



**SCHOOL OF LAW**  
TEXAS A&M UNIVERSITY

Texas A&M Law Review

---

Volume 6 | Issue 1

---

2018

## Agency Coordination of Private Action: The Role of Relational Contracting

Karen Maire Bradshaw Schulz

Arizona State University at the Tempe Campus, [kbradshaw@asu.edu](mailto:kbradshaw@asu.edu)

Follow this and additional works at: <https://scholarship.law.tamu.edu/lawreview>



Part of the [Animal Law Commons](#), [Contracts Commons](#), and the [Environmental Law Commons](#)

---

### Recommended Citation

Karen M. Bradshaw Schulz, *Agency Coordination of Private Action: The Role of Relational Contracting*, 6 Tex. A&M L. Rev. 229 (2018).

Available at: <https://doi.org/10.37419/LR.V6.I1.9>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact [aretteen@law.tamu.edu](mailto:aretteen@law.tamu.edu).

## ARTICLE

# AGENCY COORDINATION OF PRIVATE ACTION: THE ROLE OF RELATIONAL CONTRACTING

by: *Karen Bradshaw\**

### ABSTRACT

*This Article explores the previously overlooked role of relational contracting in forming and maintaining public-private partnerships. Relational contracting generally describes firms using formal but legally non-binding agreements to collaborate on shared objectives. Why do parties invest in forming elaborate contracts that they do not—and cannot—enforce in court? Contract theory suggests that the very act of contracting is relationship-building; it generates commitment, trust, cooperation, a win-win philosophy, and strengthened communication. Writing down goals and intentions allows parties to clarify expectations while maintaining flexibility for unforeseen conditions. This Article demonstrates that agencies also use relational contracting—creating unenforceable written agreements to build relationships with external actors.*

*To shed light on agencies' use of relational contracting, this Article provides a novel review of the recovery planning process required by the Endangered Species Act. A surprising finding emerges: private groups are providing crucial resources and logistical support to prevent the extinction of endangered species. Tribes, states, nongovernmental organizations, and sportsmen's groups are providing necessary resources to further agency action. By orchestrating private action through recovery planning documents, the agency can garner the resources necessary to undertake species translocations, which it could not unilaterally facilitate. Although the plans are not judicially enforceable, they nevertheless play a coordinating and commitment-generating role in facilitating private actors to engage in recovery efforts. This example highlights the broader trend of relational contracting building and formalizing relationships between agency and non-agency actors.*

*Environmental impact statements, forest management plans, and recovery plans for endangered species are all examples of such "relational contracts" governing inter-agency and private-public collaborations. Viewed in this light, seemingly prosaic planning documents are, in fact, a crucial component in facilitating many agency collaborations. Descriptively, this account adds institutional detail to literatures on new governance and public-private partnerships. Normatively, it raises questions about whether the benefits of*

---

\* Professor of Law, Arizona State University Sandra Day O'Connor College of Law; Senior Sustainability Scientist, Arizona State University Global Institute of Sustainability; Program Affiliate Scholar, Classical Liberal Institute, New York University School of Law. Professor Bradshaw is grateful to Kenneth Abbott, Ann Carlson, Vanessa Casado-Perez, Eric Biber, Federico Cheever, Robin Kundis Craig, James Coleman, Holly Doremus, Victor Flatt, Laurence Tai, Michael Vandenberg, Katrina Wyman, the participants of the Society of Environmental Law and Economics at University of Texas at Austin, University of Washington Junior Environmental Law Workshop, and the Sustainability Conference of Legal Educators of America. Librarian Beth DiFelice and students Tyna Yost, Lauren Ferrigni, and Danielle Trogden provided outstanding research assistance.

*contracting offsets the potential distributional inequities and mechanisms to shroud government actions created by the practice.*

TABLE OF CONTENTS

- I. INTRODUCTION..... 230
- II. RELATIONAL CONTRACTING IN THE ADMINISTRATIVE STATE..... 236
  - A. *Example 1: Natural Resource Damages* ..... 237
  - B. *Example 2: Stakeholder Collaborations* ..... 238
- III. CASE STUDY: RELATIONAL CONTRACTING TO HELP ENDANGERED SPECIES..... 239
  - A. *Political Economy of the Endangered Species Act...* 240
  - B. *Spurring Private Action* ..... 244
- IV. ANALYZING RELATIONAL CONTRACTING IN THE ADMINISTRATIVE STATE ..... 253
- V. CONCLUSION ..... 255
- VI. APPENDIX: METHODOLOGY ..... 256

I. INTRODUCTION

By now, it is old news that agencies collaborate with private actors to achieve shared regulatory objectives.<sup>1</sup> Agencies tend to coordinate private action through goal-setting, persuasion, and coordinating efforts, rather than heavy-hand statutory enforcement.<sup>2</sup> The cooperative nature of the process allows agencies to skirt challenges to their authority—such as takings challenges—and avoid legal controversy by

---

1. Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013) (arguing that private action plays a large, perhaps even primary, role in advancing modern environmental objectives); Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67 (2003) (noting the role of collaborative groups in public land management); Robert A. Kagan, *Political and Legal Obstacles to Collaborative Ecosystem Planning*, 24 ECOLOGY L.Q. 871 (1997) (discussing complications with collaborative attempts within the context of ecosystem management); Lawrence Susskind et al., *Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale*, 35 COLUM. J. ENVTL. L. 1, 2–3 (2010) (providing a case study of collaboration); Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515 (2013) (documenting public-private approaches to forest management as early as 1920); Karen Bradshaw & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507 (2015) (suggesting that landscape-level resources that span many parcels necessitate coordination among landowners, including public and private land managers); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3, 56–65 (2005) (analyzing the role of stakeholders in land use decisions); Cameron Holley, *Removing the Thorn from New Governance’s Side: Examining the Emergence of Collaboration in Practice and the Role for Law, Nested Institutions, and Trust*, 40 ENVTL. L. REP. 10656 (2010) (evaluating the conditions necessary for collaboration).

2. See *infra* Part II.B.

facilitating *ex ante* negotiation.<sup>3</sup> Yet agency-led private action provides increased accountability and oversight relative to purely private solutions.

Voluntary private action plays a large role in achieving environmental objectives once framed as purely public domain.<sup>4</sup> The intersection of public and private approaches involves agencies contracting with private environmentalists and coordinating for desired outcomes, rather than relying upon adjudicatory or rulemaking proceedings.<sup>5</sup> Yet the details of how, precisely, this occurs remains relatively understudied.

The presently incomplete institutional account of public-private coordination leads to two interrelated problems. First, it risks overreliance on traditional tools of positive law or naïve trust in purely private governance to address emerging challenges. Scholars and commentators have failed to appreciate the interaction between new tools like collaborative planning documents and more familiar tools, like agency rulemaking and adjudication.<sup>6</sup> Second, the mechanisms through which public-private collaboration take place are both understudied and sometimes intentionally shrouded from the public.<sup>7</sup> As a result, the nuts-and-bolts mechanisms that link agency action and private environmentalism are relatively unknown. This informational void exacerbates the inability of policymakers to respond to the effects of law on private practices.

What, then, is the role of government in achieving environmental aims? In the 1970s, Congress enacted a sweeping series of federal environmental statutes.<sup>8</sup> The resulting body of federal environmental law created vast authority for federal agency action on a multitude of objectives.<sup>9</sup> The Supreme Court largely upheld these laws and the resultant agency action.<sup>10</sup> Over time, many agencies capitulated to industrial pressures and regulated less frequently and less strongly than

3. See *infra* Part II.B.

4. Vandenberg, *supra* note 1, at 129 (noting that environmental preferences are expressed through private interactions in social settings and the marketplace, not just the political process).

5. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 797–98 (2005).

6. Vandenberg, *supra* note 1.

7. Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211 (2016) [hereinafter Bradshaw, *Settling*] (noting that \$10.4 billion in settlements paid to the government by responsible parties for natural resource damages to public trust resources is governed by contracts, the basis of which are shielded from the public).

8. Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L. J. 75, 77–82 (2001).

9. *Id.*

10. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (providing the first Supreme Court decision on the Endangered Species Act, in which the court noted that it would uphold environmental legislation even if it produced “absurd” results).

statutes mandated. Meanwhile, the public's attention shifted away from the environmental problems that prompted the laws, reducing public oversight of agency implementation.<sup>11</sup> Congress took its last major action on environmental policy in 1990, over twenty-five years ago.<sup>12</sup> In the void of congressional action, agency action<sup>13</sup> and private action<sup>14</sup> have emerged as key tools for addressing new environmental problems.

Private actors are well-poised to achieve environmental progress.<sup>15</sup> Landowners have vast stores of land-specific information, and private property rights control most American lands.<sup>16</sup> Companies have financial resources that dwarf agency budgets and expertise. Nongovernmental organizations are at the forefront of scientific and social innovation in collaborative best practices. Environmentalists, industry leaders, landowners, and nongovernmental organizations can leverage their specialized knowledge to advance or undermine various environmental objectives. Industry leaders can apply this knowledge to various areas, including profit maximization and environmental preservation. Nongovernmental organizations and landowners can act without the costly, time-consuming burdens of procedure and democracy.<sup>17</sup>

A core value proposition for agency involvement in environmental objectives rests in the government's unique ability to coordinate and channel resources toward important public objectives. Although various environmental nongovernmental organizations have expertise, control, money, and credibility, few private organizations have all of these attributes.<sup>18</sup> Government continues to play a vital role in even

11. Lazarus, *supra* note 8, at 82–84.

12. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 PA. L. REV. 1, 5 (2014).

13. *Id.* at 19.

14. Vandenbergh, *supra* note 1, at 140–41.

15. Eric W. Orts & Cary Coglianese, *Collaborative Environmental Law: Pro and Con*, 156 U. PA. L. REV. PENNUMBRA 289, 290–94 (2007) (noting that collaborative environmental governance offers flexibility and nimbleness relative to other governance approaches).

16. Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507 (2015) (describing that most American lands are held by private landowners who coordinate with public landowners to govern landscape-level resources that exceed individual parcel sizes).

17. Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603, 606–07 (2011); Haitao Yin, Howard Kunreuther, & Matthew W. White, *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J. L. & ECON. 325 (2011) (describing the superiority of private regulatory practices to govern environmental risk traditionally controlled by agency regulation and enforcement).

18. Private synergies often emerge, as with the Sierra Club working with Clorox to improve chemical formulations of its products. GreenBiz Editors, *Clorox and Sierra Club Announce Branding Partnership*, GREEN BIZ (Jan. 13, 2008, 5:00 PM), <https://www.greenbiz.com/news/2008/01/13/clorox-and-sierra-club-announce-branding-part>

“private” action in at least two ways: First, government orchestration of private environmentalism focuses efforts toward objectives that reflect democratic concerns. Second, the threat of legislation or regulation prompts industry to undertake preemptive steps to improve practices.

Government involvement also offers the imprimatur of legitimacy derived from the singular, non-duplicable nature of democratic government. Government-led action escapes the downfall of many private environmentalists in that it cannot be imitated by look-alike organizations, unlike certifications, brands, or the corporate or non-profit forms associated with corporations and nongovernmental organizations alike.<sup>19</sup> There are, of course, levels of government (local, state, federal, and international), but the authority of each is clearly delineated by law. Although imperfect, state and federal governments alike are backstopped by the democratic process. Government offers a singularity of form, which private structures cannot duplicate. Accordingly, despite enthusiasm for private efforts in environmental law, it is difficult to seriously suggest that government plays no role in achieving outcomes.

The question in crafting sensible intersections of public and private environmental action is how to leverage the inevitable mix of competencies and limitations to achieve the best outcome. For years, agencies have quietly capitalized on private resources to achieve public objectives.<sup>20</sup> In fact, agency cooperation with private actors is key to obtaining several important objectives. Over one dozen agencies rely on thousands of collaborations nationally.<sup>21</sup> The remainder of this Article shows that relational contracting plays a key, largely underappreciated role in achieving environmental objectives.<sup>22</sup>

This Article explores agencies’ use of relational contracting to enshrine commitments by private actors into their planning documents. This allows the agency to leverage the capabilities of external actors, such as nongovernmental organizations or industry groups, that share an ideological commitment to the agency mandate.<sup>23</sup> External actors voluntarily provide funding or undertake action in support of an

---

nership [<https://perma.cc/FU4Y-BYDA>]. Industries sometimes seek different corporate forms to achieve other attributes (as with the timber industry creating a nongovernmental organization, SFI, to create a credible certification regime). *SFI Strategic Vision*, SUSTAINABLE FORESTRY INITIATIVE INDUS., <http://www.sfiprogram.org/about-us/sfi-strategic-vision/> (last visited Oct. 24, 2018) [<https://perma.cc/8B3F-DFSB>].

19. Karen Bradshaw, *Information Flooding*, 48 IND. L. REV. 755 (2015) (noting that companies create look-alike certifications to fool consumers).

20. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 593 (2000).

21. KAREN BRADSHAW, ADMIN. CONFERENCE OF THE U.S., THE USE OF STAKEHOLDER COLLABORATIONS IN PUBLIC LANDS AND NATURAL RESOURCE MANAGEMENT (2017) [hereinafter BRADSHAW, STAKEHOLDER COLLABORATIONS].

22. See *infra* Part II.

23. See *infra* Part III.

agency mandate. Relational contracting differs from traditional contracting, in which agencies hire nongovernmental actors to act. Relational contracting instead relies upon longstanding, collaborative relationships.

Specifically, this Article reflects observations derived from a novel review of all 138 species translocations that the U.S. Fish and Wildlife Service (“the FWS” or “the Agency”) has undertaken. I oversaw a team of research assistants in constructing a database of translocation by reviewing all 597 recovery plans for threatened and endangered species generated from 2004–2014.<sup>24</sup> This longitudinal review of the recovery planning process yields new insights into how agencies are working with private actors to facilitate species recovery under the Endangered Species Act.

Notably, private organizations are heavily involved in many translocation decisions. Companies, nongovernmental organizations, tribes, and local governments play key roles in species recovery efforts—efforts that have not been previously identified in a systematic way. Conventional wisdom around recovery planning and species translocations focuses almost entirely on agency actions. In practice, this Article demonstrates that private actors are playing a surprising large role in translocations.

This account adds to a growing literature demonstrating agencies’ reliance on non-traditional tools to satisfy statutory mandates. It tells a new story about agencies’ response to private governance, namely adapting to chart new and creative ways to pursue their mandates. Under this narrative, agencies are not necessarily being displaced by nimbler external actors but may instead be leveraging private action as a mechanism to reduce the political and fiscal costs of satisfying agency mandates under the radar of controversy.<sup>25</sup> Agency involvement in what might otherwise be purely private realms serves as a monitor on private action to check against irresponsible, unilateral action.

Agencies’ practice of outsourcing portions of their mandates to external actors is not universally viewed as a positive.<sup>26</sup> Private action lacks the public processes and inclusiveness traditionally embedded

---

24. See *infra* Appendix I for a description of how I constructed this database.

25. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 275–77 (2015) (discussing the efficiencies that accrue from pooling among agencies, including “flexibility, shared learning, and collaborative innovation”).

26. Highlighting these concerns, a groundswell of litigation is working its way through circuit courts of appeals, with parties questioning agencies’ leveraging action by private parties to sidestep the costs and controversy of traditional processes. Cases challenging agency collaboration with private parties are before the District of Columbia and Ninth Circuit Court of Appeals. These cases will likely be appealed to the Supreme Court, which may consider the broader question of whether agencies may outsource portions of their mandate to external actors. For a discussion of this litigation, see *infra* Part III.

into the administrative states. Stakeholders who bear the costs of actions may be excluded from decision-making. Agencies' circumvention of democratic processes may functionally shield controversial actions that should be subject to robust public debate. External actors also create a new layer of redundancy in governance,<sup>27</sup> which may provide a new form of review that serves to offset concerns about democratic accountability.<sup>28</sup>

This Article proceeds in four parts. Part I describes relational contracting and outlines two brief examples of agencies' use of relational contracting to facilitate collaboration. Part II presents a case study of the FWS embedding private commitments in endangered species recovery plans, which are statutorily required but legally non-binding.<sup>29</sup> The Agency appears to be using the trust-building aspects of relational contracting to mitigate controversy that would otherwise derail conservation objectives.<sup>30</sup> The specific role of contracting appears to create surprising levels of coordinated and voluntary private action to conserve wildlife.<sup>31</sup> Detailed study of these documents yields a surprising insight: much of the action undertaken in species translocation is funded and managed by non-Agency actors. In fact, the Agency seems to only play a coordinating and monitoring role. Part III of this Article analyzes the benefits of relational contracting in forming public-private relationships. Such contracting can, however, be used to shroud agency action from public scrutiny. Furthermore, contracting can serve to lock out non-parties to a contract, even if they have a stake in the outcome of the contract. This issue highlights the need for case-by-case assessment of the role of relational contracting in establishing collaborative arrangements. Not all contracts, nor collaborations, serve the public interest. Part IV briefly concludes.

---

27. Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 346–48 (1969) (explaining that redundancy is generally thought of negatively); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1463 (2011) (“[I]nstitutional designers sometimes seek contributions from multiple agents by designing systems with built-in institutional overlap or redundancy.”).

28. Freeman, *supra* note 20, at 549 (proposing “‘aggregate’ accountability: a mix of formal and informal mechanisms, emanating not just from government supervision, but from independent third parties and regulated entities themselves [to] allay our concerns about the particular risks posed by arrangements of public and private actors, while capitalizing on their capacities”).

29. *Id.*

30. *Id.*

31. *See id.*; *infra* Part I.

## II. RELATIONAL CONTRACTING IN THE ADMINISTRATIVE STATE

Relational contracting describes how firms use trust-based agreements, without the potential for judicial enforcement,<sup>32</sup> to coordinate private action on regulatory goals.<sup>33</sup> The term “relational contracting” derives from robust law and economic literature on contract theory.<sup>34</sup> This literature documents firms that rely on relational contracting to facilitate partnerships, alliances, joint ventures, and risk sharing.<sup>35</sup> Scholars credit this practice with breeding commitment and trust. The practice is credited with increasing cooperation and communication, leading parties to identify common goals and objectives, and infusing negotiations with a win-win philosophy.<sup>36</sup> It is particularly useful in situations that are ambiguous, uncertain, or that involve currently unknown future events.<sup>37</sup>

Until now, scholarly discussion of relational contracting has focused on firm-to-firm relationships. Yet relational contracting plays a crucial role in forming and maintaining inter-agency and public-private collaborations. Planning documents, memoranda of understanding, and even some consent decrees function as relational contacts. When agencies secure private commitments, the potential exists to bring potential adversaries to the table as partners to achieve a shared goal.<sup>38</sup> This non-adversarial approach serves to marshal resources and create public-private synergies—the very heart of collaborative governance.<sup>39</sup>

---

32. Victor P. Goldberg, *Lawyers Asleep at the Wheel? The GM–Fisher Body Contract*, 17 INDUS. & CORP. CHANGE 1071, 1076–80 (2008) (showing that the General Motors–Fisher Body supply contract was legally unenforceable).

33. See generally Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981. Examples of such documents include agency planning documents (e.g., Forest Plans, species recovery plans), memoranda of understanding, and consent decrees.

34. Relational contracting theory suggests that informal agreements that are not legally enforceable nonetheless play an important role among long-term repeat transactors operating under conditions of uncertainty. Scott Baker & Albert Choi, *Contract’s Role in Relational Contract*, 101 VA. L. REV. 506, 559, 561, 566 (2015).

35. John F.Y. Yeung et al., *Defining Relational Contracting from the Wittgenstein Family-Resemblance Philosophy*, 30 INT’L J. PROJECT MGMT. 225, 227 (2012).

36. *Id.* at 230.

37. Robert J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 437, 454 (2009).

38. Planning’s reliance on a mix of public and private actors is consistent with approaches that emphasize the role of multiple actors in developing and implementing administrative policies. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (anticipating the role of both “external constituencies” and “internal staff of the agencies” as competing with the President, Congress, and Judiciary for control of administrative policies); Freeman, *supra* note 20, at 548 (proposing a conception “of decision-making [ ] that depends on combinations of public and private actors linked by implicit or explicit agreements”).

39. See *infra* Part II.A.

Agencies' role in relational contracting varies according to context. Below are two real-world examples highlighting agencies' use of relational contracting.

A. *Example 1: Natural Resource Damages*

Agencies are statutorily required to pursue natural resource damages from companies and individuals who harm public trust resources.<sup>40</sup> This unique category of damages can only be pursued by the government and can only be spent to restore the damaged resources. These damages are not a fine or penalty but are, instead, designed to “make the public whole” for resources lost, such as marine life lost through an oil spill.<sup>41</sup>

Virtually all natural resource damages cases settle. Yet, the settlement process often takes years—even decades—for certain categories of cases.<sup>42</sup> Scientists first must assess the damage; then, economists assign a dollar value to it. Only then can the parties begin to negotiate a settlement amount. Both the potentially responsible party (tortfeasor) and the agency stand to benefit from coordinating the assessment process in a variety of ways.<sup>43</sup> Thus, these potentially adversarial parties have reason and incentive to collaborate closely throughout the process. Moreover, several federal agencies, states, and tribes may act collectively to pursue a claim—introducing still another layer of collaboration.<sup>44</sup> After reviewing hundreds of natural resource damages cases and interviewing dozens of practitioners operating in this field,<sup>45</sup> it is clear that relational contracting plays a crucial role in the settlement process.

To provide one example of early, foundation-setting contracting, consider the role of the Memorandum of Understanding (“MOU”). In some cases, a lead agency may generate an MOU to formalize an initial expectation of cooperation among states, tribes, federal agencies, and a private party. The MOU is sometimes generated within mere hours of the damage-causing incident. The MOU is not legally enforceable. Any party may decide to change to an adversarial, instead of collaborative, relationship at any point in the process. But, creating an MOU “sets the tone” for the years of coordination between parties. It formalizes expectations so that a break from collaboration would be an obvious departure from agreed-to expectations. And, it finds a low-stake level of agreement that is the first in a series of increasingly higher-stake decisions that the parties will reach. Over time, the parties enter into a variety of increasingly complex written

---

40. Bradshaw, *Settling*, *supra* note 7, at 217–19.

41. *Id.* at 213.

42. *Id.* at 240.

43. *Id.* at 243–44.

44. *Id.* at 230–31.

45. *Id.* at 232–34.

agreements, each building upon previous agreements. Ultimately, the process culminates in a settlement—reachable largely in part because the parties have formed a years-long relationship that allows compromise over the shared objective of restoring natural resources.

### B. *Example 2: Stakeholder Collaborations*

Federal land management agencies, such as the Forest Service, rely heavily on stakeholder collaborations to incorporate local perspectives into land management decisions. In this context, the land management agency coordinates contracting (and collaboration) between other parties, even when the agency itself is not a party to the collaboration. Such collaborations generally begin with low-stake agreements that are unrelated to the contentious substantive issues.<sup>46</sup> Stakeholder charters, ground rules for meetings, and MOUs between the collaboration and agency are examples of such scaffolding documents.<sup>47</sup> These kinds of documents create repeated face-to-face interaction between parties, which can serve to build trust and relationships. The process of creating these written agreements is more important than their content.

After a foundation of trust is established (a process that generally takes years), the group shifts to substantive issues.<sup>48</sup> Agency planning documents, such as environmental impact statements, can be used to guide discussion. Stakeholder groups gain a sense of importance by contributing to formal agency documents because their work and input helps guide agency action. A statutorily-required document outlining future agency action provides a focal point that forces stakeholders to the table. Stakeholders either participate in the collaborative planning process or forego their interests in the outcome.

The imprimatur of government facilitates such bargaining between adversaries by providing a neutral forum for parties to bargain without foregoing ideological commitments. Disagreeing stakeholders hash out conflicts directly, negotiating to reach a mutually acceptable outcome. The agency generally incorporates the end-product of stakeholder collaboration into the planning document. Thus, the draft planning document already reflects the outcome negotiated by key stakeholders. It is also more likely to generate community acceptance and less likely to be litigated.

These documents provide a moral, if not legally-enforceable, set of shared expectations.<sup>49</sup> The very process of relational contracting appears to play a vital role in the formation and maintenance of public-

---

46. BRADSHAW, STAKEHOLDER COLLABORATIONS, *supra* note 21, at 4.

47. *See id.* at 93.

48. *Id.* at 46.

49. *See infra* Part III.

private collaboration.<sup>50</sup> This process allows parties with differing interests to coordinate resources on shared objectives.

These two examples provide a brief insight into how agencies might use contracting to facilitate collaboration that achieves substantive aims. Having made the point that relational contracting is widespread and varied, this Article now turns to a concentrated exploration of its application in a particular context.

### III. CASE STUDY: RELATIONAL CONTRACTING TO HELP ENDANGERED SPECIES

This Section focuses on agencies' use of collaborative processes to achieve environmental objectives. Collaborative adaptive management provides flexibility in adapting to changed conditions that laws and regulations do not. It further allows agencies iterative opportunities to assess and navigate stakeholder controversy. Although agencies are praised for the recognizable end-product of regulation, the less definitive process of planning and implementing a plan spurs voluntary private action on objectives. Unlike purely private action, collaborative governance maintains a role for government, which ensures transparency and lends credibility and accountability to private efforts.<sup>51</sup>

Relational contracting is a major contributor to agency success in carrying out environmental objectives, as evidenced by a case study of the FWS embedding commitments for private action into endangered species recovery plans. This Section first discusses the statutory backdrop of the Endangered Species Act ("ESA" or the "Act") as contrasted with takings concerns. It also shows that the FWS becomes bogged down with legal challenges by attempting to carry out statutory mandates. Surprisingly, the Agency has nevertheless made significant progress on its mandates to administer the Act. This Section suggests that collaboration leading to embedded commitments in planning documents is the mechanism that the Agency relies upon to prompt private contributions necessary to carry out controversial

---

50. See *infra* Part III.

51. Much of this discussion has occurred among international law scholars, including Kenneth Abbot and Duncan Snidal, who have coined the term "orchestration" to describe government entities encouraging private action. Orchestration is one form of new governance, in which public actors coordinate a mix of public and private activity. See *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., 2002); Kenneth W. Abbot & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *VAND. J. TRANSNAT'L L.* 501, 505–06 (2008) (noting that new governance regulatory initiatives are distinctive because external actors play a "central role" and that private institutions operate on a "voluntary rather than state-mandated" basis); Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44, 70–71 (Walter Mattli & Ngaire Woods eds., 2009) (discussing public-private governance arrangements).

objectives. Through embedding private commitments into planning documents, agencies achieve far more than they could by acting unilaterally, while also retaining more control than a purely private model affords.

Showing that relational contracting yields environmental progress uncovers at least two consequences. First, it shows that public-private interactions are more bi-directional and inclusive than traditional principal-agent models recognized. Second, it challenges the presumed efficacy of regulation in at least two ways: (1) it shows that regulations alone are relatively inflexible and expensive to defend; and (2) it demonstrates that more collaborative approaches are being used in practice to yield results that agencies could not require through regulation.

### A. *Political Economy of the Endangered Species Act*

In 1973, Congress enacted the ESA, tasking the FWS and National Marine Fisheries with recovering threatened and endangered species that would otherwise become extinct.<sup>52</sup> Despite the perceived strength of the law,<sup>53</sup> administration of the Act was quickly bogged down in controversy. Industry, private landowners, and states opposed federal controls on private lands and were effective in doing so.<sup>54</sup> Nongovernmental organizations sued the FWS, claiming inadequate agency action in listing imperiled species.<sup>55</sup> The Agency's timing and outcomes of species listings<sup>56</sup> for critical habitat designations<sup>57</sup> were subject to

---

52. Endangered Species Act, 16 U.S.C. §§ 1531–1543 (2012). Two federal agencies, the Fish and Wildlife Service and National Marine Fisheries Service, share responsibility for administering for the Endangered Species Act. This Article focuses on the Fish and Wildlife Service, which manages more than 95% of listed species. Daniel M. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, ISSUES ECOLOGY, Winter, 2016, at 1, 11 (noting that “NMFS manages fewer than 5 percent of all listed species”).

53. The Act was soon considered one of the most powerful federal statutory regimes in the United States. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (upholding the unprecedented level of authority in the Endangered Species Act and the agencies administering it).

54. Martin B. Main et al., *Evaluating Costs of Conservation*, 13 CONSERVATION BIOLOGY 1262, 1265 (1999) (noting that “[l]andowners fear a decline in the value of their properties because the ESA restricts future land-use options”); James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 340–42 (1990) (describing that communities and landowners near areas designated as critical habitat believe they bear a disproportionate burden of the cost for a societal good of species preservation). A recent empirical study showed that these concerns are largely unfounded; property values in fact tend to increase after an endangered species is listed in the area.

55. See JASON SHOGREN & JOHN TSCHIRHART, *PROTECTING ENDANGERED SPECIES IN THE UNITED STATES: BIOLOGICAL NEEDS, POLITICAL REALITIES, ECONOMIC CHOICES* (2001); Sayeed Mehmood & Daowei Zhang, *A Roll Call Analysis of the Endangered Species Act Amendments*, 83 AM. J. AGRIC. ECON. 501 (2001).

56. R. Patrick Rawls & David N. Laband, *A Public Choice Analysis of Endangered Species Listings*, 121 PUB. CHOICE 263, 264–65 (2004) (describing listing of spe-

political factors. In response to opposition, Congress has amended the Act several times.<sup>58</sup> The FWS has come to rely on practices that reinforce its role as an orchestrator to advance its objectives from both landowners and nongovernmental organizations.<sup>59</sup>

The ESA reads as a roadmap for an agency overcoming public opposition through partnering with potential opponents.<sup>60</sup> To provide a few examples, the Habitat Conservation Process essentially exchanges money paid to private mitigation banks in exchange for incidental take permits, which essentially grant permission to kill species.<sup>61</sup> Safe harbor agreements exchange agency promises not to increase land regulation for landowner protection of endangered species.<sup>62</sup> Landowners are paid and granted regulatory certainty for providing proactive conservation measures for species that might be eventually listed through candidate conservation agreements and conservation banking.<sup>63</sup> Collectively, by using tools to engage private partners, the FWS

---

cies as less likely if the habitat of the species overlaps with the district of a member of the U.S. House of Representative budget subcommittee, which provides oversight for the funding of the Fish and Wildlife Service).

57. Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29, 30 (1999) (noting that the timing of listing decisions correlates to interest group pressure).

58. Empirical studies in economics literature suggest that politics has more to do with endangered species recovery decisions than scientific considerations. David W. Cash, *Beyond Cute and Fuzzy: Science and Politics in the U.S. Endangered Species Act*, in PROTECTING ENDANGERED SPECIES IN THE UNITED STATES 106, 111–12, 130 (Jason F. Shogren & John Tschirhart eds., 2001) (finding the amount of funding designated to endangered species recovery “is correlated less with scientifically based considerations of endangerment and correlated more with a variety of political considerations” including economic conflict, media coverage, and public comments).

59. Holly Doremus, *Adaptive Management, The Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 WASHBURN L.J. 50, 62 (2001) (noting that agencies “seek out any flexibility the statute allows, and exploit it to deflect controversy”); 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, 279 (1993) (noting that the regulatory discretion afforded to the Fish and Wildlife Service has allowed “the ESA [to accommodate] the overwhelming majority of human activity without impediment”); Marcilyn Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL’Y F. 441, 453 (2004) (discussing how Secretary Bruce Babbitt used section 10 of the ESA, which allows private individuals to submit habitat conservation plans in order to engage in activities that would otherwise be in violation of the ESA, to “balance the interests of the species and the landowners”).

60. Of course, private efforts exist outside the auspices of federal control, as well. State efforts can eclipse federal protections, as with Florida’s robust species protection program, which has generated more than \$33 million in private contributions. Evans et al., *supra* note 52, at 13.

61. *Id.* at 15 (noting that “[b]y the end of 2012, FWS had approved more than 650 HCPs covering 85.5 million acres and several hundred species”).

62. *Id.* (noting that “[b]y the end of 2012, FWS had approved more than 70 SHAs covering 4.4 million acres and 213 miles of aquatic habitat”).

63. Candidate conservation species are those which have been proposed for listing and meet the substantive criteria to support a listing, but are precluded from listing by higher priority listing actions. Endangered and Threatened Wildlife and Plants, 79

has benefitted hundreds of species and protected over 90 million acres of habitat.<sup>64</sup>

Section Four of the ESA requires the FWS to develop a recovery plan outlining specific actions designed to restore populations of threatened and endangered species.<sup>65</sup> Recovery plans incorporate a variety of adaptive responses to climate change to save plants, wildlife, birds, and fish that might otherwise become extinct.<sup>66</sup> This sometimes includes species translocation—moving species from its indigenous habitat to another habitat in which it does not naturally occur.<sup>67</sup>

---

Fed. Reg. 72,451 (Dec. 5, 2014) (codified at 50 C.F.R. pt. 223 (2018)) (noting that Fish and Wildlife Service “offer[s] technical and financial assistance to facilitate [conservation] efforts [for candidate species]”); Endangered and Threatened Wildlife and Plants, 61 Fed. Reg. 64,481 (Dec. 5, 1996) (codified at 50 C.F.R. pt. 17 (2018)).

64. See *infra* Part II.B. Regulation and informal practices further the reach of orchestration. This number of acres of habitat conserved, for example, grows when one considers agencies’ informal partnerships, such as working with nongovernmental organizations, such as land trusts, to identify and protect habitat. See, e.g., Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10,223, 10,223 (Mar. 2004).

65. The Endangered Species Act of 1973, Pub. L. No. 93-205, § 4, 87 Stat. 884, 886–87 (codified as amended at 16 U.S.C. §§ 1531–1544 (2012)).

66. Jessica Kabaz-Gomez, Note, *Rules for Playing God: The Need for Assisted Migration and New Regulation*, 19 ANIMAL L. 111, 125–28 (2012) (“[I]nternational organizations and U.S. government agencies that are involved in species conservation are increasingly recommending assisted migration as a climate change adaptation strategy.”).

67. A non-exhaustive list of law review articles discussing species translocation includes: Karrigan Bork, *Listed Species Reintroductions on Private Land-Limiting Landowner Liability*, 30 STAN. ENVTL. L.J. 177, 183–85 (2011); Alejandro Camacho, *Assisted Migration: Redefining Nature and Natural Resource Law Under Climate Change*, 27 YALE J. REG. 171 (2010) (discussing the legal and ethical issues of human interference to natural resources through assisted migration); Federico Cheever, *From Population Segregation to Species Zoning: The Evolution of Reintroduction Law Under Section 10(j) of the Endangered Species Act*, 1 WYO. L. REV. 287 (2001); Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1 (1999) [hereinafter Doremus, *Restoring Endangered Species*]; Robert L. Glickman, *Ecosystem Resilience to Disruptions Linked to Global Climate Change: An Adaptive Approach to Federal Land Management*, 87 NEB. L. REV. 833 (2009) (discussing assisted migration, reintroduction of species, and wildlife highways as adaptive solutions to climate change); John D. Leshy, *Federal Lands in the Twenty-First Century*, 50 NAT. RESOURCE J. 111 (2010); Nicole R. Matthews, *Who Is the Predator and Who Is the Prey? The Endangered Species Act and the Reintroduction of Predator Species Into the Wild*, 6 ENVTL. L. 183 (1999); J.B. Ruhl, *Assisted Colonization: Facilitate Migration First*, 330 SCIENCE 1317 (2010); Daniel Schramm & Akiva Fishman, *Legal Frameworks for Adaptive Natural Resource Management in a Changing Climate*, 22 GEO. INT’L ENVTL. L. REV. 491, 493 (2010) (noting that climate change is projected to have a deleterious impact on a significant number of species previously thought to be “immune” to extinction risk”); Kabaz-Gomez, *supra* note 66, at 125–28 (“[I]nternational organizations and U.S. government agencies that are involved in species conservation are increasingly recommending assisted migration as a climate change adaptation strategy.”). For a database consisting of thousands of interdisciplinary scholarly articles about translocations from 1970–1996, see Brad

Prior to translocating a species, the Secretary of the Interior must issue a regulation identifying the population and determining whether the population is essential to the continued existence of an endangered or threatened species.<sup>68</sup> The FWS has produced guidelines outlining criteria to guide translocation decisions.<sup>69</sup> Courts have widely upheld the Agency's translocation authority and have afforded them considerable discretion in doing so.<sup>70</sup> Yet translocations (like most recovery actions) are discretionary—meaning that agencies do not have to undertake them—even if they are written into recovery plans. Many proposed translocations are derailed by private opposition.<sup>71</sup>

---

Griffith et al., *Annotated Biography of Wildlife Translocations*, INST. ARTIC BIOLOGY, [http://www.iab.uaf.edu/people/brad\\_griffith/translocation.html](http://www.iab.uaf.edu/people/brad_griffith/translocation.html) (last visited Jan. 29, 2018) [<https://perma.cc/LR35-RG34>] (listing topics as divided by birds, mammals, reptiles and amphibians, general topics, index, and late-1989 through early 1996). For a database of more recent scholarly articles from a variety of academic disciplines, see *Assisted Migration (Assisted Colonization, Managed Relocation, Translocation) and Rewilding of Plants and Animals in an Era of Rapid Climate Change*, TORREYA GUARDIANS, <http://www.torreyaguards.org/assisted-migration.html#forestry> (last visited Jan. 29, 2017) [<https://perma.cc/3ZLV-GVET>] (listing over one hundred articles about species relocations).

68. 16 U.S.C. § 1539(j)(2)(B) (2012).

69. See, e.g., Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Central Valley Spring-Run Chinook Salmon Below Friant Dam in the San Joaquin River, CA, 78 Fed. Reg. 79,622, 79,623 (Dec. 13, 2013) (codified at 50 C.F.R. pt. 223) (noting that the Fish and Wildlife Service has regulations guiding how to make the required determinations under Section 10(j)). The National Marine Fisheries Service has not promulgated translocation guidelines, relying instead on the Fish and Wildlife Service's guidelines when making translocation decisions. See *id.* (noting that “while [the National Marine Fisheries Service does] not have regulations governing the designation of experimental populations, [it] considered [Fish and Wildlife Service] regulations”).

70. *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000) (upholding a Fish and Wildlife Service decision to reintroduce wolves over the objections of ranchers concerned about wolves preying upon their livestock); *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998).

71. Local opposition and funding limitations regularly constrained agency activities. Translocations of Black Footed Ferrets (*Mustela nigripes*), 61 Fed. Reg. 11,320, 11,321 (Mar. 20, 1996) (codified at 50 C.F.R. pt. 17) (“[L]ocal citizens often opposed reintroduction because they were concerned about restrictions and prohibitions on Federal and private activities. This opposition severely handicapped the effectiveness of reintroduction as a management tool.”); Translocation of Red Wolves (*Canis rufus*), 51 Fed. Reg. 41,790, 41,790 (Nov. 19, 1986) (codified at 50 C.F.R. pt. 17) (“Local opposition to reintroduction efforts, however, stemming from concerns about the restrictions and prohibitions on private and Federal activities contained in sections 7 and 9 of the Act, severely handicapped the effectiveness of this as a management tool.”); Stephen M. Meyer, *Community Politics and Endangered Species Protection, in PROTECTING ENDANGERED SPECIES IN THE UNITED STATES* 138, 142 (Jason F. Shogren & John Tschirhart eds., 2001) (noting that, with respect to U.S. biodiversity policy “[t]raditional interest group politics [between economic and environmental interests] would describe well what we have seen for the past decade or so.”); Clifford Nowell, *On Political Realities: Comments on Ando, Cash, and Meyer, in PROTECTING ENDANGERED SPECIES IN THE UNITED STATES, supra*, at 166, 167 (noting that the “exact same issues raised by Meyer” with regard to interest groups “will determine the success of the ESA”).

Resource-constrained<sup>72</sup> government agencies carry out translocation and must decide which species' survival to prioritize.<sup>73</sup> The FWS's ability to satisfy its statutory mandate under the Act is circumscribed by opposition. Yet the Agency faces public<sup>74</sup> and legal<sup>75</sup> pressure to undertake such recovery efforts. Below, the Article discusses how the FWS is relying upon private action coordinated through relational contracting to overcome this polarized situation.

### B. *Spurring Private Action*

I worked with a team of research assistants to search for the recovery plans for all 597 endangered species.<sup>76</sup> The FWS identified translocation as an ecologically necessary recovery strategy for 138 threatened or endangered species. The team reviewed each of these recovery plans to identify whether translocation(s) had occurred and whether non-Agency actors were included in the recovery plan. Sixty-five translocations have occurred; seventy proposed translocations have not occurred.<sup>77</sup> In three instances, it is unclear whether the translocation occurred.

Research assistants identified portions of the recovery plan in which non-Agency actors—including tribes, states, cities, and environmental nongovernmental organizations—are playing a crucial role in species recovery. This review yielded that private actors are playing key roles in translocations. The below figure reflects the non-Agency actors whose involvement is incorporated into the recovery planning process.

---

72. Holly Doremus, *Adaptive Management as an Information Problem*, 89 N.C. L. REV. 1455, 1491 (2011) (noting that natural resource managers are “typically resource-limited, understaffed, and overcommitted”) [hereinafter Doremus, *Adaptive Management*].

73. See Andrew Metrick & Martin L. Weitzman, *Patterns of Behavior in Endangered Species Preservation*, 72 LAND. ECON. 1, 1 (1996) (“[R]elevant government agencies face difficult problems of, first, deciding which species to place on the endangered species list and, second, deciding how much to spend on the recovery of each listed species.”).

74. For example, hunters might encourage translocations of large prey, such as bighorn sheep or foxes, with the goal of population recovery for future hunting. In *Gibbs v. Babbit*, the court held that one reason that endangered, translocated red wolves were related to interstate commerce was their potential to recover to the point that they could be hunted and their pelts traded or sold. 214 F.3d 483, 492–93 (4th Cir. 2000).

75. Legal pressure refers to suits brought by environmental nongovernmental organizations to force agency action to undertake recovery efforts.

76. See *infra* Appendix I.

77. See *infra* Appendix I.

FIGURE 1

<b>Non-Fish and Wildlife Service Actors</b>	<b>Number of Decisions</b>
City, state, foreign, or tribal government	5
Agency other than the Fish and Wildlife Service	2
Commercial or industrial interest	4
Environmental nongovernmental organization	19
Zoo	6
Botanical garden and organizing bodies	4
Sportsman group	1

Collaborating enables the Agency to: (1) generate additional resources; (2) reduce litigation risk; (3) insulate its actions from political change; (4) shield its actions from oppositional actors; and (5) encourage experimentation. Each of these factors is discussed below.

FIGURE 2

<b>FWS Incentives to Outsource Translocation Activities to External Actors</b>	<b>Example</b>
Generate additional resources	Wild Sheep Foundation providing \$4 million to fund grazing rights buyouts for domestic sheep spreading disease to translocated bighorn sheep.
Reduce litigation risk	The Nature Conservancy purchasing land to avoid landowner opposition in recipient areas.
Insulate from political change	Zoos and botanical gardens housing captive populations of endangered plants and animals.
Shield from oppositional actors	Tohono O’odham Nation exercising tribal sovereignty regarding public disclosure requirements on species habitat to protect jaguars.
Encourage experimentation	Center for Plant Conservation promulgating a private governance regime and best practices for conservation by dissemination techniques.

First, the FWS is generating resources to facilitate translocations by outsourcing. Outsourcing allows the Agency to receive financial support, scientific expertise, and manpower in addition to that which is available through public funds. Engaging external actors enables greater progress toward species recovery than unilateral action by the FWS. For example, the Utah Wild Sheep Foundation and the Nevada Wildlife Agency have spent millions of dollars facilitating bighorn

sheep translocations.<sup>78</sup> In a long, involved translocation process, bighorn sheep were airlifted to their new habitats.

Several translocated sheep died from diseases caught from intermingling with domesticated sheep populations grazing in the area. To minimize the risk of disease transfer between domestic and wild sheep, the Utah chapter of the Wild Sheep Foundation spent \$4 million buying out grazing rights on publicly owned land.<sup>79</sup> In exchange for cash buyouts, sheep farmers could either graze cattle instead of sheep or retire grazing rights entirely. But for the quick and considerable support of external actors, the translocation may have failed because of the spread of unanticipated disease. In this sense, outsourcing translocation activity is a success in the well-supported public goal of preventing extinction of endangered species.<sup>80</sup>

Second, outsourcing enables the FWS to sidestep controversial portions of translocations, presumably reducing litigation risk. Private landowner opposition to a variety of species recovery actions is widely documented.<sup>81</sup> Landowners in recipient areas<sup>82</sup> believe themselves to be disproportionately burdened<sup>83</sup> by translocations,<sup>84</sup> which are

78. Kate Yoshida, *A Symbol of the Range Returns Home*, N.Y. TIMES (Jan. 6, 2014), <https://www.nytimes.com/2014/01/07/science/earth/a-symbol-of-the-range-returns-home.html> [https://perma.cc/Q7EL-NZKZ].

79. *Id.*

80. Later discussion indicates that individual species recovery may be the wrong metric for measuring the success of translocation activity.

81. This is, admittedly, an oversimplification as landowners hold diverse preferences for the existence of endangered species on their land. A nature conservancy group or recreational landowner, for example, would likely welcome some endangered species, whereas industrial land users like mining or timber companies would likely not. As a general matter, literature focuses on landowners' attempts to resist the listing and relocation of endangered species onto privately-held land because of perceptions of increased liability, decreased land value, and increased scrutiny by federal wildlife management agencies of land management decisions. *See, e.g., Bork, supra* note 67, at 183–84 (describing translocations as burdensome for landowners in the recipient area, into which the endangered species are placed). Translocation's redistributive effects are not unique; virtually all environmental protection laws are redistributive in nature. Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1000 (2003) ("Environmental protection laws are invariably redistributive; they impose substantial costs on some and confer substantial benefits on others.").

82. Of course, the Endangered Species Act is not unique in producing public goods with localized harms. A similar dynamic emerges in NIMBY opposition to land use decisions, in which socially-necessary facilities—such as hospitals—are unpopular wherever they land. *See, e.g., Michael Wheeler, Negotiating NIMBYs: Learning from the Failure of Massachusetts Siting Law*, 11 YALE J. REG. 241, 275 (1994).

83. Salzman, *supra* note 54, at 340 (noting that communities and landowners near areas designated as critical habitat believe they bear a disproportionate burden of the cost for the societal good of species preservation).

84. Translocations essentially create new populations of endangered species in areas where they did not immediately exist before. Thus, translocations are roughly analogous to the decision to list a species because an area that previously did not face species-specific restrictions now will.

perceived as imposing localized costs,<sup>85</sup> including: loss of control over private land,<sup>86</sup> increased scrutiny of industrial land uses,<sup>87</sup> liability for unintentionally taking endangered species,<sup>88</sup> and diminished property values.<sup>89</sup> Landowner opposition increases when predatory species, such as wolves, are translocated near the landowners' property.<sup>90</sup>

To avoid perceived harms, landowners in recipient areas may organize to exert political influence to halt proposed translocations.<sup>91</sup> The small size of landowner groups coupled with the large burden that they stand to suffer causes them to invest heavily in exerting political pressure to avoid translocations.<sup>92</sup> The FWS is loath to invest limited resources into controversial translocations that are time-consuming and that divert resources from more effective on-the-ground recovery

---

85. Holly Doremus, *Private Property Interests, Wildlife Restoration and Competing Visions of a Western Eden*, 18 J. LAND RESOURCES & ENVTL. L. 41, 45 (1998) (“[R]eintroduction efforts create or threaten a variety of conflicts with private property interests.”).

86. *Id.*

87. For example, the translocation of endangered species to an area might threaten industrial interests in the area. When bighorn sheep were reintroduced to Utah, several died from disease caught from intermingling with domesticated sheep populations grazing in the area. To minimize the risk of domestic-to-wild disease transfer, the Utah chapter of the Wild Sheep Foundation purchased grazing rights on publicly owned land. In exchange for cash buyouts, sheep farmers could either graze cattle instead of sheep or retire grazing rights entirely. Wild Sheep Foundation has spent more than \$4 million dollars in such buyouts. Yoshida, *supra* note 78.

88. *Endangered Species Act: Hearing on Endangered Species Act Reauthorization and Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 97th Cong. 391 (1982) (statement of Patrick A. Parenteau, Vice President for Conservation, Nat'l Wildlife Fed'n) (noting concern by the state of Arizona that hunters might be “fined or jailed for accidentally shooting the masked bobwhite”); Bork, *supra* note 67, at 186 (noting that landowners may face liability for unintentionally taking an endangered species—punishable by criminal and civil penalties—during routine land use activities).

89. Main et al., *supra* note 54, at 1265 (“Landowners fear a decline in the value of their properties because the ESA restricts future land-use options . . .”).

90. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). *Gibbs v. Babbitt* involved a population of endangered red wolves bred in captivity and released by the Fish and Wildlife Service onto wildlife refuges in North Carolina and Tennessee. 41 of the 75 wolves released wandered out of the refuges and onto private land. *Id.* at 488. Landowner Gibbs sued the Fish and Wildlife Service for the right to exterminate any wolves found on private land. The Fourth Circuit Court of Appeals ruled that the wolves affected interstate commerce and were therefore subject to federal regulation as administered by the Fish and Wildlife Service. *Id.* at 497. Accordingly, the court denied landowners the right to exterminate wolves found on private property, even if the wolves killed livestock. *Id.* at 496–98.

91. Industrial land users may be members of preexisting groups, such as Cattlemen's Associations or saddle clubs, and thus face few start-up costs when organizing to oppose translocation. Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507 (2015) (discussing the importance of pre-existing organizations and landowner homogeneity in influencing resource use—including wildlife management—at the landscape-level).

92. See *supra* notes 34–46 (discussing the factors that make interest groups effective at exerting political pressure).

efforts.<sup>93</sup> Outsourcing translocation efforts provides the Agency with the opportunity to avoid legal controversy while still undertaking the translocation, by buying out the interests that give rise to intensely concentrated groups of landowners opposing translocations.

For example, The Nature Conservancy was the environmental nongovernmental organization most frequently incorporated into translocation actions in recovery plans. The Nature Conservancy purchases private land for conservation activity.<sup>94</sup> By purchasing land for translocations, rather than locating species on or near privately held lands, the FWS can sidestep landowner opposition. Further, having an environmental nongovernmental organization funding the purchase and managing the land conserves the FWS's resources.

Third, the FWS outsources to protect vulnerable species against fluctuating levels of political support. The FWS operates at the whim of changing political priorities and budgetary decisions.<sup>95</sup> Environmental nongovernmental organizations, including botanical gardens and zoos, are relatively removed from cyclical political change.<sup>96</sup> These ideologically aligned nongovernmental organizations may be able to protect species against the political pressures that can undermine long-term recovery efforts.

For example, zoos and botanical gardens house captive populations of endangered plants and animals.<sup>97</sup> In several cases, the only

---

93. Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of New Age Environmental Protection*, 41 WASHBURN L.J. 50, 62 (noting that the Fish and Wildlife Service “seek[s] out any flexibility the statute allows, and exploit[s] it to deflect controversy”); Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 WASH. U.J.L. & POL’Y 175, 230 (2010); (noting that implementation of the Endangered Species Act “has been a story of political compromise and accommodation of development interests, with only scattered sightings of an administrative spine.”).

94. *About Us*, NATURE CONSERVANCY, <https://www.nature.org/about-us/private-lands-conservation/index.htm> [<https://perma.cc/KU8W-DEYD>].

95. Economist Amy Whritenour Ando has demonstrated that interest groups affect the endangered species listing process through comments, petitions, and via the influence of Congressmen. Ando, *supra* note 57, at 30 (“Interest groups have a variety of tools at their disposal with which to affect the administrative process; they can act directly with petitions or comments or work indirectly through the influence of important members of Congress.”); R. Patrick Rawls and David Laband demonstrate a relationship between a state’s political muscle and the number of endangered species listings that occurred within that state. Rawls & Laband, *supra* note 56, at 263 (finding a correlation between state representation on the House of Representatives budget subcommittee—which provides oversight for the funding of the Fish and Wildlife Service—and the number of endangered species listings that occur within that state).

96. They are of course, subject to other and indirect political pressures with attendant budgetary effects.

97. For an interesting and detailed discussion of the role of zoos in conservation of threatened and endangered species, see IRUS BRAVERMAN, *ZOOLAND: THE INSTITUTION OF CAPTIVITY* 5–6, 14 (2013) (discussing zoos re-envisioning themselves as conservation organizations through a variety of activities, including captive breeding of endangered species).

remaining populations of a species are kept in captivity by zoos or botanical gardens. But for the role of these external actors, changing political whims might spell the doom of a species. This is not a hypothetical scenario: government officials exterminated hundreds of threatened desert tortoises because of funding shortages.<sup>98</sup> Housing fragile populations of species with well-funded nongovernmental organizations reduces the likelihood that, over a period of decades, changing political or fiscal climates will undermine species survival. Captive breeding populations are crucial to some translocation efforts, which release captive-bred animals to the wild.

Fourth, Agency officials use relational contracting to avoid opposition and controversy that would otherwise derail translocations. It is well-documented that some landowners seek to destroy natural places where endangered species live to avoid listing and critical habitat designations.<sup>99</sup> Individuals who are ideologically opposed to the Act may even kill endangered species to undermine translocation efforts.<sup>100</sup> Plants and corals, which are immobile and often live in isolated locations, are especially vulnerable to intentional destruction. However, the Freedom of Information Act (“FOIA”) requires the Agency to publicly release information on the habitat and location of endangered species.<sup>101</sup>

The FWS officials may be circumventing FOIA requirements by cooperating with Native American tribes to conceal the location of particularly vulnerable endangered species. Tribes are not subject to FOIA requirements and thus are not required to publicly release information about endangered species located on tribal lands. Accordingly, recent scholarship suggests that FWS officials are cooperating with tribal governments’ refusal to publicly state whether

98. Hannah Dreier, Associated Press, *Desert Tortoise Faces Threat from Conservation Center*, DESERT NEWS (Aug. 25, 2013), <https://www.deseretnews.com/article/765636588/Desert-tortoise-faces-threat-from-its-own-refuge.html> [<https://perma.cc/X7GY-Q37B>].

99. Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 506 (2008) (suggesting that “[t]here is considerable anecdotal and empirical evidence that private landowners preemptively destroy the habitat of imperiled species . . .”). Localized resistance to listing endangered species and designating critical habitat is well-documented. Daowei Zhang, *Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers*, 42 ECON. INQUIRY 150, 162–163 (2004) (reporting results of an empirical study showing that landowners reduce endangered species habitat, and encourage their neighbors to do the same, before critical habitat designation to protect and enhance their property values).

100. A person who killed, skinned, and decapitated a translocated wolf in Yellowstone National Park wore a tee-shirt reading “wild wolf reduction.” See *United States v. McKittrick*, 142 F.3d 1170, 1172 (9th Cir. 1998); see also Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 B.C. L. REV. 301, 320–31 (2008).

101. Kevin R. Kemper, *Environmental Information Policy and Secrets About Jaguars: Why Trusting Arizona Tribes Is the Best Strategy for Jaguar Protection*, 4 ARIZ. J. ENVTL. L. & POL’Y 187, 196 (2014).

particularly fragile endangered species exist on their lands.<sup>102</sup> Tribes' ability to conceal the location of translocated animals may provide one reason why the FWS sometimes yields its planned translocation efforts to allow tribes to undertake translocations.

The jaguar provides a particularly compelling example of such shielding. The jaguar's indigenous range includes Southern Arizona, although the majority of the population resides in Northern Mexico.<sup>103</sup> Three times within the past fifteen years, jaguars have appeared in Arizona.<sup>104</sup> A Pulitzer-prize winning journalistic investigation traced Arizona State Game and Fish officials as they tracked, trapped, collared, and ultimately euthanized a jaguar in 1997.<sup>105</sup> When a new jaguar appeared in Southern Arizona in 2000, FWS officials were concerned about attempts to harm the animal.<sup>106</sup> The FWS has outsourced some level of protection to the Tohono O'odham Nation, which has lands intersecting with a jaguar habitat.<sup>107</sup> At least one legal commentator suggests that the tribe is using its sovereignty to protect information about the jaguar and other endangered species.<sup>108</sup>

Fifth, the collaboration facilitated by relational contracting enables low-cost experimentation in translocation techniques. For example, botanical gardens are spearheading the innovative translocation technique of conservation by dissemination, in which desirable plant species are sold to private gardeners to propagate in biologically suitable locations.<sup>109</sup> Conservation by dissemination is a scientifically uncertain practice.<sup>110</sup> Translocation locations may prove inappropriate if translocated species are invasive or undermine indigenous species. The practice also raises ethical questions surrounding the commodification of endangered species and distributional effects of outsourcing.<sup>111</sup>

---

102. *Id.*

103. Endangered and Threatened Wildlife and Plants; Final Rule to Extend Endangered Status for the Jaguar in the United States, 62 Fed. Reg. 39,147, 39,147 (July 22, 1997) (codified at 50 C.F.R. pt. 17).

104. Kemper, *supra* note 101.

105. Dennis Wagner, *Web of Intrigue Surrounds Death of Jaguar Macho B*, ARIZ. REPUBLIC (Dec. 12, 2012, 10:20 AM), <https://archive.azcentral.com/news/articles/20121215macho-b-death-jaguar-mystery.html> [<https://perma.cc/TY2X-BCE6>].

106. Kemper, *supra* note 101.

107. *Id.* at 191, 193–194 (“Because the federal and state governments say little about their ongoing work with tribes, the public was left to guess . . . the tribes would have much to say about jaguars, but their actions and positions are usually not known publicly.”).

108. *Id.* at 191 (noting that “the historical record shows that other tribes like the White Mountain Apache Tribe have set strict boundaries about information flow with the federal government because of past abuses . . .”).

109. Tyna Yost, Dissertation (on file with Author).

110. *Id.*

111. William H. Allen, *Reintroduction of Endangered Species*, *BIO SCIENCE*, Feb. 1994, at 65, 65–68 (describing plant biologists' mixed feelings towards endangered

By outsourcing responsibility for conservation by dissemination to botanical gardens, the FWS sidesteps responsibility for translocation mistakes and avoids taking a public stand on the ethical and scientific questions at issue. Instead, a private regulatory regime—the Center for Plant Conservation, an association of botanical gardens—governs the practice. Thus, the Agency is allowing experimentation in this innovative technique without going through the costly and time-consuming practice of seeking explicit congressional permission or undergoing rulemaking procedures. Nevertheless, the Agency retains loose control over botanical gardens should the botanical gardens undertake irresponsible translocation practices through the enforcement provisions of the ESA. Thus, outsourcing enables the Agency to inexpensively experiment with new translocation techniques.

Despite the largely private nature of the translocations, the FWS is playing a central, crucial role in translocation activities. Perhaps most importantly, it provides a vital check against illicit, illegal, or unwise translocations.<sup>112</sup> Although the Agency may choose not to exert its authority to halt translocations that may technically violate Section 10(j) of the Act, the threat of using that authority for criminal enforcement provides a vital check on private activity. FWS agents provide an important role in networking, advice, and scientific expertise. The FWS is an identifiable, central source of authority—a clearinghouse through which all legitimate translocations pass.

Through collaboration with private groups, the FWS maintains control over private translocations while expanding its ability to achieve its objective. Private action allows a level of speed, flexibility, and resource allocation that simply would not be possible if the Agency exerted exclusive control over translocations. Given the immediacy of the threat of extinction due to climate change, these factors arguably suggest that the FWS is doing much better at satisfying its mission as a facilitator of private activity than as an exclusive administer of translocations. What the Agency loses in direct control over translocation, it gains in efficiency in satisfying its mandate.

It appears as though the FWS may be avoiding the costliness and political infeasibility of directly undertaking translocations. Instead, the Agency has shifted its efforts towards facilitating and monitoring translocation efforts by other groups. Thus, an agency that could be

---

plant translocation innovations being used to facilitate land development destroying the indigenous habitat of some plant species).

112. Jason S. McLachlan et al., *A Framework for Debate of Assisted Migration in an Era of Climate Change*, 21 *CONSERVATION BIOLOGY* 297, 299 (2007) (“Maverick, unsupervised translocation efforts run the risk of undermining current conservation work and do not reflect a consensus among interested parties.”).

cast as obsolete in the light of private action is in fact satisfying its mandate by permitting, facilitating, and monitoring private action.

The political economy of translocations renders the FWS unable to complete translocations at the rate necessary to satisfy its statutory mandate of preventing species extinction. Despite Agency inaction, translocations are occurring at a rapid pace thanks to private action. The FWS has largely outsourced the task of translocating species to outside groups.<sup>113</sup> Because the Agency lacks the capacity to unilaterally satisfy its mandate through mass translocations, it has leveraged other actors to prevent extinction and thus satisfy its statutory mandate.

Hundreds of endangered species translocations are taking place annually,<sup>114</sup> staving off extinction. Private groups are facilitating the translocations, including: environmental nongovernmental organizations, commercial timber harvesters, sportsman's groups, tribal governments, agencies not officially tasked with wildlife conservations, and even foreign governments. Private contributions to developing translocation practices include promulgations of policies and standards, provision of scientific expertise, funding to facilitate translocations, availability of secrecy unavailable to the FWS's activities, and on-the-ground manpower to undertake translocations.<sup>115</sup>

---

113. Species translocation is one of several ways in which the Fish and Wildlife Service has partnered with external actors to further its administration of the Endangered Species Act. Other examples of public-private action include the Section 4 listing process and Section 10 Habitat Conservation Plan process, in which private and municipal actors provide private funding of recovery efforts in exchange for Incidental Take Permits. For an overview of these actions, see Federico Cheever, *The Prohibition Against Taking Endangered Wildlife in Section 9 of the Endangered Species Act of 1973: The Existence of Exceptions Supports Full Enforcement*, Nat. Res. L. Ctr. Occasional Paper, Univ. of Colo. (1990).

114. Exact estimates are not available due to inadequate record-keeping practices. See J. Fischer & D.B. Lindenmayer, *An Assessment of the Published Results of Animal Relocations*, 96 BIOLOGICAL CONSERVATION 1, 8–9 (2000).

115. The International Union for Conservation of Nature, an international environmental nongovernmental organization, has issued non-binding international guidelines for species translocation decisions. IUCN SPECIES SURVIVAL COMM'N GUIDELINES FOR REINTRODUCTIONS AND OTHER CONSERVATION TRANSLOCATIONS (2012), <http://www.issg.org/pdf/publications/Translocation-Guidelines-2012.pdf> [<https://perma.cc/LC5S-76WV>]; see also BEYOND CAPTIVE BREEDING: REINTRODUCING ENDANGERED MAMMALS TO THE WILD (J.H.W. Gipps ed., 1991) (presenting an edited collection of important papers on reintroduction); Suzanne R. Jones, *Overview of the Goals and Activities of the IUCN Captive Breeding Specialist Group and International Species Information System*, 8 ENDANGERED SPECIES UPDATE 8 (1990); *Guidelines for Reintroduction of Animals Born or Held in Captivity*, ASS'N ZOOS & AQUARIUMS (1992), <https://www.aza.org/reintroduction-scientific-advisory-group> [<https://perma.cc/9USZ-HRJR>] (outlining nineteen guidelines governing zoo reintroductions). For an example of one technique used for domestic translocation decisions that relies upon software-based decision-making, see Bork, *supra* note 67, at 183–85 (describing translocations as burdensome for landowners in recipient areas); Jill S. Heaton et al., *Spatially Explicit Decision Support for Selecting*

#### IV. ANALYZING RELATIONAL CONTRACTING IN THE ADMINISTRATIVE STATE

Is relational contracting and the collaborations it gives rise to a good thing? Agencies embedding private commitments into planning documents provide a vital tool for resolving the inherent tension between federal environmental objectives and the private action required to achieve those goals. It may also serve to mitigate federalism concerns by incorporating local priorities and information into the federal decision-making process. This technique has become particularly relevant as a bi-partisan technique in an era of political polarization.

Because hundreds of translocations take place annually, monies are being generated to fund projects, and best practices in relocation policies are fully formed and usually followed.<sup>116</sup> These concerns extend beyond fairness to substantive effects: embedding private actions limits expression of the preference heterogeneity that would be available by including more diverse stakeholder perspectives.<sup>117</sup> Aggregating information from diverse stakeholders provides benefits like the wisdom of crowds, whereas relying upon particularized groups risks losing benefits.<sup>118</sup> Some stakeholders are granted a direct role in influencing outcomes, while others are excluded from decision-making and implementation entirely. This presents a complex set of distributional issues, which vary according to the mandate and agency at issue.

It is neither clear nor predictable which stakeholder groups will embed commitments into agency planning documents. The FWS case study showed an agency allocating translocation responsibility across a variety of groups with diverse interests; for example, both sportsmen's groups and conservation groups received implicit agency permission to participate in the translocation of species. The FWS appears genuinely committed to the objective of saving animals. In other contexts,

---

*Translocation Areas for Mojave Desert Tortoises*, 17 BIODIVERSITY & CONSERVATION 575, 576–79 (2008) (listing ten objective criteria for determining where to translocate 2,000 desert tortoises displaced by a proposed military facility, but acknowledging that the decision tool ignored the political and social aspects of the decision); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 315 (1997) (noting the difficulties landowners face in accommodating endangered species recovery efforts).

116. Doremus, *Restoring Endangered Species*, *supra* note 67, at 7–8 (“Today governments, nonprofit organizations, and individuals carry out many hundred deliberate wildlife translocations each year in North America.”); *see also id.* at 9 (describing public and private funding sources).

117. Stephenson, *supra* note 27, at 1472 (“The fact that information acquisition is often endogenous may supply another perspective on the differences between the behaviors of ideologically diverse and ideologically homogeneous groups, as well as another tentative reason to favor diversity—particularly in the form of including the representation of minority views—in collective decision-making.”).

118. *See generally* JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2005); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 124–66 (1999).

however, the picture is murkier. Less even-handed policies develop, as the same type of actors will repeatedly be granted outsourced portions of mandates, while others are systemically excluded.<sup>119</sup>

Distributional inequities in planning are exacerbated by the relative inaccessibility of judicial review for outsourced actions. Unlike the more formalized processes underlying traditional agency procedures—as with the exhaustive records necessary for rulemaking processes—the existence and availability of agency recordkeeping of privatized action are sorely lacking (and possibly intentionally so).<sup>120</sup> Excluded stakeholders may have trouble challenging their lack of participation in court since they may not even be aware of the decisions being made that affect them.<sup>121</sup> Even if they bring litigation, judges will have difficulty assessing the extent to which privatization is occurring because of a lack of centralized recordkeeping. Thus, the scope of outsourcing is largely unknown to courts, making it virtually impossible for judges to assess its harms to stakeholder groups who litigate agency action.

When agencies partner with private actors to contract, excluded stakeholders lose the benefit of participating in influencing agency action. Emerging trends in litigation indicate that excluded stakeholders are demanding a seat at the table in agency actions.<sup>122</sup> One strand of emerging litigation challenges the EPA's administration of the Clean Air Act. The EPA has relied upon agencies working with environmental nongovernmental organizations in sue-and-settle litigation.<sup>123</sup>

---

119. This appears to be the case with Zachary Gubler's discussion of the Security and Exchange Commission private offerings, in which companies seeking to go public are the recipients of agency privatization whereas investors never are. See generally Zachary J. Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745 (2013) (describing how the Security and Exchange Commission allows private funding of initial public offerings).

120. For a discussion of poor recordkeeping practices regarding conservation easements, see generally Jessica Owley, *Keeping Track of Conservation*, 42 ECOLOGY L.Q. 79 (2015).

121. For a discussion of how federal agencies interact with states without meaningful access to courts or judicial precedent in the cooperative federalism arena of the EPA Petition-to-Withdraw Process, see Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013).

122. This concern is reflective of a broader trend of the public grappling with private governance in environmental law. Federico Cheever notes: "as the nation (and the globe) become covered with a patchwork of privately managed biodiversity preserves containing publicly protected species we will see a series of new problems generated by interest groups interested in developing privately preserved land and government agencies uncomfortable with having such an obviously public resource managed largely in private hands." E-mail from Federico Cheever, Professor of Law, Univ. of Denver Sturm Coll. of Law, to Karen Bradshaw Schulz, Assoc. Professor of Law, Ariz. State Univ. Sandra Day O'Connor Coll. of Law (May 14, 2015) (on file with Author).

123. Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL'Y 579, 580–83 (2014).

States and industries are challenging the consent decrees that emerge from the agreements between agencies and environmental nongovernmental organizations. States argue that substantive outcomes are determined in bilateral settlement agreements to the exclusion of state participation, which violates the cooperative federalism model at the core of the Clean Air Act. In other words, states protest an agency's avoidance of direct engagement with states through collaboration with environmental nongovernmental organizations. The challenges are well-funded and well-publicized: Oklahoma's Attorney General penned an editorial in the *Washington Examiner* highlighting the practice.<sup>124</sup> This case is currently up on appeal in the Ninth Circuit.<sup>125</sup>

Cast more broadly, sue-and-settle litigation reflects larger concerns that agencies cooperate with one type of stakeholder to the exclusion of others. This is a familiar refrain in a variety of arenas, ranging from the consent decrees in natural resource damage claims (in which agencies cooperate with polluters) to ESA listings litigation (in which agencies cooperate with environmental nongovernmental organizations). Clean Act Air litigation may be the first in a string of lawsuits challenging agencies' bilateral cooperation with a single stakeholder group to the exclusion of other actors. If so, the often-practiced and little-discussed agency adaptation of outsourcing public mandates will be subject to heightened judicial scrutiny.<sup>126</sup>

Even more broadly, public-private collaborations and contractual agreements function at least partially through exclusion. We readily accept such exclusion in relational contracting arrangements among private parties. Agency action, in contrast, demands much higher scrutiny about the potential exclusionary effects of contractual arrangements. This is a bi-partisan concern, and this Article has outlined examples of excluded parties falling upon both sides of ideological lines. Additional scholarly thought is needed to identify, explore, and address the undertheorized issue that exclusion is a necessary precursor to collaborative agreements, like the relational contracts explored herein.

## V. CONCLUSION

This Article documents agencies' use of planning documents to coordinate external actors' participation in substantive environmental

---

124. Scott Pruitt, Opinion, '*Sue and Settle*' Deals Are Regulation-by-Consent-Decree, WASH. EXAMINER (May 15, 2014, 12:00 AM), <https://www.washingtonexaminer.com/sue-and-settle-deals-are-regulation-by-consent-decree> [<https://perma.cc/9SGA-WTQG>].

125. See *Sierra Club v. McCarthy*, No. 13-cv-03953-SI, 2015 WL 889142 (N.D. Cal. March 2, 2015), *aff'd*, 868 F.3d 1062 (9th Cir. 2017) for an order granting consent decree entered into by nongovernmental organizations and the EPA, over objections brought by a coalition of states.

126. For a discussion of this concern, see *supra* Part III.

goals. Recovery planning as required by the ESA provides one such example of contracting the facilitation and coordination of private action. This case study illustrates the mix of benefits and harms that emerge from this practice, which is then used as a framework for considering the potential expansion of relational contracting as a technique to address climate change response.

While coordination of external private actors is an effective way to achieve results, it comes with the drawback that agencies may favor certain stakeholders and exclude others. The administrative state was designed with procedural mechanisms that were intended to ensure agency expertise is coupled with public participation to produce good policy. Thus, relational contracting between agencies and private actors is an important tool that must be carefully administered with an eye toward the overall goal of creating good policy.

## VI. APPENDIX: METHODOLOGY

The Endangered Species Act requires the FWS to develop a recovery plan for each species listed as either threatened or endangered. The recovery plan database is the most complete source of record-keeping about the FWS's administration of the Act. I led a team of research assistants in reviewing this database with a focus on the specific recovery action of species translocation.

Within the recovery plan database, research assistants searched for terms under the umbrella of translocation drawn from scientific journals, including: "translocation"; "relocation"; "reintroduction"; "assisted colonization"; and "assisted migration." These terms produced results indicating that translocations—under a variety of terms—were incorporated into 138 single species recovery plans and plan addendums.<sup>127</sup> To validate the accuracy of the database search, research assistants verified that each of the recovery plans deemed translocation ecologically necessary for species recovery.<sup>128</sup>

The team drew various elements of analysis—such as terminology describing non-Agency actors—from a variety of documents in the recovery plan database for each species. The FWS is required to update the recovery plan for each species every five years to reflect new information. Research assistants culled the updated documents on a species-by-species analysis.

Notably, the analysis is limited to reporting the data from the database. I do not test the causal sources driving the outcomes reported using econometric approaches, such as multivariable analysis.

---

127. These terms also produced 47 multispecies recovery plans and 16 duplicative recovery plans, both of which are omitted from this analysis.

128. Research assistants notated the document name, year, page number, and language deeming recovery ecologically necessary.

As such, the findings do not account for variables that may be explanatory but differ from public choice predictions.

In this Appendix, I specifically explore the FWS’s use of embedding private commitments into statutorily-required recovery plan documents as a mechanism to achieve species translocations. It demonstrates that FWS is using recovery planning as a tool to gauge potential opposition and marshal private environmental action.

As noted above, FWS has prepared a total of 597 recovery plans for endangered and threatened species. Species translocation is included in the plan for 138 species, or 22% of listed species. Roughly half of the planned translocations have, in fact, occurred. This is unsurprising as recovery plans are guidance documents, which cannot be judicially enforced, and thus likely include several objectives that are not carried out.

The FWS identified translocation as an ecologically necessary recovery strategy for 138 threatened or endangered species. This represents 22% of all 597 recovery plans. Of the 138 proposed translocations, sixty-five translocations have occurred. Seventy proposed translocations have not occurred. In three instances, it is unclear whether the translocation occurred. Figure 3 reflects this data.

FIGURE 3

<b>Translocation Status</b>	<b>Number</b>	<b>Percentage</b>
Not completed	70	51%
Completed	65	47%
Indeterminate	3	2%

Groups other than the FWS are involved with seventeen of the sixty-five translocations that have occurred and twenty-six of the seventy proposed translocations that have not occurred. Non-Agency actors include tribes, states, cities, sportsmen’s groups, business interests, botanical gardens, zoos, and environmental non-governmental organizations.

Notably, forty-seven of the seventy translocations not completed provide vague or incomplete information about translocation status. Seventeen plans simply state that translocation has “not started” with no additional explanation for why the translocation had not begun. Similarly, thirty plans suggest planned future action with varying degrees of specificity about when and how the recovery will occur in the future. Four plans suggest that there is a scientific rationale for not completing recovery, including uncertainty about the effects of translocation. In two instances, subsequent plan reviews deem translocation unnecessary because the species has shown recovery.

Additionally, in five cases, the species declined to the point that there are too few species to transplant.

In one case, the Agency declined to translocate a species because a tribe planned to do so, which is a clear case of the Agency deferring to non-Agency action. In another instance, the FWS did not translocate because of low levels of landowner participation in transplanting the Western Lily on private land. Commentators have noted in the past that the FWS hides behind ecological rationale and scientific uncertainty to justify inaction caused by interest group pressures.<sup>129</sup> Most rationales offered do not provide sufficient information to assess whether the Agency decision not to complete translocation accorded with the Agency’s recovery mandate, as reflected in Figure 4 below.

FIGURE 4

<b>Rationale Provided for Uncompleted Translocations</b>	<b>Number of Translocation Decisions</b>
“Not started” with no rationale offered	17
Planned in future	30
Scientific rationale for status, including uncertainty	4
Unnecessary because of species recovery	2
Species believed to be extinct, or so few cannot transplant	5
Private group undertaking translocation	1
Interest group pressure prevents translocation	1

As discussed above, agencies can use relational contracting in order to pursue policy goals. This research illustrates how the FWS has used relational contracting to administer recovery planning and species translocation under the ESA. It demonstrates that FWS is managing species translocation by coordinating with private actors to develop recovery plan documents.

---

129. Doremus, *Adaptive Management*, *supra* note 72, at 1462–63 (noting that scientific uncertainty gives managers an excuse to be passive at the risk of systemically under-protecting environmental values and bowing to political and economic pressures).