WESTERN WATER CONFLICTS AND THE SLEEPING GIANT OF THE ESA

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Introduction

Since its passage in 1973, the Endangered Species Act ("ESA")[1] has remained the subject of significant controversy. Those in favor of conservation claim, among other things, that its listing procedures are too cumbersome, resulting in major delays between proposal and listing, and that its substantive provisions do not go far enough.[2] Those in regulated industries contend that its requirements are too restrictive and that the exemption process is needlessly complicated.[3] These general concerns are particularly acute in the context of water. Specifically, in the western United States, clashes between these two groups are becoming more frequent and severe.[4] Given the effects of climate change, and the persistence of a severe drought that began in 2000,[5] these conflicts will likely increase.

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[1] 16 U.S.C. §§ 1531–1544.

[2] *See, e.g.*, CTR. FOR BIOLOGICAL DIVERSITY, A FUTURE FOR ALL: A BLUEPRINT FOR STRENGTHENING THE ENDANGERED SPECIES ACT 4 (Oct. 2011) (discussing the "lengthy delays in listing of species"); UNIV. OF CAL., IRVINE SCH. OF L., THE SIX PRIORITY RECOMMENDATIONS FOR IMPROVING CONSERVATION UNDER THE FEDERAL ENDANGERED SPECIES ACT 2 (2021) ("While there are political risks involved in opening up the ESA by recommending legislative amendments, recommendations for improving the ESA from a conservation perspective are long overdue.").

[3] *See, e.g.*, Press Release, U.S. Department of the Interior, What They Are Saying – Endangered Species Act Announcement (Aug. 12, 2019); M. LYNNE CORN ET. AL., CONG. RSCH. SERV., R40787, ENDANGERED SPECIES ACT (ESA): THE EXEMPTION PROCESS 11 (2017); Mark Squillace, *Applying the Park City Principles to the Endangered Species Act*, 31 LAND & WATER L. REV. 387, 389 ("[T]he exemption process is cumbersome, and exemptions are difficult to obtain.").

[4] *See The Endangered Species Act: How Litigation Is Costing Jobs and Impeding True Recovery Efforts*: *Hearing Before the H. Comm. on Nat. Res.*, 112th Cong. (2011) (describing the ways that increased litigation over ESA compliance is costing jobs and hurting regulated industries).

[5] *See* Henry Fountain, *The Western Drought Is Bad. Here's What You Should Know About It*, N.Y. TIMES (Oct. 21, 2021), https://perma.cc/YPW9-PT8R.

Congress attempted to address the unique problem of conservation and water use in the ESA Amendments of 1982.[6] Given concerns raised by western states over preemption of state water law and the future of the then existing system of water allocation, Congress amended the policy section of the Act, adding section 2(c)(2).[7] This provision requires federal agencies to cooperate with states to resolve clashes between state water law and conservation efforts under the ESA.[8]

Although this section appears to give states a greater role in determining whether and how water resources will be affected to protect species, it has largely been either overlooked or deemed non-substantive by the few courts that have spoken directly about it. That interpretation of section 2(c)(2) is likely incorrect, however. This Essay argues that the provision does, and was intended to, have substantive weight. First, Part I will analyze the language of the provision and its context. It will look both at the text of the amendment and at what weight, if any, should be given to statements in "policy sections." It will then look at section 101(g) of the Clean Water Act ("CWA"),[9] a parallel provision addressing the role of state water law, and how courts have interpreted its substantive force. Second, Part II will focus on the cases that have addressed this provision, assessing the validity of their reasoning and the reach of their holdings. Finally, Part III will consider the policy implications of fully enforcing this provision. Currently, because of the way in

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[6] Pub. L. No. 97-304, 96 Stat. 1411.
[7] *See* Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RES. J. 319, 322 (1996).
[8] 16 U.S.C. § 1531(c)(2).
[9] 33 U.S.C. § 1251(g).

which the ESA is implemented in practice, there is no incentive for regulated parties to proactively promote conservation efforts. The result is years of costly litigation to try to get agencies with limited resources to do more to prevent the destruction of habitat and wildlife. While section 2(c)(2) is not a cure-all for these problems, if it were fully respected, it could act as a mechanism to help resolve conflicts and promote mutually beneficial conservation efforts.

I. Section 2(c)(2)

A. Mandatory Language

On its face, section 2(c)(2) seems to mandate federal-state cooperation over water resource issues. It states, "[i]t is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."[10] The use of "shall" here signals its mandatory nature, as "shall" is commonly understood to place a requirement on the subject of the provision.[11] That "shall" indicates a mandate comes from one of the most basic principles of statutory construction, often referred to as the "Mandatory/Permissive Cannon."[12] As Justice Scalia and Bryan Garner have noted, "[t]he traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive."[13] And generally, "when the word *shall* can reasonably be read as mandatory, it ought to be so read."[14] Thus, a reasonable

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[10] 16 U.S.C. § 1531(c)(2).
[11] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012).
[12] *Id.*
[13] *Id.*
[14] *Id.* at 114.

reading of "shall" in this provision is that the requirement of cooperation is mandatory.

Although "shall" ordinarily has this meaning, the Supreme Court has held that the mandatory nature of this word changes in the context of requirements placed on the federal government. In *Railroad Co. v. Hecht*,[15] the Court asserted that when "shall" is used in a statute in relation to the government, it "is to be construed as 'may,' unless a contrary intention is manifest."[16] Picking up on this point, the Court has more recently indicated that when interpreting "shall," it is important to look to context and the necessities that the context entails.[17] In the context of the ESA, then, one might argue that cooperation on water resource issues is not mandatory but permissive. Such an argument is buttressed by the fact that, as the Court has noted, "the language, history, and structure of the [ESA] . . . indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[18] Thus, only when the agency involved believes it will be to its benefit, or to the benefit of an endangered or threatened species, will it cooperate with states in this area. The provision, the argument goes, is for the benefit of the agency in its effort to conserve species. This too may be indicated by the fact that the provision is found in the "policy section" of the Act.[19] One could conclude, then, that Section 2(c)(2) is not a mandatory requirement at all.

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[15] 95 U.S. 168 (1877).
[16] *Id.* at 170.
[17] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 761–62 (2005) (focusing on the law enforcement context to say that despite the use of "shall," police officers still had discretion to act because that was a "practical necessity" of police work).
[18] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).
[19] The substantive force of provisions in policy sections is discussed more below.

This argument, however, misapplies the rule relied on in these cases. The context of the Act manifestly indicates a contrary intent on the part of Congress. First, it would make little sense for Congress to declare a policy that agencies may work with states to resolve water resource conflicts, if they so choose. That would largely defeat the purpose of the amendment itself because it would, in practice, not give the states any real say in the implementation of the ESA. That the language is mandatory is bolstered by the fact that section 6 expressly requires the Secretary of the Interior to cooperate with the states.[20] That section begins "[i]n carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States."[21] It would be quite odd for Congress to require "maximum" cooperation when the Secretary implements important provisions of the Act, such as listing or designating critical habitat, but give agencies discretion to do so when taking equally important actions, such as limiting or banning the use of major water resources. Given that, on the whole, these other agencies play a subordinate role to the Secretary of the Interior under the ESA,[22] it does not make sense that Congress would give them more discretion.

Section 6 also uses the same "shall" language as section 2(c)(2). When interpreting statutes, there is a presumption of consistent usage of a word throughout the text of an act.[23] Each section places cooperation requirements on

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[20] *See* 16 U.S.C. § 1535(a).
[21] *Id.*
[22] *See, e.g.*, 16 U.S. Code § 1536 (requiring all other agencies to consult with the Secretary when undertaking any "action" that might affect endangered species).
[23] *See* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).

certain actors and uses "shall" similarly. "Shall" in section 6 is clearly mandatory. The "shall cooperate" language starts off a section that sets forth specific requirements that dictate the shape of that cooperation. If "shall" was permissive here, it would render the section and its requirements superfluous, leaving it up to the Secretary whether to use those procedures or not. The fact that section 6 details the procedures and mechanisms for cooperation does not indicate that "shall" is being used differently in section 6 than elsewhere in the act. It simply indicates that in this area, Congress wanted to specify the form that cooperation would take. That "shall" in Section 6 is not made mandatory by the subsequent listing of procedures is also indicated by the fact that the "shall" requirement is set forth in a separate subsection. Additionally, this is how both case law and the Secretary, in regulations, have treated it.[24] Because the use of the word "shall" in section 6 creates a requirement that the Secretary cooperate with the states, "shall" in section 2(c)(2) should be read in the same way. Thus, section 2(c)(2) seems to mandate that all federal agencies cooperate with the states to resolve water resource conflicts.

B. The Substantive Force of "Policy Sections"

Unlike the mandatory cooperation provisions in section 6, the requirement in section 2(c)(2) is found in the "Policy" section.[25] This may mean that Congress intended it to be a general policy statement rather than a specific requirement.

[24] *See* N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior, 854 F.3d 1236, 1248 (3d Cir. 2017); 43 C.F.R. § 24.4(i)(5) (2021).
[25] 15 U.S.C. § 1531(c).

Usually, the prologue of an act is understood to be "an aside," which states the general beliefs and opinions about the facts and purposes that prompted the legislature to enact the legislation.[26] As the Supreme Court has noted, "the preamble is no part of the act, and cannot enlarge or confer powers."[27] Thus, because the cooperation requirement is arguably part of the preamble, it arguably should be treated as non-substantive.

But despite the fact that the requirement is in section 2, the preamble, it should be read as a distinct and separate section. The title of section 2 is: "Congressional findings and declaration of purposes and policy."[28] This indicates that section 2(c)(2) does not fall within the traditional categories of prefatory material, findings and purposes, but rather into a distinct category of "policy." [29] A preface to an Act is usually limited to general findings, facts, and purposes.[30] Preambles discuss the "mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute."[31] Section 2(c)(2) is not a finding, mischief, or purpose. That this section is different from a traditional preface is also indicated by the structure of the section itself. Unlike a statement that sets forth general goals or factual findings, the text of section 2 sets forth a specific command. It sounds more in the language normally found in an act's body than in

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[26] *See* SCALIA & GARNER, *supra* note 11, at 217–18.
[27] Yazoo & Miss. Valley R.R. Co. v. Thomas, 132 U.S. 174, 188 (1889).
[28] 16 U.S.C. § 1531.
[29] Although a title does not "take the place of the detailed provisions of the text" nor are they reference guides, they can be used to resolve doubts about the various provisions of an act. Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528–29 (1947).
[30] *See* SCALIA & GARNER, *supra* note 11, at 217.
[31] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 326 (2d ed. 1858).

its preamble. While no Supreme Court opinion has directly addressed the substantive weight of policy sections, it makes more sense to treat those provisions that use mandatory language and are separated from the more traditional sections of a preamble as separate substantive provisions.

Even if section 2(c)(2) was read as part of the preamble, the cooperation requirement should still be understood to have substantive force. Although provisions in a preamble do not play the same role as provisions in the body of an act, they still carry weight in determining how the act is implemented and what is required by the agencies and parties that it governs. As Justice Joseph Story has noted, a preamble speaks to the objects that an act is supposed to accomplish.[32] While the preamble's language can neither limit a "more general disposition that the operative text contains" nor be read to enlarge the requirements under a specific provision, it can clarify and define the requirements set forth in the act.[33] Thus, section 2(c)(2) can be seen as a further definition of the consultation requirements in section 6 of the act or as a clarification of the requirements placed on federal agencies in section 7.[34] This reading does stretch the text of both section 6 and 7 but is a tenable interpretation. Ultimately, however this section is conceived, it seems that it should be given substantive weight.

It should also be noted that the U.S. Fish and Wildlife Service ("FWS") has recognized section 2(c)(2) as a substantive requirement. FWS has never set forth a

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[32] *See id.*
[33] SCALIA & GARNER, *supra* note 11, at 218–19.
[34] 16 U.S.C. § 1536.

regulation requiring cooperation, though it has stated in rulemakings that it recognizes section 2(c)(2) as an affirmative duty.[35] In its rulemaking designating critical habitat for the jaguar, FWS stated: "We recognize our responsibilities under section 2(c)(2) of the Act to cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species . . . ."[36] Although this is neither a binding statement nor one that applies to agencies other than FWS, it is a strong indication that agencies that have large roles in implementing the ESA do recognize section 2(c)(2), in theory, as a requirement.

C. Parallel Provisions in the Clean Water Act

That section 2(c)(2) should be treated as a substantive provision is confirmed by the treatment of a parallel provision of the Clean Water Act: section 101(g). This provision is found in the first section of the Act entitled "Declaration of Goals and Policy."[37] Much like section 2(c)(2), section 101(g) is designated by the title of the first section of the CWA as a separate "policy" provision. This suggests that the two sections should be treated alike.[38] Section 101(g)—which appears last in the list of items in the section—states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to

[35] *See, e.g.*, Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12,572, 12,631 (Mar. 5, 2014) (codified at 50 C.F.R. pt. 17); Designation of Critical Habitat for Buena Vista Lake Shrew, 78 Fed. Reg. 39,835, 39,841 (Jul. 2, 2013) (codified at 50 C.F.R. pt. 17).
[36] *Id.*
[37] 33 U.S.C. § 1251.
[38] *See* A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1, 18–19 (1985) (treating both provisions as related attempts by Congress to integrate western water interests into environmental laws).

> quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.[39]

Aside from the additional language granting primacy to state law regulating water quantity allocations, the provisions are strikingly similar. Both mandate that all federal agencies "shall" cooperate with state and local agencies in managing issues relating to environmental concerns and management of water resources. Courts should treat them equivalently.

Courts have generally treated section 101(g) as separate from the general preamble, and as having substantive effect. A clear example comes from *National Wildlife Federation v. Gorsuch*.[40] There, the D.C. Circuit distinguished between the purposes section and the policy section of the CWA.[41] The National Wildlife Fund argued, broadly speaking, that the general goals announced at the beginning of the CWA should be seen as a baseline against which the Environmental Protection Agency's ("EPA") interpretation of the Act should be tested in regards to the issuance of national pollutant discharge elimination system permits.[42] The court first noted that by using the word "policy" in section 101(g), Congress "explicitly distinguished between the congressional 'policy' to eliminate discharge of toxic pollutants and the presumably weaker 'goal' of eliminating discharge of all pollutants."[43] The policy sections were understood to have more substantive weight

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[39] 33 U.S.C. § 1251(g).
[40] 693 F.2d 156 (D.C. Cir. 1982).
[41] *Id.* at 178.
[42] *See id.* at 177–78.
[43] *Id.* at 178.

than mere "goal" or "purposes" statements. Referring specifically to section 101(g), the court treated it as a "specific indication in the Act that Congress did not want to interfere any more than necessary with state water management."[44] The policy statements, rather than the general purposes statements, were the provisions that carried weight in interpreting EPA's authority. Additionally, the Supreme Court has, in other cases, treated section 101(g) as a specific requirement that agencies must follow. In its first discussion of section 101(g), the Court did not address the question of whether it was a non-substantive prefatory statement; it simply applied section 101(g) as a substantive provision.[45] In a subsequent case, the Court referred to the provision as a "specific instruction."[46] In neither instance did the Court consider it a live question whether section 101(g) had substantive effect. It was simply treated as such.

Given that section 101(g) is almost completely parallel to section 2(c)(2), and that section 101(g) is read as a substantive command, section 2(c)(2) should be similarly read. While section 101(g) does contain language that expressly protects certain aspects of state water law, the inclusion of this language is not what gives the section substantive effect. The first two sentences of section 101(g) simply define the scope of the command being set forth by Congress. But all three sentences contain "mandatory" language. It is because of this language, and the fact that it is a policy statement, that gives it force. The only rational way to read section 2(c)(2),

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[44] *Id.*
[45] *See* PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 720 (1994).
[46] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 108 (2004).

then, is as a substantive requirement. Consequently, the cooperation command may be somewhat of a sleeping giant of the ESA.

II. How the Courts have Interpreted Section 2(c)(2)

Although the cooperation requirement was added to the ESA in 1982, only two courts have directly addressed whether it is actually a requirement.[47] Contrary to the analysis above, both have held that it has no substantive force. The first case, *United States v. Glenn–Colusa Irrigation District*,[48] concerned the pumping activities of the Glenn–Colusa Irrigation District in the Sacramento River.[49] The federal government sought an injunction against the district, claiming that its pumping activities and inadequate fish screens were leading to takes of Sacramento River Winter-run Chinook Salmon, a threatened species under the ESA.[50] A take was occurring, they asserted, because the district neither installed an updated fish screen, as had been recommended by FWS in a biological opinion, nor sought an incidental take permit.[51] The district's primary defense was that their pumping activities were not the cause of the take.[52] Rather, they asserted, the taking was occurring because of the faulty fish screens, which were installed and owned by the

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[47] One court has discussed it in a footnote. *See* Aransas Project v. Shaw, 835 F.Supp.2d 251, 280 n.13 (S.D. Tex. 2011). Another case briefly mentioned it as evidence that Congress did not intend the ESA to preempt all state conservation related law. *See* Sierra Club v. City of San Antonio, 112 F.3d 789, 797–98 (5th Cir. 1997). Finally, another court looked to it as a basis to confer standing, noting that when "determining standing the court is not limited to condensing the statute under which plaintiffs sued, but may consider any provision that helps us to understand Congress' overall purposes in the Act." Westlands Water Dist. v. United States Dept. of Interior, Bureau of Reclamation, 850 F. Supp. 1388, 1424–25 (E.D. Cal. 1994) (declining to decide whether Section 2(c)(2) creates substantive rights) (internal punctuation marks and quotations omitted).

[48] 788 F. Supp. 1126 (E.D. Cal. 1992).

[49] *See id.*

[50] *See id.* at 1128.

[51] *See id.* at 1130–31.

[52] *See id.* at 1133.

California Department of Fish and Game.[53] The court held that the screens themselves did not pose any hazard to the fish, but that the pumping, which caused the salmon to be impinged on the screens, was the cause of the take.[54] The district also made the related argument that because, under the ESA, state water law rights prevail over the requirements of the Act, the take provisions did not apply.[55] They asserted that the section 2(c)(2) cooperation requirement for water resource conflicts meant that whenever these issues arose, state water law should decide the question.[56] The court dismissed this argument stating that such a reading "would render the Act a nullity."[57] Section 2(c)(2) was not an exemption from compliance with the Act for those who held water rights under state law.[58] The court did limit the extent of its holding, however, by noting that "enforcement of the Act [here] does not affect the District's water rights but only the manner in which it exercises those rights."[59] Section 2(c)(2) thus was not interpreted as a substantive provision that required the federal government to completely respect state water law under the ESA.

The second case, *Bear Valley Mutual Water Co. v. Jewell*,[60] involved the designation of critical habitat for the Santa Ana Sucker along the Santa Ana River in California.[61] In the 1990s, a number of governmental agencies, municipalities,

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[53] *See id.*
[54] *See id.*
[55] *See id.* at 1134.
[56] *See id.*
[57] *Id.*
[58] *See id.*
[59] *Id.*
[60] 790 F.3d 977 (9th Cir. 2015).
[61] *See id.* at 981.

and water districts entered into conservation partnerships that allowed them to continue diverting water and maintaining dams in exchange for implementing certain protective measures.[62] In 2010, FWS issued a final rule designating critical habitat for the sucker.[63] Some of the areas covered by the original partnerships were included in the designation, leading to the restriction of some of the partners' activities.[64] The water rights holders claimed that FWS violated its duties under section 2(c)(2) because it "failed to cooperate with State and local agencies on water resource issues . . . otherwise declining to engage [them] . . . in negotiating the critical habitat designation."[65] The court held that "Section 2(c)(2) is a non-operative statement of policy that 'does not create an enforceable mandate for some additional procedural step.'"[66] Although the provision is clear on its face, it is a subsection of the declaration of purpose.[67] Thus, the court reasoned, it could not "create substantive or enforceable rights."[68] The court contended that the only effect of this provision is to clarify the substantive provisions of the Act, namely section 4.[69] This section requires FWS to notify states of proposed regulations that concern species in their state and allow them to comment.[70] It also requires FWS to provide a written justification for rules that do not incorporate those comments.[71] The cooperation

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[62] *See id.* at 982.
[63] *See id.* at 985.
[64] *See id.*
[65] *Id.* at 986–87.
[66] *Id.* at 987 (quoting Bear Valley Mut. Water Co. v. Salazar, No. SACV 11-01263-JVS (ANx), 2012 U.S. Dist. LEXIS 160048, at *11 (C.D. Cal. Oct. 17, 2012)).
[67] *See id.*
[68] *Id.*
[69] *See id.*
[70] *See id.* at 987–88; 16 U.S.C. § 1533.
[71] *See Bear Valley Mutual Water Co.*, 790 F.3d at 988.

mentioned in section 2(c)(2), the court asserted, was merely a general description of the specific procedures required by section 4.[72] Section 2(c)(2), thus, had no independent force.

Both cases clearly state that the cooperation requirement is not a substantive provision of the ESA, but there is reason to believe that the reasoning of these opinions might not be accepted in future litigation. First, the *Glenn–Colusa* claim was that because of the provision, the ESA was subordinate to state water law. Quite correctly, the court held that the provision in no way alters the federal-state balance in this way. Yet that conclusion is not the same as an argument that section 2(c)(2) requires nothing of federal agencies. In fact, the court affirmatively stated that enforcing the ESA in that circumstance only affected the manner in which the district exercised its water rights, not the actual rights themselves. The focus was on what the appropriate remedy to the take was, not on whether the ESA gave the federal government the authority to terminate state water rights. There is, thus, a recognition that state water law does have some place under the ESA. Consequently, it would be difficult to apply the court's reasoning in a case where the government was claiming an absolute right to terminate water rights that were protected by state law. And this reasoning would not extend to a case where the government stated that it was not required to do anything under section 2(c)(2).

Second, *Bear Valley* rests on a misreading of the relevant case law. Thus, it is unlikely that other courts will accept it. In claiming that because section 2(c)(2) was

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[72] *See id.*

located in a purposes section it is non-substantive, the court cited *Hawaii v. Office of Hawaiian Affairs*.[73] That case does not stand for the general proposition the court claims it does, however. The Court in *Hawaii* was concerned with the effect of "whereas" clauses in legislation.[74] It held that "where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation, a court has no license to make it do what it was not designed to do."[75] It is the language used in each provision of the preamble that makes it prefatory and thus non-substantive. As noted above, the cooperation requirement uses the mandatory language "shall," and, as a "policy statement," should not be considered part of the traditional preamble. Furthermore, the *Bear Valley* court's position that section 2(c)(2) is merely a general expression of the requirements of section 4 renders the specific language used a nullity. Section 2(c)(2) specifically mandates state-federal cooperation in the area of water resources. If the section 4 notification requirements were all that were necessary, then the singling out of water resource conflicts would be meaningless. That Congress intended for a different form of cooperation in this area is the only reading of the Act that makes sense. Neither case will likely become the governing interpretation.

III. Policy Implications

Conflicts over water resources between conservation and beneficial water use did not end in the 1980s when the cooperation amendment was added. They are

[73] *See id.* at 987.
[74] *See id.* (citing 556 U.S. 163, 175 (2009)).
[75] *Id.* (internal punctuation marks and quotations omitted).

ongoing. And given trends in climate and population, they will likely only become more intense. Changes in climate are currently having large impacts on available water supplies, particularly in the west.[76] As EPA reported, the western United States has experienced reduced rain over the past fifty years, "as well as increases in the severity and length of droughts."[77] This, coupled with less annual rainfall and an earlier snowmelt "mean that less water will likely be available during the summer months when demand is highest."[78] Further, if temperatures rise, more water will be needed to sustain current water dependent activities.[79] And more water resources will have to be diverted to protect threatened and endangered species.[80] These strains on the water supply will be exacerbated by the fact that the west has also seen the largest increases in population over the past decade.[81] Given this background, it would seem that a solution that promotes cooperation on these important issues would be beneficial to all involved.

Unfortunately, because agencies are largely overlooking their section 2(c)(2) responsibilities, these opportunities to work together have been missed. Not one instance could be found in which an agency explicitly undertook action to fulfill its 2(c)(2) requirements. This has led to disastrous consequences. One of the most important things that results from cooperative efforts is stakeholder engagement.

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[76] *Climate Impacts on Water Resources*, U.S. ENV'T PROT. AGENCY (2017), https://perma.cc/3WX6-QU78.
[77] *Id.*
[78] *Id.*
[79] *See id.*
[80] *See* Benji Jones, *The West's Megadrought Is So Bad, Authorities Are Airlifting Water for Animals*, VOX (Aug. 20, 2021), https://perma.cc/95SN-6V8R.
[81] *See Southern and Western Regions Experienced Rapid Growth This Decade*, U.S. CENSUS BUREAU (May 21, 2020), https://perma.cc/N5CS-YXKL.

When groups with competing interests come together to find workable solutions, all parties to the agreement generally work to make sure that it stays in place.[82] As the ESA is currently enforced, however, there is nothing to promote stakeholder engagement or even to prompt regulated entities to advance the purposes of the Act. In fact, the opposite may be occurring. A common statement made by people whose activities are restricted by the ESA is that when you come across a species that is preventing you from doing what you want, "shoot, shovel, and shut up."[83]

One report has found that this attitude is potentially quite prevalent in dealing with critical habitat. The study looked at old-growth pine in North Carolina, which is habitat for red-cockaded woodpeckers.[84] It found that the closer an area of pine forest is to current woodpecker habitat, the more likely it is that that area will be harvested at a younger age to prevent the establishment of old-growth pine.[85] The report concludes that "the ESA itself has induced habitat destruction."[86] This specific example does not concern water rights, but it reveals the existence of a larger problem that should be addressed.

Section 2(c)(2) is the beginning of a response. If agencies were required to meet and work with state and local agencies every time that they planned on

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[82] *See* Chelsea L. Baldino et al., working paper, *Assessing County and Regional Habitat Conservation Plan Creation: What Contributes to Success?*, DUKE UNIV., NICHOLAS INST., 9 (May 2016) (noting that early stakeholder engagement in Habitat Conservation Plans under the ESA was a key factor contributing to their success).
[83] *See* Terry Anderson, *When the Endangered Species Act Threatens Wildlife*, HOOVER INST. (Oct. 21, 2014), https://perma.cc/67V7-TSNV.
[84] *See* Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).
[85] *See id.* at 27.
[86] *Id.* at 51.

engaging in actions affecting water resources, not only would preemptive takes and habitat destruction be mitigated, but the affected parties would be prompted to work to promote the ESA's conservation ends. Because these affected parties might not feel as if they had little to no say in the action or that the efforts of the agency were completely antithetical to their own ends, they might see that the goals of all involved could be met—at least to some extent. They would become stakeholders. This would also help to reduce the waste of time and resources involved in the extensive litigation that often surrounds agency action under the ESA. Instead of spending time and money litigating to prevent harmful actions, those efforts and treasures could be put towards conservation and the creation of workable cooperative programs.

Arguably, adding this requirement could make things more difficult and time consuming for federal agencies. States could use their perceived power under section 2(c)(2) to prevent agency action. This might also lead to protracted negotiations that waste agency time and resources. It could result in non-uniformity, as states negotiate special carveouts to meet their needs. Thus, section 2(c)(2) could present a major issue, particularly given the already difficult and complex ESA process that agencies must go through. Yet this overstates the potential conflict. First, section 2(c)(2) only requires cooperation. As the *Glenn–Colusa* court stated, it does not give the states a veto power.[87] Consequently, states could not really be holdouts, as they would not really have the power to prevent or

[87] *See* United States v. Glenn–Colusa Irrigation District, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992).

greatly slow down agency action. Second, although the cooperation requirement would naturally lead to negotiations, and even to protracted negotiations, this might not be a major detriment. Protracted negotiations might be necessary when making decisions regarding the complex interaction between humans, endangered wildlife, and water resources. Third, it is clearly preferable to have lengthy negotiations than expensive and divisive litigation. The constant litigation in this area is one of the biggest contributors to the lack of stakeholder engagement and the "us versus them" mentality that pervades this area of the law. Finally, uniformity is not really a concern as agencies already craft different solutions to the myriad problems they encounter in ESA enforcement. It may also be good to have unique solutions for unique issues where there are divergent yet equally valid interests on all sides. Ultimately, section 2(c)(2) does not provide a complete answer to the problems of the current operation of the ESA. But it does provide the beginning of one. One that might serve as the basis for a more cooperative approach to conservation.

Conclusion

As the ESA is now implemented, there is little role for states. While they must receive notice under section 4, their input can be freely ignored. And section 6 only applies to the secretaries of the Interior and Commerce. The current practice of federal agencies, however, seems to be in violation of section 2(c)(2), which mandates cooperation and consultation. Although this section was placed in what traditionally would be referred to as a preamble to the ESA, it should be read as an

independent substantive section. Its mandatory language places an obligation on all federal agencies. Also, it is a separate policy statement that should be read in the same way as section 101(g) of the CWA. The few courts that have considered this provision have rejected this argument, but those opinions rest on narrow or shaky reasoning that will likely not become the controlling interpretation. More fundamentally, there seems to be little reason not to want a system of cooperation, aside from the increased procedural requirements it will place on agencies. If this interpretation of section 2(c)(2) is implemented, it can help to prevent the active destruction of species and allow the country's resources to be refocused. While it is only the start of an answer, it can, in time, come to serve as a powerful tool to help promote the twin goals of beneficial agriculture and industry and conservation of species.