA policy, the Services cannot bind themselves with a commitment of providing assurances to a state entity.[293] Furthermore, according to the *Daley* analysis, the Services cannot blindly rely on the conservation efforts of a state to determine that a listing is not warranted.[294] Thus, statewide candidate conservation plans, like the OCSRI, may be developed

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[288] Agencies receive strong deference when interpreting law in legislative rulemaking actions like the Services' adoption of a CCA policy. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The standard of review used in *Daley* was arbitrary and capricious. Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1145 (D. Or. 1998).

[289] *See* 16 U.S.C. § 1533(a)(1)(A).

[290] *See id.*

[291] *See* Announcement, *supra* note 267.

[292] *Id.* at 32,186.

[293] *See id.* at 32,183

[294] *See* Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139 (D. Or. 1998); *see also supra* text accompanying notes 265-274 (using the *Daley* case

and even encouraged, but the Services can commit by agreement only to provide technical services.

The larger question concerns the ability of the Services to rely on a state candidate conservation plan in a listing decision. The initial policies on CCAs, prior to the draft policy with assurance, indicated that all CCAs could be relied upon, provided that the plan was implemented at the time of listing.[295] While reliance on an individual landowner's CCA plan may or may not be substantiated, reliance on a state conservation plan is more likely to be *unsubstantiated* because statewide conservation plans encompass a variety of land types, landowners, regulatory authorities, and factors for decline.[296] Statewide conservation plans therefore involve efforts that are fundamentally different than an individual landowner's land-specific conservation plan. Statewide plans include provisions regarding general efforts on state lands, new agency policies, voluntary and incentive programs, and even regulatory measures. The uncertainty associated with such conservation plans that are not land-specific far exceeds the minimal uncertainties associated with an individual landowner or land management agency, because the "on-the-ground" effects of a state plan cannot be adequately anticipated.[297] Thus, until enough of the state plan's measures reach actual results that effectively remove threats to a species, the Services should not rely on the plan in a listing decision.

In addition, a state candidate conservation plan moves the Services one step away from the conservation effort by transferring the final decisions on a species' needs to the state and/or its regulatory agencies.[298] By relying on the state's plan during a

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to analyze the ability of the Services to rely on a CCA when making listing decisions).

[295] *See supra* note 272.

[296] The term "statewide plan" is used in this article to refer to plans like the OCSRI which cover lands in excess of state holdings. Inherently, a plan of this nature would involve many different landowners and land-uses, in contrast to the single owner, single use addressed in an individual landowner's CCA.

[297] Section 4(a)(1)(A) of the ESA allows consideration of the threats to a species' habitat or range. 16 U.S.C. § 1533(a)(1)(A) (1994). In order to consider a conservation plan, the Service must therefore demonstrate that threats are not present. *Id.* The planned efforts in a statewide program may be too speculative to support a finding that threats are removed under the plan. *See Daley,* 6 F. Supp. 2d at 1153-55 (finding that the prospective measures contained in the statewide OCSRI plan were too speculative to be considered during a listing procedure).

[298] *See* Announcement, *supra* note 267, at 32,185.

listing decision, the Services are, in effect, allowing the state to assume jurisdiction over the recovery process. Under ESA, this would be an impermissible delegation. If the federal government wishes to transfer its duty to protect candidate species, a method for state assumption should be installed directly into the ESA and should include standards as to what a state candidate conservation plan must include. This would parallel state assumption provisions included in other environmental statutes, such as the Clean Water Act.[299]

Under the Clean Water Act, a state can develop a program to implement its own point-source pollution permit system, and the federal government will surrender federal permit authority to the state's program, provided that the state has met certain requirements.[300] The applicable provisions mandate that the state set specific minimum pollutant levels, demonstrate that it has the laws and regulations to effectively implement and enforce the permit program, and prove, through statements from its Attorney General, that state laws provide adequate authority to state agencies.[301] If the state fails to maintain its program, the federal government can remove the state authority and reinstate the federal permit program.[302]

If the Services want to allow a state to take over a conservation program and wish to rely on the program in a listing decision, then the state plan should be developed according to a structured set of standards that includes a requirement that the state demonstrate its authority to administer and enforce the provisions in its conservation plan.

B. *An ESA Listing and the New Role of the OCSRI*

State conservation plans can still play a prominent role in the recovery of a species despite the ESA listing of that species. Oregon recognized this, and on January 22, 1999, the state dropped its pending appeal of the *Daley* decision.[303] Oregon's

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[299] *See* 33 U.S.C. § 1342(b) (1994).

[300] *See id.*

[301] *See id.* § 1342(b)(1).

[302] *See id.*

[303] Oregon recognized that its efforts were better placed on recovery of the species rather than on the appeal. *See* Jonathon Brinckman, *Oregon Abandons Fight with U.S. over Coastal Coho*, PORTLAND OREGONIAN, Jan. 23, 1999, at D1. NMFS also dropped its part of the appeal on the same day. *See id.*

governor also issued an Executive Order (EO)[304] that reaffirmed the state's intent to play a leading role in salmon recovery and contended that the OCSRI (now the Oregon Plan for Salmon and Watersheds) would in fact play a prominent role in the recovery process. The governor based this statement on NMFS's general lack of resources to implement an effective fish recovery plan and on the location of much of the salmon habitat on private lands where NMFS could only prohibit harmful activity but could not require beneficial efforts like those facilitated through the OCSRI.[305] The state's contentions are substantiated by the Services' historical record for designating critical habitat and developing recovery plans under the ESA for listed species, both of which take years to implement for most species.[306] The results achieved by efforts under the OCSRI further substantiate the state's contentions. For example, culvert replacements by the Oregon Department of Transportation and by private and state forest landowners have opened up or improved access to 247 miles of streams, a result that ESA prohibitions could not have reached.[307]

The Governor's EO expands the scope of the OCSRI to include all salmonids throughout the state, listed or not, and sets standards and expectations for all agency actions. For actions taken, approved, or funded by an agency for a purpose other than restoring salmon, the EO requires that the agency minimize and mitigate adverse impacts on salmon and not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."[308] For actions taken for the purpose of salmon recovery, the EO mandates that the action have the goal of producing a conservation benefit that "if taken together with comparable

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304 Executive Order No. EO 99-01 (Or. 1999), *reprinted in* Or. Admin. R. Bull., Jan. 8, 1999 [hereinafter EO].

305 *See id.* at 2-3.

306 The agencies rarely meet the ESA's requirement for critical habitat designations at the time of listing. *See* Larry J. Bradfish, *Recent Developments in Listing Decisions Under the Endangered Species Act and Their Impact on Salmonids in the Northwest*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 77, 82 (1995). Funding restraints preclude the Services from developing recovery plans, and a 1992 report showed that 30% of listed species did not have a plan for three years after listing and that 23% of the developed recovery plans had not been implemented. *See* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce,* 64 U. COLO. L. REV. 277, 346 (1993).

307 *See* EO, *supra* note 304, § 2(e), (k), at 9, 11.

308 *Id.* § 1(d)(A), (B), at 4.

and related actions . . . is likely to result in sustainable population levels of salmonids in the foreseeable future."[309] The EO also serves as a replacement for the MOA, and as such it similarly mandates that all OCSRI measures be implemented and that additional measures be included, such as requiring priorities based on science and efficiency standards. Finally, the EO provides that the Forest Practices Act and OCSRI hatchery provisions be reviewed and revised as necessary.[310]

The EO may have an underlying purpose beyond clarifying and strengthening the OCSRI provisions, and the state may be trying to resume state control of the listed species through the ESA. For a state, the next best thing to avoiding an ESA listing altogether would be to assume from the federal government control of the restoration process for the listed species within the state. For Oregon, this would effectively eliminate the concern of losing "state authority over management of Oregon's natural resources," which Oregon had associated with a federal listing.[311] The means of assuming control could come through the assumption of a recovery plan, the granting of incidental take through a Section 10(a) HCP, or a Section 4(d) rule.[312]

1. *Recovery Plan*

In several areas of the EO, the governor's language indicates an intent that the OCSRI form the basis of the coho recovery plan, which would be one way that a state conservation plan could be used in conjunction with an ESA listing. The EO states that the OCSRI addresses all factors for decline,[313] it reiterates the state's intent to play the lead in restoring Oregon coho,[314] and it relays the state's perception that the federal government is unable to "develop and implement effective recovery plans for fisheries."[315] Through this language, the governor expressed his belief that the OCSRI sufficiently provides for the recovery of listed salmonids throughout the state and should serve as the ESA recovery plan.

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309 *Id.* § 1(e), at 4.

310 *See generally id.* §§ 1(f), 2(b)-(c), 3(c), at 5, 8-9, 13-14; *see also id.*, § 1, at 3 (explaining that the MOA is terminated).

311 *See* OCSRI, *supra* note 17, at 2-3.

312 *See* 16 U.S.C. §§ 1533(d), (f), 1539(a) (1994).

313 *See* EO, *supra* note 304, at 1.

314 *See id.* at 3.

315 *Id.* at 2.

Under Section 4(f)(1) of the ESA, recovery plans must incorporate, among other requirements: (1) a description of site specific management actions as may be necessary; (2) objective, measurable criteria to determine when a species may be removed from the list; and (3) estimates of the time required and the cost to carry out those measures needed.[316] Despite additional changes to the OCSRI since the March 1998 version,[317] the OCSRI still lacks these measures; therefore, NMFS could not designate the OCSRI as the recovery plan for coho in Oregon without significantly changing it. In addition, if NMFS adopted the OCSRI as a recovery plan, significant questions would remain concerning the relationship between the OCSRI and the prohibitions in Section 9 of the ESA. Would activities under the OCSRI automatically be excluded from Section 9 prohibitions? The answer to this question has remained largely unexplored, especially in relation to state-run portions of a recovery plan, because the Services can declare the activities exempt from Section 9 under a Section 4(d) rule for threatened species, or through agreements under the habitat conservation plan policy.[318] Thus, if the OCSRI does serve as a recovery plan, it can be expected that one of these latter tools would be used as well.

2. *Habitat Conservation Plan*

Since some of the EO's covered species are not yet listed, the state could be trying to transform the plan into a habitat conservation plan and receive an incidental take permit for the listed species and a "no surprises" assurance for the unlisted species, thus resuming control of its wildlife.[319] The EO mandates that

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316 *See* 16 U.S.C. § 1533(f)(1).

317 The previous sections in this Article refer to the March 1998 OCSRI because NMFS based its listing decision on that version. Although there have not been additional drafts, the conservation plan is an adaptable piece, and there have been some additions made to the state effort. *See, e.g.*, EO, *supra* note 304, § 2, at 7-13.

318 *See* 16 U.S.C. § 1533(d). It has been noted that federal actions that require consultation under Section 7 "can use a healthy recovery process as a shield against the possibility of a jeopardy finding." Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 70 (1996).

319 Under Section 10(a) of the ESA, incidental take permits may be granted to except a party from the "take" prohibitions of Section 9 for those "takes" that are incidental to an otherwise legal activity. *See* 16 U.S.C. § 1539(a)(1)(B). The applying party must submit a conservation plan to the listing agency describing how it plans to minimize and mitigate the harm to the listed species,

agency actions, at a minimum, "not appreciably reduce the likelihood of the survival and recovery of salmonids in the wild."[320] This language directly mirrors the language in Section 10(a)(2)(B)(iv) of the ESA which describes the finding the Secretary must make in order to grant an incidental take permit.[321] With this language, Oregon may be positioning the OCSRI to serve as a statewide HCP in that the efforts identified in the OCSRI serve to minimize and mitigate the harm from otherwise lawful activities occurring in the state,[322] with any takes arising from the plan considered incidental to otherwise lawful activities.

The issuance of a statewide HCP is questionable. Although the FWS has granted incidental take permits to states in the past, it has never granted one that was completely statewide in nature.[323] Nonetheless, it appears that the FWS might do so. In its draft rules for CCAs, the agency stated that

> the HCP permittee may be a [s]tate or local agency that intends to sub-permit or blanket the incidental take authorization to hundreds if not thousands of its citizens. The Service again does not view this as a problem so long as the original agency permittee abides by, and ensures compliance with, the terms of the HCP.[324]

If NMFS adopted the same language, it could apparently grant Oregon a statewide incidental take permit, calling the Oregon

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and the agency must find that the takings associated with the permitted activity will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. *See id.* § 1539(a)(2)(B). The Services have developed a policy on this section, which described the conservation plan required, called a Habitat Conservation Plan. Later policy created "no surprises," under which the Service provides assurances to a landowner—under the incidental take permit granted in association with an HCP—providing that if a landowner includes a species in its HCP, the landowner will not be asked to contribute more in the future if that species' status ever changes. This policy includes unlisted species, and thus a landowner can provide for an unlisted species in its HCP and have an incidental take permit for that species if it is ever listed. *See generally* U.S. FISH AND WILDLIFE SERV. & NATIONAL MARINE FISHERIES SERV., ENDANGERED SPECIES HABITAT CONSERVATION PLANNING HANDBOOK (1996).

320 EO, *supra* note 304, § 1(d)(B), at 4. The EO sets a higher standard for some actions. *See supra* note 309 and accompanying text.

321 *See* 16 U.S.C. § 1539(a)(2)(B)(iv).

322 *See supra* note 319.

323 For example, the FWS issued a multi-species, statewide HCP to Washington for the Northern Spotted Owl in January 1997; however, the HCP only covered state forest lands. *See* Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 337 (1997).

324 Announcement, *supra* note 267, at 32,189.

Plan an HCP, and thereby allow the state to decide which activities would not "appreciably reduce the likelihood and recovery of the [listed] species in the wild." The issuance of a statewide HCP would, however, be inconsistent with both the language and purpose of the ESA.

First, although the FWS statement above indicates that state agencies may grant permits to numerous parties under an HCP, the scope of this policy should be limited to the areas where the agency has actual land management control. A state does not have this same control over private lands even though it may be able to regulate them to some extent; therefore, it cannot assure the "not appreciably reduce" standard on those private lands.

Moreover, by granting a statewide HCP for a state conservation plan like the OCSRI, NMFS would be allowing a "not appreciably reduce" standard for the range of the species within the state except for areas of federal land ownership. In *Daley*, the agency determined the species to be threatened despite the protections offered on federal lands;[325] thus the statewide standard would be less than recovery and NMFS would be in violation of its duty to recover the species under Section 7 of the ESA.[326] Additionally, since the Oregon EO calls for a higher "likely to result in sustainable population levels" standard for all purposeful salmon conservation efforts, it is debatable that NMFS would meet the recovery standard even with the OCSRI as a HCP.

3. *4(d) Rule/Section 6 Cooperation with the State*

When a listing agency declares a species "threatened," Section 4(d) of the ESA requires it to "issue such regulations as [it] deems necessary and advisable to provide for the conservation of such species."[327] Section 6(g) states, "the prohibitions set forth in . . . section [4](d) . . . of this title shall not apply with respect to the taking of any resident endangered species or threatened spe-

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[325] *Daley* held that, since federal lands only encompassed 35% of the coho range, federal efforts alone failed to provide adequate protections to warrant a "no list" determination. *See* Oregon Natural Resources Council v. Daley, 6 F. Supp. 2d 1139, 1157 (D. Or. 1998); *see also supra* notes 200-203 and accompanying text.

[326] *See* 16 U.S.C. § 1536.

[327] 16 U.S.C. § 1533(d).

cies . . . within any State which is then a party to a cooperative agreement with the Secretary pursuant to subsection [6](c)."[328]

The United States District Court for the District of Montana has held that these provisions do not exempt a state with a Section 6 cooperative agreement from the Section 9 take provision, because Section 6(f) requires that any state laws regarding the take of a threatened or endangered species may not be less restrictive than "the federal prohibitions so defined," indicating federal preemption in the area of the take definition.[329] However, NMFS has explicitly stated that, for threatened species, regulations under Section 4(d) may be the same as for threatened species as under the ESA, "or they can be less restrictive, as appropriate."[330] Thus, under Section 4(d), NMFS could issue protective regulations for the coho and determine that their application to activities under the OCSRI was not "appropriate," thereby exempting the OCSRI from any regulations, so long as the state and the Service have entered into a cooperative agreement meeting the requirements of Section 6(c).

Section 6(c) requires the state to "establish and maintain an adequate and active program for the conservation of" endangered and threatened species.[331] Under the ESA, the term "conservation" means the use of all methods and procedures necessary to bring a listed species to the point where listing is no longer necessary; thus, the standard for a state cooperative agreement is one of recovery.[332] Although the EO for the OCSRI prescribes that OCSRI actions be implemented such that they are "likely to result in sustainable populations,"[333] for the reasons noted previously, the OCSRI may still not meet the standard of recovery.[334]

The OCSRI describes many promising efforts for the conservation of coho and other salmonids, and its implementation should be encouraged. However, NMFS has a duty to conserve and restore the species under the ESA, and it cannot relinquish

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328 *Id.* § 1535(g)(2).

329 *See* Swan View Coalition v. Turner, 824 F. Supp. 923, 938 (D. Mont. 1993) (citing 16 U.S.C. § 1535(f)).

330 Permits for Incidental Taking of Endangered Marine Species, 55 Fed. Reg. 20,603, 20,604 (1990).

331 16 U.S.C. § 1535(c).

332 *See id.* § 1532(3).

333 EO, *supra* note 304, § 1(e), at 4.

334 *See* discussion *supra* Part IV.C.

this duty in its recognition of the OCSRI. With the proper coordination, a program can be worked out under Section 6(c) for the OCSRI to play a role in species recovery under the ESA, provided that NMFS assures that the OCSRI does indeed provide for conservation. This cooperation would allow the state to retain management over most aspects concerning the species in the state.

Conclusion

Congress enacted the Endangered Species Act in 1973 to establish a program to protect and conserve imperiled species and the ecosystems on which they depend.[335] The program it developed relies on the designation of species as threatened or endangered, and the statute requires that a listing agency look at prescribed, meaningful factors in determining a species' status.[336] The National Marine Fisheries Service violated both the language and the purpose of the ESA by relying on the Oregon Coastal Salmon Restoration Initiative as a substitute for making an otherwise warranted listing. The language of the ESA does not allow consideration of prospective and voluntary conservation efforts such as those in the OCSRI. Such measures, because of their speculative nature, cannot assure necessary protections for the conservation of the species, and deferring the ESA protections because of such measures conflicts with the conservation purpose of the ESA. In addition, if a species warrants a listing because *without prospective protection* it may likely become endangered or extinct in the foreseeable future, then that species is threatened or endangered under the language of the ESA.

Recently, both the NMFS and FWS have been searching for alternative ways of providing for imperiled species protection beyond the normal ESA listing procedures.[337] Plans such as the OCSRI can still be beneficial in the conservation of a species and may, on occasion, aid a species so that it does not need federal listing. The FWS and NMFS should be encouraged to participate in developing conservation plans for unlisted species, but they should not use such plans as a substitute for a listing. Only when a conservation plan, through implementation and time, protects

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335 *See* 16 U.S.C. § 1531(b) (purpose of the ESA).

336 *See id.* § 1533(a)(1).

337 *See* discussion *supra* Part V.A (discussing candidate conservation agreements).

the species by removing all threats to its existence may the service determine that a species does not warrant a listing.

Despite the OCSRI's inability to serve as a substitute for an ESA listing, the conservation plan and future statewide conservation may still play an important role in the recovery of a species. The OCSRI facilitates efforts on both the state and local level that an ESA listing could never achieve, and the plan can therefore supplement and aid the ESA's efforts to recover the species.