

Potential levels of rigor and benefits an agreement could recognize:

- A. Acknowledgement without regulatory certainty (I.)
 - B. Regulatory certainty for pre-acquired credits for a future debtor (II.)
 - C. Regulatory certainty for debit side (III.)
 - D. Acknowledgement of a programs credits and debits; regulatory assurances provided by a separate agreement with FWS (CHCP) (IV.)
 - E. Regulatory certainty for credit and debit all within one program
 - a. Project impacts assessed now (similar to III.)
 - b. Project impact methodology for assessment later (e.g. Barrick) (VI.)
 - F. Regulatory certainty for credit providers (V.)
- I. **The Service recognizes the mitigation program through a letter.** We could recognize the CHE as a method that will improve Colorado's ability to track voluntary participation in CO's 1200 series rules. OGCC encourages operators to consult with CPW. CPW provides guidance on avoidance, minimization, and compensatory mitigation. CHE provides streamlined access to mitigation projects that have been identified by CPW.
- a. Pros: The Service has "recognized" similar conservation efforts. Low potential legal exposure. Helps CO document the conservation benefit of their voluntary mitigation efforts.
 - b. Cons: Does not provide incentives for operators to participate in the CHE. Uncertain how program will be evaluated in precluding need to list (PECE).
 - c. Programmatic Pros: Since there is limited legal exposure, a programmatic approach is advised.
 - d. Programmatic Cons:
 - e. Individual agreement Pros: Increased understanding of mitigation project benefits.
 - f. Individual agreement Cons: Increased workload with limited conservation returns.
- II. **Commit to recognizing CHE credits in a post-listing scenario.** We could agree that, if credits are released or purchased/reserved (in anticipation of a future project) prior to a listing decision that finds warranted, credits could be used to meet necessary mitigation that might be identified during a post-listing consultation. However, there would be no assurances that the credits would be sufficient.

At the time of project (post-listing) consultation, avoidance, minimization, and remaining impacts would be assessed by the Service. Remaining impacts might be measured using the CHE or by another method

identified by the Service. Pre-listing mitigation credits would be weighed against necessary mitigation identified during consultation.

- a. Pros: Incentivizes operator participation for credits.
- b. Cons: Operators uncertain if credits will be sufficient for anticipated debits.
- c. Programmatic Pros
- d. Programmatic Cons
- e. Individual agreement Pros
- f. Individual agreement Cons

- III. **Same as II, plus, FWS Service recognizes how a program determines avoidance, minimization, and measures debits.** A program includes a regulatory mechanism that ensures avoidance and minimization will be required in a way that is sufficient for the Service to provide regulatory assurances. In this scenario, the state wildlife agency would probably need a required avoidance and mitigation program in place.

- IV. **Develop a regulatory assurances agreement like an HCP (Candidate HCP or CHCP) that can be used for candidate species and can complement the CHE.** A CHCP may be beyond the scope of the CHE. However, a CHCP may be easier to develop if the CHE is developed with the intent to function with a CHCP.

CHE function: Measures credits. Measures debits. The Service might need to concur with CPW's recommendations for Avoidance and Minimization.

CHCP function: The Service might need to concur with CPW's recommendations for Avoidance and Minimization.

Prior to a listing decision, if an agreement has been developed for an area, operators would have the option of entering into a pre-project agreement with the Service. The agreement would identify how a future project would avoid and minimize. It would also estimate what remaining impacts would be so that the operator could purchase credits to offset impacts.

- a. Pros: familiar tool that can provide strong regulatory certainty
- b. Cons: operator may not be able to estimate impacts far in advance; how does BLM fit in?
- c. Programmatic Pros: Could lead to more industry participation.
- d. Programmatic Cons: Who would hold a programmatic permit?
- e. Individual agreement Pros: strong regulatory certainty for us and operators

- f. Individual agreement Cons: joint consultation with FWS and COGCC or CPW; heavy workload; FWS would need to develop avoid/min standards

V. Provide regulatory assurances to private landowners who generate credits for the CHE.

- a. Separate from a credit agreement, a landowner could enter into a CCAA (separate from the CHE). Conservation benefits that are **additional** to what is required by the CCAA could be registered with the CHE as **credits**.
- b. A landowner could be given CCAA-like certainty through their participant agreement with the CHE. The CHE would have an agreement with the Service that provided programmatic certainty, similar to SGI **model** (relates to #2 above).

Comment [DD1]: Hmm. We have not yet heard the basis for 20%. Would this be higher than 20% if the baseline is supposed to exceed the CCAA standard?

Comment [SG2]: Should not use CCAAs for mitigation purposes though... we should be careful about using this tool in this way.

Comment [DD3]: If it is similar to the SGI model, at the CR level or CO level? I would be more comfortable with the Conference Report version – where, at the time of listing, the Service would review what is being done and update requirements according to best available science

Comment [SG4]: To maximize participation, the CO level. This may also eliminate need to use CCAA as assurances will be similar.

Comment [LZC5]: This language has been sent to Veronica for her review.

Comment [DD6]: Who makes the Avoidance & Minimization recommendations? Is Service approval required?

Comment [LZC7]: I think it depends. Barrick will be proposing avoidance and minimization measures through the NEPA process for the mine. Without a federal nexus or NEPA requirement I could see FWS approval being worked into the agreement, but we haven't seen an example of that yet.

VI. Ongoing FWS involvement in approval of individual conservation projects for credit development, tying regulatory assurances to delivery of net

gain. Establish a process that FWS would be part of that, as long as the process is implemented correctly, would result in certainty of credits providing more benefits than the debits they offset. The agreement, signed by FWS, would provide a process for addressing **avoidance and minimization** for debit projects, the methodology for calculating debits and credits, and how the process is to be adaptively managed.

- a. Pros:
 - Opportunity for adapting program management to changing science, policies, and priorities
 - Direct engagement of FWS at the project level
- b. Cons:
 - Higher workload for FWS staff; But this approach may make sense for single, large projects that have immediate and lasting impact on sage-grouse habitat.
- c. Individual agreement Pros – see a.
- d. Individual agreement Cons – see b.

The table below illustrates mitigation scenarios currently utilized for listed species with suggestions for sister mechanisms for non-listed species (other than a general Memorandum of Agreement – MOA, or Conservation Agreement – CA, and also where an agreement is completely independent of listed species, e.g. an HCP for a listed species can cover non-listed species). We use the term “regulatory assurances” loosely to mean both the types of assurances given to non-federal landowners (as in CCAA-like assurances) as well as those protections afforded entities through, for example, incidental take permits.

Mitigation Scenarios for Unavoidable Impacts*							
Sponsor "Buyer"	Regulatory Assurances		Provider "Seller"	Regulatory Assurances		Connecting Agreement	
	Listed Species	Non-Listed		Listed Species	Non-Listed	Listed Species	Non-Listed
Non Federal	HCP or CEM (via iBO)	- HCP "like" - CEM "like" - CCAA	Non Federal	- HCTA; 10(A)(1)(a) - HCP	- HCTA; 10(A)(1)(a) - CCAA - 4(d)	- HCP or CEM identifies mitigation site - IA (for HCPs)	- HCP or CEM identifies mitigation site - IA (for HCP, CEM, CCAA)
			Federal	- BO; 10(A)(1)(a)	- CO - CCA - CCA/CCAA	- IA	- CO
Federal	BO	- CO - CCA	Non Federal	- HCTA; 10(A)(1)(a) - BO - RCS	Same as Above	- BO identifies mitigation site	- CO identifies mitigation site
			Federal	- BO		- BO	- CO

*HCP = Habitat Conservation Plan, CEM = Conservation Enhancement Memorandum of Agreement; iBO = Intra-Service Biological Opinion; BO = Biological Opinion; CCAA = Candidate Conservation Agreement with Assurances; CO = Conference Opinion; HCTA = Habitat Credit Trading Agreement (generic, includes CBA = Conservation Banking Agreement & RCS = Recovery Crediting System); 10(A)(1)(a) = Enhancement of Survival Permit; 4(d) = Protective Regulations Rule; CCA = Candidate Conservation Agreement; IA = Implementing Agreement.

REGULATORY “CERTAINTY”

Possible mechanisms:

	Conservation Banking	Pre-Listing Mitigation
Seller (Banker)	CBA (iBO) and/or possibly 10(a)(1)(A)	CBA (iCO) ?
Buyer Federal	Sec. 7 (BO) also: RCS	Sec. 7 (CO) ?
Buyer Non-federal	Sec. 10 HCP also: CEM (iBO)	? new Sec. 10 tool? CCAA? HCP-like?

- CBA Conservation Banking Agreement
- CCAA Candidate Conservation Agreement
- iBO Intra-Service Biological Opinion
- iCO Intra-Service Conference Opinion
- RCS Recovery Credit System
- HCP Habitat Conservation Plan
- CEM Conservation Enhancement Memorandum of Agreement