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Two Prongs of Public Interest Lawyering Under the Endangered Species Act: Building a Cooperative Strategy From Litigation and Collaborative Efforts

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Editors' Summary: In working to protect species and enforce the Endangered Species Act, nongovernmental organizations (NGOs) generally take one of two possible routes: litigation or collaboration. While some NGOs primarily use confrontational efforts to force agency action, such as petitioning the government to list a species, filing lawsuits to require timely agency action, and challenging decisions not to list through litigation, other NGOs use cooperative efforts with private landowners and agencies to help protect and recover species. The author argues that NGOs should continue to specialize in one approach or the other and urges NGOs to coordinate their efforts to maximize results. Developing a cooperative strategy that uses both approaches will increase the efficacy of environmental efforts and lead to better results.

I. Introduction

The Endangered Species Act (ESA) advances the protection of biological diversity through two main requirements.[1] First, the Act requires the identification of species facing a risk of extinction. Listing of species as threatened or endangered triggers protective provisions of the Act and requires that the appropriate agency take further measures to promote the recovery of the species. Efforts to promote recovery of listed species, the second aspect of protection under the ESA, can take a variety of forms and have been a subject of increasing attention in the environmental community.

The actions of nongovernmental organizations (NGOs) that affect ESA implementation are generally litigation-oriented and confrontational or collaborative. These approaches to promoting the goals of the ESA reflect an ongoing debate concerning the appropriate route to the recovery of listed species and are a part of broader developments in public interest environmental law practice. The differing approaches also correspond, roughly, to the identification (listing) and protection goals of the ESA's statutory scheme.

In regard to listing, NGOs participate primarily through confrontational efforts to force agency action. This includes petitioning to list a species, filing lawsuits to require timely agency action, and challenging decisions not to list through litigation. The litigation-oriented participation of NGOs on the listing end of ESA implementation embodies the "rule of law" approach that characterized early environmentalist efforts.

In regard to listed species' recovery, however, one may question whether a more collaborative approach will produce greater protection of endangered species and their habitat than the litigation-oriented approach that dominates listing disputes. Thus, some NGOs have adopted an approach that emphasizes the development and implementation of cooperative efforts involving private landowners and agencies for the protection and recovery of species. Other NGOs, which continue to emphasize a contentious, litigation-centered approach, have expressed concerns with this collaborative model. However, there is an intriguing relationship between these two methods that has previously received little attention.

The two-pronged effort of the environmental community creates both a carrot and a stick that urges action to protect endangered species. The litigation-based approach has a history nearly as long as the Act—a history that has shaped perceptions of the ESA for better or worse. Yet, due to the growth of collaborative planning in natural resources management generally, as well as the current Administration's heavy emphasis on collaboration, the efficacy of collaborative efforts to implement ESA goals is becoming an ever more important question. Further, an examination of both approaches, and the relationship between litigation and collaboration as NGO strategies, provides a means of analyzing whether the two-pronged effort produces results better than either approach could produce on its own. It also sheds light on the evolving nature of public interest environmental law practice.

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1. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

This Article discusses the division of labor among NGOs, recognizing that groups tend to focus on either a litigious or collaborative approach. It explores how their efforts reinforce or otherwise relate to each other and looks at the extent to which the environmental NGO community as a whole can be understood as consciously adopting a two-prong approach. The Article encourages an increase in the specialization that has already taken hold in the community and asserts that developing a cooperative strategy employing both approaches will increase the efficacy of environmental efforts, leading to greater realization of a protective, proactive vision.

II. Two Paths for Advocating the Public's Interest in Environmental Protection

The literature on public interest environmental lawyering makes plain that two paths, often distinct from one another, exist for working toward improving environmental quality. Simply stated, one path consists of holding governmental and private actors to the letter of the law through litigation. The other more recent and evolving approach embraces a collaborative model wherein environmental NGOs become active participants in the planning process with government, industry, and other actors not traditionally viewed as partners with the environmental community. This simple division deserves a bit more elaboration before it can be discussed within the context of the ESA, where each of the approaches contributes to advancing the environmental goals enshrined in the Act in a distinct way.

A. Traditional "Rule of Law" Litigation

The "rule of law" approach in environmental law can be traced back to the roots of environmental lawyering before the major environmental statutes were enacted.[2] The essential premise of environmental lawyering at that time held that litigation provided the primary avenue for advancing environmental goals by reading environmental goals into statutes.[3]

Much has changed since the birth of public interest environmental law. With the passage of major environmental statutes in the early 1970s, the role of rule of law litigation changed from inventing environmental law to ensuring its enforcement. The early ad hoc citizen groups, such as those involved in the paradigmatic environmental rule of law litigation, *Scenic Hudson Preservation Conference v. Federal Power Commission*,[4] have grown into established NGOs.

The litigation-focused origins of environmental law tended to create a concept of environmental law as a contest between environmental interests and industry, a concept that informed the shape of environmental statutes.[5] The command-and-control regulatory model that grew from this concept imposes binding rules, primarily on corporate entities and federal agencies, and divides complex problems into smaller components, focusing on those that can be addressed through specific rules.[6]

The frequently noted drawbacks to the command-and-control model reflect similar shortcomings in a fully litigation-based NGO strategy. Normatively, the problem with such a strategy is that by focusing on counteracting environmentally harmful activities, public interest environmental lawyers do not advance a forward-looking vision or model for enhanced environmental protection.[7] This problem is particularly acute in the area of biodiversity, which is why this Article uses the ESA to examine the dual role of public interest environmental lawyers in greater depth. Unlike most pollution prevention goals, the very nature of biodiversity preservation requires a forward-looking strategy for harmonizing species protection with other social and economic objectives. Biodiversity protection involves fostering and maintaining complex ecological systems, which are irreplaceable and often surrounded by scientific uncertainty. The very focus on rules, designed and implemented with the knowledge that public interest litigation will be used to enforce them, may hinder the creation of means for actually solving problems because of the emphasis on proscribing specific activities.[8] Further, "the rules themselves, crafted in the bowels of the bureaucracy under necessarily fragmented and incomplete information, are often costly, ineffective, inflexible, underinclusive, overinclusive, at cross purposes with other fragmentary rules, or all of these simultaneously."[9] Also, public interest environmental lawyers have less incentive to litigate than they used to because many of the easiest targets for litigation have already been hit. The more difficult cases that remain present greater challenges in terms of resources and risk to environmental NGOs, and the law of standing has become less favorable.[10]

Although environmental litigation has declined,[11] the litigation-based approach remains alive and well in the NGO community. A recent article by Earthjustice attorney Susan Daggett, for example, concludes that "[c]itizen enforcement in the coming years is likely to be more important than ever."[12] The article convincingly advances a vision of litigation by environmental NGOs as a major positive force in developing and enforcing environmental law. It provides examples demonstrating the significance of NGO litigation in developing rules of administrative law, as well as interpretations of environmental statutes.[13] The role of NGOs in forcing compliance by governmental and nongovernmental actors also figures prominently in the article. On the whole, Daggett's article provides a broad overview of the NGO role as one centered on litigation. While a number of litigation-based NGO successes can be found, some of which are

2. A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation*, 17 Pace Envtl. L. Rev. 237 (2000), *reprinted in* 19 Pace Envtl. L. Rev. 575, 579 (2002).

3. *Id.* (citing David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612 (1970)).

4. 354 F.2d 608 (2d Cir. 1965).

5. Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 Wis. L. Rev. 555, 557.

6. *Id.*

7. A. Dan Tarlock, *The Future of Environmental "Rule of Law" Litigation and There Is One*, 19 Pace Envtl. L. Rev. 611, 612 (2002).

8. *See* Karkkainen, *supra* note 5, at 558.

9. *Id.*

10. Michael B. Gerrard, *Trends in the Supply and Demand for Environmental Lawyers*, 25 Colum. J. Envtl. L. 1, 4 (2000).

11. *Id.* at 2.

12. Susan D. Daggett, *NGOs as Lawmakers, Watchdogs, Whistleblowers, and Private Attorneys General*, 13 Colo. J. Int'l Envtl. L. & Pol'y 99, 112 (2002).

13. *Id.* at 103-04.

discussed below in relation to the ESA, the litigation-based picture of public interest environmental lawyering is, at best, only one-half of the picture. Litigation does not occupy the preeminent place in environmental law that it held in earlier decades.[14]

The evolution of environmental law into a major and established field of law has brought significant challenges to the traditional rule of law model of public interest environmental practice. Most importantly, as many aspects of environmental law move away from command-and-control regulation toward a more cooperative and decentralized means for environmental protection, the role of NGOs as enforcers and law developers loses significance. While this is not to say that litigation has no place in public interest environmental lawyering, NGOs must develop new modes of working toward environmental protection through collaboration.

B. Collaboration to Meet Environmental Goals

The alternative to traditional litigation-based NGO models is working with government agencies and private parties to meet conservation goals, rather than suing them to force compliance with the law. This model has become very important in natural resources law, particularly in the management of biodiversity. The collaborative approach can be viewed as attempting to build forward-looking arrangements to meet environmental goals, rather than compelling parties to avoid breaking rules.

The concept of "adaptive management" embodies the type of collaborative approach that constitutes a growing trend in environmental law. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), the two agencies charged with primary ESA responsibilities, as well as the U.S. Forest Service (Forest Service), the Bureau of Land Management (BLM), and other federal agencies, have made significant moves toward collaborative management based on a model that allows for flexibility and change as management techniques are tried and their results are understood.[15] The impact of these still experimental methods of addressing environmental problems on public interest environmental lawyering is not hard to imagine: as the emphasis in environmental protection shifts toward finding solutions through collaboration, litigation directly related to such processes will often be impossible, counterproductive, or inappropriate. Thus, as NGOs seek to retain influence over environmental developments, it is through their participation in collaborative processes, rather than litigation, that many will find a role.[16]

The reasons for development of a collaborative approach to environmental issues are myriad. Many corporations who were previous targets for litigation have begun to seriously work toward voluntary compliance and even to move "beyond compliance."[17] Federal and state agencies have sought to reinvent themselves as compliance assistance agencies and to adopt policies encouraging further cooperation with private parties.[18] In biodiversity conservation, environmentalists may be increasingly recognizing that the need to focus on land, rather than public airspace and water, frequently pits entrenched property rights against relatively limited federal authority and undermines the effectiveness of the command-and-control model developed for other problems.[19] Perhaps the most significant reason for the development of a collaborative model, however, is the desire of parties to find more efficient solutions to their problems, rather than relying on court-imposed remedies. As one astute observer of the development of collaborative approaches in environmental law has concluded:

> [A]ll parties recognize that litigation and judicially imposed remedies are likely to be so costly and inefficient that they are willing to invest considerable resources in finding alternative, mutually acceptable solutions. In short, the background legal rules operate as a set of "penalty default" provisions, and litigation seeking to enforce those rules is deployed as a punitive threat, the "nuclear option" in a larger, highly complex negotiating strategy.[20]

Thus, one can view the ongoing development of collaborative planning in environmental law as a growth beyond the early stages of the subject into a more complex, forward-looking mode of practice.

If these developments truly reflect transformation of the "very nature of environmental decision-making,"[21] which it appears they do, then surely this transformation is simultaneously changing the dynamics of public interest environmental lawyering. Turning to a review of the role of litigation and collaborative planning in one statutory regime, the ESA, provides an opportunity to examine the effect of each approach on the other and the implications of these developments for public interest environmental lawyering.

III. Background on the ESA

The goals of the ESA are to protect endangered species and the ecosystems on which they depend.[22] One view of how the statute achieves these goals describes it as a prohibitive policy.[23] In recent years, much of the innovation in ESA implementation has focused on reaching the ESA's goals while addressing the critiques leveled by landowners who feel threatened by the restrictions the statute may impose.[24]

The ESA works as follows. Under §4 of the Act, the FWS and the NMFS determine whether species face sufficient

14. *See* Karkkainen, *supra* note 5, at 564.

15. *See generally* Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943 (2003) [hereinafter Karkkainen, *Adaptive Ecosystem Management*]; Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869 (1997).

16. There is also a role for litigation related to collaborative planning, though the contours of it are still developing. *See* Tarlock, *supra* note 7, at 614-17 (discussing litigation related to habitat conservation planning under the ESA). This development is discussed further in Part V.B., *infra*.

17. Karkkainen, *supra* note 5, at 561. Among other things, this may suggest that the litigation-based model has been successful in the past and has led potential targets of litigation to seek to avoid future lawsuits.

18. *Id.* at 559.

19. Tarlock, *supra* note 7, at 613.

20. Karkkainen, *supra* note 5, at 566-67.

21. *Id.* at 567.

22. 16 U.S.C. §1531(b).

23. *E.g.*, STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT (1982).

24. *See* J.B. Ruhl, *Endangered Species Act Innovations in the Post-Babbittonian Era—Are There Any?*, 14 DUKE ENVTL. L. & POL'Y F. 419, 430-34 (2004).

threats to render them either threatened or endangered, in which case they are "listed" as such.[25] The ESA also provides for citizen petitions regarding the listing or delisting of species.[26] Where the petition is supported by substantial information, the agency must make a determination within one year that the petition is either warranted, not warranted, or warranted but precluded by other pending proposals.[27] The latter two negative decisions are explicitly subject to judicial review.[28]

At the time a listing decision is made, the agency must designate critical habitat for the species.[29] Litigation concerning critical habitat decisions has become more common, though it is sometimes initiated by industry associations opposed to restrictions resulting from the designation. With regard to citizen petitions seeking a change in critical habitat designation, the agency retains more flexibility than it does for listing decisions. The agency must determine how it will proceed within one year of a petition found to present substantial information.[30] The statute also requires the agencies to develop "recovery plans" for listed species.[31]

Once a species is listed, two basic protective and prohibitive provisions are triggered. Section 7 requires that all federal agencies consult with the wildlife agencies to ensure that action they engage in, fund, or authorize does not "jeopardize" any listed species.[32] Section 9 prohibits the "take" of listed species by any person, including private landowners.[33] The term "take" includes to "harass, harm, [and] pursue," as well as to kill or capture.[34] Significantly, the regulatory elaboration of the definition of "take" provides that "harm" "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns."[35] Violation of §9 is punishable by civil and criminal penalties.[36]

The agencies are authorized to issue permits for the taking of listed species, commonly known as incidental take permits (ITPs).[37] Through the ITP provisions and other authority to allow takes, the FWS has crafted a means of addressing the problems posed by the potentially unduly harsh restrictions of the ESA upon private landowners on the one hand, and the difficulty of mandating protection of habitat on the other.[38] Some environmentalists contend that these contract-based arrangements that the FWS has developed are in fact underprotective of habitat and species, while others have become fully engaged in their design and implementation.[39]

With regard to private landowners, applications for ITPs must include a habitat conservation plan (HCP).[40] The provisions for HCPs entered the statute with the 1982 Amendments as a means of increasing flexibility as to the Act's effect on private landowners.[41] The HCP program initially floundered somewhat and its provisions were infrequently used until the 1990s,[42] when their potential for providing an innovative means of addressing private landowner concerns while attempting to enhance endangered species habitat was developed under U.S. Department of the Interior Secretary Bruce Babbitt.[43] The essence of an HCP is that a landowner agrees to undertake certain measures to mitigate harm to a species or to benefit a species and, in exchange, receives an ITP that allows development or other activities that will result in takes.

HCPs are now a very prominent collaborative planning process under the ESA. Some HCPs cover relatively small areas of land and one or few endangered species, while others cover very large swaths of habitat and encompass a wide variety of species.[44] The timescale of HCPs varies. HCPs frequently run for long periods, such as 50 or 100 years. The complexity of HCPs has grown over time.[45] For example, a permittee may be a state agency that intends to allow takes under an HCP by a large number of citizens.[46] The FWS and the NMFS have developed a "no surprises" policy that provides for further assurances to landowners entering an HCP agreement that new biological information regarding the species will not increase land use restrictions.[47] This policy responded to concerns that the effectiveness of the HCP program was inhibited by landowner fears that even with an HCP in place, additional restrictions would arise.[48] While it has effectively increased landowner participation, it has also drawn sharp criticism from some environmentally concerned interests and scientists.[49]

Other collaborative arrangements have also developed under the ESA, including candidate conservation agree-

25. 16 U.S.C. §1633(a)(1). Publication of a list is required by *id.* §1533(c).
26. *Id.* §1533(b)(3)(A).
27. *Id.* §1533(b)(3)(B).
28. *Id.* §1533(b)(3)(C)(ii).
29. *Id.* §1533(a)(3)(A).
30. *Id.* §1533(b)(3)(D)(ii).
31. *Id.* §1533(f).
32. *Id.* §1536(a)(2).
33. *Id.* §1538(a)(1).
34. *Id.* §1532(19).
35. 50 C.F.R. §17.3 (2004).
36. 16 U.S.C. §1540(a), (b).
37. *Id.* §1536(b)(4) (for federal actions); §1539(a)(1) (for other activities).
38. Daniel A. Farber, *A Tale of Two Cases*, 20 Va. Envtl. L.J. 33, 38 (2001).
39. Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 Stan. L. Rev. 305, 319-20, and sources cited therein (1997).
40. 16 U.S.C. §1539(a)(2).
41. Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles' Heel of the Endangered Species Act*, 6 N.Y.U. Envtl. L.J. 279, 283, 294-95 (1998).
42. *See* Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 Envtl. L. 605, 607 (1991).
43. Ruhl, *supra* note 24, at 431-32.
44. The Schleuter 33 Commercial Development HCP, for example, covers only 33 acres inhabited by the golden-cheeked warbler, while the Tacoma Water HCP for the city of Tacoma, Washington, covers 14,888 acres with nine listed species and a variety of significant non-listed species. Information on HCPs is available at U.S. FWS, *Environmental Conservation Online System*, *at* http://ecos.fws.gov (last visited July 25, 2005).
45. *See* Thompson, *supra* note 39, at 316-17.
46. *See* U.S. FWS & NMFS, Safe Harbor Agreements and Candidate Conservation Agreements With Assurances; Announcement of Final Safe Harbor Policy; Announcement of Final Policy for Candidate Conservation Agreements With Assurances, 64 Fed. Reg. 32705 (June 17, 1999) (noting this situation under HCPs).
47. U.S. FWS & NMFS, Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998). Prior to the final regulations, the "no surprises" policy was expressed in individual HCPs and in U.S. FWS & NMFS, Endangered Species Habitat Conservation Planning Handbook (1996).
48. Thornton, *supra* note 42, at 607.
49. *See generally* Jennifer Jester, *Habitat Conservation Plans Under Section 10 of the Endangered Species Act: The Alabama Beach Mouse and the Unfulfilled Mandate of Species Recovery*, 26 B.C. Envtl. Aff. L. Rev. 131, 133-34, and sources cited therein (1998).

ments (CCAs) with assurances and safe harbor agreements (SHAs).[50] CCAs with assurances are entered into between the agency and a nonfederal party, such as a private landowner. In essence, the landowner agrees to certain management measures believed to benefit a species that is a candidate for listing or is proposed for listing. The agency enters the agreement to improve the status of the species and to reduce the need for listing. In the event that listing occurs, the landowner receives assurances that ITPs will be issued to enable continuation of land uses associated with those recognized in the CCA. In sum, CCAs establish arrangements that seek to avoid a listing.[51]

SHAs are a prime example of NGO involvement under the ESA. Environmental Defense (ED) played a major role in developing the safe harbor concept in conjunction with the FWS and works with landowners to construct SHAs. The essence of SHAs is to reach voluntary agreements with landowners to protect habitat for endangered and other species on private land. ED's Michael Bean asserts that the key distinction between SHAs and HCPs is that HCPs serve as mitigation for development projects that negatively impact habitat, whereas SHAs are more proactive because they involve voluntary beneficial activities by landowners who receive assurances that such activities will not result in an increased regulatory burden.[52] The assurances given to landowners are granted through "enhancement of survival" permits under ESA §10(a)(1)(A) rather than through the ITPs used for HCPs.[53]

Several key concepts underlie SHAs. First, a baseline condition, which describes the characteristics of the covered species' population and their habitat on the covered property, must be established.[54] Based on this baseline, the SHA must achieve a "net conservation benefit," which means that the FWS must make a detailed finding that the agreement will increase species abundance or improve species' habitat, taking into account the occurrence of permitted takes.[55] The basic assurance to a landowner consists of permission to use the property in any way he desires, provided the property does not fall below the described baseline condition.[56] Although the FWS retains the authority to revoke permits where a species' viability is jeopardized by permitted landowner activities, this is an absolute last resort.[57] An issue of possible concern is the "biological sink," in which protected species move from other habitat that is protected onto SHA-covered property, thus removing the need for protection of their original habitat without affording additional protection on the SHA-covered property because the new specimens are in excess of the baseline.[58] There is also the possibility that other listed species will be drawn to the covered property or that other species on the covered property are listed following the entry into force of the SHA, a situation that the FWS apparently handles in an ad hoc manner.[59]

IV. NGO Participation Under the ESA: Litigation and Collaboration

Public interest environmental lawyers play two primary roles under the ESA that reflect the division in the environmental community as a whole between litigation and collaboration.[60] The NGOs tend to fall into two camps, one focusing on litigation and the other on collaboration.[61] The role of NGOs as collaborators involves a much different approach than the litigation approach. This is why NGOs frequently focus heavily on one approach or the other. In a sense, the two camps represent two views on the roles of federal agencies and landowners: the litigious approach implies that other actors must be compelled to protect species, while the collaborative approach implies that parties want to protect species as long as it does not conflict too heavily with their other interests. In general, the groups from one camp harbor at least some skepticism as to the effect of the other's approach. However, while these two approaches may sometimes work at counterpurposes, there are also significant opportunities for each approach to enhance or support the other. The environmental community would do well to work toward greater inter-NGO coordination that eliminates counterproductive effects or, at least, haphazard gaps and missed opportunities resulting from the pursuit of two relatively independent tracks. Such coordination will lead to improved efficiency and strengthen the NGO community. The environmental community perceives a daunting challenge in working to protect endangered species under the George W. Bush Administration,[62] signaling that it is time for increased inter-NGO coordination and a more united and effective approach.

A. Litigation Successes

Environmental NGOs have played an important part in ensuring that the FWS and the NMFS implement the ESA through pressuring them with litigation.[63] Groups such as Earthjustice and the Center for Biological Diversity (CBD) focus almost entirely on advancing the environmental

50. *See generally* 64 Fed. Reg. at 32716; *id*. at 32726.

51. For an argument that candidate conservation agreements actually undermine the ESA, see Martha F. Phelps, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. Envtl. Aff. L. Rev. 175 (1997).

52. Telephone Interview with Michael Bean, ED (Jan. 6, 2005) [hereinafter Bean Interview].

53. *See generally* 64 Fed. Reg. at 32721-22, 32724-25. ESA §10(a)(1)(A), 16 U.S.C. §1539(a)(1)(A), allows permitting of prohibited activities "to enhance the propagation or survival of the species."

54. 64 Fed. Reg. at 32722-24.

55. *Id.* at 32722-23.

56. *Id.* at 32724.

57. *Id.*

58. *See, e.g.*, Defenders of Wildlife, Frayed Safety Nets: Conservation Planning Under the Endangered Species Act 8 (1998), *available at* http://www.defenders.org/pubs/hcp01.html (last visited July 25, 2005).

59. *See* 64 Fed. Reg. at 32724-25.

60. NGOs may also play a significant role through scientific input, which can be important in litigation or, especially, in collaboration.

61. While specialization is probably greater among large national NGOs, local groups also tend to find a niche in either litigation or collaboration as needed to advance their more locally focused agenda. Telephone Interview with Judith Lamare, Friends of the Swainson's Hawk (Feb. 17, 2005) [hereinafter Lamare Interview].

62. *E.g.*, Robert F. Kennedy Jr., Crimes Against Nature: How George W. Bush and His Corporate Pals Are Plundering the Country and Hijacking Our Democracy (2004).

63. One can also argue, however, that too much litigation reduces agency resources that can be devoted to more proactive policies designed to aid species recovery. Telephone Interview with Louise Milkman, TNC (Jan. 20, 2005) [hereinafter Milkman Interview].

agenda through litigation. A very large portion of CBD's work focuses on ESA litigation, and Earthjustice has also been involved in many ESA battles. The decisions under the ESA that most frequently involve litigation are listing and critical habitat designation, although HCPs can also generate litigation by environmental and industry groups.

The importance of NGOs in the listing process can hardly be overstated. One report found, for example, that in California, "92% of all species listed since 1992, and 74% of all species listed since 1974 were initiated by citizen petitions and lawsuits."[64] Litigation under the ESA has been a very important element of ensuring that the agencies provide protection for species in the face of significant political pressure. Examples of species listed following several rounds of litigation by environmental groups abound. The listing of the bull trout, for example, involved four rounds of litigation initiated by environmental NGOs that petitioned to have the highly imperiled species listed.[65] Along with the bull trout, species such as the Canada lynx and the jaguar gained protection only after litigation broke down agency resistance to making a decision known to have relatively severe economic and political consequences.[66]

A review of the websites of major litigation-NGOs such as Earthjustice and CBD provides a picture of why, at least from their perspective, litigation continues to play a major role in public interest lawyering under the ESA. The Earthjustice wildlife "accomplishments" web page[67] contains a long list of settlements and court victories that will provide enhanced protection through specific activities (such as construction of a sea wall to protect sea turtle nests),[68] by securing an agreement to designate critical habitat,[69] or through compelling action on listing petitions.[70] CBD's press releases focus largely on the efforts of the environmental community to hold federal agencies accountable through litigation.[71] These groups embody the view that litigation remains a primary vehicle for ensuring protection of endangered species, an opinion shared by some smaller, local groups as well.[72] There is another side to the story, of course, that these groups do not tell. That story is suggested by the rise in importance of collaborative efforts.

B. Collaboration-Based NGOs

Several NGOs focus almost entirely on collaboration. Among the most important are ED, discussed above with regard to SHAs, and The Nature Conservancy (TNC). ED has taken a very active role in developing programs that promote cooperative strategies for protecting species. TNC plays a significant role in habitat conservation planning.[73]

As already noted, ED was instrumental in developing the safe harbor program. It also developed a related Landowner Conservation Assistance Program (LCAP) through which it works with landowners to promote conservation of species and habitat.[74] These programs have been described as very successful in bringing landowners into agreements that seek to benefit species.[75] They have rapidly become a significant presence among the options for endangered species protection. In 2002, seven years after it began, the safe harbor program included 189 landowners, 2 million acres, and 21 endangered species.[76] The LCAP, which does not include the assurances of regulatory protection that come with federally approved SHAs, has also shown rapid growth. Three years after it began in the Texas Hill Country in 1999, 21,000 acres of land owned by 33 landowners in the area were involved in the LCAP.[77] The LCAP, provided free of charge by ED, helps landowners develop habitat improvement strategies that can easily be converted into SHAs.[78] Notably, very few of the landowners participating in the LCAP have sought the regulatory protection afforded by an SHA.[79] This provides support for the rationale behind such collaborative models and suggests that landowners have a genuine interest in protecting species where it is economically feasible, rather than simply an interest in gaining protection from regulatory sanctions.

TNC may play a more important role in HCPs than any other environmental group.[80] Their role in negotiations is sometimes viewed as skewing the environmentalists' representation to the right because they are a relatively conservative environmental group.[81] They are nonetheless major players in many HCPs both because they may bridge the ideological divide between environmentalists and develop-

64. Kieran Suckling, No Room on the Ark: Endangered Species Listing Trends in California 1974-2000 (2000), *available at* http://www.biologicaldiversity.org/swcbd/activist/ESA/ark2.html (last visited July 25, 2005).

65. *See generally* Timothy Bechtold, *Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species*, 20 Pub. Land & Resources L. Rev. 99 (1999). The bull trout is now covered by several HCPs.

66. Ivan J. Lieben, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 Envtl. L. 1323, 1342-46 (1997).

67. Earthjustice, *Wildlife Accomplishments*, *at* http://www.earthjustice.org/program/wildlife/index.html?ID=&show=Accomplishments (last visited July 25, 2005).

68. Earthjustice, *Emergency Sea Wall Construction Plan to Protect Sea Turtles*, *at* http://www.earthjustice.org/accomplishments/display.html?ID=214 (last visited July 25, 2005).

69. *See, e.g.*, Earthjustice, *Rota Bridled White-Eye Habitat to Be Protected*, *at* http://www.earthjustice.org/accomplishments/display.html?ID=209 (last visited July 25, 2005).

70. *See, e.g.*, Earthjustice, *Court Orders Interior to Act on Pacific Fisher Listing*, *at* http://www.earthjustice.org/accomplishments/display.html?ID=154 (last visited July 25, 2005).

71. *See* CBD, *For Immediate Release*, *at* http://www.sw-center.org/swcbd/press/index.html (last visited July 25, 2005).

72. For example, Spirit of the Sage Council, a California-based environmental NGO, focuses largely on litigation and other confrontational strategies to promote species protection.

73. Milkman Interview, *supra* note 63. This is also reflected in many of the materials on habitat conservation planning, such as Timothy Beatley, Habitat Conservation Planning 44-45 (1994).

74. *See generally* ED, *The Landowner Conservation Assistance Program*, *at* http://www.environmentaldefense.org/article.cfm?ContentID=154 (last visited July 25, 2005).

75. David S. Wilcove & Joon Lee, *Using Economic and Regulatory Incentives to Restore Endangered Species: Lessons Learned From Three New Programs*, 18 Conservation Biology 639, 643 (2004).

76. *Id.* at 642.

77. *Id.* at 641, 643.

78. *Id.* at 641.

79. *Id.* at 643.

80. *See* Beatley, *supra* note 73.

81. Merrick Hoben, *Clark County Habitat Conservation Planning Process*, *in* The Controversy Over Collaboration: An Assessment of Collaborative Resource Management Partnerships 7-9 (Christine W. Coughlin et al. 1999), *available at* http://www.snre.umich.edu/ecomgt/pubs/crmp/ (last visited July 25, 2005) (quoting BLM wildlife biologist Jim Sloan).

ers and because they sometimes own large parcels of the land that will be covered by the HCP.[82]

C. Criticisms Within the Environmental Community

The two approaches embraced by the environmental community can serve as a sort of dividing line within the community. While there is some overlap of approaches within many groups, those falling on either side of the divide also offer significant criticism of the other approach and sometimes view it as hindering the chances of securing effective environmental protection. From a neutral perspective, there are valid criticisms of each approach.

At least two significant drawbacks to a very litigious approach can be noted. First, the contentious atmosphere created by extended legal battles increases polarization and friction between environmental interests and property rights or economic interests. Such battles have been responsible for people viewing the ESA as anti-development and as placing little-known species before human needs, which may contribute to efforts to undercut the ESA's protections through listing moratoriums and similar mechanisms. Second, litigation consumes vast agency resources which, if the parties agreed on the necessary measures to save a species, could be spent on proactive measures.[83]

These critiques play an important role in the rationale behind the collaborative approach. NGOs focused on collaboration generally maintain that bringing all parties to the negotiating table will avoid contentious litigation[84] and that frequent litigation by an NGO undermines the trust required to bring parties into negotiations that reach agreements beneficial to the species.[85]

On the other hand, criticism of collaboration has ranged from the polite suggestion for improvement to fierce campaigns designed to de-rail major collaborative efforts. The California NGO Spirit of the Sage Council, for example, maintains several campaigns against collaborative programs such as the "no surprises" policy associated with HCPs, which it describes in the following terms:

> Over 19 million acres of endangered species habitat is currently locked up in, and threatened by, the [FWS'] issuance of [ITPs] and Agreements with "No Surprises" guarantees that allow such habitat areas to be destroyed along with over 400 various species of rare, threatened and endangered wildlife, plants and fish. Such killing, for private economic gain and political support, appears unstoppable regardless of the negative ramifications to the species over the next 30-100 years.[86]

Although this characterization reflects the more radical edge of the environmental community, it does point to concerns that have been expressed by more mainstream NGOs.

A Defenders of Wildlife report, for example, found examples of promising successes in collaborative planning but found that HCPs are too often based on inadequate information.[87] Specifically, it concluded that "for many plans, the combination of any of the following factors: paucity of biological information, reliance upon unproven management techniques, lack of scientific review, and inability to monitor and make adjustments, makes safety nets for species disappear." This criticism comes from a group who dedicates "the vast majority of staff time and resources" to collaborative activities, such as participating in HCP processes.[88] The criticisms of CBD, a litigation-oriented group, are sharper. While it recognizes the value of long-term landscape-level planning, it asserts the process is shaped by developers and politicians, for whom "[e]xpediency, without concern for even the immediate future, is the name of the game."[89]

The most important concern about HCPs is that inflexibility and insufficient scientific data can lead to long-term agreements that turn out to be underprotective. A comprehensive American Institute of Biological Sciences and the National Center for Ecological Analysis and Synthesis evaluation of HCPs in 1999 found that insufficient scientific data and monitoring pose significant obstacles to the success of HCPs in effectively conserving species.[90] That report called for greater flexibility, along the lines of the adaptive management concept, and more explicit discussion of available data in HCPs.[91] The need for flexibility has been echoed by legal commentators as well.[92] On the whole, however, these criticisms of HCPs do not undercut the need for the type of long-term planning that HCPs embrace.[93]

V. Examples of the Interplay Between Litigation and Collaboration

Numerous examples of situations where both litigation and collaboration have played a role in ESA protection exist. In many cases, litigation leads to a listing that lays the framework for a collaborative effort to provide the required protection while minimizing the negative impact on affected landowners and other interested parties.[94] On the other hand, NGOs may wield litigation to attack the underpro-

82. *See* Beatley, *supra* note 73.

83. *See, e.g.*, Press Release, U.S. FWS, Flood of Court Orders Preclude New Listings of Threatened and Endangered Species in FY 2001 (Nov. 22, 2000), *available at* http://www.fws.gov/arizonaes/Documents/NewsReleases/Traditional.PDF (last visited Aug. 10, 2005) (stating that no new listings would be considered because "all available funding must be allocated to conduct critical habitat designations required by court orders or settlement agreements").

84. Milkman Interview, *supra* note 63.

85. Bean Interview, *supra* note 52.

86. Spirit of the Sage Council, *The "No Surprises" Campaign*, *at* http://www.sagecouncil.com/noSur1.html (last visited July 25, 2005).

87. Defenders of Wildlife, *supra* note 58 (citing surveys of species information for the San Diego Multiple Species Conservation Plan and private landowners activities under a North Carolina safe harbor agreement as promising examples).

88. E-mail exchange with Laura Watchman, Defenders of Wildlife (Feb. 18, 2005).

89. CBD, *Alison Rolfe, Southwest Center for Biological Diversity—Habitat Conservation Plan*, *at* http://www.biologicaldiversity.org/swcbd/activist/HCP.html (last visited July 25, 2005).

90. *See* Peter Kareiva et al., Using Science in Habitat Conservation Plans 3-4 (1999), *available at* http://www.nceas.ucsb.edu/nceas-web/projects/97KAREI2/hcp-1999-01-14.pdf (last visited Aug. 10, 2005).

91. *Id.* at 4-5.

92. *See, e.g.*, Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation From Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 Colum. J. Envtl. L. 45, 150-55 (2002).

93. *Id.* and Kareiva et al., *supra* note 90, recommend improvements to planning, maintaining that it is a valuable tool for conservation.

94. One book-length study of HCPs noted that "[v]ery often it is the direct complaints to USFWS and other resource agencies, and the initiation of legal proceedings, or the threat of legal action by [environmental] groups that result in the initiation of HCPs." Beatley, *supra* note 73, at 44.

ductive output of collaboration. This is a fairly new area of litigation in which few successes have occurred, but it points to what may become the most important interplay of litigation and collaboration. The third and least observable interaction between the two approaches is the background threat and incentive for productive negotiation that the mere possibility of litigation provides.[95] By looking at several examples where litigation and collaboration have both played significant roles in resolving disputes concerning the protection of species and their habitat, we can draw out a few lessons that point to a strategy for greater success among the NGO community as a whole.

A. Litigation Leading to Collaboration

Below are two examples of how litigation can set the stage for collaboration. As this lesson becomes more widely recognized, litigation may become avoidable in more instances. Provided that litigators exert sufficient pressure and score enough victories, it will become more efficient for federal agencies to enter directly into collaborative planning and more readily accede to environmental interests. This should produce not only environmentally protective decisions by agencies in cases where reaching that result would previously have required litigation, but also a greater likelihood of environmentally friendly decisions in situations where the potential for successful litigation is less clear. The key to litigation being a catalyst for collaboration is a reasonably strong case for litigation coupled with a clear signal that collaboration can prevent the expense and controversy that would be generated by the potential suit.

1. The Desert Tortoise in Clark County, Nevada

The Clark County HCP in Nevada is a prime example of litigation leading directly to collaborative planning. Not only does it show the value of litigation to the NGO community, it also demonstrates that local governments and nonenvironmental interests recognize the value of collaboration with NGOs. Additionally, the Clark County HCP reflects the growing scope and complexity of collaborative planning under the ESA. It covers 2 listed species and approximately 75 unlisted species on roughly 5 million acres of land, and it is effective for 30 years.[96] It shows the potential of collaborative planning for reconciling environmental concerns with economic growth.

The HCP emerged after the listing of the desert tortoise, which resulted from litigation, forced the people of the area to consider ways to mitigate the economic effects of species protection. The process of getting the species listed began with a petition to list the entire species, including the Mojave Desert population now covered by the Clark County HCP, by ED, Natural Resources Defense Council, Inc., and Defenders of Wildlife in 1984.[97] The FWS repeatedly found the listing warranted but precluded until 1989 when it issued an emergency listing.[98] The emergency listing grew from litigation by the groups that had petitioned for the listing, as well as local environmental groups.[99] When the emergency listing expired, the FWS listed the species as threatened.[100] What followed from the desert tortoise listing in terms of collaborative planning provides a fairly clear example of how litigation can set the stage for collaboration that resolves conflicts and provides a long-term plan for protection.

Clark County, Nevada, which includes Las Vegas, constitutes a significant portion of the desert tortoise's range and is one of the fastest growing regions in the nation. The listing of the desert tortoise created a furor that pitted developers, ranchers, off-road vehicle enthusiasts, and others against environmental interests in a fierce debate concerning the protection of the species and the continued use of its habitat for development, ranching, and recreation.[101] While a number of parties initiated litigation in opposition to the listing, others, including the county and TNC, began to work toward a collaborative plan. In August 1989, a steering committee was formed and brought together a variety of parties representing a wide range of interests.[102] The collaborative effort first led to a short-term HCP, eventually eased the tension in the area, and then concluded with a long-term HCP by which all interested parties, except the local ranchers, agreed to abide.[103] The Clark County HCP has largely been characterized as a successful example of collaborative planning that bridges the gap between environmental and other social and economic considerations.[104]

The initial listing of the species resulted directly from pressure and litigation by the NGOs, and the impact this listing had on this collaborative process should not be underes-

95. Prof. Bradley Karkkainen associates this role of litigation with the penalty default concept in contract negotiation. *See supra* text accompanying note 20. *See also* Karkkainen, *Adaptive Ecosystem Management*, *supra* note 15.

96. U.S. FWS, *Clark County Multiple Species HCP*, *at* http://ecos.fws.Gov/conserv_plans/servlet/gov.doi.hcp.servlets.PlanReport?plan_id=528&region=8&type=HCP&rtype=1 (last visited July 26, 2005).

97. U.S. FWS, Determination of Threatened Status for the Mojave Population of the Desert Tortoise, 55 Fed. Reg. 12178, 12179 (Apr. 2, 1990). The inclusion of ED and Defenders of Wildlife in the petition and suit shows that the line between litigation and collaboration is not entirely strict, though it does not detract from the portrayal of ED, and to a lesser degree Defenders of Wildlife, as primarily collaboration-focused NGOs. It just signals that collaborative NGOs recognize the value of collaboration in some instances. Notably, after having litigated in this instance, these groups tended to stay out of the collaborative process.

98. U.S. FWS, Emergency Determination of Endangered Status for the Mojave Population of the Desert Tortoise, 54 Fed. Reg. 32326 (Aug. 4, 1989). The FWS had issued the emergency listing of the species as endangered in response to a petition by national environmental groups predicated on the perceived threat of a respiratory disease affecting the tortoise. The FWS subsequently determined the threat to the Mojave population was not as severe as originally thought and listed the species as threatened. 55 Fed. Reg. at 12188.

99. BEATLEY, *supra* note 73, at 147.

100. 55 Fed. Reg. 12178.

101. Hoben, *supra* note 81.

102. Environmental Planning Division, Clark County Desert Conservation Program, *The Lawsuit and the Short-Term Habitat Conservation Plan*, *at* http://www.co.clark.nv.us/comprehensive_planning/Environmental/MultipleSpecies/Lawsuit.htm (last visited July 26, 2005). The parties included Clark County's five incorporated cities, TNC, the FWS, BLM, National Park Service, Nevada Division of Wildlife, Nevada Division of Agriculture, Las Vegas Valley Water District, Desert Tortoise Council, the Tortoise Group (a local organization with the protection of free-living tortoises and their habitat among its goals), Nevada Mining Association, Southern Nevada Off-Road Enthusiasts, The Greater Las Vegas Board of Realtors, and representatives of the cattle industry. *Id.*

103. Hoben, *supra* note 81, at 7-4.

104. A prevalence of case studies on the Clark County HCP, some of which are cited below, explore the planning process as a fairly strong model of success. *See also* BEATLEY, *supra* note 73, at 146.

timated. It appears highly unlikely that parties with economic interests at stake would have agreed to limit their activities for protection of the tortoise absent the restrictions imposed by the ESA. The listing of these species created an incentive for these parties to collaborate. As one case study of the Clark County HCP process notes:

> [O]nce the desert tortoise had been listed, there seemed no way around a huge economic impact and a cultural state of war. For participants, other than obligated agencies, there was at least the possibility of having influence on the outcome by being at the table instead of in the courtroom.[105]

Thus, the Clark County HCP provides a clear example of litigation-forced listing leading directly to a collaborative planning process.

Notably, there are few public complaints about the Clark County HCP. Nevertheless, it raises some questions concerning NGO involvement and what constitutes an acceptable agreement. While the planning process included NGOs, some observers say they were underrepresented.[106] Several local groups were involved in the process, such as the Desert Tortoise Council. The national group with the heaviest involvement was TNC, whose involvement some viewed as a factor that "pulled decisionmaking to the right" of what most environmentalists would have liked.[107] The other national environmental group with some involvement, ED, apparently "only remained peripherally involved in the process."[108]

Concerns such as whether TNC accepted a less-protective agreement than other groups may have accepted reflect differences within the environmental movement. While they provide a caution against viewing collaborative planning as a panacea, they do not undermine the basic lesson of the Clark County experience. In this instance, litigation set the stage for groups whose interests initially appeared diametrically opposed to enter negotiations that produced a long-term agreement by which virtually all parties have agreed to abide.[109]

2. The Northern Spotted Owl

The case of the spotted owl in the Pacific Northwest provides an example of litigation that eventually earned the environmental community unprecedented bargaining power in collaborative planning to integrate environmental concerns with social and economic interests. While the other examples discussed in this Article deal primarily with private lands, the spotted owl controversy and resulting HCP predominately concerned federal lands, although economic implications felt throughout the private sector of the Northwest economy were the driving force for a collaborative solution. The situation is unlikely to be replicated, but the spotted owl story provides numerous lessons that can be applied in other contexts, not the least of which is the ability of litigation to create a situation requiring environmental interests to be taken seriously in collaborative efforts.

Environmentalists' extensive efforts to affect logging in the Pacific Northwest by demanding protection of the owl spanned a period of seven years, resulted in injunctions that virtually halted logging operations on national forests, and engendered fierce hostility from proponents of logging.[110] The ESA component of the litigation, initiated by the Sierra Club Legal Defense Fund (SCLDF) (now known as Earthjustice), focused on a 1987 FWS decision not to list the spotted owl.[111] It scored a major victory in 1988 when a federal district court found this decision arbitrary and capricious on a motion for summary judgment and sent the matter back to the FWS.[112] Thereafter, a U.S. General Accounting Office report and other factors pressured FWS toward a listing decision, and the agency eventually listed the species on June 26, 1990.[113] Following additional litigation concerning critical habitat and other matters, the SCLDF scored another major victory in 1991 by securing an injunction halting timber sales on federal lands.[114]

From that point on, the stage was set for collaborative planning in which environmentalists would have significant bargaining power. The drawback of this litigious approach, of course, was that it engendered strong opposition from many who felt that their economic well-being, and indeed their way of life, were being sacrificed to protect a species that they cared little about. This was not a good way to protect the ESA from political attempts to weaken it, but in the end it led to landscape-level planning that has endured over the years and has served as a model in many ways for planning on other areas.[115] In its wake, a number of HCPs covering the spotted owl and other species have been developed throughout the Northwest.[116]

B. Litigation Setting the Bounds of Acceptable Collaboration

The second fundamental intersection of litigation and collaboration involves using litigation as a tool to set the bounds of acceptable collaboration. This is a new and evolving relationship under the ESA. It has the potential to become very important if litigious NGOs are seen as lurking in the shadows, ready to jump in where nonenvironmental interests force plans that are underprotective. In this way, it should increase the inclusion of environmental interests in

105. Hoben, *supra* note 81, at 7-6.

106. National Center for Environmental Decisionmaking Research, Case Studies, *Paola Bernazzani*, *Clark County Habitat Conservation Plan*, at http://www.ncedr.org/casestudies/hcp/clark.htm (last visited July 26, 2005).

107. *Id.*; Hoben, *supra* note 81, at 7-9 (quoting BLM wildlife biologist Sloan).

108. Hoben, *supra* note 81, at 7-4. This report also characterizes TNC's involvement in the same way, but later notes that some perceived TNC as "overly-dominant." *Id.* at 7-9.

109. Ranchers were the only interest that dropped out of the negotiations as they perceived no benefit to giving up some of their grazing rights. Hoben, *supra* note 81, at 7-4.

110. Brenden Swedlow, *Scientists, Judges, and Spotted Owls: Policymakers in the Northwest*, 13 DUKE ENVTL. L. & POL'Y F. 187, 206 (2003).

111. *See generally id.* at 225-28. Numerous environmental groups had petitioned the FWS to list the species. *Id.* at 201-02.

112. Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 19 ELR 20277 (W.D. Wash. 1988).

113. U.S. FWS, Determination of Threatened Status for the Northern Spotted Owl; Final Rule, 55 Fed. Reg. 26114 (June 26, 1990).

114. Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 628, 21 ELR 20914 (W.D. Wash. 1991). The injunction was based on the National Forest Management Act, not the ESA.

115. *See* David J. Hayes, *Recent Developments Reveal "Mid-Life" Crisis for Species Act*, LEGAL BACKGROUNDER, Dec. 14, 2001.

116. *See* William Vogel & Lorin Hicks, *Multi-Species HCPs: Experiments With an Ecosystem Approach*, ENDANGERED SPECIES BULL., July/Aug. 2000, at 20-23.

planning processes as interested parties recognize that creating plans without serious attention to the input of the environmental community will drastically increase the risk of litigation, thereby undercutting the benefits of collaboration. It should also enhance the bargaining position of collaborative environmental groups by instilling a sense that their concerns must be taken seriously if the litigation-avoiding benefits of collaboration are to be retained. Below, this Article explores a few examples of the type of litigation that should, as a trend develops, ultimately strengthen the hand of environmental interests in planning processes.

In a number of instances, environmental NGOs have gone to court in an effort to overturn HCPs that they perceive to be underprotective. The very possibility of such litigation must create some incentive on the part of the FWS, as well as others who will invest heavily in the HCP process, to ensure that HCPs and other collaborative arrangements satisfy legal requirements and, perhaps, provide at least a minimum standard of protection that is acceptable under the ESA. In other words, litigation over HCPs by environmental groups serves as a counterpressure to the possibility of domination by economic interests.

The first NGO challenge to an HCP involved one of the earliest HCPs: the San Bruno Mountain HCP in the San Francisco Bay area.[117] While this challenge in the early 1980s ultimately failed, it signaled from the beginning of the HCP era that NGOs were prepared to litigate HCPs that appeared too development-friendly. The pressure has continued. Earthjustice and San Bruno Mountain Watch, a local environmental NGO, recently filed a suit that formed at least part of the basis for the FWS to reinitiate consultation to consider the effects of the HCP for San Bruno Mountain.[118] Further, San Bruno Mountain Watch monitors events in the area and disseminates information, thereby increasing transparency of events and counteracting the dominance of development pressure.

The first successful challenge to an HCP—and only the second time an HCP was challenged by an NGO—was brought by the Sierra Club and concerned two HCPs that allowed development in the critical habitat of the Alabama beach mouse.[119] In that case, the Sierra Club challenged the FWS' findings of no significant impact (FONSI) under the National Environmental Policy Act that were based on the HCPs' proposals for mitigating the effects of development.[120] The court invalidated the HCPs and remanded the ITPs for further consideration.[121] Following remand, the parties reached a settlement agreement and development eventually occurred, but presumably on terms more acceptable to environmental interests.[122] Other ITPs for the beach mouse have since been challenged, and a preliminary injunction was issued to prevent development, primarily due to the likelihood that FONSI would be found arbitrary and capricious, as in the previous case.[123]

The HCP for the Natomas Basin north of Sacramento provides the most significant example of an NGO challenge to habitat conservation planning, one in which an ITP and a large, multi-species HCP were invalidated. The area is home to the two species protected under the ESA: the giant garter snake and the swainson's hawk. The Natomas Basin HCP, which currently covers 53,341 acres in the interior of the basin, began with an ITP application in 1991 and the formation of a working group in 1994.[124] The working group consisted primarily of local landowners, developers, and local government, with essentially no input from the environmental community.[125] After several draft plans, the FWS approved a final plan in 1997 and issued a permit to the city of Sacramento.[126] In 1999, the National Wildlife Federation (NWF) and Friends of the Swainson's Hawk filed suit to challenge the HCP as underprotective of the species.[127] When the NWF announced its participation in the suit, its attorney, John Kostyack, stated that the plan's overemphasis on development at the expense of wildlife protection reflects a flaw present in many HCPs throughout the country, making the Natomas Basin suit a potential forerunner of similar suits in other locations.[128] The suit succeeded in overturning the ITP issuance and the parties entered negotiations toward a revised HCP.[129] A short-term settlement allowed greater protection and some development in 2001.[130] A revised plan was announced and approved by the FWS in 2003, but environmental NGOs have initiated another lawsuit challenging the plan.[131] The plan was again developed without input from the environmental community.[132]

These examples point to the need for effective involvement of NGOs in collaborative processes. In the absence of adequate consideration and inclusion of environmental concerns, a greater number of HCPs are likely to face chal-

117. *See generally* Friends of Endangered Species v. Jantzen, 760 F.2d 976, 15 ELR 20455 (9th Cir. 1985).

118. *See* Earthjustice, *Development on San Bruno Mountain to Be Reassessed*, *at* http://www.earthjustice.org/accomplishments/display.html?ID=136 (last updated Oct. 29, 2002). *See also* San Bruno Mountain Watch website, *at* http://www.mountainwatch.org/ (last visited July 26, 2005).

119. Jester, *supra* note 49, at 164.

120. Sierra Club v. Babbitt, 15 F. Supp. 2d 1274 (S.D. Ala. 1998).

121. *Id.* at 1285.

122. Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1315 n.4 (S.D. Ala. 2002).

123. *Id.* at 1336.

124. *See generally* Natomas Basin Conservancy website, *at* http://www.natomasbasin.org/index.php (last visited July 26, 2005); *see also* National Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274 (E.D. Cal. 2000).

125. Lamare Interview, *supra* note 61; *see also* 128 F. Supp. 2d at 1278.

126. 128 F. Supp. 2d at 1279.

127. *Id.* at 1284; *see also* Friends of the Swainson's Hawk, *Legal Action*, *at* http://www.swainsonshawk.org/legal.html (last visited July 26, 2005).

128. *NWF Joins Suit to Save Sacramento Wildlife Habitat*, Nat'l Wildlife Mag., June/July 1999, *available at* http://www.nwf.org/nationalwildlife/article.cfm?issueID=24&articleID=221#joi (last visited July 26, 2005).

129. 128 F. Supp. at 1302; Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can't Win*, 41 Washburn L.J. 114, 124 n.46 (2001).

130. A description and settlement documents are available at City of Sacramento Development Services Department, *Habitat Conservation Plan*, *at* http://www.cityofsacramento.org/dsd/new%5Fgrowth/north_natomas/projects/long_term/hcp/ (last visited Aug. 10, 2005).

131. Plan documents and information are accessible at U.S. FWS, *Individual Report for Natomas Basin Revised HCP and Litigation Resolution*, *at* http://ecos.fws.gov/conserv_plans/index.jsp? (last visited Aug. 10, 2005); Friends of the Swainson's Hawk, *supra* note 127; National Wildlife Foundation, *NWF Sues to Protect California's Natomas Basin*, *at* http://www.nwf.org/enviroaction/index.cfm?articleid=258&issueid=29 (last visited July 26, 2005) (charging that the 2003 plan is "essentially the same plan that the U.S. District Court struck down three years ago").

132. Lamare Interview, *supra* note 61.

lenges such as those illustrated by the beach mouse and Natomas Basin examples. While not every challenge to an HCP succeeds, of course,[133] the increase in this type of litigation points to an important development in the relationship of litigation and collaboration under the ESA and, perhaps, in environmental law generally. One commentator has suggested that this sort of challenge to collaborative planning illustrates the future of the "rule of law" litigation approach and the judicial role in policing collaborative efforts to conserve biodiversity.[134] The examples discussed above show the potential for litigation to prevent excessively underprotective planning from taking effect and how it may serve to prevent industry capture of planning. Litigation in cases such as the one invalidating the Natomas Basin HCP can be seen as setting the boundaries for acceptable plans, which, on the whole, should reinforce the position of environmental NGOs engaged in collaborative planning efforts.[135] When this effect is considered alongside the ability of litigation to set the stage for collaboration, the potential for a mutually supportive relationship between these two prongs of public interest environmental law practice under the ESA becomes apparent. The next question is how environmental groups can maximize the advantage of the relationship of these two approaches to securing protection.

VI. Litigation and Collaboration: Lessons for Coordinating the Two-Pronged Approach

Under the ESA, at least, the development of more collaborative approaches to environmental protection has led to a significant degree of specialization among environmental public interest groups. Some groups have embraced the collaborative approach as their niche, while others retain a litigation-based strategy. The development of this two-prong approach leads to a question of how the two sides of the environmental community can work together to enhance the benefits of the two distinct approaches to meet their common objective of species and habitat protection. The examples surveyed above suggest that an ideal strategy involves both prodding the government into action and securing long-term arrangements for guaranteed protection. Alone, each approach has major weaknesses: litigation fails to offer a positive vision for developing more effective protection, and collaboration remains vulnerable to exploitation by nonenvironmental interests, especially in the face of insufficient data. Each approach, however, has the potential to reinforce the other in a way that creates a whole greater than the sum of its parts. The challenge for the environmental community is to coordinate the two approaches so that when combined, they lead to greater protection than either could secure on its own.

As explained below, past experience under the ESA demonstrates that the potential impact of each approach increases when the groups specialize in either litigation or collaboration. Upon recognizing the benefits of specialization, the environmental community should make a conscious attempt to coordinate the two approaches in as many circumstances as possible because this will maximize their effectiveness in securing protection.

A. Specialization

Environmental groups tend to specialize in either litigation or collaboration, but this is far from absolute. This Article argues that NGOs ought to continue to specialize and, in fact, avoid crossing over unnecessarily. The environmental community as a whole is made stronger when the various groups are specialized rather than when they regularly use both approaches. The primary strategic advantage of specialization relates to the reputation that specialized groups create. Recognizing the benefits of specialization is the first step toward increasing the effectiveness of environmental advocacy generally. Coordinating the approaches, as discussed below, requires prior specialization in order to be most effective.

Specialization benefits environmental NGOs through the perception they are able to generate in the nonenvironmental interests with which they work.[136] Collaborative groups, such as TNC, enjoy a reputation among local governments, landowners, and even developers as a reasonable group to work with. While some other environmentalists view them as too conservative and as making too many concessions, this reputation may allow them to secure agreements with landowners that many other groups could not. It probably allows them and other collaborative NGOs to break down barriers to negotiation with nonenvironmental interests and, once they are at the table, to work in an atmosphere of increased trust and cooperation. The reputation that creates this trust comes from years of finding solutions that do not involve contentious litigation and would likely crumble were such NGOs to more frequently bring suits to secure environmental priorities. On the other hand, litigious NGOs present a realistic threat of major litigation because they have developed an approach focused on such suits, an image which would be softened were they more regularly seeking collaborative solutions. If the two camps are coordinated such that litigious NGOs are increasingly perceived as lurking in the shadows of the planning process ready to police abuses, the trust and cooperative spirit engendered by collaborative groups may be used to maximum advantage to reach agreements that are more environmentally protective than what they could secure without a realistic threat of litigation by others.

Dividing the work of litigation and collaboration will maximize peoples' perception that collaborators are willing to work together and listen to nonenvironmental interests, and that litigators are independent entities ready, and perhaps eager, to challenge underprotective agreements. The

133. Some examples of failed challenges to HCPs are: National Wildlife Fed'n v. Norton, 306 F. Supp. 2d 920 (E.D. Cal. 2004) (this suit involved the HCP and ITPs for the Metro Airpark region near Sacramento and was initiated by the groups involved in the Natomas litigation); Center for Biological Diversity v. U.S. Fish & Wildlife Serv., 202 F. Supp. 2d 594 (W.D. Tex. 2002); Loggerhead Turtle v. County Council, 120 F. Supp. 2d 1005 (M.D. Fla. 2000).

134. Tarlock, *supra* note 7, at 614; Hayes, *supra* note 115.

135. *See* Hayes, *supra* note 115 (describing the case as one that is "helping to define the parameters of legally-sufficient HCPs, thereby further establishing a body of working knowledge on how landowners and ESA regulatory officials can work together to craft [HCPs] that provide certainty for the landowner, and for the affected species").

136. Other benefits, which are fairly straightforward and have little to do with the coordination recommended below, relate to efficiency. In particular, by developing expertise and focusing resources in one approach or the other, a given NGO may increase efficiency in the same way that specialization in a business setting can increase efficiency.

two camps should acknowledge that it is in both of their interests to stick with one approach and to not cross over too frequently. A reputation as falling within one camp or the other comes over time, which can then be brought to bear in a given situation. A group such as Earthjustice, for example, may be able to influence the atmosphere through threats to litigate because there is little question that they are prepared to follow through. Additionally, in a particular case it will be to the litigation-focused NGOs' advantage to leave collaboration to others so that they do not have a personal stake in negotiations that will discourage their ability to challenge results that are not viewed as sufficiently protective. A collaborative NGO, on the other hand, will obviously want to preserve the trust it has created and, thus, should not associate itself with contentious litigation. While the community seems to have instinctively reacted to the growth of collaborative approaches through specialization, it is not clear that they have taken the next step, which involves increasing the benefits of specialization through a more conscious and coordinated two-pronged approach.

B. Coordinating the Approaches

The two approaches in combination are stronger than the sum of their parts. The effect is like the classic "good cop, bad cop" scenario. While it can be difficult to document, the presence of both approaches strengthens the environmental community through achieving results that neither approach could achieve on its own. Essentially, litigators pose a threat to the interests of developers, local governments, and others. This threat can be eased or eliminated by working with collaborative groups. Yet, the potential for litigation remains in the background as a disincentive for abuse of the trust put forth by collaborators.

Whether the environmental community sees itself as coordinated in this way remains something of an open question. Some individuals certainly think this effect is significant, while others do not.[137] There does not appear to be explicit coordination among groups designed to maximize the advantage gained by using the two-pronged approach, and it is at least unclear whether any implicit coordination between groups exists.[138]

Upon recognizing the two distinct types of environmental advocacy, the environmental community should move to maximize the effect of these two prongs through coordination. Coordination may be explicit, such as direct conversations over what species or areas should be targeted by litigators prior to or during work by collaborators, or implicit through a more focused awareness of each other's strategies and current work. Coordination will also allow the two sides to avoid counterproductivity. For example, litigious groups should target their suits to increase the bargaining power of collaborators. They can target their suits to situations where the demands of collaborative NGOs are not taken seriously or where environmental interests are excluded from planning, or they can set the stage for collaborative planning by securing protection that threatens economic interests. While such targeting probably already occurs to some extent, communication between groups can only enhance its effectiveness. Conversely, a haphazard approach will lead to situations where litigation and collaboration are counterproductive or, at least, miss opportunities for reinforcing each other.

The risk of coordination is that it will detract from the ability of collaborative groups to secure the trust of other parties to the negotiation. If they are seen as too closely tied with litigation-oriented groups, there is a chance that other parties will view them as disingenuous. But this is not a necessary outgrowth of coordination. In fact, where coordination is observable, it may increase the bargaining power of collaborative groups. To the extent that collaborative NGOs are seen as working in tandem with litigators, they may be able to better provide assurances to other parties that working with them will prevent litigation. An increase in coordination will make it implicitly clear to nonenvironmental interests that pushing too hard on collaborative groups will result in others filing suit over the final product, while acceding to their environmental demands will provide greater immunization from suit.

A clearer and more uniform understanding among the environmental community of what acceptable collaborative planning entails will enhance the "good cop, bad cop" effect. It will increase the sense among nonenvironmental interests that if they do not work within the range of options acceptable to a collaborative NGO, they will have to deal with the much more confrontational litigious NGOs, which would increase expense, delay, and risk. If collaboration has developed out of a recognition that investment in planning pays off by saving nonenvironmental interests and government agencies the costs and risks of litigation, coordination of the two-prong approach will strengthen the position of collaborators generally. This, in turn, will lead to more protective agreements and further the ultimate goal of forging an effective, realizable vision of environmental protection.

VII. Applying the Two-Pronged Approach Beyond the ESA

The ESA provides an excellent context for examining the development of a collaborative approach to public interest environmental lawyering and its relationship to the traditional rule of law, litigation-oriented approach.[139] Collaboration under the ESA is the vanguard of a new type of environmental lawyering, yet enforcement of the statute's mandates frequently depends on litigation-oriented NGOs that pressure federal agencies into action. Major decisions that protect species, most notably listing decisions, would probably be avoided absent NGO pressure because they are often viewed as pitting entrenched economic interests against environmental interests. Long-term solutions to the environmental issues that the ESA seeks to address require more than an NGO-forced listing, however. Creating long-lasting solutions to environmental problems underlying the threat

137. Judith Lamare of Friends of the Swainson's Hawk stated that this effect is important, Lamare Interview, *supra* note 61, while Michael Bean of ED was uncertain whether the threat of litigation tended to help or harm efforts toward collaboration. Bean Interview, *supra* note 52.

138. For example, Lamare suggested an implicit coordination, but did not provide any examples of an explicitly coordinated strategy. Lamare Interview, *supra* note 61. Bean thought that no such coordination existed. Bean Interview, *supra* note 52.

139. Likewise, scholars find the ESA an ideal context against which to discuss the emerging adaptive and collaborative approaches to environmental management. *See, e.g.*, Karkkainen, *Adaptive Ecosystem Management*, *supra* note 15, at 970-75 (using the development of HCPs as an illustration of how regulatory penalty defaults may operate in adaptive, collaborative environmental management).

of extinction requires the harmonization of environmental goals with other interests. By recognizing the need for both action-forcing and collaborative NGOs, the stage is set for coordinating the two approaches, as discussed above. Although the ESA is a prime example, the growth of collaboration and its implications for NGOs are not limited to the ESA context.[140] Rather, the strategy recommended in this Article can and should be applied to other areas of environmental law.

Environmental law as a whole is moving toward a more collaborative approach. While this affects the practice of environmental lawyers generally,[141] the implications for *public interest* environmental lawyers may seem less clear because these lawyers have traditionally relied on litigation as their primary mode of gaining influence. Public interest environmental practice is evolving in many areas, not just under the ESA. The strategy discussed above can be applied in many contexts to increase the strength of long-term protection, just as it can be applied under the ESA.

Developments in public interest environmental lawyering similar to those under the ESA are occurring with regard to other natural resource regulatory regimes because of the increasing use of adaptive ecosystem management.[142] In the development of national forest plans, for example, environmental NGOs may play a collaborative role similar to their role in collaborative processes implementing the ESA. Recent Forest Service regulations clearly emphasize an adaptive approach that will more fully require public interest environmental lawyers to adopt a collaborative approach if they seek to maintain real influence because they present few opportunities for the kind of suits that drive a rule of law litigation strategy.[143] Nonetheless, more litigious NGOs will likely still find avenues to use the law to ensure that at least minimum levels of environmental protection result from collaborative processes.

In other areas of environmental law, such as pollution control, there is evidence that at least some NGOs are working to exploit the advantages of specialization as either collaborators or litigators. For example, ED is using the publicity generated by the automobile industry's suit over more stringent California air quality standards in order to urge a collaborative approach to reducing automobile emissions.[144] An example of ED's role as a collaborator in this area is its work with FedEx Express in bringing about and implementing the company's policy to make greater use of hybrid vehicles in order to cut diesel emissions.[145] At the other end of the spectrum, groups such as Earthjustice pursue a fierce litigation agenda aimed at ensuring adequately protective measures by the U.S. Environmental Protection Agency and other agencies whose actions impact the environment, as well as litigation aimed at companies violating environmental laws (although this type of litigation is much less prominent as companies are increasingly in compliance).[146] As with the ESA, a group such as Earthjustice poses a threat of litigation and provides an incentive to non-environmental interests to reach agreement with the environmental community. Likewise, ED and others are ready to help private interests and public agencies find solutions that will keep the litigators at bay. Under virtually any environmental statutory regime, potential pressure from litigious NGOs can create situations in which collaboration offers a more efficient avenue to dispute resolution than litigation. Some commentators have suggested, for example, that litigation under the Clean Water Act, or the threat of such litigation, may serve to encourage collaborative watershed protection.[147]

Given that opportunities for collaboration are increasing and opportunities for litigation are decreasing (but not disappearing) in contexts other than the ESA, the coordinated two-pronged strategy outlined above should have broad application. If the environmental NGO community sends a clear enough signal that collaboration leading to reasonably protective outcomes will avoid a credible litigation threat, their influence will be increased. There is no apparent reason why a "good cop, bad cop" coordinated strategy would not work beyond the ESA context, as long as the threat of litigation is credible and collaboration minimizes this threat.

VIII. Conclusion

The ESA provides an avenue for public interest environmental lawyers to reach landscape-level issues of development, pollution, and other environmental impacts through lawsuits and collaborative plans directed toward the protection of imperiled species. The strategy recommended in this Article represents an important tool that can bring together the best aspects of collaboration and litigation to improve biodiversity protection by maximizing the bargaining strength of collaborative groups and directing the energies of litigious groups to situations where they will have the most effect. There is no apparent reason why this strategy would not also work to enhance the impact of environmental NGOs in contexts beyond the ESA. If litigators set the bounds and present a realistic threat, collaborators can step in to relieve the pressure on other parties and to secure an en-

140. This is noted throughout the literature on the rise of collaborative approaches and the decline of a rule of law approach to environmental lawyering. Notably, however, this literature appears to draw examples primarily from the ESA context. *See, e.g.*, Tarlock, *supra* note 7.

141. *See, e.g.*, Karkkainen, *supra* note 5, at 573 (noting that environmental lawyers are spending an increasing percentage of their time representing clients in collaborative processes).

142. *See supra* note 15 and accompanying text for a brief discussion on the rise of adaptive ecosystem management.

143. *See* U.S. Forest Service, U.S. Department of Agriculture, National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005).

144. ED maintains a letter on its website that it urges citizens to send to major car companies who are suing California over the new rules. Presumably, as in other instances, ED would work collaboratively with the companies to reduce emissions if the companies were so inclined. *See* ED, *Tell Car Companies: Innovate, Don't Ligitate*, *at* http://actionnetwork.org/campaign/car_company_lawsuit (last visited July 26, 2005).

145. *See generally* ED, Getting In Gear: Environmental Defense and FedEx Express: Transforming Truck Technology in America (2004), *available at* http://www.environmentaldefense.org/documents/3605_FedExBrochure.pdf (last visited July 26, 2005).

146. Earthjustice's "Accomplishments" web page for air, for example, lists a number of cases in which it has sued the U.S. Environmental Protection Agency to require more environmentally protective regulations. Earthjustice, *Air Accomplishments*, *at* http://www.earthjustice.org/program/air/index.html?ID=&show=Accomplishments (last visited July 26, 2005). *See also* Karkkainen, *supra* note 5, at 560-61 (noting the decreasing opportunities for citizen suits as companies become more environmentally conscious).

147. *See* Karkkainen, *supra* note 5, at 566 and sources cited therein.

vironmentally protective forward-looking agreement. In this way, the changes occurring in environmental law provide an opportunity for public interest environmental lawyers to coordinate two distinct approaches, thereby increasing their influence on policy while developing a more complete and forward-looking normative vision for securing environmental protection by working with other, nonenvironmental interests.