Contractual Ecosystem Management under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments

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Contractual Ecosystem Management
Under the Endangered Species Act: Can
Federal Agencies Make Enforceable
Commitments?

Jean O. Melious* and Robert D. Thornton**

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INTRODUCTION

As the term "command and control" implies, the enforcement of obligations relating to environmental and natural resource protection traditionally has been a one-way street. Agencies, on behalf of the state, command; the subjects of legislation, including citizens, landowners, corporations, and other governmental entities, obey. One of the most significant advances in environmental law over the last decade has been the transformation of the command and control model into a contractual model in which each actor, including private parties and environmental and resource agencies, takes on enforceable obligations.

The most prominent example of this transformation is the Habitat Conservation Plan (HCP) process under the Endangered Species Act (ESA), which has brought contractual ecosystem management to millions of acres of land. HCPs generally are implemented through agreements that establish contractual

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relationships among private parties, various levels of government (federal, state, and local), and public interest groups. In these contracts, agencies reward significant habitat protection with assurances that, in the event of unforeseen circumstances, landowners will not be required to contribute additional land or money beyond the requirements of the HCP. The contractual obligation of agencies is necessary to encourage landowners to contribute land and financial resources to long-term habitat protection not otherwise mandated by the ESA.

This concept, embodied in policies known as No Surprises, Safe Harbors, and Candidate Conservation Agreements, is a cornerstone of the Clinton administration’s approach to the ESA. While the environmental community and academia have acknowledged that the goals of the ESA are unlikely to be achieved on non-federal lands in the absence of positive incentives to private landowners, these policies remain unpopular with conservation groups.2 These groups fear that these policies protect landowners’ financial interests at the expense of species protection.3

Because of this controversy, much of the commentary regarding HCPs has focused on whether public interest groups will be able to enforce landowners’ obligations under implementing agreements.4 This is an important concern arising naturally from the command and control model of enforcement against economic actors. The contractual model of enforcement, however, also requires an examination of “the other side”: whether, in fact, government agencies’ contractual assurances will provide private parties with security that the government will keep its side of the bargain. Will contractual assurances be enforceable by property owners or by interest groups that are parties to ecosystem management contracts? Or will federal

2. More than 800 comments were received on the proposed No Surprises rule. See Habitat Conservation Plan Assurances (No Surprises) Rule, 63 Fed. Reg. 8859, 8861 (1998) (to be codified at 50 C.F.R. pts. 17 & 222). The issues raised in the comments included concerns that the policy “was driven solely by the needs of private landowners, and is not in the best interests of the species . . . .”; concerns that no “commensurate certainties for protection of biological resources” were provided; and concerns that adequate funding was not available, either through agencies or through HCP funding, to implement necessary mitigation measures. Id. at 8861-8864.


agencies be able to assert their sovereignty as a defense to the enforcement of their agreements?

These are not questions of technical or esoteric concern. Rather, they are issues that will help to determine the future of contractual ecosystem management. For contractual relationships to prosper, all parties must be assured that they will receive the benefits of their bargains. If agreements with federal agencies are not enforceable over their entire term, the other contracting parties will—rightly—discount the value of the assurances that they contain. If contractual ecosystem management is to have a future, all parties will have to address issues relating to contractual enforcement, including legal issues arising from cases outside the area of environmental law.

This Article analyzes the enforceability of federal government agencies' contractual obligations. Part I introduces the concepts of ecosystem management and contractual regulation and describes the HCP process. Part II examines whether federal agencies' contractual obligations will be enforceable over the entire term of an HCP. This analysis first addresses the applicability of the Supreme Court's ruling in United States v. Winstar Corp., a federal contract case involving the savings and loan industry, to the HCP context. At first glance, Winstar appears to provide assurances to contracting parties that federal agency commitments will be enforceable, even if the underlying law changes. Unlike the contracts at issue in Winstar, however, the standard federal implementing agreement for HCPs specifically excludes the possibility of money damages as a remedy for breach of the agreement. In order to determine the implications of this policy, Part III examines the applicability of sovereign immunity, under the Administrative Procedures Act

5. This concept, which would be considered a truism in other areas of government contracting, is not as well-established in the environmental field. See Robert D. Thornton, Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973, 21 ENVTL. L. 605, 643-45 (1991).


8. See U.S. FISH AND WILDLIFE SERVICE & NATIONAL MARINE FISHERIES SERVICE, "TEMPLATE" IMPLEMENTING AGREEMENT § 12.1.a. (1998) [hereinafter TEMPLATE IA] ("No Party shall be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement.").

and the Tucker Act, to claims seeking the specific performance of contracts with the federal government. While Supreme Court precedent indicates that sovereign immunity may not apply, the law in this area is far from clear. This ambiguity is demonstrated most clearly by conflicting opinions from the Ninth and Tenth Circuits.

If sovereign immunity applies to the specific performance of HCP implementing agreements as currently worded, non-federal parties may be left without a remedy—even if the underlying law does not change. The implications are clear for HCPs in particular, and for contractual ecosystem management in general. By precluding the remedy of money damages, federal agencies may circumvent Winstar. As an unintended consequence, however, they may also ensure that the agreement is entirely unenforceable by private parties. Agreements without a remedy for breach are unlikely to encourage private landowner participation in voluntary habitat conservation efforts; if one party can default with impunity, the remaining parties will most assuredly discount the value of that agreement. Such a development would be detrimental to the evolution of the contractual ecosystem management approach, which assumes that the parties can rely on mutual assurances and obligations.

I

THE EVOLUTION OF CONTRACTUAL ECOSYSTEM MANAGEMENT AS AN ALTERNATIVE TO COMMAND AND CONTROL REGULATION

A. Showdown on the New Frontier: Enforcement Under Contractual Ecosystem Management

The United States traditionally has relied on command and control regulation to address environmental problems. This approach, with its focus on blanket standards applicable to entire industries or pollution sources, evolved in order to address problems created by point-source pollution affecting a single medium—air, water, or land. The country is now moving

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13. A command and control system has been described as one in which "some governmental unit determines what the appropriate level of a given pollutant or activity is, sets the standards, and establishes a way to enforce adherence to these standards." ZACHARY SMITH, THE ENVIRONMENTAL POLICY PARADOX 31 (1995).
beyond this first stage of environmental regulation in an effort to address complex interactions between resources involving multiple stakeholders within specific geographical regions. This approach is commonly referred to as "ecosystem management."

Ecosystems are complex even when viewed solely in scientific terms. When the whole range of human interests within an ecosystem is added to the management equation, the resolution of environmental issues to the general satisfaction of all parties grows even more challenging. Thus, efforts to manage on an ecosystem basis will be more, rather than less, complex than earlier approaches to environmental regulation. As Secretary of the Interior Bruce Babbitt stated, perhaps optimistically:

[Resource disputes will only be resolved if we first complexify them. Complex does not mean confusing. It simply means deliberately expanding the issues involved; bringing in more local stakeholders; asking parties to check their ideological positions at the door; and engaging them in a place-based, information-loaded inquiry that uses all the tools of good science and data presentation.]

The multiple stakeholders involved in such disputes have multiple interests. In the ESA context, federal agencies may need to incorporate concerns such as recreation and revenue needs.

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14. See, e.g., Beth S. Ginsberg & Cynthia Cummis, EPA's Project XL: A Paradigm for Promising Regulatory Reform, 26 ENVTL. L. REP. NEWS & ANALYSIS 10,059, 10,059 (1996) ("Much has been said and written about the impediments to environmental and economic progress that the current regulatory system presents. The overly prescriptive "technology enforcing" schemes that prior Congresses created are quickly becoming anachronistic."); William D. Ruckelshaus, Stopping the Pendulum, 12 ENVTL. FORUM 25, 29 (1995) ("What one piece of a right answer [to the question of reforming environmental policy] could look like is slowly emerging from local experiences in this country and from the experience of some other nations. It involves a new sort of consensus process, in which all the significant stakeholders are brought together to hammer out a solution to a set of environmental problems.").

15. The Clinton administration has made an explicit commitment to ecosystem management. See, e.g., 1 INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES (1995). Ecosystem management is defined as "a comprehensive regional approach to protecting, restoring, and sustaining our ecological resources and the communities and economies that they support.... The ecosystem approach integrates ecological protection and restoration with human needs to strengthen the essential connection between economic prosperity and environmental well being." Id. Although ecosystem management has been defined "differently according to discipline and perspective.... [at the core is the idea that land and wildlife managers should manage ecosystems, not just individual species." Sheila Lynch, Comment, The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?, 71 WASH. L. REV. 431, 432-33 (1996) [footnotes omitted].

into their plans for species preservation. Local governments may have to incorporate their obligations to provide infrastructure and housing into their ESA planning processes. Landowners will generally insist on ensuring that the ESA planning process does not render their property valueless.

The integration of all of these interests into a scientifically adequate plan that ensures preservation of the species of concern is indeed complex and not particularly amenable to formulation through command and control regulation. Landowners' obligations may exceed ESA requirements in recognition of the advantages of assisting the local government in establishing enough certainty to proceed with land use permits. State agency obligations may reflect the advantages of meeting the requirements of state law and federal law through one process. Local governments may rely on landowners' assurances in order to meet their own obligations under state and federal law. The use of contracts is necessary to memorialize these interrelationships, which are critical to ensuring that an HCP maximizes the interests of all parties to the greatest extent feasible.

This more complex approach to environmental regulation requires that the government become involved in HCP negotiations with private landowners and other private parties. These negotiations generally result in implementing agreements that specify all parties' obligations and establish procedures for amending and enforcing the HCP. While the Fish and Wildlife Service's (FWS) Regional Directors have discretion to determine whether an implementing agreement should accompany an HCP, most regional or large-scale HCPs that address significant portions of a species' range or that involve numerous activities or landowners result in an implementing agreement.

One problem with this contractual ecosystem management approach is that the parties must reach agreement. Many ambitious efforts have failed because of the inability of the

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17. See U.S. Fish and Wildlife Service & National Marine Fisheries Service, Dept of the Interior, Endangered Species: Habitat Conservation Planning Handbook 3-36 to 3-37 (1996). An implementing agreement will generally define the obligations, benefits, rights, authorities, liabilities, and privileges of all signatories and other parties to the HCP; assign responsibility for planning, approving, and implementing specific HCP measures; specify the responsibilities of state and federal agencies in implementing and monitoring the HCP; provide for specific measures to implement mitigation; establish a process for amendment of the HCP; and provide for enforcement of HCP measures and for remedies if parties fail to perform their obligations under HCPs. See id. at 3-37.

18. See id. at 3-36.
A second problem, which is the focus of this Article, is that the resultant agreement still must be enforced over the long term. Long-term enforcement of multi-party stakeholder agreements that purport to govern relationships between various, and often numerous, federal, state and local agencies, local governments, private parties, and even non-party stakeholders such as environmental organizations is inherently complex. For example, ESA negotiations addressing 85 species over a 172,000-acre area in San Diego involved officials from the federal Fish and Wildlife Service, two state agencies, nine city and county jurisdictions, and representatives of several thousand landowners and local environmental and community groups.²⁰

The difficulty of enforcing such an unwieldy undertaking is compounded because agreements concerning long-term environmental issues necessarily involve uncertainty. Environmental conditions, relevant laws, and the interests of the parties may change over time. As personnel changes, the original understanding of the parties may be subject to reinterpretation. The availability of resources for implementation and monitoring throughout all phases of the agreement may diminish over time. In light of the complexity and the uncertainty involved in these agreements, the parties may be obliged to enforce implementing agreements against parties who have become less enthusiastic about the agreement with the passage of time.

A final complication of enforcing implementing agreements is that they do not fit within the traditional model either of legislation or of private contract law. Cases and legal concepts outside the area of environmental law can affect the rights and obligations of parties to agreements. Contractual issues that do not affect the enforcement of laws under the traditional command and control model come to the forefront, while issues of sovereignty differentiate implementing agreements from normal contractual arrangements.

In order to evaluate the significance of these enforcement issues in the context of a specific policy, this Article will examine habitat conservation planning under the Endangered Species Act.²¹ The evolution of the ESA to include HCPs is the archetype of the shift from command and control legislation to contractual

ecosystem management, and experience under the ESA over the past quarter of a century has been a dominant factor in promoting contractual ecosystem management in the conservation of natural resources.\textsuperscript{22}

\textbf{B. Federal Assurances Under Contractual Endangered Species Protection}

The ESA, the “pit bull of federal environmental statutes,”\textsuperscript{23} has frequently been applauded for its forceful stance on species protection.\textsuperscript{24} The heart of the ESA is section 9, which prohibits the “take”\textsuperscript{25} of threatened or endangered species; activities resulting in a take are “unlawful for any person.”\textsuperscript{26} The ESA thus commands clearly and then controls through civil and criminal penalties.\textsuperscript{27}

Because of its potency as a command and control measure,

\begin{footnotes}
\footnotetext{22}{See, e.g., Oliver A. Houck, \textit{On the Law of Biodiversity and Ecosystem Management}, 81 MINN. L. REV. 869, 870 (1997) (“One of the more rational conclusions to emerge from America’s experience with the Endangered Species Act is that we need to manage ecosystems and protect biological diversity on a scale larger than individual species on the brink of doom. Supported by evidence of a decline in diversity and the crash of environments on which all species depend, ‘ecosystem management’ and ‘biodiversity’ have become new catchwords in the vocabulary of natural resources management.”) (footnotes omitted). A large part of the effort to design new approaches to environmental protection “has been linked to ‘reinventing’ the Endangered Species Act—transforming a statute that was originally designed as a species-by-species ‘emergency room’ regulatory tool or safety net into a comprehensive vehicle for regional multi-species habitat planning in collaboration with state and local governments, private landowners and other interest groups.” George Frampton, \textit{Ecosystem Management in the Clinton Administration}, 7 DUKE ENVTL. L. & POLY F. 39, 40 (1996).
\footnotetext{23}{Donald Barry, Address to A.B.A. Section on Natural Resources, Energy and Environmental Law, Workshop on Endangered Species (Apr. 6, 1990).
\footnotetext{24}{The Supreme Court has stated as follows:
One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or ‘result in the destruction or modification of habitat of such species . . . .’ This language admits of no exception.

\footnotetext{25}{“Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect . . . .” 16 U.S.C. § 1532(19) (1994). “Harm” is defined as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife . . . .” 50 C.F.R. § 17.3 (1999).
\footnotetext{27}{16 U.S.C. § 1540(a), (b) (1994).}
the ESA may seem at first glance an unlikely vehicle to usher in the era of contractual ecosystem management. In fact, section 9’s absolute prohibition on “take” has provided powerful evidence of the limits of command and control regulatory systems. As a senior attorney at the Environmental Defense Fund has declared:

Given that the ESA’s only current tool to affect the behavior of private landowners—the taking prohibition—does not effectively address many of the most serious threats to rare species, and given that fear of that tool has sometimes prompted landowners to act against—rather than for—the best interests of such species, other conservation tools are clearly needed. Simply deterring harmful conduct—as the taking prohibition seeks to do—is not enough. It is necessary as well to encourage and reward beneficial conduct.28

Section 9 therefore can be criticized as insufficient, standing alone, to preserve species.29 The more familiar objection to section 9, however, focuses on its zeal. The unyielding nature of section 9’s “take” prohibition has generated bitter conflicts within the real world of politics. The ESA has been accused of instigating two notable “train wrecks” in United States environmental policy: the dispute over the snail darter and the Tellico Dam30 and the controversy concerning the spotted owl and its old-growth forest habitat in the Pacific Northwest.31 Although the species at issue served as surrogates for a larger discontent with the government’s handling of social, economic,

29. Endangered species protection under section 9 faces a litany of difficulties. To enforce section 9, the government bears the difficult burden of proving that an activity resulted in the actual death of, or injury to, a listed species. See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 692 (1995). Moreover, section 9’s take prohibition does not reach activities on land that is unoccupied by endangered species, even if the land has other important environmental values. Land that may be important for species not subject to the ESA’s regulatory protections remains unprotected; nor are plants on private land protected. See 16 U.S.C. § 1538(a)(2) (1994). Consequently, a significant percentage of habitat on non-federal land remains beyond the reach of the ESA. A 1996 study concluded that “endangered species on private land appear to be faring much worse than their counterparts on federal land.” David S. Wilcove et al., Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land (visited Dec. 5, 1996) <http://www.edf.org/pubs/reports/help-esa/index.html>. The study further noted that “for every species that is rebounding due to the [Endangered Species] Act, there are several more that are still declining. This is especially true for species that depend largely or entirely on private land for their habitat.” Id.
31. See Sweet Home, 515 U.S. at 692.
and natural resource issues in both of these disputes, the ESA has borne the brunt of an anti-environmentalist backlash. This backlash reflects the ESA's unique place in environmental law. Because of its forceful provisions, the ESA serves as a lightning rod, attracting and channeling controversy. One law, in the whole realm of environmental laws, has been expected to bear the weight of ecosystem preservation when other approaches have failed. It may not be able to withstand this pressure forever, as landowners and other forces opposing the law's restrictions lobby Congress to weaken its restrictions.

In response to the ESA's imperfections and the Act's critics, the FWS, which has primary authority for the implementation of the ESA, has embraced ecosystem management. This has led to a dramatic metamorphosis in the implementation of the ESA. In 1982, Congress amended the ESA to include provisions allowing for the preparation of HCPs. The HCP amendment addressed the fact that a significant amount of habitat used by endangered species is on land owned, not by the federal government, but by private citizens, states, municipalities, and

32. For a discussion of the public controversy over the snail darter, see generally Zygmunt J.B. Plater, In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences, 19 U. Mich. J.L. Reform 805 (1986). The many factors that culminated in the Pacific Northwest "train wreck" are thoughtfully discussed in William Dietrich, The Final Forest: The Battle for the Last Great Trees of the Pacific Northwest (1992). See also Andrew J. Hoffman et al., Balancing Business Interests and Endangered Species Protection, 39 Sloan Mgmt. Rev. 59, 61 ("Even in the spotted owl case, the story has been one not of economic recession but economic transition . . . . Some in the forestry industry deftly placed blame for their economic circumstances on the ESA, while others successfully adapted to its goals . . . .").

33. As one commentator has observed, "[i]t is not possible to imagine the serious, difficult conversations now taking place over western water management, coastal land development, the depletion of aquifers and the impact of marine fisheries without the existence of endangered turtles, salmon, salamanders and their kin—and the law that backs them up. Indeed, it might be said that the Endangered Species Act is in trouble today not because it fails to address diversity and ecosystems, but instead because it is beginning to address them too well." Houck, supra note 22, at 872 (footnotes omitted).


35. The Fish and Wildlife Service is part of the Department of the Interior. The Secretary of Commerce has jurisdiction over most marine species, including anadromous fish. See 50 C.F.R. §§ 222.23(a), 227.4 (1998) (designates listed species over which the Secretary of Commerce has jurisdiction).


tribal governments. As a result, landowner cooperation through a collaborative stewardship approach is critical to long-term conservation. The HCP amendment fosters this approach by authorizing the FWS to permit otherwise prohibited takings of endangered species if the agency approves a conservation plan that minimizes and mitigates the taking. The landowner applicant for the HCP must also show that adequate funding for the plan will be provided.

Congress intended HCPs, which may address endangered species habitat issues on private as well as public land, to be flexible. In fact, it was Congress' intent to allow HCPs to consider both listed and unlisted species. The FWS was given discretion to issue permits of thirty years or more in duration, and it was anticipated that the process would result in both "long-term commitments regarding the conservation of... species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan."

For years, however, the promise of the HCP provisions went largely unrecognized. A number of landowners who entered into HCP negotiations ultimately gave up because the process was too time-consuming and uncertain. Only fourteen HCPs had been signed by 1993. During the past five years, however, the use of

38. More than 90% of the listed species for which the FWS was responsible as of May 1993 have habitat on nonfederal lands. Approximately two-thirds of the listed species have over 60% of their total habitat on nonfederal lands. See U.S. General Accounting Office, Endangered Species Act: Information on Species Protection on Nonfederal Lands 1 (1994).


41. See id.


43. Id. (emphasis added).

44. See Thornton, supra note 5, at 607.

45. See Babbitt, Daley to Announce Private Land Conservation Programs, U.S. Newsweek, June 5, 1997. Of the fourteen HCPs, twelve were in California, one was in Texas, and one was in Florida. See Michael A. O'Connell & Stephen P. Johnson, Improving Habitat Conservation Planning: The California Natural Community Conservation Model (visited July 21, 1998) <http://www.umich.edu/~esupdate/library/97.01-02/oconnell.html>.
HCPs has skyrocketed. The FWS reported that approximately 200 HCPs were approved between 1993 and March, 1997, and that approximately 200 additional HCPs were in some stage of development. One reason for this surge in HCP preparation is the lesson of the spotted owl; the Clinton administration has seen the effect of failing to prepare broad-based plans addressing the needs of the wide range of stakeholders with interests in an ecosystem. Other reasons are the support of the Secretary of the Interior, Bruce Babbitt, and the development of policies that make the HCP process more attractive to potential participants.

The Department of the Interior has implemented three policies intended to enhance the benefits of the HCP process to private landowners. These three policies, known as the No Surprises, Safe Harbors, and Candidate Conservation policies (collectively, ESA assurance policies), require landowners to make significant commitments to species maintenance and preservation. In return, landowners are supplied with "economic and regulatory certainty regarding the overall cost of species conservation and mitigation."

The No Surprises policy provides assurances to the permit

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47. See TVA, 437 U.S. at 173.; see also Sweet Home, 515 U.S. at 692.

48. Secretary of the Interior Babbitt recently stated:

If we are going to make this Act work on the ground in the real world, and ask timber companies and developers to make those kinds of concessions . . . we've got to establish one simple common-sense principle, and that is one bite at the apple—take a good one—thrust it out, then say to the developer, "Okay, a deal is a deal."

Bruce Babbitt, Address to the National Press Club Luncheon (July 17, 1996).

49. See, e.g., O'Connell & Johnson, supra note 45, at 2 ("It is no secret among those who study conservation planning that the guarantees and efficiencies (collectively known as 'assurances') promised by HCPs are what brings private landowners to the table and keeps them there."). See generally Andrew G. Frank, Reforming the Endangered Species Act: Voluntary Conservation Agreements, Government Compensation and Incentives for Private Action, 22 COLUM. J. ENVT'L. L. 137 (1997).


No additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by the permit.\textsuperscript{52}

If additional measures are required to protect a species, the government may undertake these activities at its own expense.\textsuperscript{53} Assurances only apply to species listed on a permit that are sufficiently covered in the conservation plan,\textsuperscript{54} where the conservation plan is being properly implemented.\textsuperscript{55} The duration of the assurances is the same as the length of the permit. Although HCPs range from seven months to one hundred years to perpetuity, the median duration to date is ten years.\textsuperscript{56}

The Safe Harbors policy\textsuperscript{57} responds to landowners' fears that activities benefiting listed species may result in land use or resource use restrictions if endangered species colonize the property or increase in numbers. In some cases, these fears have prompted landowners to "take preemptive action designed to ensure that endangered species never have the opportunity to occupy their land," through such illegal and often difficult-to-patrol measures as removing vegetation or plowing potential habitat. Harder to document, but no less important for the goal of recovering endangered species, are examples of landowners who simply avoid taking minor steps that would improve habitat for endangered species.\textsuperscript{58} The Safe Harbors rule is intended to encourage landowners to undertake activities that will help listed

\textsuperscript{52.} Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. at 8859.

\textsuperscript{53.} See id. at 8871 (codified at 50 C.F.R. § 17.22(b)(6) (1999)). If a species declines to the point of jeopardy and other recovery efforts are unsuccessful, the permit may be revoked. See Safe Harbor and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. at 32,709.

\textsuperscript{54.} See id. at 8871, 8872 (codified at 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5) (1999); 50 CFR § 222.22(g) (1999)).

\textsuperscript{55.} See id. at 8871 (codified at 50 C.F.R. § 17.22(b)(6) (1999)).

\textsuperscript{56.} See THE NATURAL HERITAGE INSTITUTE, COMPENDIUM OF EMPIRICAL REVIEWS AND SCHOLARLY ANALYSIS OF THE EXPERIENCE WITH HABITAT CONSERVATION PLANNING UNDER SECTION 10 OF THE ENDANGERED SPECIES ACT 7 n.45 (1998).

\textsuperscript{57.} Safe Harbor and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,705 (June 17, 1999).

\textsuperscript{58.} Bean, supra note 28, at 10,706. While it is difficult to gauge how frequently such "species-preempting practices" are undertaken, it is "clear that landowners are commonly advised to engage in them." Id. Developers, farmers, and foresters have all intentionally eliminated habitat in order to avoid ESA strictures. See id.

species, including reducing habitat fragmentation, stabilizing or maintaining populations, buffering protective areas, and creating areas for testing and implementing new conservation strategies. Safe Harbors agreements provide assurances that landowners who improve their property for species preservation may then modify the property back to baseline conditions, even if the modification will result in the incidental take of a listed species.

While the Safe Harbors policy only addresses listed species, Candidate Conservation Agreements are designed to promote efforts to preserve unlisted species. The specific "targets of Candidate Conservation Agreements are proposed and candidate species of fish, wildlife, and plants; species likely to become candidate species in the near future may also be included." The goal of the policy is to encourage private landowners to take precautions that will avoid future listing of the species. If, however, nonfederal property owners fulfill all their obligations under the agreement and a species is listed anyway, the property owner would still be allowed to "take" the species or to modify its habitat up to levels specified by the permit.

All of these policies require landowners to make significant commitments to species maintenance and preservation. In the cases of Safe Harbors and Candidate Conservation, the policies require commitments that the government otherwise could not legally enforce. A common thread connecting these ESA assurance policies is that they are all based on the assumption that the government is in the position to grant landowners something of value. For these assurances by federal agencies to constitute a genuine incentive, property owners must be confident that the agencies will not be able to renege on their

60. See id. at 32,179, 32,180.
61. See id. at 32,180.
62. Id. at 32,185.
63. See id. at 32,186.
64. See id. at 32,178 (discussing Safe Harbors and noting that "[s]uch proactive management actions cannot be mandated or required by the Act. Thus, failure to conduct habitat enhancement or restoration activities would not violate any of the Act's provisions"); see also Announcement of Draft Policy for Candidate Conservation Agreements, 62 Fed. Reg. at 32,185 (discussing Candidate Conservation Agreements and noting that "[w]ithout such assurances, most property owners and/or agencies will not have as much incentive to undertake candidate conservation agreements on their property").
65. For example, the "driving concern" behind the FWS's adoption of the No Surprises policy was the "absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities." Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. at 8860.
promises with impunity.

Under at least two scenarios, government assurances may not have much value. First, if the government can change the underlying law and then claim that the change excuses it from meeting its contractual obligations, any long-term assurances would be of dubious value. Second, if agencies can defend contractual lapses by relying on the doctrine of sovereign immunity, the agencies' attractiveness as contracting parties would be significantly diminished. Because either of these scenarios may arise when parties enter into ESA assurance agreements, the following sections analyze these possibilities in evaluating the federal government's ability to enter into enforceable contracts.

II

UNITED STATES V. WINSTAR CORP. AND THE POWER OF THE FEDERAL GOVERNMENT TO CHANGE THE LAW

A. Background: Contracting With the Federal Government

In contracting with the federal government, parties enter into a situation of inherent inequality. One of the parties (the federal government) has the power to change federal law in ways that may affect the contract. The government has this power because federal agencies serve as both regulators and deal-makers. Therefore, the right of contracting parties to a firm deal must be balanced against the right of the federal government to take future actions necessary to protect the public interest.

In the context of ESA assurances, this means that private parties must bear in mind that Congress always has the power to change the underlying law, namely the Endangered Species Act. It is well within the realm of possibility that, two or ten or fifty years from now, the federal government could regret assuming the risk of future changes under ESA assurance agreements. For example, Congress could amend the ESA to require private landowners to bear the burden of endangered


species preservation, regardless of any preexisting agreement. An example of such a congressional change of heart took place during the meltdown of the savings and loan industry in the early 1980s. Displeased with cash incentives offered to healthy savings and loan associations (thrifts) that took on the obligations of failed thrifts, Congress passed legislation to eliminate the policy. The resulting litigation, brought by disgruntled thrifts, reached the Supreme Court in Winstar and allowed the Court to establish "the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here." Winstar provides the framework for analyzing the extent to which the federal government is free to alter the terms of its contractual obligations through subsequent legislation.

B. The Winstar Decision

1. Plurality Opinion in Winstar

Winstar is a high-stakes example of a federal bargain gone bad. Wearing its administrative hat, the federal government agreed to provide a generous subsidy to induce healthy thrifts to bail out failed thrifts. Wearing its legislative hat, the federal government then decided that it had given away too much for too little. Congress repealed the subsidy by passing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The impact of FIRREA was "swift and severe." Many formerly healthy thrifts immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators. Three such thrifts sued the government, seeking monetary damages under contract and constitutional theories. Despite the extraordinarily large sums of money involved, and despite the plaintiffs' lack of popular

69. Because the Federal Savings and Loan Insurance Corporation ("FSLIC") lacked the funds necessary to make up the difference between a failed savings and loan association's (thrift's) liabilities and assets, the Federal Home Loan Bank Board offered healthy thrifts a "cash substitute" to induce them to assume the failed thrifts' obligations. Id. at 849-50. The incentive was an accounting treatment that allowed "supervisory goodwill" to be counted toward regulatory capital requirements. See id. at 858.
71. Winstar, 518 U.S. at 857.
72. The Justice Department estimates that damages in similar suits will reach
appeal (savings and loan institutions), the Supreme Court held the government to its original bargain and made the government liable for damages for breach of the agreement.\textsuperscript{73} In particular, the Court focused on the unmistakability doctrine, the canon of contract construction providing that waivers of sovereign authority immunity must appear in unmistakable terms.\textsuperscript{74} The plurality found this doctrine inapplicable because the contract in the \textit{Winstar} case was a "risk-shifting agreement," which made it enforceable despite the unmistakability doctrine.\textsuperscript{75}

The government contended in \textit{Winstar} that contracts limiting the future exercise of government authority were disfavored and should be recognized only when the limitation on future regulatory authority is expressed in unmistakable terms.\textsuperscript{76} Justice Souter, writing for the plurality, concluded that this argument did not accurately construe the scope of unmistakability. While acknowledging that "a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress),"\textsuperscript{77}
the plurality found that the unmistakability doctrine does not apply unless enforcement of the government's contractual obligation would "block the exercise of a sovereign power of the Government."\textsuperscript{78}

If the contracts in \textit{Winstar} had blocked the government's power to modify banking regulations, or if the thrifts had sought an injunction against the application of the law to such regulations, the plurality indicated that the exercise of a sovereign power would have been blocked and the unmistakability doctrine would apply.\textsuperscript{79} The Court reasoned that the doctrine would not apply if performance of a contract would "require exercise (or not) of a power peculiar to the Government," however, if the contract can be "reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power. . . ."\textsuperscript{80} The plurality viewed the \textit{Winstar} contracts as "solely risk-shifting agreements" providing the thrifts with "nothing more than the benefit of promises by the Government to insure them against any losses arising from future regulatory change."\textsuperscript{81} The contracts therefore did not limit sovereign power, and the unmistakability doctrine did not apply.

According to the plurality, the "risk-shifting" nature of the agreements also defeated two additional government defenses: that the Federal Savings and Loan Insurance Corporation (FSLIC) and the Bank Board had no authority to bargain away Congress's power to change the law in the future,\textsuperscript{82} and that any such surrender of power had to be stated in express terms.\textsuperscript{83} The first argument is familiar to land use lawyers as invoking the constraint against bargaining away the police power. The government contended that this constraint applies to federal as

\textsuperscript{78} \textit{Id.} at 879. The plurality defined "sovereign power" to mean "a power that could otherwise affect the Government's obligation under the contract. The Government could not, for example, abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, government contracts of a class including that one, or simply all government contracts." \textit{Id.} at 879 n.22.

\textsuperscript{79} \textit{See id.} at 881.

\textsuperscript{80} \textit{Id.} at 880-81 (emphasis added).

\textsuperscript{81} \textit{Id.} at 881. The Court further observed that the "mere" fact that contracts may raise the cost of government regulation is not a reason to excuse the government from its contractual obligations. In an interesting twist on the "takings" doctrine, the Court stated: "Just as we have long recognized that the Constitution "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," so we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change." \textit{Id.} at 883 (citations omitted).

\textsuperscript{82} \textit{See id.} at 889.

\textsuperscript{83} \textit{See id.}
well as to state government contracts. The Court reiterated, however, that the government did not barter away any power; rather, it merely "adjust[ed] the risk of subsequent legislative change." The same response answered the contention that an express delegation is required before the exercise of sovereign authority can be restricted. The Court reasoned that this doctrine "simply has no application to the present case" because the government had not surrendered any sovereign power through its contract. In rejecting the argument based on "express delegation," the Court further supported its analysis by observing that the Bank Board and FSLIC had "ample statutory authority" to make promises regarding regulatory capital "and to pay respondents' damages if that performance became impossible."

The government's final argument rested on the judicially created sovereign acts doctrine, which mandates that "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." The government contended that, because FIRREA's alteration of the regulatory capital requirements was a public and general act, the regulation could not amount to a breach of the government's contract. This doctrine distinguishes between the roles of the government as contractor and the government as regulator, providing that the government as contractor cannot be held liable for the acts of the government as regulator. The Winstar plurality found, however, that these roles are not easily separated in the modern regulatory state. From a practical perspective, the plurality noted that "if... the sovereign acts doctrine permits the Government to abrogate its contractual commitments in 'regulatory' cases even where it simply sought to avoid contracts it had come to regret, then the Government's sovereign contracting power would be of very little use in this broad sphere of public activity... '[T]he right to make binding obligations is a competence attaching to sovereignty.'"

84. Id.
85. Id. at 889-90.
86. Id.
87. Horowitz v. United States, 267 U.S. 458, 461 (1925) (quoting Jones v. United States, 1 Ct. Cl. 383, 384 (1865)).
88. See Winstar, 518 U.S. at 892-93.
89. See id. at 894.
90. Id. at 894 n.38 (quoting Perry v. United States, 294 U.S. 330, 353 (1935)).
Finally, the plurality found that, even if FIRREA had qualified as public and general, the government would still have to meet the requirements of the common law doctrine of impossibility. Most significantly, the government would have to show that "the nonoccurrence of regulatory amendment was a basic assumption of these contracts."91 This would be difficult to demonstrate when a contract provides for a particular regulatory treatment because such an agreement "reflects the inescapable recognition that regulated industries in the modern world do not live under the law of the Medes and the Persians, and the very fact that such a contract is made at all is at odds with any assumption of regulatory stasis."92 Indeed, in some government contracts, "determining the consequences of legal change [is] the

One case interpreting and applying *Winstar*, *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1987), demonstrates clearly the pitfalls of the sovereign acts doctrine. *Yankee Atomic* involved fixed-price contracts between the government as a supplier of enriched uranium and purchasers of the enriched uranium. The government subsequently passed a law that required the users of the uranium to pay a special assessment intended to help with the cleanup of old uranium enrichment plants. Yankee Atomic claimed that the subsequent assessment violated its contracts with the government. The Federal Circuit upheld the assessment, finding that the contracts between Yankee Atomic and the government did not preclude the government from later imposing the assessment. See *id.* at 1580.

In order to determine whether the subsequent law constituted a "retroactive price increase" or "an exercise of the sovereign's taxing power," the court announced that it was obliged to apply the sovereign acts doctrine. *Id.* at 1573. To do so, the court stated, it had to decide whether the government was acting for the "purpose" of retroactively increasing the price of its earlier contracts, or if its "purpose" was to solve the problem of cleaning up enrichment facilities. *Id.* at 1575. Predictably, the court found that the law's "purpose" was to facilitate cleanup. *Id.* at 1577. It based this conclusion on the fact that the subsequent law did not target all contracting entities; rather, the law applied to all entities that purchased enriched uranium. *See id.* Because some contracting entities apparently re-sold the uranium, the affected class was not precisely the same as the contracting class. *See id.* at 1575-76. Based on this test, the government could satisfy the sovereign acts doctrine simply by expressing a public purpose for its subsequent legislative actions and then ensuring that the law affected either fewer or more parties than had entered into the contracts in question. This would not be a difficult drafting test.

*Yankee Atomic* should not, however, have a direct effect on the enforceability of ESA Assurances agreements. The contracts at issue in *Yankee Atomic*, unlike ESA assurance agreements, did not expressly provide that the government could not impose any additional liabilities on the parties. In *Yankee Atomic*, even the government admitted that the characterization of the subsequent law would have been different if the original contracts had "contained an express provision that precluded the government from imposing an assessment to fund decontamination and decommissioning costs." *Id.* at 1573. This observation should help to encourage parties to implementing agreements to specify precisely the future obligations undertaken by the government.

92. *Id.* at 906.
point of the agreements." The plurality concluded that such contracts allocating the risk of regulatory change would by definition fail the impossibility test. Thus, the Winstar plurality provides for a broad protection to private parties contracting with the federal government.

Only four of the nine justices, however, subscribed to the analysis described above. Justice Scalia, joined by Justices Kennedy and Thomas, concurred only in the result, arguing that the unmistakability doctrine did apply but that the contracts at issue met the doctrine's requirements. Chief Justice Rehnquist, joined by Justice Ginsburg, dissented, concluding that the thrifts did not meet either the unmistakability doctrine or the sovereign acts doctrine. Five of the nine justices thus agreed that the unmistakability doctrine applied to the Winstar contracts, although they disagreed on the effect of applying the doctrine. In predicting the future of federal contract enforceability under the ESA, therefore, these justices' views must be carefully analyzed.

2. Concurring Opinion in Winstar

Justice Scalia noted in his concurring opinion that, while the unmistakability doctrine should apply, its requirements had been met and the contract was enforceable against the government. Scalia disagreed with the plurality's conclusion that most of the government's sovereign defenses are eliminated if the contract can be characterized as risk-shifting. Scalia argued that, if the rationale of risk-shifting were accepted, "[v]irtually every contract" would fall within its scope. In fact, he contended that the Winstar contracts presented exactly the sort of situation in which the unmistakability doctrine has and should be applied: "where a sovereign act is claimed to deprive a party of the benefits of a prior bargain with the government."

As interpreted by the concurrence, however, the unmistakability doctrine does not cut a very wide swath. The doctrine has "little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." It simply reverses the usual presumptions with

93. *Id.* at 908.
94. See *Id.* at 907.
95. *Id.* at 937.
96. *Id.* at 920, 922.
97. *Id.* at 919 (emphasis in original).
98. *Id.* at 920.
99. *Id.*
respect to the impossibility of performance attributed to the party's own acts. When private parties contract, the private party is presumed liable if its own acts prevent it from performing. When a governmental party is involved, "it is simply not reasonable to presume an intent of that sort." Instead, it is presumed that the sovereign's "multifarious sovereign acts, needful for the public good," may keep it from performing its contractual obligations "unless the opposite clearly appears." The concurrence concluded that "[g]overnments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a common-sense way against that background understanding."

In applying the unmistakability doctrine to the contracts at issue in Winstar, however, the concurrence's analysis does not apply a standard much more rigorous than that of the plurality. The thrifts in Winstar claimed that "the Government quite plainly promised to regulate them in a particular fashion, into the future. They say that the very subject matter of these agreements, an essential part of the quid pro quo, was government regulation..." Unless the government was bound to that regulation, the element most essential to their consent to enter into the contract would be illusory. Justice Scalia agreed, reasoning that an interpretation that would allow the government to say "we promise to regulate in this fashion for as long as we choose to regulate in this fashion" would constitute an "absolutely classic description of an illusory promise." Therefore, "it is unmistakably clear that a promise to accord favorable regulatory treatment must be understood as (unsurprisingly) a promise to accord favorable regulatory treatment. I do not accept that unmistakability demands a further promise not to go back on the promise to accord favorable regulatory treatment." The concurrence concluded that, if the government plainly promises to regulate in a certain fashion in the future, the government does not have to "promise to keep its promise" for the unmistakability doctrine to be satisfied.

100. Id. (emphasis in original).
101. Id. at 921 (emphasis in original).
102. Id.
103. Id. (emphasis in original).
104. See id.
105. Id. (citation omitted).
106. Id. (emphasis in original).
107. Id. The concurrence summarily disposed of the government's remaining defenses, noting that the doctrines of "reserved powers" and "express delegation... have not been well defined by our prior cases." Id. In any event, reserved powers
The concurrence agreed with the dissent that, if the government had awarded favorable regulatory treatment in the short term but had made no commitment about the long term, the other contracting parties still would have received adequate consideration. In a statement important to the interpretation of long-term assurances under the ESA, Justice Scalia then argued that this rule did not apply to the facts at hand:

"It is quite impossible to construe these contracts as providing for only "short term" favorable treatment, with the long term up for grabs: either there was an undertaking to regulate respondents as agreed for the specified amortization periods, or there was no promise regarding the future at all—not even so much as a peppercorn's worth." 108

Thus, both the plurality and the concurrence emphasized that the government must keep its word; they were far less sympathetic to the position that the government should be allowed to change its mind.

3. Dissenting Opinion in Winstar

The dissent also applied the unmistakability doctrine but found that the agreements failed to meet its requirements. The dissent objected strenuously to the analysis employed by both the plurality and concurrence, charging that both opinions "changed the status of the Government to just another private party under the law of contracts." 109 The dissent observed that the danger in this view lies in its failure to protect "the federal fisc— and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government." 110

Thus, the dissent operated from an entirely different perspective than either the plurality or the concurrence in analyzing the enforceability of contract claims against the government. While the plurality and concurrence both approached the issue from the perspective of the rights of the non-governmental contracting parties to receive the benefits of their bargains, the dissent's analysis focused on the

"would have no force here," and "whatever is required by the 'express delegation' doctrine" is satisfied by the statutory authority granted to federal bank regulatory agencies. Id. at 923. The concurrence noted further that the "sovereign acts" doctrine "adds little, if anything at all, to the 'unmistakability' doctrine . . . ." Id.

108. Id. at 922.
109. Id. at 937.
110. Id.
government's need to exercise sovereign control in the public interest. The dissent further criticized the remaining justices' understanding of the substance of the unmistakability rule. While the plurality supported its conclusion that the unmistakability doctrine did not apply by noting that the contracts at issue did not "purport to bind the Congress from enacting regulatory measures," the dissent concluded that the unmistakability doctrine would only be satisfied if the contracts had surrendered the government's authority to enact or amend regulation affecting the other parties. Similarly, the dissent flatly disagreed with the concurrence's reasoning that the contracts implied consistent long-term regulatory treatment, arguing that "determining which promise the Government has made is precisely what the unmistakability doctrine is designed to determine."

4. **Summary of the Winstar Decision**

In each *Winstar* opinion, the applicability of the unmistakability doctrine to federal contracts is an important component of the analysis. While the dissent and the concurrence applied unmistakability and rejected the doctrine of risk-shifting adopted by the plurality, their analyses diverged significantly in the scope of the unmistakability doctrine as applied to federal contracts. Ultimately, more common ground was shared by the seven justices who voted to enforce the contractual provisions against the government, despite their divergence on the issue of when and whether the unmistakability doctrine will apply to government contracts. Therefore, in predicting *Winstar*'s future application, the factors emphasized by both the plurality and the concurrence will likely appear again as the majority view. Accordingly, a prudent nonfederal contracting party should attempt both to characterize the contract as a risk-shifting agreement and to satisfy the plurality's view of unmistakability.

111. The dissent also discounted the plurality's practical concern that a broad unmistakability doctrine would impair the government's ability to enter into contracts by observing that "[t]he Government's contracting authority has survived from the beginning of the Nation with no diminution in bidders, so far as I am aware, without the curtailment of the unmistakability doctrine announced today." *Id.* at 929.

112. *Id.* (quoting plurality opinion).

113. *See id.*

114. *Id.* at 935.

115. In *Yankee Atomic*, the court concluded that "the unmistakability doctrine applies in the present case" in "respect[ ] of the views of the five justices who stated
C. Effect of Winstar on the ESA Assurance Agreements

The lack of unanimity in the justices' views, particularly with respect to the unmistakability doctrine, has created uncertainty in determining how broadly Winstar will be applied. Some predict that the ruling will be limited purely to contracts in the savings and loans field, while others claim that the case represents a "broad shift in contract law, dropping the government from an exalted perch to the level of any private citizen." As a result of this uncertainty, it is important that parties relying on ESA assurances ensure that their agreements address the concerns raised in the Winstar decision. The following discussion will compare ESA assurances to the savings and loan agreements in Winstar and will conclude by suggesting how parties contracting with the government may characterize their agreements to ensure meeting the dictates of Winstar.

1. Does Winstar Apply to ESA Assurance Agreements?

The narrow issue addressed by Winstar is "the enforceability of contracts between the Government and participants in a regulated industry, to accord them particular regulatory treatment in exchange for their assumption of liabilities that threatened to produce claims against the Government as insurer." The analogy with ESA assurance agreements is not perfect because property owners are not, strictly speaking, a "regulated industry," and the government does not act as an "insurer" in the technical sense. Under a broad reading, however, property owners and other interests seeking a permit

that the application of the doctrine is unrelated to the nature of the underlying contracts." Before discussing unmistakability, however, the court first attempted to apply the "risk-shifting" doctrine, to satisfy Winstar's plurality. The court's analysis thus supports the conclusion that the logical way to analyze a contract under Winstar is to determine whether both the plurality's risk-shifting doctrine and the concurrence's unmistakability doctrine have been satisfied. See id. at 1579. Several recent cases have noted that the scope of unmistakability is "somewhat unclear" after Winstar. See, e.g., Tamarind Resort Ass'n v. Virgin Islands, 138 F.3d 107, 112 (3d Cir. 1998); Pitney Bowes, Inc. v. United States Postal Service, 27 F. Supp. 15, 23 (1998).

116. Grunwald, supra note 67. The Justice Department is not only defending "125 other Winstar-style lawsuits filed by S&Ls and investors" but is also involved in "hundreds of additional lawsuits, claiming the government has backed out on deals in areas stretching from subsidized housing to nuclear waste to satellite launches." Id. The Justice Department's civil division has asked Congress for an additional $64 million, equivalent to half the division's budget, just to litigate the thrift cases. See id.

117. Winstar, 518 U.S. at 843.
appear to meet the Court's criteria. Property owners are certainly regulated by the ESA, even if they are not considered a regulated industry. An assurance's "particular regulatory treatment" provision allows plans to proceed without future liability with respect to endangered species. The assumption of liabilities is the private parties' agreement to undertake significant preservation efforts over a long period of time or to take on obligations that otherwise would not be required by law.

An ESA analogy can also be made to government as "insurer." In the case of HCPs, the government could be viewed as providing insurance that any future species protection requirements will be paid for by the government, or at least by a party other than the permit-seeking party. Candidate Conservation Agreements insure that landowners will not be required to take additional actions to protect species listed in the future, and Safe Harbors Agreements insure that landowners can later modify their property even if endangered species are present. The strongest analogy can be made when permit-seeking parties take on obligations that are not required by law\textsuperscript{18} because such agreements involve parties taking on claims that would otherwise accrue against the government. If private parties did not agree to take these steps, the ESA would require the government to list and protect endangered species in the future.\textsuperscript{19}

Numerous other factors analyzed in the \textit{Winstar} decision support this interpretation of the government as an insurer, based on similarities between ESA assurances and the promises made to thrifts. First, the plurality emphasized that the government's promise of favorable accounting treatment was "the primary inducement" for the thrifts' acquisition of failing institutions.\textsuperscript{2} Because FSLIC had insufficient funds to make up the difference between a failed thrift's liabilities and assets, the Bank Board had to offer a "cash substitute" to induce the
healthy thrifts to assume the obligations of the failed thrifts. The plurality noted, "[A]n acquiring institution would reasonably have wanted to bargain for such treatment." This favorable treatment was "expressly arranged" between the regulators and the acquiring institutions. Federal assurances under the ESA follow this model quite closely. Wildlife agencies lack sufficient resources to ensure endangered species protection without private assistance; therefore, they need to induce private landowners and other permit-seekers to help reach their goals. Permit-seeking parties generally would not take on long-term obligations, often in excess of legal requirements, if long-term federal assurances were not provided as an inducement. These obligations are expressly arranged through implementing agreements.

Second, the Winstar plurality emphasized that nothing contained in the contracts purported to bar the government from changing the way that it regulated thrifts. Rather, the contracts bound the government to recognize the accounting inducements over the amortization period reflected in the contracts. Contracts implementing federal assurances under the ESA similarly commit the government not to require additional species protection over the term specified in the agreement. Implementing agreements do not attempt to prevent Congress from amending the ESA or even from reneging on the underlying ESA assurances policies.

According to the plurality, when these conditions are met the government's assurances should be read as promises insuring the promisee against losses arising from regulatory changes. This interpretation is "especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the

121. Id. at 849-50.
122. Id. at 853-54.
123. See, e.g., Ann Gibbons, Mission Impossible: Saving All Endangered Species, 256 Sci. 1386, 1386 (1992) ("[In 1992], the FWS had $42.3 million and the National Marine Fisheries Service had $8.2 million to manage 648 species. For comparison, notes Michael Bean, chairman of the wildlife program at the Environmental Defense Fund, the federal government spent far more this year—$300 million—to support state conservation programs for game and sportfish. . . . As a result, government officials have to make a wrenching Sophie's choice—to pick which species they will help to survive.").
125. See Winstar, 518 U.S. at 868.
126. See id. at 868-69.
Similarly, parties operating under the ESA always must be aware that legal change may be lurking, particularly in light of Congress’ numerous (if so far unsuccessful) efforts to reauthorize the law since 1992. Viewing the government’s ESA assurances as a promise to insure permit-seekers against losses arising from a change in the assurances policies is consistent with the plurality’s analysis of the contracts at issue in *Winstar*.

The plurality also rejected the cost to government as a limiting factor. While the court’s decision not to apply the unmistakability doctrine to risk-shifting agreements may deter needed government regulation by raising its costs, “all regulations have their costs . . . .” Just as the Constitution bars government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” the plurality reasoned, “we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change.” Similarly, the fact that the government may incur increased species protection costs pursuant to ESA assurances if unforeseen circumstances arise in the future should not prevent the enforcement of the assurances.

The statutory authority behind the government’s contracts was an additional factor that the plurality considered, both in the reasoning supporting its conclusion that the government should not be allowed to shift costs to private parties and in finding that the contracts passed the test of express delegation. Justice Souter noted that the organic statute creating FSLIC “generally empowered ‘it to make contracts’, and that a later statute specifically authorized it to employ the accounting practices established by contract. Although the

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127. *Id.* at 869.
128. See *Kriz*, *supra* note 34; *Gauvin*, *supra* note 34.
129. *Id.* at 883.
130. *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).
131. *Id.* Justice Breyer’s separate concurring opinion also emphasized this point, stating that it would be “unsatisfactory” to “draw the line—i.e., to apply a more stringent rule of contract interpretation—based only on the amount of money at stake . . . .” *Id.* at 917.
132. *See id.* at 883.
133. *See id.* at 890-91. The dissent also concluded that the government’s statutory authority defeated any claim that express delegation had not been satisfied. *See id.* at 923.
134. *Id.* at 890 (quoting 12 U.S.C. § 1725(c) (1988) (repealed 1989)).
federal wildlife agencies are also generally empowered to make contracts,136 the ESA assurances are currently authorized by regulation, rather than by statute. The No Surprises policy is contained in a final rule, while the Safe Harbor policy and the Candidate Conservation policy are contained in proposed rules.137 Statutory support for the assurances can be found in Congress’s declared policy in the ESA "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."138 The HCP provisions of the ESA allow the Secretary to prescribe terms and conditions to accompany permits139 and further authorize conservation plans to contain "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan."140

These statutory provisions should be interpreted in the context of the HCP’s congressional conference report, which states:

[The Secretary may... approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan . . . . Permits of 30 or more years duration may be appropriate in order to provide adequate assurances to the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land.141

136. Agencies of "the United States can, without the authority of any statute, make a valid contract." Jessup v. United States, 106 U.S. 147, 152 (1882); accord Moses v. United States, 166 U.S. 571, 585-87 (1897). The federal executive branch may "within the sphere of the constitutional powers confided to it . . . enter into contracts" so long as those contracts are "not prohibited by law, and [are] appropriate to the just exercise of" the executive's other statutory or constitutional powers. United States v. Tingey, 30 U.S. (5 Pet.) 115, 128 (1831). The FWS' enabling statute provides that it may "take any such steps as may be required for the development, management, conservation, and protection of fish and wildlife resources." 16 U.S.C. § 742(f) (1994). This authority thus includes the power to enter into contracts.

137. See supra notes 50 and 57.

138. 16 U.S.C. § 1531(c)(1) (1994); see also Bosselman, supra note 51, at 721 n.64.

139. 16 U.S.C. § 1539(a)(1), (a)(2)(b) (1994) ("The permit shall contain such terms and conditions as the Secretary deems necessary and appropriate to carry out the purposes of this paragraph . . . .").


While this statutory authorization may not be as explicit as that given to FSLIC in *Winstar*, it should be sufficient to show that the agencies are within their statutory authority in granting ESA assurances.

*Winstar* further addressed the "sovereign acts" doctrine, which provides that "public and general" acts of the sovereign do not constitute a violation of private contract rights. Applying *Winstar*’s requirements with respect to the sovereign acts doctrine requires an analysis of a wide range of views. Justice O'Connell did not join the plurality in concluding that FIRREA was not a public and general law that could relieve the government of its contractual obligations under the sovereign acts doctrine. She rejoined the opinion when the plurality found that, regardless of whether the law was "public and general," the government did not satisfy its burden of showing that its performance of the contract was impossible. Because the three concurring justices gave the entire sovereign acts doctrine short shrift, it seems that a majority of the court would enforce a government contract under the sovereign acts doctrine if the government could not meet the impossibility standard.

The impossibility standard requires the government to show that the passage of the statute preventing the government from complying with its contract was "an event contrary to the assumptions on which the party agreed . . . ." In the case of ESA assurances, the parties’ agreement is explicitly predicated on the assumption that the law might change. In such agreements, as in the contracts with the thrifts, "determining the consequences of legal change was the point of the agreement." Similarly, the concurrence’s standard for establishing unmistakability, which requires a showing that the government’s agreement to regulate was "the very subject matter" of the agreement, would be met by the permit-seeking parties’ reliance on the government’s assurances regarding species protection.

As a final consideration, when reviewing the overall substance of the contracts at issue, parties relying on ESA assurances may actually have a stronger case than the thrifts in *Winstar*. Even while upholding the thrifts in their contractual

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2860, 2871; see also Thornton, *supra* note 5, at 624-25; Bosselman, *supra* note 51, at 724.

142. See *supra* note 74.
144. *Id.* at 904.
145. *Id.* at 908.
146. *Id.* at 921 (emphasis in original).
claims, the Supreme Court in *Winstar* acknowledged that Congress passed FIRREA because it recognized that the government had been giving without receiving. As the Court noted, the law reflected a congressional judgment that "[t]o a considerable extent, the size of the thrift crisis resulted from the utilization of capital gimmicks that masked the inadequate capitalization of thrifts."\(^{147}\) In contrast, ESA assurance policies provide that private parties do contribute something of value by taking on long-term obligations that will benefit species, including in some cases unlisted species that would not otherwise be subject to any legal protection.\(^{148}\)

On the other hand, when taking ultimate outcomes into account, the ESA addresses the possibility of ultimate extinction and not just monetary loss. ESA assurance policies presume that, if unforeseen circumstances arise that put a species at risk, the public will pay for additional protection measures. It is possible, however, that the law could be amended to renege on assurances because a species moved to the brink of extinction and federal agencies lacked sufficient resources to reverse the process.\(^{149}\) If the public fails to meet its obligation to protect species, the temptation to enlist private resources to prevent extinction could be strong. Thus, the ultimate enforceability of ESA assurances will depend on the extent to which future courts adhere to *Winstar*’s admonition that "the Government may [not] simply shift the costs of legislation onto its contractual

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147. *Id.* at 857.

148. Some environmental organizations and other critics of the HCP process might disagree with this observation. Critics have charged "(1) that HCPs may undermine species recovery because they can allow for impacts to species that are not fully offset, (2) that HCPs are developed without adequate biological information or scientific review, (3) that small-scale HCPs can lead to piecemeal habitat destruction and fragmentation, and (4) that meaningful public participation occurs infrequently." PETER KAREIVA ET AL., USING SCIENCE IN HABITAT CONSERVATION PLANS 6 (1998). The most comprehensive review of the scientific underpinnings of HCPs to date concludes that "[a]lthough our analysis points to several shortcomings of HCPs, we acknowledge that the HCP process is new, complex, and difficult. In general, the FWS and NMFS are doing a good job with the data that are available."

149. Of course, the wildlife agencies’ budgetary limitations have this *de facto* effect on a continual basis. See, e.g., Wilcove et al., supra note 29, at 2 ("The most common explanation for why more endangered species aren't improving is a lack of money .... Presently, only a small fraction of the protected species are improving. The decline in the amount of dollars available per species makes it unlikely that significant increases in the number of improving species will occur in the foreseeable future.").
partners . . . "\textsuperscript{150}\)

In summary, parties to implementing agreements that incorporate ESA assurances should ensure that the contracts meet the requirements of both the \textit{Winstar} plurality and the concurrence. The crux of the plurality's decision is that the unmistakability doctrine will not apply to a contract if the agreement merely shifts the risk to the government. The concurrence concludes that, although the unmistakability doctrine does apply, the contract will still be enforceable if the very subject matter of the agreement was the government's agreement to be bound as to that regulation.

2. \textit{Advice to Parties to Implementing Agreements}

As a practical matter, HCP and Candidate Conservation agreements should state clearly that the government must pay for any new species protection requirements not specified by the agreement. If a future law removes the contracting agency's authority to exempt permit-holders from the costs of future protective measures, the parties will have to show that the government accepted the costs of such future measures when it entered into the contracts. Safe Harbors agreements should specify the government's obligation either to allow land to return to baseline conditions or to reimburse landowners for additional obligations. Meeting these standards should not be difficult because they are intrinsic to ESA assurances.

Agreements should also show clearly that government assurances were an inducement to enter into the contract, and that private parties would not have taken on the obligations contained in the agreement without these assurances. To satisfy the concurring \textit{Winstar} justices, parties should also show that the promise to regulate in a certain way was the very subject matter of the agreement. When applicable, agreements should state explicitly that obligations exceed those that could be required by law. As discussed above, this will make the contract more closely resemble a situation in which claims could come back against the government as insurer.

These precautions cannot remove entirely the risk of contracting with government agencies. Because \textit{Winstar}'s analysis is so fragmented, the Supreme Court (and lower courts interpreting the decision) could move in a number of directions in interpreting ESA implementing agreements. Furthermore, to

\textsuperscript{150} \textit{Winstar}, 518 U.S. at 883.
evaluate the enforceability of implementing agreements as they are currently negotiated, it is necessary to address one other interesting wrinkle: the FWS' insistence that agreements exclude the possibility of money damages.¹⁵¹

D. Winstar and the Availability of Money Damages

The availability of money damages is the most significant difference between the Winstar contracts and ESA assurance agreements. Winstar involved suits for money damages,¹⁵² although the contracts at issue in Winstar apparently did not specify that a damages remedy would be available.¹⁵³ Nonetheless, the plurality reasoned that an agreement between the government and a regulated agency "is usually interpreted as one to pay damages if performance is prevented rather than one to render a performance in violation of law."¹⁵⁴ The plurality thus assumed the necessary fact that upheld the thrifts' argument. The thrifts "simply claim that the Government assumed the risk that subsequent changes in the law might prevent it from performing, and agreed to pay damages in the event that such failure to perform caused financial injury."¹⁵⁵ Finding that "a requirement to pay money supposes no surrender of sovereign power,"¹⁵⁶ the Court construed the contracts as including a "risk-shifting component that may be enforced without effectively barring the exercise of [a] power [peculiar to the Government] . . . ."¹⁵⁷ The assumption that the contracts allowed for damages thus was the basis of the plurality's conclusion that the unmistakability doctrine should not apply.¹⁵⁸

¹⁵¹. See infra Part II.D.
¹⁵². The thrifts sued "the United States in the Court of Federal Claims, seeking monetary damages on both contractual and constitutional theories." Id. at 858.
¹⁵³. In fact, with respect to one of the thrift parties, the Court explicitly discussed "the failure to specify remedies in the contract . . . ." Id. at 869 n.15. As one commentator has noted, "despite Justice Souter's insistence, there is no indication in the record that the FHLBB, the FSLIC, or 'the Government' ever 'agreed to pay damages in the event that such failure to perform caused financial injury.' It would be mere question-begging on Justice Souter's part to accept this approach to the problem, but accept it he does." Michael P. Malloy, When You Wish Upon Winstar: Contract Analysis and the Future of Regulatory Action, 42 ST. LOUIS U. L.J. 409, 442 (1998) (footnotes omitted).
¹⁵⁴. Winstar, 518 U.S. at 869-70 (quoting RESTATMENT (SECOND) OF CONTRACTS § 264 cmt. a (1981)).
¹⁵⁵. Id. at 894.
¹⁵⁶. Id.
¹⁵⁷. Id. at 880.
¹⁵⁸. The dissent pointed out this assumption, observing that "the plurality's reading of additional terms into the contract so that the contract contained an
If the implementing agreements for ESA assurance policies were silent as to remedies, the courts might assume—as the Supreme Court did in *Winstar*—that the parties had bargained for damages. This would in turn allow the courts to conclude that the agreements were risk-shifting. ESA assurance policies are not, however, silent. The current standard-form implementation agreement includes a "no monetary damages" clause. As a result, the risk-shifting argument may be foreclosed. Thus, if these private parties' only remedy for breach is to sue for specific performance of the agreements, federal agencies could argue that the agreements constitute an impermissible surrender of sovereignty. In particular, if ESA assurance policies were amended to impose additional obligations on landowners, affected landowners would have to seek specific performance to enforce the federal agencies' pre-amendment agreement not to seek additional obligations. A reviewing court could find that the landowner was requesting "an exemption from the new law," bringing the landowner outside the protection of *Winstar*'s plurality.

If it is the FWS' intent to preserve maximum future flexibility, the implementing agreements' preclusion of monetary damages serves its purpose well. It allows the FWS to placate nonfederal parties involved in implementing agreements by promising long-term protections while ensuring that, in fact, these long-term obligations will only last as long as the underlying statutory authority. This is not, however, the only implication of this policy. By eliminating money damages, the government has limited contracting parties to seeking specific performance in order to enforce implementation agreements. Unfortunately for private parties, this may allow the federal government to invoke sovereign immunity against suits for the specific performance of contracts. As the following section will discuss, immunity to specific performance may shield the federal

unstated, additional promise to insure the promisee against loss arising from the promised condition's nonoccurrence seems the very essence of a promise implied in law, which is not even actionable under the Tucker Act ..." *Id.* at 930.

159. See Template IA, *supra* note 8, § 12.1.a. While the FWS and the NMFS have diverged from the template implementation agreement on numerous occasions, they have not been willing to abandon the "no monetary damages" provision. The agencies claim that the clause is a response, not to *Winstar*, but the Anti-Deficiency Act, which precludes federal agencies from spending funds without a Congressional appropriation. Personal Communication with Dep't of the Interior, Associate Solicitor for Conservation and Wildlife (May 1998).

160. *Id.* at 881 ("Nor do the damages respondents seek amount to exemption from the new law . . . ").
government from enforcement of its obligations even if the underlying ESA assurances policies do not change.

III

FEDERAL SOVEREIGN IMMUNITY TO THE SPECIFIC PERFORMANCE OF CONTRACTS

A. The Unsettled Relationship Between the Administrative Procedure Act and the Tucker Act

1. Section 702 and the Tucker Act

The federal government has been immune from the specific performance of contracts since the nineteenth century, based on the premise that specific performance would unduly interfere with government operations. This rule has come into doubt, however, since the amendment of the Administrative Procedure Act (APA) in 1976. Section 702, added to the APA by this amendment, provides as follows:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . .

This provision appears to waive sovereign immunity to specific performance. The unsettled issue in this area, however, arises from the following exception within section 702: “Nothing herein . . . confers authority to grant relief if any other statute that grants consent to sue expressly or impliedly forbids the relief which is sought.”

This exception may affect section 702’s apparent waiver of sovereign immunity because the Tucker Act may constitute a statute that forbids specific performance. The Tucker Act, which waives the federal government’s sovereign immunity to contract claims, provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claims against the United States founded either upon the Constitution, or any

161. See Seamon, supra note 66, at 155.
163. 5 U.S.C. § 702 (1994). (emphasis added). Claims under § 702 must be founded on agency action “for which there is no other adequate remedy in a court . . . .” Id. § 704.
Act of Congress or any regulation of an executive department, 
or upon any express or implied contract with the United States... .165

This waiver is not complete, however, because the courts 
have held that the Tucker Act does not authorize specific relief, 
although this prohibition is not incorporated within its express 
language.166 Therefore, if the Tucker Act restricts the scope of 
section 702's waiver by impliedly forbidding specific performance 
of federal contracts, private parties to ESA implementation 
agreements would be foreclosed from pursuing specific 
performance. If the Tucker Act does not apply, then section 702 
would grant private parties the right to obtain specific 
performance from federal agencies, even if money damages were 
not available.

The federal circuit courts of appeals disagree as to whether 
the Tucker Act forbids specific performance of a contract under 
section 702.167 This disagreement is largely based on the 
disparity between the statutory language of section 702 and its 
legislative history. With respect to the language of the statute, it 
is important to bear in mind that the Tucker Act establishes 
jurisdiction for claims based on the Constitution, federal 
statutes, and federal regulations, as well as on contracts with the 
government. If the Tucker Act were read to preclude specific 
relief for all of the claims for which money damages are available 
under all of these jurisdictional bases, then section 702, which 
only authorizes specific relief, would be largely superfluous. 
Very few, if any, claims would be cognizable under the APA 
under such a reading. Based solely on the text of the two 
statutes, therefore, it would appear that the Tucker Act does not 
impliedly forbid any type of specific relief under the APA.168

The legislative history of the 1976 amendment that led to the 
adoption of section 702, however, indicates that Congress 
intended to retain traditional sovereign immunity to contractual 
specific performance. The committee reports to the 1976 
amendment state that the exception contained within section 
702 is "intended to foreclose specific performance of government 
contracts. In the terms of the proviso, a statute granting consent

166. See United States v. King, 395 U.S. 1, 3 (1969); see also Seamon, supra note 
66, at 182-83.
167. See infra Part III.C.
168. See Seamon, supra note 66, at 183; see also Vipul N. Nishawala, Sovereign 
Immunity, Judicial Review, and the Notion of "Entitlement" in the Administrative 
to suit, i.e. the Tucker Act, 'impliedly forbids' relief other than the remedy provided by the Act."\(^{169}\)

There are three possible interpretations of the conflict between the apparent purpose of section 702 and the legislative history of this amendment. Based on the textual interpretation described above, one could conclude that the Tucker Act does not "forbid" any specific performance actions under section 702, whether based on the Constitution, federal statutes or regulations, or federal contracts. Under this theory, implementation agreements could be effectively enforced. Alternatively, the legislative history of section 702 suggests that contract claims under the Tucker Act may be singled out from other causes of action and barred from specific performance, leaving parties with no remedy if the implementation agreement were breached. Finally, the broadest possible reading of the legislative history would lead to the conclusion that the Tucker Act prohibits specific performance of any claim based on the Constitution, statute, regulation, or contract. This interpretation would also leave private parties to a federal contract with no remedy in the event of breach.

As discussed below, the Supreme Court has restricted this range of possible interpretations only to the extent of holding that specific performance is possible in some non-contractual settings. It has further hinted, but not definitively decided, that specific performance may be possible in some contractual settings. While the Supreme Court has eliminated the possibility that the Tucker Act prohibits specific performance in all contexts, it has not established which of the first two possible interpretations of the Tucker Act and section 702 is appropriate. Unfortunately, the Court's lack of clarity regarding the scope of sovereign immunity to specific performance has set the stage for confusion and division in the federal courts that have considered this issue in the context of contracts with the federal government.

2. The Supreme Court: Bowen v. Massachusetts

In *Bowen v. Massachusetts*,\(^ {170}\) the Supreme Court held that Massachusetts could sue the United States Department of Health and Human Services under the APA in federal district court for specific relief under the federal Medicaid statute.

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169. Seamon, *supra* note 66, at 184 (citing S. REP. No. 94-996, at 11-12 (1976)).
Interestingly, the issue of whether the Tucker Act impliedly forbids actions for specific relief did not arise. The case is nonetheless important to the enforcement of ESA assurances agreements because of dicta suggesting that specific relief might be possible when the federal government breaches a contract.

The Bowen Court first explored whether the action was an action for specific relief as claimed by Massachusetts in seeking district court jurisdiction, or whether Massachusetts was really seeking money damages. If the action was for specific relief, the district court would have jurisdiction under the “other than money damages” provision of section 702. If the relief requested really amounted to money damages, the federal government argued that the Claims Court would have exclusive jurisdiction under the Tucker Act.

Because Massachusetts’ request for specific relief would result in reimbursement of funds, the federal government argued that the relief actually constituted money damages under section 702. The Court held that money damages are a sum of money “given to the plaintiff to substitute for a suffered loss, whereas specific remedies ‘are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.’” Although an award of money is usually an award of damages, a money award may also constitute a specific remedy: the Court noted that “[c]ourts frequently describe equitable actions for monetary relief under a contract in exactly those terms.” The Court concluded that the possibility of money changing hands did not transform the relief sought from specific relief to money damages.

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171. Id. at 882.
172. Id.
173. The Tucker Act provides the Claims Court with concurrent jurisdiction over claims against the United States for amounts up to $10,000. 28 U.S.C. § 1346(a)(2) (1994).
174. The Secretary of Health and Human Services had refused to reimburse Massachusetts for a category of its expenditures under its Medicaid program. See Bowen, 487 U.S. at 882. Massachusetts requested declaratory and injunctive relief and asked that the order of the Departmental Appeals Board be set aside. See id. at 887. A resolution in the state’s favor, while “affect[ing] far more than any money past due,” id. at 889 (quoting Massachusetts v. Secretary of Health and Human Services, 816 F.2d 796, 799 (1987)), would also require the Secretary to pay money to Massachusetts. See id. at 893.
175. Id. at 895 (quoting Maryland Dep’t of Human Resources v. Department of Health and Human Services, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.) (internal citations omitted)).
176. Id.
177. Id. at 900-01. The government also argued unsuccessfully that section 704 of the APA barred the state’s claim. Section 704 provides that “agency action[s] made
3. **The Application of Bowen by Federal Appeals Courts to Contractual Claims**

Bowen was not based on a contract claim and did not consider the "impliedly forbids" exception contained in section 702. Thus, it is not directly applicable to ESA assurances agreements, which are contractual in nature. On the other hand, the case does not foreclose an analysis of contracts that follows Bowen's analysis of a statutorily-based claim. In fact, the *dicta* quoted above, observing that "equitable actions for monetary relief under a contract" are the types of actions for specific relief that a district court might hear, seem to invite such an interpretation.

In *Hamilton Stores, Inc. v. Hodel*, the Tenth Circuit followed this logic in applying Bowen to a specific performance claim arising out of a contract. In *Hamilton Stores*, the court held that the district court had jurisdiction to hear Hamilton Stores' claims for injunctive, mandamus, and declaratory relief under a concessions contract with the National Park Service. The government again did not argue that the Tucker Act impliedly forbids specific performance under the APA's section 702 waiver of sovereign immunity. As was the case in Bowen, the government argued instead that the action was a "disguised action for monetary damages," cognizable only in the Court of Claims.

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reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (1994) (emphasis added). The Court rejected the government's argument that the availability of monetary relief in the Claims Court constituted an "adequate remedy" under section 704. The Court observed that the parties would be involved in a "rather complex ongoing relationship," Bowen, 487 U.S. at 905, and concluded that the "naked money judgment" available from the Claims Court would not be an adequate substitute for prospective relief. See id. at 880. This argument could help parties to ESA assurance agreements who are also in a "complex ongoing relationship" with the federal government in which money damages may not constitute adequate relief in some circumstances. A number of ESA implementation agreements cover millions of acres of land and have terms of 50 years or more. The benefit of the bargain in these agreements is much more complex than the right to develop identified property. Rather, the HCP establishes a set of land management standards applicable to all of the property in the HCP. The primary objective of the landowners and local government participants is long-term regulatory certainty and predictability that will allow them to accomplish other personal and societal objectives—contract rights that are not easily satisfied by a money judgment.

178. Id. at 895.
179. 925 F.2d 1272 (10th Cir. 1991).
180. Id. at 1274.
181. Id. at 1277.
182. Id.
The Tenth Circuit's decision in *Hamilton Stores* thus focused on whether the claim was a disguised claim for monetary relief, noting that "we scrutinize claims against the United States to be certain that the plaintiff has not endeavored to 'transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders payment of the money.'"\(^{183}\) The Tenth Circuit determined that the "primary purpose and essential objective" of the suit was to protect Hamilton Stores' preferential right under the contract, not to require the payment of compensatory damages.\(^{184}\) As a result, the suit was not an action for money damages.

The court further found that "[r]ecognition that [Hamilton Stores'] action against the Secretary is not an action for money damages resolves the issue of the waiver of sovereign immunity raised by the government."\(^{185}\) The court's reasoning was based on *Bowen*'s finding that "the Claims Court's jurisdiction over claims against the United States for more than $10,000, 'is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court.'"\(^{186}\) The Tenth Circuit then stated that "[e]ven if money damages for a given claim are only available in the Claims Court, the Tucker Act does not preclude the same claimant from seeking nonmonetary relief in a district court."\(^{187}\) Although the Tenth Circuit's analysis did not explicitly consider the "impliedly forbids" language in section 702, this portion of the opinion has been described as "authoritatively address[ing]" the "impliedly forbids" exception because the statement was "essential to holding that the district court had jurisdiction . . . ."\(^{188}\) The result of *Hamilton Stores* is that parties to ESA assurances agreement in the Tenth Circuit have a strong argument that they can sue federal agencies for specific performance.

This argument may not necessarily help parties in other parts of the country. While acknowledging the logic of *Hamilton Store's* reasoning under *Bowen*, other circuits have chosen to follow their own precedent regarding the application of section 702 until otherwise clearly directed by the Supreme Court. In

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183. *Id.* at 1278 (citation omitted).
184. *Id.* at 1279.
185. *Id.* at 1278 n.12.
186. *Id.* at 1278 n.11 (quoting *Bowen*, 487 U.S. at 910 n.48).
187. *Id.*
188. Seamon, supra note 66, at 186.
Transohio Savings Bank v. Office of Thrift Supervision, a case with facts resembling Winstar, the D.C. Circuit found that the district court did not have jurisdiction over contractual specific performance claims. The court acknowledged that Bowen did not even hint that the broad scope of the APA's sovereign immunity waiver or the nonexclusivity of Claims Court jurisdiction varies according to whether the claim involves a contract. Indeed, the court noted that language in Bowen seemed to imply that the contractual nature of a claim would not change the scope of section 702. The court even agreed with the reasoning of the private party plaintiff:

[Re]ading § 702 as waiving sovereign immunity for contract claims seeking specific relief would seem to establish a coherent and complementary regime in which the Claims Court and federal district courts share a body of substantive law, but where the appropriate forum is determined by the relief sought: suits against the government for damages go to Claims Court, while those seeking specific relief go to district court. . . . Although specific performance might not always be wise, it is hard to see the justification for an absolute bar on specific performance since specific performance is available when the contractual breach rises to statutory or constitutional violation.

Despite all of these factors and the fact that "Bowen, in sum, raises the possibility that in resolving the relationship between the APA and the Tucker Act, courts— including this one— have been leaning a bit too heavily toward the Tucker Act," the court ruled against the effort to obtain specific performance. Because Bowen "did not involve a contract and did not address the 'impliedly forbids' limitation on the APA's waiver of sovereign immunity," the court did not feel compelled to reject its prior rulings. "Without more certain direction from the Supreme Court," the court concluded, "we decline to overrule this Court's very specific holdings that the APA does not waive sovereign immunity for contract claims seeking specific relief."

Recently, the Ninth Circuit, which had previously reached a decision similar to Transohio, explicitly considered the

189. 967 F.2d 598 (D.C. Cir. 1992).
190. Id. at 612.
191. Id. at 613.
192. Id.
193. Id. (emphasis added).
194. In North Star Alaska v. United States, 14 F.3d 36 (9th Cir. 1994), the Ninth Circuit held that the district court did not have jurisdiction over a contractually-based claim. The court observed that *Bowen could be interpreted as taking a more
application of the "impliedly forbids" exception to contracts. In *Tucson Airport Authority v. General Dynamics Corp.*, the court distinguished between statutorily based claims such as the claim in *Bowen* and claims based on contract, holding that the Tucker Act precludes a waiver of sovereign immunity under section 702 for actions to obtain specific performance of a contract. The court in *Tucson Airport* reviewed the federal government's contractual obligation to indemnify General Dynamics for hazardous waste cleanup obligations arising from aircraft works during World War II. General Dynamics invoked section 702 as the source of the government's waiver of sovereign immunity. The court found that General Dynamics' action for specific performance did not constitute a claim for money damages.

Under an analysis limited to the *Bowen* factors, these findings would have closed the inquiry and specific performance would have been available. The court stated, however, that "our determination that General Dynamics does not have an adequate remedy elsewhere does not end our discussion. General Dynamics must still show that its claims are not 'impliedly forbid[den]' under Section 702." Based on its own jurisprudence, without reference to *Bowen*, the court concluded summarily that "in all other contract claims [exceeding $10,000], however, [the Tucker Act] gives the Court of Federal Claims exclusive jurisdiction to award money damages, and 'impliedly forbids' declaratory and injunctive relief and precludes a Section 702 waiver of sovereign immunity." While stating its regret

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expansive view of district court jurisdiction under the APA than we have previously recognized . . . . This suggests that contractual actions seeking equitable relief could be heard in district court under the APA." *Id.* at 38. Citing *Transohio Savings Bank v. Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992), the court concluded, however, that it would not overrule its previous holdings without more certain direction from the Supreme Court. *Id.*

195. 136 F.3d 641 (9th Cir. 1998).


197. See *Tucson Airport*, 136 F.3d at 644-45.

198. *Id.* at 645. Citing *Bowen*, the court further found that General Dynamics did not have an adequate remedy in the Court of Federal Claims under section 704. *Id.* at 645-46.

199. *Id.* at 646 (alteration in original).

200. *Id.* (quoting *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir. 1985)). The court also cited *United States v. King*, 395 U.S. 1, 3 (1969), a short opinion in which the Supreme Court merely affirmed that the jurisdiction of the Court of Claims excludes equitable matters. The claim in *King* did not arise from a
that its decision would impose an inefficient and unfair burden on General Dynamics, the court concluded that “[t]he equities are on the side of General Dynamics, but the law is against it.”

**Tucson Airport Authority** perfects the conflict between the Ninth and Tenth Circuits. The Tenth Circuit implicitly decided that the Tucker Act’s jurisdiction over contracts does not trigger the “impliedly forbids” exception in section 702, while the Ninth Circuit has explicitly held that the Tucker Act does trigger the “impliedly forbids” exception when a claim is contractual rather than statutorily-based. In addition, **Tucson Airport Authority** represents the other face of sovereign immunity. Rather than emphasizing the breadth of section 702, as the Supreme Court did in *Bowen*, the Ninth Circuit stated that “the concept of make-whole relief inherent in much of the common law tradition does not apply in the context of actions brought against the United States.”

The court instead emphasized that “waivers of sovereign immunity are to be strictly construed.” In order to resolve the split between the Ninth and Tenth Circuits and to clarify its *Bowen* opinion, it would appear logical for the Supreme Court to grant certiorari to review **Tucson Airport Authority**.

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201. *Id.* at 648.
202. *Id.* at 644.
203. *Id.* The facts of the case further appeared to influence the Ninth Circuit’s analysis. The court observed, rather incoherently, that “the scenario before us involves one branch of the federal government in 1991 questioning the conduct of government contractors a half century earlier when the public policy of our government was not the protection of the environment, but to crank out combat aircraft by the thousands to crush the military around the globe aligned against us.” *Id.* at 643-44.
204. The Supreme Court did review another Ninth Circuit case, **Blue Fox Inc. v. Small Business Administration**, 121 F.3d 1357 (9th Cir. 1997), *rev’d sub nom. Dep’t of the Army v. Blue Fox Inc., ___ U.S. ___, 119 S.Ct. 687 (1999). Blue Fox involved a subcontractor’s equitable lien against funds held by the United States Army, based on a prime contractor’s failure to pay. The Ninth Circuit cited *Bowen* and found that section 702 constitutes a waiver for such a claim. See *Blue Fox*, 121 F.3d at 1361. The court emphasized that the fact that the claim was not statutorily derived did not mean that it was excluded from the waiver of sovereign immunity, noting that “there is no requirement in *Bowen* or the APA that the specific relief requested be statutorily granted. That is, a party need not rely upon a statute in order to obtain federal court jurisdiction under the APA.” *Id.* This reasoning appears, on its face, to conflict with the Ninth Circuit’s analysis in *Tuscon Airport Authority*, which concluded that section 702 did not waive the claim because the claim was not statutorily based. The Supreme Court could have clarified this issue in *Blue Fox*. It did not address the absence of a statutory basis for the claim, however, seizing instead on a narrower issue: the Ninth Circuit’s claim that *Bowen* waived immunity for equitable actions. Observing that section 702’s waiver of sovereign immunity only applied to relief other than “money damages,” the court found that liens, whether equitable or legal, are “merely a means to an end of satisfying a claim for the recovery of money.” *Blue Fox,*
has not done so to date. Unless and until the Supreme Court clarifies its *Bowen* ruling, it appears that a claim for specific performance of a government contract will fall within federal district court jurisdiction in the Tenth Circuit but not in the Ninth Circuit, the D.C. Circuit, or the First Circuit. 205

Parties negotiating ESA implementation agreements with federal agencies should understand the full scope of the problems that the “no money damages” provision raises. If federal district courts do not have jurisdiction to hear contract actions for specific performance, the only other possible forum is the Court of Federal Claims, which only has the power to grant money damages; it cannot grant specific remedies. If an ESA assurances agreement contains a “no money damages” provision, private parties may be left without a forum for enforcement.

4. Predicting the Future: Will the Sovereign be Immune from the Specific Performance of ESA Assurances Implementing Agreements?

Justice Stevens is among the critics who have noted that “sovereign immunity is nothing more than a judge-made rule that is sometimes favored and sometimes disfavored.” 206 When federal facilities have been charged with violating federal environmental laws, the federal government’s sovereign immunity generally has been broadly interpreted, resulting in the denial of rights of action against the government. 207 In contrast, when the government is acting in a commercial or financial capacity, the courts have shown a greater tendency to find a waiver of sovereign immunity. 208

In a hybrid situation such as the enforcement of an ESA implementation agreement, where a federal agency contracts

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119 S.Ct. at 692. On this basis, and without venturing to analyze the ambiguities surrounding the scope of section 702, the court held that section 702 did not waive sovereign immunity for equitable liens on government property. See id. at 693.

205. The First Circuit briefly considered this issue in *Coggeshall Development Corp. v. Diamond*, 884 F.2d 1, 4-5 (1st Cir. 1989) (rejecting “last ditch” request based on *Bowen* for district court jurisdiction over contractual action).


208. See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Far West v. Office of Thrift Supervision*, 930 F.2d 883, 884 (Fed. Cir. 1991) (finding that a “sue and be sued” clause waived the government’s sovereign immunity to a contractual specific performance claim); see also infra note 243 and accompanying text.
with private parties in the context of an environmental law, it is
difficult to predict the Supreme Court's reaction. This is
particularly true in light of the fact that several of the Supreme
Court's usual proponents of a business perspective, including
Chief Justice Rehnquist and Justices Scalia and Kennedy,
dissenting in Bowen. The Bowen dissent stated explicitly that
"sovereign immunity bars a suit against the United States for
specific performance of a contract . . . , and that this bar was not
disturbed by the 1976 amendment to § 702 . . . ." \(^{209}\)
The Court majority included Justices Brennan, Marshall, Blackmun,
Stevens, and O'Connor, with Justice White concurring. Of the
Bowen majority, only Justices Stevens and O'Connor are still
part of the Supreme Court.

Winstar supports the view that the current Supreme Court is
reluctant to condone specific performance of federal contracts.
In calling on the Supreme Court to resolve the issue of the scope
of the section 702 waiver, a recent law review article contends
that "[t]he reasoning [for a refusal to allow specific performance
of contracts] is straightforward. Specific relief is more intrusive
because it prevents officials from doing what they want to do,
whereas an award of money damages allows them to do what
they want to do, as long as they pay for it later." \(^{210}\) This
argument is an overt appeal to the Supreme Court's concerns in
Winstar that the government should not be prevented by
contract from doing what it wants to do, even though it may be
required to pay for its policy change.

Even if section 702 is ultimately found to bar specific
performance of contractual obligations, it may be possible to find
another legal basis to argue that the government has waived its
sovereign immunity in such cases. The Federal Circuit has held
that district courts have jurisdiction over contractual specific
performance claims when a statute other than section 702
provides a basis for claiming waiver of sovereign immunity. The
following section evaluates the possibility that the federal
government may have waived its sovereign immunity to specific
performance of ESA implementing agreements through statutes
other than section 702.

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209. Bowen, 487 U.S. at 921 (citations omitted).
210. Seamon, supra note 66, at 207.
B. Waiver of Sovereign Immunity to Specific Performance by Statutes Other Than Section 702

Even in courts following the Ninth Circuit's finding that section 702 does not waive federal sovereign immunity to the specific performance of contracts, there still exists the possibility that sovereign immunity for contractual specific performance has been waived under a statute other than section 702. In Munoz v. Small Business Administration, the Ninth Circuit found that statutory "sue and be sued" clauses can waive sovereign immunity for contractual money claims, even if the amount in controversy would otherwise invoke the Tucker Act. Munoz thus "established the principle that 'jurisdiction under the Tucker Act is not exclusive where other statutes independently confer jurisdiction and waive sovereign immunity." Federal courts cite Munoz "for the broad proposition that contract claims against the government may be brought under statutes that independently confer jurisdiction on the district courts even if the claims fall within the scope of the Tucker Act."

Munoz does not specifically address the waiver of sovereign immunity for specific performance, as opposed to money damages, through "sue and be sued" clauses. The Federal Circuit has addressed this issue, however, in Far West v. Office of Thrift Supervision. In Far West, as in Winstar, a savings and loan sued to enforce a contract with government thrift regulators in response to FIRREA's repudiation of contract terms. Although Far West sued on a number of counts, the only issue that the Federal Circuit considered was whether a claim seeking rescission of the contract and restitution of invested funds should be severed and transferred to the Claims Court.

The government argued that the case should be transferred to the Claims Court because "the Tucker Act impliedly forbids equitable relief on a contract claim against the United States." The government contended that FIRREA's two clauses authorizing suit in the district court, the "sue and be sued" and the "subject to suit" clauses, did "not waive immunity from suit

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211. 644 F.2d 1361 (9th Cir. 1981).
212. The Tucker Act applies to claims in excess of $10,000. Federal district courts have concurrent jurisdiction over claims of less than $10,000. 28 U.S.C. § 1346(a)(2) (1994).
213. In re Liberty Constr., 9 F.3d 800, 801 (9th Cir. 1993) (quoting Pacificorp v. Federal Energy Regulatory Comm'n, 795 F.2d 816, 826 (9th Cir. 1986)).
214. Id. at 802 n.7.
216. Id. at 888.
in the district court when the factual issues derive from a contractual relationship."\textsuperscript{217}

The "sue and be sued" clause states that "the Federal Deposit Insurance Corporation shall have power . . . to sue and be sued, and complain and defend, in any court of law or equity, State or Federal."\textsuperscript{218} The Federal Circuit observed that the "sue and be sued" clause "is the form of waiver of immunity from suit that is most often employed in statutes that authorize a government agency to engage in commercial or business-related activity."\textsuperscript{219} The Federal Circuit Court noted that this waiver has been broadly applied, reasoning that "[t]he large number of statutes that contain 'sue and be sued' clauses reflects congressional intention that judicial remedy not be withheld when governmental agencies enter into transactions with the public."\textsuperscript{220} The court further observed that "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,'" restrictions on that authority should not be implied.\textsuperscript{221} Concluding that "'sue and be sued' clauses in an agency's enabling legislation are correctly viewed as coextensive with the statutory authority of the agency," the court held that "Far West's claim for rescission and restitution may be brought in the district court under the 'sue and be sued' clause."\textsuperscript{222}

The "subject to suit" clause states that the Director of the Office of Thrift Supervision "shall be subject to suit (other than suits on claims for money damages)" in the federal judicial district in which the thrift was located or in the District of Columbia.\textsuperscript{223} The court rejected the argument that this waiver was narrower than the "sue and be sued" waiver, stating that "[w]hatever the merits of these arguments, they reinforce our view that severance of this issue and this defendant from other counts and parties before the district court would add significant encumbrance to the litigation process."\textsuperscript{224} The Federal Circuit commented, "In today's climate of burgeoning litigation and strained resources... duplication of litigation serves no

\textsuperscript{217} Id. at 887-88.
\textsuperscript{218} Id. at 888.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 889.
\textsuperscript{223} Id. at 891.
\textsuperscript{224} Id.
congressional purpose; it squanders judicial, governmental, and private resources."\(^{225}\)

The court in *Far West* also addressed the general rule that "in an action against a governmental corporation only those funds 'which are in its possession, severed from Treasury funds and Treasury control, are subject to execution.'\(^{226}\) The court found that the funds sought by the action were within the possession and control of the agency and that any monetary recovery would not be paid from general funds of the United States.\(^{227}\)

The court concluded that "waiver of sovereign immunity is accomplished not by "a ritualistic formula"; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy."\(^{228}\) Because the court found that FIRREA's statutory provisions waived sovereign immunity, it did not reach the issue of whether section 702 constituted a separate waiver of sovereign immunity for contract actions under *Bowen*.\(^{229}\)

In applying *Far West* to the ESA context, it appears that an action for the specific performance of implementation agreements against a federal agency could be brought in district court if: (1) the federal agency possesses and controls funds to implement the remedy, and (2) the statutory authority for implementation agreements includes a "sue and be sued" clause, a subject to suit provision, or the functional equivalent of these provisions. While the enabling statutes for the DOI or the FWS do not contain such provisions, the ESA does contain a citizens suit provision.\(^{230}\) The relevant portion of this statute provides:

(1) *Any person may commence a civil suit on his own behalf— (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof...* \(^{231}\)

Under *Far West*, this provision appears to provide a strong argument that the United States has waived its sovereign

\(^{225}\) *Id.*

\(^{226}\) *Id.* at 890 (citations omitted).

\(^{227}\) *Id.* at 890.

\(^{228}\) *Id.* at 892 (citations omitted).

\(^{229}\) *Id.* at 892-93.


\(^{231}\) *Id.*
immunity to actions seeking to enjoin the FWS with respect to implementation agreements—that is, as long as the statutory and regulatory provisions underlying the contract have not changed.\(^{232}\) The waiver is not as broad as a "sue and be sued" clause, however, and does not appear to provide an independent waiver of sovereign immunity to the specific performance of a contract.

Thus, no independent basis appears to exist for the waiver of sovereign immunity relating to the specific performance implementation agreements. One more potential enforcement option remains, however, based on the doctrine that specific performance is available when a contractual breach rises to a statutory or constitutional violation.\(^{233}\) The following section analyzes the possibility of specific performance of an ESA implementing agreement under this exception.

C. Specific Performance When Contractual Breach Rises to a Statutory or Constitutional Violation

If the federal government breaches an ESA implementation agreement, it may be possible for the other parties to bring statutory and constitutional claims for specific relief in federal district court. According to Sharp v. Weinberger,\(^{234}\) a 1986 D.C. Circuit case in which then-Judge Scalia authored the majority opinion, section 702 waives sovereign immunity even when the claim depends on the existence and terms of a contract with the government.\(^{235}\) While Sharp held that the district court did not have jurisdiction over claims based on contract, it held that the district court did have jurisdiction over claims for nonmonetary relief based on federal actions "contrary to regulations, statutes, and the Constitution . . . ."\(^{236}\) This distinction may allow parties to enforce implementation agreements with the "no money damages" provision—assuming that the underlying law has not changed. While basing a claim on statutory breach may be

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\(^{232}\) The citizen suit provision itself only addresses violations of a statute or regulation, implying that current law must support the suit.


\(^{234}\) 798 F.2d 1521 (D.C. Cir. 1986).

\(^{235}\) Id. at 1523-34.

\(^{236}\) Id. at 1523. In North Side Lumber Co. v. Block, 753 F.2d 1482, 1486 (9th Cir. 1985), the Ninth Circuit held that "the Tucker Act does not impliedly forbid relief on [a] statutory claim and thus does not preclude a § 702 waiver of sovereign immunity on that claim." The court in North Side found that the federal district court had jurisdiction over timber companies' claim that enforcement of timber sales contracts would violate federal statutes, including the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994). North Side, 753 F.2d at 1486.
attractive under the existing regulatory regime, it does not necessarily provide a secure basis for a claim if ESA policies change.

One last possible theory leading to the enforcement of ESA assurances is that a contractual breach could give rise to a constitutional violation. This would allow for the possibility of seeking non-monetary relief for federal actions that are contrary to the Constitution.

The Fifth Amendment takings clause prohibits the federal government from taking property without providing just compensation. This protection extends to rights arising out of valid contracts with the United States. In cases in which there is no relief under the law for a breach of contract, the contractor may pursue just compensation under the Fifth Amendment for the loss of its contractual rights. As a result, when a plaintiff presents alternative theories of recovery based on breach of contract and on takings under the Fifth Amendment, recovery on the breach of contract claim precludes recovery on the takings theory. When no action lies in contract, however, the Fifth Amendment may provide relief.

The enforcement of ESA implementation agreements, which may not be allowed under the other theories discussed above, may be possible within the takings context. If this is the case, the key principle guiding a determination as to whether a contractual right vests is whether the government has unmistakably surrendered its sovereignty with respect to subsequent modifications of the agreement. Because Winstar only addressed actions seeking money damages, its holding that unmistakability does not apply would not be relevant in a context in which specific performance is sought. The Supreme Court's fractured view of unmistakability does create difficulties, however, in predicting whether the ESA assurance policies meet the requirements of unmistakability. One Department of the

237. See U.S. CONST. amend. V.
241. See, e.g., Wah Chang Corp. v. United States, 282 F.2d 728 (Cl. Ct. 1960).
243. In Winstar, 518 U.S. at 878-80, the Court writes: "[A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed
Interior official has stated that the No Surprises policy comes as close as possible to a "federal vested development right," lending credence to the view that the government unmistakably intends to surrender its sovereignty when it grants ESA assurances. On the other hand, existing interpretations of the unmistakability doctrine have tended to avoid contractual constructions that result in a showing that sovereignty was surrendered in unmistakable terms.

Private parties may be able to enforce implementing agreements by means of a takings claim. This route is fraught with uncertainty, however, and none of the takings justifications provides an entirely reliable basis on which to ensure that the agreements can be enforced.

CONCLUSION

When federal agencies enter a contractual relationship, private parties to the contract should be aware of the extent to which the agencies can or cannot be bound by their promises. *Winstar* provides a strong argument that the federal government cannot renege on its obligations with impunity, but it only applies to cases for money damages. If the Fish and Wildlife Service continues to insist on language precluding money damages, the other parties to the contract may believe they are still able to seek specific performance of the federal agencies' obligations. As the foregoing analysis has demonstrated, however, federal agencies may in fact be able to assert sovereign immunity as a defense to specific performance of the agreement. Because *Winstar* muddies the waters regarding the scope and

as a conveyance or surrender of sovereign power .... The *application* of the doctrine [of unmistakability] will therefore differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them ...." (emphasis added). The plurality then discusses the *applicability* of the doctrine, or *when* it should be applied, not its *application*, or *how* the doctrine should be applied when applicable. *See id.* The plurality opinion thus provides little guidance as to the scope of unmistakability. Whether or not the plurality's view of unmistakability (when applicable) is as broad as that of the concurrence is difficult to discern from the decision.


245. *See, e.g.*, Madera Irrigation Dist. v. Hancock, 985 F.2d 1397, 1404 (9th Cir. 1993) (finding that a contractual provision stating that a federal agency's price for irrigation water "shall not exceed charges made to others .... for the same class of water and service" did not constitute an unmistakable surrender of the government's sovereign authority to charge more for water service "with a higher operation and maintenance cost").
applicability of the unmistakability doctrine, "no money damages" clauses may also diminish the likelihood of a successful takings claim based on contractually-vested rights.

While remedies may be available, it is likely that they will be limited by the terms of the Endangered Species Act regulatory scheme at the time of suit. One such remedy would be injunctive relief, made available through the explicit waiver of sovereign immunity in the Endangered Species Act's citizen suit provision. Even this remedy will not be available, however, if the underlying statutory or regulatory authority for Endangered Species Act assurance policies has been removed. Similarly, specific performance may be available for a contractual breach that violates statutory or regulatory requirements, assuming that the underlying statutes or regulations have not changed. If the federal government decides to avoid its contractual obligations by amending the law, it may succeed in doing so.

This is not necessarily a desirable outcome from the perspective of the federal agencies because it will weaken their bargaining position in the negotiation of Endangered Species Act implementing agreements. The other parties to the agreements will discount the federal agencies' promises in light of risks of unenforceability.

One solution to this problem, if contractual ecosystem management is to become an entrenched part of environmental policy, will be to revise the agencies' underlying statutory authority. When agencies are regularly involved in commercial or business activities, Congress has generally allowed for judicial review of the agencies' activities. At this early stage in the development of contractual ecosystem management, federal environmental and resource agencies do not have statutory authority equivalent to the more traditionally business-like agencies. As more agencies "enter into transactions with the public," such as the contractual arrangements involved in implementing Endangered Species Act assurances policies, the agencies will need the statutory authority necessary to establish a wide range of public-private partnerships. As one of the Winstar thrifts argued in its Supreme Court brief:

Ultimately, the enforceability of promises potentially involving, as here, or even embracing, a wide variety of government regulatory powers—particularly after full performance by the private party—is essential to modern
government. Much of modern community and economic development hinges on negotiated zoning, regulatory and tax exemptions. Similarly, an effective private-public partnership in areas ranging from utility services to environmental, health, and welfare services funded by the government would be impossible [without enforceable promises].²⁴⁸

At present, however, it appears that the Fish and Wildlife Services' rhetoric about providing contractual incentives to non-federal landowners to protect endangered species habitat may exceed its willingness to ensure those contracts are enforceable. In the short-term, the agency and the environmental community may view this as fortunate. In the long-term, however, if contractual ecosystem management is to deliver on the promise of large-scale habitat conservation planning on private lands, environmental and resource agencies will need to recognize that a true public-private partnership must involve mutually enforceable obligations.