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# Towards Common Sense in ESA Enforcement: Federal Courts and the Limits on Administrative Authority and Discretion under the Endangered Species Act

## ABSTRACT

*This article reviews important recent developments in the interpretation and application of the Endangered Species Act (ESA). Specifically, the article reviews three important rulings from the federal courts of appeals, Sierra Club v. United States Fish and Wildlife Service, Arizona Cattle Growers v. United States Fish and Wildlife Service, and New Mexico Cattle Growers v. United States Fish and Wildlife Service. When read together, these cases reveal an emerging judicial trend toward limiting the federal government's discretion under the ESA.*

*Further, these decisions have placed the federal government in the impossible position of implementing mandatory species programs without the required funding. Thus, the article announces, species conservation policy is being determined by activists and judges rather than by scientists. The article describes the holdings of the three cases and discusses the severity of the constraints they place on ESA implementation and enforcement. It also offers several suggestions for reform and evaluates each potential solution's chances for success. The article further contends that none of the solutions is likely to succeed and that the modern trend of setting species policy through litigation is likely to continue.*

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In the early 1970s, Congress enacted a significant number of new environmental laws, marking the dawn of "the environmental revolution."<sup>1</sup> The Clean Air Act,<sup>2</sup> the Clean Water Act,<sup>3</sup> the National Environmental Policy Act (NEPA),<sup>4</sup> and the "pit bull" of environmental laws,<sup>5</sup> the Endangered Species Act (ESA or Act),<sup>6</sup> marked a new age in federal authority over the environment. Through legislative amendments, regulations, and court decisions, agency control over environmental regulation expanded greatly through the 1980s and into the mid-1990s.<sup>7</sup> Recently, however, federal courts of appeals have been taking a harder look at federal administrative authority, especially discretionary actions.<sup>8</sup>

After 20 years of expanding authority in federal agencies,<sup>9</sup> courts are making evident an emerging distaste for unrestricted discretion in the federal agencies charged with administering environmental laws. Nowhere has this been more apparent than in the limits placed on the U.S. Fish and Wildlife Service (FWS) and its implementation of the ESA.<sup>10</sup> Recently, federal courts have limited the amount of discretion enjoyed by FWS in three significant opinions. The Fifth, Ninth, and Tenth Circuit Courts of Appeals have each published opinions narrowing FWS's ability to pick and choose whether and how to enforce

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1. Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 396 (1995).

2. 33 U.S.C. § 1251, *et seq.* (2000).

3. 42 U.S.C. § 7403, *et seq.* (2000).

4. 42 U.S.C. § 4321, *et seq.* (2000).

5. J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37 (1998).

6. 16 U.S.C. § 1531, *et seq.* (2000).

7. *See generally* Stanley H. Anderson, *The Evolution and Use of the Endangered Species Act*, 32 LAND & WATER L. REV. 487 (1997).

8. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* [hereinafter *SWANCC*], 531 U.S. 159 (2001) (invalidating the Army Corps' expansive interpretation of its jurisdiction under the Clean Water Act. Though the statute was unclear, the Court interpreted federal jurisdiction narrowly to avoid raising questions about Congress's Commerce Clause authority.). *But see* Todd William Roles, *Has the Supreme Court Armed Property Owners in Their Fight Against Environmentalists?* *Bennett v. Spear and Its Effect on Environmental Litigation*, 41 ARIZ. L. REV. 227, 241 (1999) (arguing that the court will continue to be deferential to agency decisions due to the lax standard of review). Roles' article was written in 1999, but *SWANCC* and the three trend-setting decisions covered in Part II of this article were issued in 2000 and 2001.

9. *See* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 278, 279 (1993).

10. The National Marine Fisheries Service (NMFS) is also responsible for implementing those portions of the Act that relate to aquatic species. *See generally* 16 U.S.C. § 1361, *et seq.* (2000). For purposes of this article, any reference to FWS also includes NMFS where relevant.

the ESA's provisions.<sup>11</sup> These rulings strictly limit the agency's discretion to that conferred by statute and require the agency to implement mandatory provisions. These cases are important not only for the way in which they will restrict agency authority and alter agency practice, but also for the developing trend that they signal. Federal courts are no longer willing to allow the FWS to ignore portions of the ESA, execute them improperly, or operate with unfettered discretion.

Part I of this article provides an outline of the relevant portions of the ESA and briefly explains them. Part II discusses *Arizona Cattle Growers Association v. United States Fish and Wildlife Service* and its impact on agency authority and discretion. Part III examines *Sierra Club v. United States Fish and Wildlife Service* and *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service* and how these decisions impact FWS and the regulated communities. Part IV discusses other FWS activities that may be struck down in the near future, while part V offers possible solutions and discusses the viability of each option.

## I. BACKGROUND: A GUIDE TO THE ESA

Understanding the implications of the recent decisions by the courts of appeals requires a working knowledge of the ESA. This article will focus on three essential sections of the Act. Section 9<sup>12</sup> covers the various activities prohibited by the Act, including when "taking" a listed species will result in liability. Section 4<sup>13</sup> sets out the process by which species are listed, requires that land be designated as critical habitat, and establishes the procedures for doing so. Section 7<sup>14</sup> details the requirements that government agencies must meet when their actions affect a listed species or its critical habitat. The following is a brief history of the ESA and a description of each section.

### A. The ESA: A Brief History<sup>15</sup>

Dissatisfied with previous efforts to make headway in the fight to protect endangered species and their habitats, Congress adopted the ESA in 1973 to "provide a means whereby the ecosystems upon which

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11. *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229 (9th Cir. 2001); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001); *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001).

12. 16 U.S.C. § 1538 (2000).

13. 15 U.S.C. § 1533 (2000).

14. 15 U.S.C. § 1536 (2000).

15. This section provides only a cursory overview of the major legislative developments in the Act's history. For a more thorough discussion, see Houck, *supra* note 9.

endangered species and threatened species depend may be conserved [and] provide a program for the conservation of such endangered species and threatened species."<sup>16</sup> Congress found that a large number of species had become "so depleted in numbers that they [we]re in danger of...extinction," due to the pressures of agriculture, population growth, and urban sprawl, and that others had become "extinct as a consequence of economic growth and development untempered by adequate concern and conservation."<sup>17</sup> Prior laws had only protected endangered species on federal land and prohibited importing enumerated species;<sup>18</sup> the 1973 Act applied to species on all land in the United States, whether public or private.<sup>19</sup> This was a significant leap for species protection and was heralded as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>20</sup>

This tough new law permitted both governments and private citizens to enforce its provisions.<sup>21</sup> Both enthusiastically enforced the Act and its lofty goals until the Tellico Dam controversy.<sup>22</sup> At Tellico, the presence of an endangered fish, the Snail darter, halted completion of a dam on the Little Tennessee River, despite the fact that the government had already spent more than one hundred million dollars on the project.<sup>23</sup> After a contentious legal battle, the Supreme Court held that the ESA "admits of no exception" and that "endangered species [are] to be afforded the highest of priorities."<sup>24</sup> Despite the massive amount of

16. 16 U.S.C. § 1531(b) (2000).

17. 16 U.S.C. § 1531(a)(1) (2000).

18. See Davina Kari Kaile, *Evolution of Wildlife Legislation in the United States: An Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 448 (1993) (providing an outline of the Act as it existed in both 1966 and 1969). Technically, the 1966 and 1969 acts also required federal agencies to protect endangered species insofar as it was practicable, but that mandate was largely ignored. See 83 Stat. 275 (1969) and 80 Stat. 926 (1966). Finally, the 1973 Act extended limited protections to plants. See 16 U.S.C. § 1532(14) (2000).

19. See 16 U.S.C. § 1538(a)(1)(B)-(C) (2000). The ESA also applies to listed species on the territorial and high seas. *Id.*

20. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978), *superseded by statute* at 16 U.S.C. § 1536(e)(2) (2000).

21. See 16 U.S.C. § 1540(g) (2000). The citizen-suit provision permits any person (subject to the Eleventh Amendment and presumably within the limits of constitutional standing requirements) to bring a suit to enjoin any person in violation of the Act or to compel the FWS to perform any nondiscretionary act. See *id.*

22. See Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REF. 805, 806 (1986). See also William J. Snape II & Robert M. Ferris, *Saving America's Wildlife: Renewing the Endangered Species Act*, at <http://www.defenders.org/pubs/save05.html> (last visited Mar. 12, 2004).

23. See Plater, *supra* note 22, at 813 n.31 (noting that 95 percent of the money for the dam construction had already been spent).

24. *Tennessee Valley Authority*, 437 U.S. at 173-74.

tax dollars that would go to waste, the Supreme Court enjoined the government from beginning the operation of the dam after concluding that the Snail darter would be jeopardized by the completion of the dam.<sup>25</sup>

Not surprisingly, Congress responded to the Tellico Dam controversy with a series of amendments designed to avoid such a conflict in the future.<sup>26</sup> Rather than weakening the substantive provisions of the Act, the 1978 amendments defined several terms<sup>27</sup> and added the much debated but seldom used "God Squad" provision, a procedural device to exempt agencies from the Act and avoid another Tellico situation.<sup>28</sup> Congress also added requirements for local hearings<sup>29</sup> and required FWS to designate critical habitat concurrently with the listing of species.<sup>30</sup>

Congress added another round of significant amendments in 1982<sup>31</sup> aimed at streamlining the Act, including various technical amendments and two more exemption procedures.<sup>32</sup> Since then, the Act

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25. *Id.* at 195.

26. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 1, 92 Stat. 3751 (1978). See also Endangered Species Act Amendments of 1978, H.R. CONF. REP. NO. 95-1804 (1978), codified at 16 U.S.C. § 1531, *et seq.* (2000). But see Houck, *supra* note 9, at 283 (arguing that these amendments, rather than affording flexibility, "ground the listing process to a halt").

27. Terms defined were "critical habitat," "Federal Agency," "State agency," "species," "irresolvable conflict," "permit or license applicant," and "alternative courses of action." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 1978 U.S.C.C.A.N. (92 Stat.) 3751, 3751-52.

28. The "God Squad" is the common name given to the Endangered Species Committee. See The Thoreau Institute, *The History of the Endangered Species Act*, at <http://www.ti.org/ESAHistory.html> (last visited Feb. 27, 2004). The God Squad is made up of the administrators of the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the chair of the Council of Economic Advisors, a state representative, and the secretaries of the Army, Agriculture, and Interior. See 16 U.S.C. § 1536(e)(3) (2000). It is rarely used and has been described as "impossibly difficult." John C. Kunich, *Species & Habitat Conservation: The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 560 (1994).

29. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 1, 92 Stat. 3765 (1978).

30. See *id.* at 3764, 3766. In these amendments, Congress also required the secretary to consider economic impacts when designating critical habitat. This significant provision is discussed in Part III.B.

31. See Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 1982 U.S.C.C.A.N. (96 Stat.) 1417, 1426.

32. See H.R. REP. NO. 97-567, at 14 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2814-15. One exemption provision applies to private parties while the other applies to federal agencies. See 16 U.S.C. §§ 1538(a)(1), 1536(b)(4) (2000).

has gone largely unmodified and has not been reauthorized.<sup>33</sup> The following sections briefly describe the relevant provisions of the Act.

## B. Section 9: The ESA Prohibitions

Section 9 prohibits any person or government agency from taking a member of an endangered species without authorization.<sup>34</sup> "Take" is defined as any action that will "harass [or] harm" a member of an endangered species or any attempt to "pursue, hunt, shoot, wound, kill, trap, capture, or collect" a member of the species.<sup>35</sup> The terms listed in the definition of "take" are not themselves defined but most are self-explanatory. The precise meaning of "harm," however, has been the subject of much litigation.<sup>36</sup> According to FWS regulations, "harm" is "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."<sup>37</sup> Thus, section 9 prohibits both direct and indirect forms of harming members of a listed species. The penalties for violating section 9 range from imprisonment to civil penalties including fines and permit revocation.<sup>38</sup>

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33. In its 1988 reauthorization, Congress only extended the ESA through 1992. Thus, the Act required reauthorization in 1992 but technically "expired" when no agreement could be reached. See M. Neil Browne & Nancy K. Kubasek, *A Communitarian Green Space Between Market and Political Rhetoric About Environmental Law*, 37 AM. BUS. L.J. 127, 164 (1999). The ESA's provisions still operate even though the Act technically "expired," because a federal statute usually remains in effect, despite the expiration of its authorization, absent an express sunset provision. See Donald J. Barry, *The Endangered Species Act: Amending the Endangered Species Act, the Ransom of Red Chief, and Other Related Topics*, 21 ENVTL. L. 587, 597 (1991).

The only essential question is whether the government continues to possess adequate "budget authority" to spend federal funds on behalf of the expired program. Conveniently, annual appropriations acts are deemed adequate for providing this requisite "budget authority." Thus, as long as funds are appropriated, an environmental statute remains in business. This explains why numerous environmental laws like the Clean Air Act and the Clean Water Act have had their authorizations lapse without any real world consequences

*Id.*

34. See 16 U.S.C. § 1538(a) (2000).

35. 16 U.S.C. § 1533(19) (2000).

36. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

37. Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3 (2002).

38. These penalties are actually set out in section 11. See 16 U.S.C. § 1540 (2000).

### C. Section 4: Listing and Critical Habitat Designation

Section 4 imposes a duty on the FWS to list endangered and threatened species and to designate critical habitat for those species.<sup>39</sup> The FWS may list a species when it is “in danger of extinction throughout all or a significant portion of its range.”<sup>40</sup> A species is threatened if it is “likely to become an endangered species within the foreseeable future.”<sup>41</sup> The authority of the FWS to list extends to all species of plants and animals, except pest insects.<sup>42</sup>

When listing a species, FWS must, “to the maximum extent prudent, designate habitat critical to the survival of the species at the time of listing.”<sup>43</sup> Once lands are designated as critical habitat, they are subject to a variety of restrictions.<sup>44</sup> Critical habitat may consist of both public and private lands and may be either occupied or unoccupied by the species.<sup>45</sup>

To be eligible for designation as critical habitat, occupied lands must be “the specific areas within the geographical area occupied by the species...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.”<sup>46</sup> Unoccupied habitat may be designated only if it is determined “by the Secretary that such areas are essential for the conservation of the species.”<sup>47</sup> The Act defines conservation as the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>48</sup> This language is generally understood to mean recovery.<sup>49</sup>

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39. See 16 U.S.C. § 1533(a) (2000).

40. 16 U.S.C. § 1532(6) (2000).

41. 16 U.S.C. § 1532(20) (2000).

42. See 16 U.S.C. § 1532(6) (2000). See also Nancy L. Bethurem, *Environmental Destruction in the Name of National Security: Will the Old Paradigm Return in the Wake of September 11?*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 109, 113 n.16 (2002).

43. H.R. REP. NO. 97-567, at 14 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2810.

44. See *The Application of the Endangered Species Act to the Protection of Freshwater Mussels: A Case Study*, 32 ENVTL. L. 91, 146 n.279 (2002) (citing Edward C. Beedy, *Ten Ways to Fix the Endangered Species Act*, ENDANGERED SPECIES UPDATE, Nov.-Dec. 1995, at 12-14 (arguing that critical habitat designation has the potential to “restrict land uses and to reduce property values” on private property, and is costly to designate)).

45. See 16 U.S.C. § 1533(5)(A) (2000).

46. 16 U.S.C. § 1532(5)(A)(i) (2000).

47. 16 U.S.C. § 1532(5)(A)(ii).

48. 16 U.S.C. § 1532(3) (2000).

49. See 50 C.F.R. § 402.02 (2002) (defining recovery as “improvement in the status of listed species to the point at which listing is no longer appropriate” under the statute).



Thus, unoccupied critical habitat is that which FWS determines to be essential to the survival or recovery of the species.<sup>50</sup>

In designating critical habitat, FWS must use "the best scientific and commercial data available" and must conduct an individualized economic impact analysis to assess the financial repercussions of the designation.<sup>51</sup> The FWS may choose not to designate land if the financial burdens outweigh the ecological benefits.<sup>52</sup>

#### D. Section 7: Interagency Consultation

Section 7, commonly referred to as the heart of the ESA, is the Act's most used provision.<sup>53</sup> Under section 7, federal agencies must consult with FWS to insure that any action that they authorize, fund, or carry out neither jeopardizes the continued existence of an endangered or threatened species nor results in the destruction or adverse modification of critical habitat.<sup>54</sup> Agency actions that require section 7 consultation typically involve contracting for services (e.g., building roads) and permitting; the private parties are involved during the consultation stage.<sup>55</sup>

Once consultation begins, FWS is responsible for issuing a biological opinion.<sup>56</sup> The biological opinion must state whether the action will jeopardize the continued existence of the species or adversely

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50. "Essential" means "of the utmost importance." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 396 (10th ed. 1996). "Essential" is not the same as "useful" or "beneficial," which mean "capable of being put to use." *Id.* Only land that is truly essential may be designated as critical habitat.

51. See 16 U.S.C. § 1533(b)(2) (2000). See also PAMELA BALDWIN, THE ENDANGERED SPECIES ACT: CONSIDERATION OF ECONOMIC FACTORS (Cong. Res. Serv., Rep. No. RL30792, Jan. 5, 2001).

52. See 16 U.S.C. § 1533(b)(2) (2000).

53. See generally Jeffrey S. Kopf, *Steamrolling Section 7(d) of the Endangered Species Act: How Sunk Costs Undermine Environmental Regulation*, 23 B.C. ENVTL. AFF. L. REV. 393 (1996).

54. See 16 U.S.C. § 1536(a)(2) (2000). The terms "authorize," "fund," and "carry out" collectively make up "agency action." Agency action is regulated by section 7(a)(2). Unfortunately, neither the terms "authorize," "fund," "carry out," nor "agency action" is defined in the Act. Courts have determined whether something is agency action on an ad hoc basis as industry groups and environmentalists bring court challenges to mark the boundaries of the term. For more thorough treatment of this issue, see Derick A. Weller, *Limiting the Scope of the Endangered Species Act: Discretionary Federal Involvement or Control Under Section 402.03*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 309 (1999). For the moment, the scope of the term remains unclear and may or may not include activity as minor as a federally insured home loan.

55. See 16 U.S.C. § 1536(b)(3)(A) (2000).

56. *Id.*

modify critical habitat.<sup>57</sup> If so, FWS must offer “reasonable and prudent alternatives.”<sup>58</sup> While other agencies are technically free to ignore biological opinions, these opinions have a “virtually determinative effect” on the consulting agencies, which almost always adopt any conditions or mitigation suggestions.<sup>59</sup>

Even if FWS determines that “no jeopardy” will result from the agency action, the consultation process is not necessarily over. If the action will not jeopardize the species under section 7 but will result in the “take” of a species under section 9, the agency and any permit applicant may apply for an incidental take statement (ITS) from FWS.<sup>60</sup> An ITS shields the federal agency and the permittee from the normal section 9 liability that would result from a take. As discussed in part II, the issuance of an ITS allows the agency or its permittee to engage in a take if they accept certain other conditions.<sup>61</sup> The FWS must still ensure that the underlying agency action does not jeopardize the species or adversely modify critical habitat and must guarantee that the take itself will not place the species in jeopardy.<sup>62</sup>

The ITS, however, comes with a price for the applicant because FWS must still specify (1) the impact of the taking on the species, (2) the reasonable and prudent measures the secretary deems necessary or

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57. See 16 U.S.C. § 1536(b)(3) (2000). See also Jeremy Firestone & Robert Barber, *Fish as Pollutants: Limitations of and Crosscurrents in Law, Science, Management, and Policy*, 78 WASH. L. REV. 693, 736 n.251 (2003).

58. 16 U.S.C. § 1536(b)(3)(A) (2000). Reasonable and prudent alternatives are actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and...would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02 (2002).

59. *Bennet v. Spear*, 520 U.S. 154, 170 (1997).

60. See 16 U.S.C. § 1536(b)(4) (2000). Some commentators have suggested that FWS must issue an ITS in every biological opinion regardless of whether a take will occur. See Robert S. Nix, *Bennett v. Spear: Justice Scalia Oversees the Latest “Battle” in the “War” Between Property Rights and Environmentalism*, 70 TEMPLE L. REV. 745, 753 (1997) (arguing that FWS must issue an ITS if it concludes that no threat to the species or adverse modification would result from the project). *But cf.* J.B. Ruhl, *Section 7(a)(1) of the “New” Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies’ Duty to Conserve Species*, 25 ENVTL. L. 1107, 1119–20 (1995) (suggesting that an ITS is appropriate only if the biological opinion concludes that a take will occur). Courts have rejected the mandatory ITS interpretation in favor of Professor Ruhl's view. This will be discussed at length in Part II *infra*.

61. See 16 U.S.C. § 1536(b)(4) (2000).

62. See 16 U.S.C. § 1536(b)(4)(B) (2000).

appropriate to minimize the impact, and (3) the terms and conditions with which the consulting agency must comply to implement the measures to minimize impact.<sup>63</sup> Conditions may range from providing funds for recovery projects to providing land for species habitat.<sup>64</sup> The costs of complying with conditions in ITSs are almost universally borne by private parties applying for federal permits.<sup>65</sup>

## II. ARIZONA CATTLE GROWERS: A MAJOR SETBACK FOR AGENCY DISCRETION AND AUTHORITY

In early 2001, the Ninth Circuit issued a strongly worded opinion in *Arizona Cattle Growers* that removed a large measure of FWS's discretion in imposing conditions in ITSs.<sup>66</sup> The opinion resulted from two separate but related district court cases in which ranchers challenged FWS's policy of imposing vague conditions in areas where species were unlikely to be harmed.<sup>67</sup> In the first, the Arizona Cattle Growers' Association (ACGA) and Jeff Menges challenged conditions in an ITS issued by the FWS in a biological opinion for certain grazing lands.<sup>68</sup> Menges, a rancher, sought a grazing permit under a Bureau of Land Management (BLM) program affecting more than one and one-half-million acres of grazing allotments in the Tucson area.<sup>69</sup> The FWS's biological opinion, issued in late 1997, covered 20 species and concluded that the program was unlikely to either jeopardize the continued existence of the species or result in adverse modification of critical

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63. In practice, the process of obtaining an ITS is simple but costly. Once a federal agency determines that its project will affect an endangered or threatened species and engages in consultation with FWS, the FWS may determine that there will be a take but no jeopardy. The FWS then issues an ITS stating the terms deemed necessary or appropriate for minimizing the impact. Lastly, the consulting agency agrees to the terms and imposes them on the permit applicant as conditions of the permit.

64. See Christopher H.M. Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENVTL. AFF. L. REV. 135, 167 (1991).

65. *Id.* at 162.

66. See *Ariz. Cattle Growers*, 273 F.3d 1229.

67. See *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 63 F. Supp. 2d 1034 (D. Ariz. 1998) [hereinafter *ACGA I*]; *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, No. CIV 99-0673 PHX RCB, 1999 U.S. Dist. LEXIS 23236 (D. Ariz. Dec. 13, 1999) [hereinafter *ACGA II*].

68. See *ACGA I*, 63 F. Supp. 2d at 1036.

69. *Ariz. Cattle Growers*, 273 F.3d at 1233. Grazing cattle on public land is a common practice in the Southwest. Rather than sell otherwise non-developable land or leave it fallow, the government permits private persons to graze cattle on it in exchange for a fee. See 43 U.S.C. § 315 (2000).

habitat.<sup>70</sup> The FWS found, however, that an incidental take of some of the species would occur and issued several ITSs.<sup>71</sup> As a condition of issuing a permit for the take, FWS ordered ranchers to refrain from grazing in certain areas and to pay for monitoring in the area.<sup>72</sup>

ACGA's suit challenged both the issuance of the ITSs and the attached conditions.<sup>73</sup> The plaintiffs argued that FWS had improperly issued the ITSs without providing evidence that a take would occur and objected to the permit conditions as vague or unsupported by the evidence.<sup>74</sup> ACGA focused particularly on the incidental take statements for the Razorback sucker and the Cactus ferruginous pygmy-owl.<sup>75</sup> The district court agreed with Menges and the Cattle Growers, holding that FWS's issuance of ITSs for the Razorback sucker and the pygmy-owl was arbitrary and capricious because the service "failed to provide sufficient reason to believe that listed species exist in the allotments in question."<sup>76</sup>

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70. ACGA I, 63 F. Supp. 2d at 1036. Grazing allotments are federal lands upon which private individuals are permitted to graze livestock. Large portions of public land in the western states are grazed. The BLM administers grazing allotments on 163.3 million acres, and the Forest Service administers grazing allotments on 89.6 million acres. Kristi Johnson, *The Mythical Giant: Clean Water Act Section 401 and Nonpoint Source Pollution*, 29 ENVTL. L. 417, 440 (1999).

71. ACGA I, 63 F. Supp. 2d at 1036; See Programmatic Biological Opinion for the Safford and Tucson Field Offices' Livestock Grazing Program, Southeastern Arizona, at <http://arizonaes.fws.gov/Documents/BiologicalOpinions/96160%20Programmatic%20BO%20Safford-Tucson%20Livestock%20Grazing%20SE%20Arizona.pdf> [hereinafter Safford & Tucson Biological Opinion] (last visited Feb. 25, 2004).

72. See ACGA I, 63 F. Supp. 2d at 1036.

No grazing of cattle shall occur on Bureau-administered lands in the 100-year flood plain of the Gila River, and the riparian corridors of Bonita Creek and the San Francisco River through the project area for the life of the project (through December 31, 2006). Actions shall be taken, including fencing, monitoring for and removal of trespass cattle, and other measures to ensure grazing does not occur on these lands

*Id.* (quoting Safford & Tucson Biological Opinion, *supra* note 71).

73. *Id.* at 1037.

74. *Id.* The association sought to force FWS to name a specific number of endangered species that must be taken for the permit to be violated, rather than simply conditioning the permit based on environmental factors. The ACGA argued that the environmental factors condition gave FWS boundless discretion to determine whether a take had occurred and further claimed that the permit conditions were illegal because they failed to identify a numerical amount of authorized take. *Id.*

75. The FWS issues a separate ITS for each species. See Safford & Tucson Biological Opinion, *supra* note 71.

76. ACGA I, 63 F. Supp. 2d at 1045. The court did not reach the conditions of the ITSs because it held that the ITSs should never have been issued.

In a second suit, ACGA challenged ITSs issued by FWS for livestock grazing on U.S. Forest Service lands.<sup>77</sup> There, FWS determined that the ongoing grazing activities would incidentally take members of one or more protected species in each of the 22 allotments.<sup>78</sup> ACGA contested the ITSs for six of the allotments. After examining the biological opinion, the district court determined that FWS acted arbitrarily and capriciously in issuing an ITS for five of the allotments because the biological opinion failed to show that a take was reasonably certain to occur.<sup>79</sup>

The FWS appealed to the Ninth Circuit, arguing that the trial court erred on several points of law. First, FWS argued that the text of section 7 required it to issue an ITS regardless of whether there would be a take.<sup>80</sup> Second, the service claimed that the court applied an overly narrow definition of the term "take" in section 7.<sup>81</sup> The FWS argued that "take" had a broader meaning in section 7 than in section 9 and, therefore, it could issue an ITS based on *any* possibility that a species could be taken rather than by the "reasonable certainty" standard announced by the lower court.<sup>82</sup> Regarding the vagueness of the permit conditions, FWS argued that it had full authority to establish thresholds for permitted takes based on general environmental conditions.

Although FWS argued that the text of section 7 required an ITS in every biological opinion regardless of whether a take would occur,<sup>83</sup> the lower courts held that an ITS was allowed "only when a take has occurred or is reasonably certain to occur."<sup>84</sup>

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77. ACGA II, No. CIV 99-0673 PHX RCB, 1999 U.S. Dist. LEXIS 23236. Jeff Menges did not take part in this litigation.

78. ACGA II, No. CIV 99-0673 PHX RCB, 1999 U.S. Dist. LEXIS 23236, at \*5-\*6. "A grazing allotment is '[a] designated area of land available for livestock grazing upon which a specified number and kind of livestock may be grazed under a range allotment management plan.'" Peter Morrisette, *Is There Room for Free-Roaming Bison in Greater Yellowstone?*, 27 *ECOLOGY* L.Q. 467, 477 n.42 (2000) (quoting Forest Service, Dep't of Agric., Gallatin Nat'l Forest Plan VI-28 (1987)).

79. ACGA II, No. CIV 99-0673 PHX RCB, 1999 U.S. Dist. LEXIS 23236, at \*51-\*52. The district court upheld the final ITS because FWS showed that a take was reasonably certain to occur. *Id.* at \*52.

80. *Ariz. Cattle Growers*, 273 F.3d at 1241.

81. *Id.* at 1240-41.

82. *Id.*

83. *Id.* at 1241.

84. See ACGA II, No. CIV 99-0673 PHX RCB, 1999 U.S. Dist. LEXIS 23236, at \*37 (citing *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996)).

## A. Key Holdings

### 1. FWS May Not Issue an ITS in Every Biological Opinion

On appeal, FWS challenged the district court's ruling and asserted that *Chevron* deference should be applied to sustain the Agency's interpretation of its statutory responsibilities.<sup>85</sup> FWS maintained that the statutory language spoke clearly and supported its position and that ITSs were mandatory in every biological opinion.<sup>86</sup> While the Ninth Circuit agreed that the statute did require FWS to issue ITSs, it found that certain conditions must be met before an ITS was appropriate.<sup>87</sup> The section, read in context, states:

If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection...;

(B) the taking of an endangered or a threatened species incidental to the agency action will not violate such subsection; and

(C) if...a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972 [16 U.S.C. §§ 1361 *et seq.*]

the secretary shall provide the Federal agency...with [an ITS].<sup>88</sup>

In response to FWS's narrow, non-contextual reading, the court invoked the Whole Act Rule<sup>89</sup> of statutory construction requiring "that the words of a statute...be read...with a view to their place in the overall statutory

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85. *Ariz. Cattle Growers*, 273 F.3d at 1236–37. According to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), an agency interpretation of a statute should be granted deference if (1) the statute is ambiguous and (2) the agency interpretation is reasonable. See also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (arguing that courts should treat statutory law, like the common law, as a "rational and purposive construct. Thus, they should resolve ambiguities by 'assuming, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable goals reasonably.'").

86. *Ariz. Cattle Growers*, 273 F.3d at 1241.

87. *Id.*

88. 16 U.S.C. § 1536(b)(4) (2000).

89. Under the Whole Act Rule, a court must interpret a statute as a "symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

scheme."<sup>90</sup> Reading the subsection as a whole, the Ninth Circuit disagreed with FWS's interpretation and held that the FWS may issue an ITS only pursuant to the conditions outlined in section 7(b)(4).<sup>91</sup>

The court found that both FWS's implementing regulations and the legislative history of the Act supported this interpretation. The FWS's own implementing regulations stated that FWS must "formulate a statement concerning incidental take, *if such take may occur*,"<sup>92</sup> indicating that even agency policy did not require an ITS in every biological opinion.<sup>93</sup> Further, the legislative history of the ITS procedure suggested that it was intended only to provide a safe harbor from section 9 liability.<sup>94</sup> Thus, the panel reasoned that "it would be nonsensical, to require the issuance of [an ITS] when no takings cognizable under Section 9 are to occur."<sup>95</sup> Highlighting the intent of the Act, the common sense interpretation of its terms, the legislative history, and the agency's own regulations, the court determined "that the plain language of the ESA does not dictate that the Fish and Wildlife Service must issue an Incidental Take Statement irrespective of whether any incidental takings will occur."<sup>96</sup>

## 2. FWS Must Not Issue an ITS Without Evidence That a Take Is Reasonably Certain to Occur

To counter the claim that no protected species were present in the regulated areas, FWS asserted that the term "take" in section 7 had a broader meaning than the same term in section 9.<sup>97</sup> Though section 2 defines "take" for purposes of the entire act, FWS argued that the term should be understood in light of the differing purposes of section 7 and section 9. The FWS maintained that section 9 should be read restrictively to include only incidences of actual takings, because it was enacted to punish people who violated the Act.<sup>98</sup> Section 7, they argued, ordered

90. *Ariz. Cattle Growers*, 273 F.3d at 1241 (citing *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

91. *Id.* The required findings are quoted in the text above. Essentially, they require FWS to conclude that the underlying agency action will not violate section 7(a)(2), the taking will be incidental to the underlying action, and the incidental take will not cause jeopardy. See 16 U.S.C. § 1536(b)(4) (2000).

92. 50 C.F.R. § 402.14(g)(7) (2002) (emphasis added).

93. *Ariz. Cattle Growers*, 273 F.3d at 1242.

94. See H.R. REP. NO. 97-567, at 26 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2826.

95. *Ariz. Cattle Growers*, 273 F.3d at 1242.

96. *Id.* at 1241.

97. *Id.* at 1234.

98. *Id.* at 1237. That is, according to FWS, section 9 operates as a negative reinforcement, stopping action.

federal agencies to protect species, so “take” in that context should be read broadly to include *any possibility* that a species could be harmed.<sup>99</sup> FWS further asserted that its interpretation of section 7 take, outlined in FWS’s internal section 7 consultation handbook, should be given controlling weight under *Chevron*.<sup>100</sup>

The Ninth Circuit also rejected FWS’s interpretation that take had a broader definition in section 7 than in section 9.<sup>101</sup> First, the court held that *Chevron* only requires deference if Congress has not spoken to the precise question at issue.<sup>102</sup> Here, however, the panel concluded that Congress *had* spoken, as evidenced by the language and structure of the Act.<sup>103</sup> The panel found that “the Incidental Take Statement provided in Section 7 functions as a safe harbor provision immunizing persons from Section 9 liability.”<sup>104</sup> After all, the ITS provision existed only to shield the agency from liability for a take;<sup>105</sup> otherwise, the agency action could not proceed as long as an endangered species would be harmed.<sup>106</sup>

If there is no section 9 liability, the court reasoned, there is no need for a section 7 incidental take statement and no justification for placing restrictive conditions on an otherwise legal action.<sup>107</sup> Without the specter of section 9 liability, there is no need for a safe harbor. In fact, the “clear intent” behind the amendments adding this procedure was to ensure that any take occurring within the terms of an ITS was not considered a violation of section 9.<sup>108</sup> ESA section 7(o)(2) expressly provides that such take “shall not be considered to be a taking of the

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99. *Id.* In other words, FWS argued that section 7 gives federal agencies an affirmative duty to protect species, rather than simply ordering agencies to refrain from harming species (as in section 9). FWS argued that “take” could be read differently because section 9 was prohibitory and section 7 was proactive.

100. *Id.* at 1242. An agency is generally accorded deference in interpreting the statutes that the agency is charged with enforcing. See *SWANCC*, 531 U.S. 159, 191 (2001).

101. *Ariz. Cattle Growers*, 273 F.3d at 1240 (citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 853, n.9 (1984)).

102. *Id.* at 1236–37.

103. *Id.* at 1237–39.

104. *Id.* at 1239. See also *Weller*, *supra* note 54, at 334.

105. See 50 C.F.R. § 402.14(7)(o)(2) (2002).

106. Michael C. Blumm & Jonathan Lovvorn, *The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions*, 32 *LAND & WATER L. REV.* 353, 395 n.230 (1997). Remember that harm does not necessarily mean death or even physical injury. See generally Part I.B *supra*.

107. *Ariz. Cattle Growers*, 273 F.3d at 1242.

108. James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator’s Perspective*, 21 *ENVTL. L.* 499, 555 (1991).



species concerned."<sup>109</sup> Thus, a broader interpretation of section 7 was unwarranted.

The panel again noted that the legislative history of the Act weighed against FWS's expansive interpretation of a section 7 take.<sup>110</sup> The court found that, in enacting the 1982 amendments, Congress meant to introduce flexibility into section 7 by providing a way for projects to continue when they did not violate the jeopardy provisions of section 7 but did violate the taking provisions of section 9.<sup>111</sup> A broad interpretation of section 7, the court observed, "would allow the Fish and Wildlife Service to engage in widespread land regulation even where no Section 9 liability could be imposed,"<sup>112</sup> and "would turn the purpose behind the 1982 Amendment on its head."<sup>113</sup> Looking to the legislative history of the 1982 amendment, the court found that

[t]he "purpose of Section 7 (b)(4) (incidental take permits)...is to resolve the situation in which a Federal agency or a permit or license applicant has been advised that the proposed action will not violate section 7(a)(2) of the Act but the proposed action will result in the taking of some species incidental to the action—a clear violation of Section 9."<sup>114</sup>

Thus, the 1982 amendments were intended only to provide an exception to section 9's ironclad prohibition against take. The court then expressly held that, absent rare circumstances, it is arbitrary and capricious to issue an ITS when there is not a reasonable certainty that a take will occur incident to otherwise lawful activity.<sup>115</sup>

Having lost the arguments that an ITS must be issued in every biological opinion and that an ITS was warranted by any possibility of a take, FWS argued that the district court set an inappropriately high bar in ruling that FWS had to prove a take was "reasonably certain" before an ITS was authorized.<sup>116</sup> The Ninth Circuit again disagreed, explaining

109. 16 U.S.C. § 1536(o)(2) (2000). See also H.R. REP. NO. 97-567, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2826.

110. *Ariz. Cattle Growers*, 273 F.3d at 1239-40. The legislative history is fairly explicit on this point. See H.R. REP. NO. 97-567, at 31 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2831 ("Section 10(a), as amended, would allow the Secretary to permit any taking *otherwise prohibited by Section 9(a)(1)(B)...*") (emphasis added).

111. See H.R. REP. NO. 97-567, at 8 (1982), reprinted in 1982 U.S.C.C.A.N. 2807.

112. *Ariz. Cattle Growers*, 273 F.3d at 1240.

113. *Id.*

114. See H.R. REP. NO. 97-567, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2826.

115. *Ariz. Cattle Growers*, 273 F.3d at 1242.

116. *Id.* at 1235. The court noted that FWS "strenuously objects" to the reasonable certainty standard. *Id.*

that *ACGA II* “held merely that if the Fish and Wildlife Service cannot satisfy the court to a reasonable certainty that a take will occur, then it is arbitrary and capricious for it to issue an Incidental Take Statement imposing conditions on the use of land.”<sup>117</sup> The court stopped short of requiring FWS to provide evidence that an actual take had already occurred but held that the agency must find that a take is reasonably certain to occur before it issues an ITS.<sup>118</sup> Thus, FWS may not issue an ITS with permit conditions unless it concludes that a section 9 take is likely.

### 3. Adverse Modification of Unoccupied Habitat Does Not Justify an ITS

Having announced that take must be reasonably certain to occur before an ITS is appropriate, the Ninth Circuit examined each of FWS’s actions to determine whether the agency’s decisions were based on a “consideration of relevant factors” and whether there was a “clear error of judgment” under the arbitrary and capricious standard.<sup>119</sup> The court concluded that FWS failed to support its findings of harm to the species and that the conditions it imposed were illegal after conducting a species-by-species analysis to determine if a take was likely and reviewing the conditions imposed in the ITSs to discover if there was “a rational connection between the facts found and the choices made.”<sup>120</sup>

The FWS argued that members of the Razorback sucker species were likely to be taken even though the species could not be shown to exist in the regulated area.<sup>121</sup> The FWS pointed to the prospective nature of ITSs and argued that, though no fish had been observed since 1991, it was likely that small numbers of the fish survived in the area.<sup>122</sup> Additionally, the FWS argued that the fish could repopulate the area in the future and be taken due to grazing activities.<sup>123</sup> Further, the FWS added that a take of the Razorback sucker could result from adverse modification of critical habitat.<sup>124</sup>

The Ninth Circuit flatly rejected FWS’s arguments that future harm could come to the fish or that permit conditions could be supported by the theoretical presence of fish. First, the court disagreed

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117. *Id.* at 1243.

118. *Id.*

119. *Id.* at 1236.

120. *Id.* at 1243 (citing *Motor Vehicle Mfrs.’ Ass’n v. State Farm Mutual Auto. Ass’n*, 463 U.S. 29, 43 (1983); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)).

121. *Ariz. Cattle Growers*, 273 F.3d at 1243.

122. ITSs are long-term documents lasting for substantial periods of time, upwards of 90 years.

123. *Ariz. Cattle Growers*, 273 F.3d at 1243–44.

124. *Id.* at 1244.

with FWS's argument that small numbers of fish were present in the area, finding it totally lacking in evidentiary support.<sup>125</sup> "This speculative evidence without more," the court stated, "is woefully insufficient to meet the standards imposed by the governing statute."<sup>126</sup> Since FWS did not have any other evidence to support its assertion that the species was present in the area, there could be no take based on present harm to the species.

Second, the court noted that, rather than issuing an ITS, the agency should reinitiate consultation if the species repopulated the area,<sup>127</sup> because using the ITS procedure to account for speculative future takes would make the reinitiation procedure obsolete and would upset the structure of the Act.<sup>128</sup> Thus, the Ninth Circuit prohibited FWS from inserting conditions into a permit based on the theory that a member of an endangered species *could* be harmed if it occupied the land in the future.<sup>129</sup>

The panel also rejected FWS's argument that it could protect potential habitat and found that Congress intended the critical habitat provisions of section 4 to be the exclusive method for protecting unoccupied habitat.<sup>130</sup> Allowing FWS to regulate unoccupied potential habitat through the section 7 consultation process would obviate the need for critical habitat protections and "allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species."<sup>131</sup> The court rejected FWS's argument that a take could result from habitat modification in this case. "Although habitat modification resulting in actual killing may constitute a taking," they noted, "the Fish and Wildlife Service has presented only speculative evidence that habitat modification...may impact the razorback

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125. *Id.*

126. *Id.* at 1245.

127. Reinitiation of consultation is provided for in 50 C.F.R. § 402.16 (1986). If an action over which the agency has continuing authority affects a listed species, which was not previously affected by the agency action, the agency must engage in a new consultation to ensure that the species is not jeopardized or taken. *Id.*

128. *Ariz. Cattle Growers*, 273 F.3d at 1244.

129. *Id.*

130. *Id.* Recall that section 4 provides for the designation of critical habitat. See Part I.C *supra*. Of course, designation of critical habitat does not provide instant protection. The real protection comes during inter-agency consultation when FWS determines that a federal agency's action may damage that habitat. In that case, FWS must provide reasonable and prudent alternatives that will not cause adverse modification of critical habitat. See 16 U.S.C. § 1536(b)(3)(A) (2000). See also Robert J. Glennon & Peter W. Culp, *The Last Green Lagoon: How and Why the Bush Administration Should Save the Colorado River Delta*, 28 *ECOLOGICAL L.Q.* 903, 961 (2002).

131. *Ariz. Cattle Growers*, 273 F.3d at 1244.

sucker.”<sup>132</sup> Finally, the Ninth Circuit rejected FWS’s argument that the burden was on the plaintiff to prove that the species was not present in the area.<sup>133</sup> The court found both that the ESA required FWS, not the plaintiffs, to show that the species was present and that, in any event, it would be difficult and unfair to require permittees to prove that species were *not* present.<sup>134</sup> Rather, the court concluded that FWS had the statutory duty to support its findings.<sup>135</sup>

Having rejected FWS’s factual findings, the court determined that the agency failed to provide sufficient evidentiary support for its contention that the Razorback sucker would be taken.<sup>136</sup> Placing a significant limit on FWS’s discretion, the court held that, “[w]here the agency purports to impose conditions on the lawful use of land without showing that the species exists on it, it acts beyond its authority in violation of 5 U.S.C. § 706.”<sup>137</sup>

#### *4. FWS Must State the Maximum Take Allowed by the ITS in an Objectively Measurable Manner*

When issuing an ITS, FWS must indicate how much taking is permitted.<sup>138</sup> If the permittee exceeds the authorized level of take, the permit may be revoked and the takes are subject to the Act’s full penalties.<sup>139</sup> Since it is difficult for the agency to monitor the level of take and even more difficult to determine whether an individual member of an endangered species has been killed or harmed,<sup>140</sup> FWS frequently states that the authorized level of take will be deemed to be exceeded if environmental conditions do not improve.<sup>141</sup> The court indicated its

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132. *Id.*

133. *Id.*

134. *Id.* (“[I]t would be improper to force ACGA to prove that the species does not exist on the permitted area...both because it would require ACGA to meet the burden statutorily imposed on the agency, and because it would be requiring it to prove a negative.”).

135. *Id.*

136. *Id.*

137. *Id.*

138. See 16 U.S.C. § 1539(a) (2000).

139. See Weller, *supra* note 54, at 334.

140. Imagine the difficulty in determining whether reproductive patterns or feeding habits of a small and widely dispersed species have been altered. FWS simply does not have the resources to monitor these kinds of developments in a realistic fashion. See Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 231 (2000) (acknowledging FWS’s “extremely limited resources”).

141. Indeed, that is what FWS did here. See *Ariz. Cattle Growers*, 273 F.3d at 1250. Rather than meaningfully defining the “ecological conditions,” FWS noted vaguely that improving conditions can be defined through improvements in watershed, soil condition, trend and condition of rangelands (e.g., vegetative litter, plant vigor, and native species diversity),

displeasure with the fact that this is a routine practice rather than an exception or last resort measure.<sup>142</sup> The court stopped short, however, of banning the use of ecological conditions as a standard for determining when a permitted take has been exceeded. While noting that a numerical value is preferred, the court found that Congress "anticipated situations in which impact could not be contemplated in terms of a precise number."<sup>143</sup> Nonetheless, the Ninth Circuit was careful to limit the agency's discretion in this area as well, holding that, before another standard may be used, "the Fish and Wildlife Service must establish that no such numerical value could be practically obtained."<sup>144</sup> The court held that it was permissible for FWS to use ecological conditions as a substitute so long as they were associated with take of the species.<sup>145</sup> Applying the standard to FWS's actions here, the court of appeals found that the conditions the agency issued in this case were so vague as to be meaningless.<sup>146</sup> Worse, this put the permittee at the mercy of FWS, giving the agency "unfettered discretion" over whether the conditions had been violated.<sup>147</sup> The panel disapproved of this lack of objectivity and the fact that the conditions left the permittees with the responsibility for the general ecology of over 22,000 acres and invalidated the conditions.<sup>148</sup> By prohibiting FWS from using vague standards such as environmental degradation, which leaves the applicant with no way to know when or whether a permit has been violated, the court again limited the discretion available to FWS in issuing permitting conditions.

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riparian conditions (*e.g.*, vegetative and geomorphologic: bank, terrace, and flood plain conditions), and stream channel conditions (*e.g.*, channel profile, embeddedness, water temperature, and base flow) within the natural capabilities of the landscape in all pastures on the allotment within the Blue River watershed. *Id.* at 1249.

142. *Id.* at 1250-51.

143. *Id.* at 1250. See also H.R. REP. NO. 97-567, at 27 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2827 ("[T]he Committee does not intend that the Secretary will, in every instance, interpret the word impact to be a precise number. Where possible, the impact should be specified in terms of a numerical limitation.").

144. *Ariz. Cattle Growers*, 273 F.3d at 1250. FWS regulations indicate no preference for numbers or ecological indicators. See 50 C.F.R. § 402.14 (2002) (defining impact as "the amount or extent of such incidental taking on the species").

145. See *Ariz. Cattle Growers*, 273 F.3d at 1250 ("[T]he use of ecological conditions as a surrogate for defining the amount or extent of incidental take is reasonable so long as these conditions are linked to the take of the protected species.").

146. *Id.* at 1250 ("This vague analysis, however, cannot be what Congress contemplated when it anticipated that surrogate indices might be used in place of specific numbers.").

147. *Id.* ("Moreover, whether there has been compliance with this vague directive is within the unfettered discretion of the Fish and Wildlife Service, leaving no method by which the applicant or the action agency can gauge their performance.").

148. *Id.* at 1250-51.

While the ACGA opinion does not invalidate all uses of ecologically based conditions, it does require FWS to show that numerical values are not available before it may use ecological conditions as a proxy for the permitted level of take. Further, ecological conditions must be specific and objectively verifiable to be upheld. Finally, FWS must articulate a causal connection between the ecological conditions and the expected take of the protected species.<sup>149</sup> These objectively measurable criteria will be easier to review and will provide permittees with an objective standard by which to judge their actions.

### **B. Arizona Cattle Growers Severely Restricts FWS's Authority and Will Significantly Change Agency Procedure by Forcing Greater Proof of Harm to Species and More Specificity in Permit Conditions**

*Arizona Cattle Growers* severely reduces FWS's regulatory discretion and authority in several ways. First, by adopting a reasonable certainty standard, it forces FWS to use a narrower definition of the term "take" when exercising its authority under section 7. Under its former interpretation that *any possibility* of injury or harm was a justification for an ITS with restrictive conditions, FWS could simply assert a take and issue an ITS with any conditions it liked. A permittee would have been hard pressed to challenge the finding or object to the conditions. FWS must now meet a higher threshold before imposing conditions on permits. This will place permit applicants in a better position to avoid conditions in the first place or to challenge implausible conditions.

Second, FWS must now show that the land is occupied by endangered or threatened species before it can mandate permit conditions. FWS had previously asserted that it could place conditions on the land use based on its value as potential habitat. The new standard reduces FWS's discretion in both what kind of conditions it may issue and whether it may issue conditions at all. It must now prove that the land is occupied before issuing conditions; whereas before it could issue conditions whenever it pleased. Further, since conditions may only remedy the effects of the take,<sup>150</sup> FWS may only require measures that will remedy the impact of the take on the species that it can prove will be taken. Thus, FWS can no longer use the assertion that a species will be taken to add conditions regarding species that will not be taken. This

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149. *Id.* at 1248. That is, FWS must find that the ecological conditions it imposes would likely result in a take if they were not imposed. In more concrete terms, FWS cannot find that factors X and Y cause a take but then determine that take will be deemed exceeded if factors X, Y, and Z do not improve.

150. 16 U.S.C. § 1536(b)(4)(C) (2000).

provides land users with a much stronger shield against the imposition of conditions.

Third, and perhaps most importantly, the court recognized that FWS, rather than the permit applicant, bears the burden of proving that the land was occupied or that a species would be taken. This will be a tremendous advantage for permittees because it places the costs of conducting the necessary studies squarely on the agency. Under FWS's former interpretations, permittees had to prove that the species was not on the land.<sup>151</sup> Aside from the always difficult task of proving a negative, the cost involved in generating the necessary studies would be so prohibitive as to force permittees to accept the conditions.<sup>152</sup> Since FWS suffers from a lack of resources and cannot do the studies itself,<sup>153</sup> permittees will be in a far better position at the bargaining table. Further, permittees will have a much better chance when later challenging permit conditions that they feel are unfair.

Finally, the FWS may no longer burden individuals with general ecological responsibility for large tracts of government land. By holding that FWS must generally use numerical values for the anticipated level of take in an ITS,<sup>154</sup> the Ninth Circuit forced FWS to be much more precise in issuing the conditions and much more vigilant in enforcing them. The new standard also removes agency discretion by forcing FWS to point to specific instances of take rather than a generalized finding of ecological deterioration.

Forcing FWS to come up with the number of anticipated takes will require the service to justify why they believe that a specific number of a protected species will be harassed, harmed, injured, or killed before they may issue conditions related to a take. On the enforcement side, FWS may no longer find a permittee in violation due to general ecological deterioration. Before *Arizona Cattle Growers*, it was possible for the FWS to revoke permits or impose extra conditions based on a suspicion of take coupled with a general ecological deterioration. The service must now show that an excessive number of members of the protected species have been harmed. This will require monitoring and enforcement resources that FWS simply does not have.<sup>155</sup> The FWS will have to come

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151. *Ariz. Cattle Growers*, 273 F.3d at 1244.

152. Buckmaster de Wolf, *Strange Things Are Afoot at the Circle K: Agency Action Against Leased Sites in Environmental Bankruptcy*, 21 B.C. ENVTL. AFF. L. REV. 145, 162 n.106 (describing environmental costs as "astronomical").

153. See Jane H. Bock & Katy Human, *NGOs and the Protection of Biodiversity: The Ecologists' Views*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 167 (2002).

154. See *Ariz. Cattle Growers*, 273 F.3d at 1250.

155. Indeed, it will be very difficult for FWS to do any kind of enforcement at all. Before, the FWS could see a general deterioration, assume there had been a taking, and

up with a much more cost-effective or creative way to monitor permitted incidental take or it will be unable to enforce its permit conditions.

### III. JUDICIAL BOUNDARIES: ARIZONA CATTLE GROWERS IN THE CONTEXT OF THE DEVELOPING JUDICIAL TREND TOWARD LIMITED AGENCY DISCRETION UNDER THE ESA

The ESA sets lofty goals and establishes mandatory procedures that FWS simply cannot meet due to budget restrictions.<sup>156</sup> For example, critical habitat must be designated for each species within a very short time of listing. While listing costs relatively little, critical habitat designations are costly and require significant labor. Given its limited resources, FWS chooses to concentrate on listing, either ignoring critical habitat designation or reserving it for some later time.<sup>157</sup> For years, FWS has been picking and choosing whether and when it would designate critical habitat, despite the fact that this practice is counter to the fairly clear language of the Act and has been challenged repeatedly.<sup>158</sup>

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order it remedied. Now, it appears, the FWS will have to find harmed animals or plants. Imagine, for example, the following scenario in which FWS determines that a rancher's cattle are likely to trample fish in a stream. After issuing an ITS, FWS permits the rancher to take ten fish per year on a 22,000-acre allotment (not unlike the conditions placed on the grazing allotments at issue in the *Arizona Cattle Growers* case). Given that the fish are small and live in rivers and streams, how is FWS supposed to find individual fish that have been taken? The chances that they will wash away, be eaten by predators or scavengers, or meet some other fate make the FWS's job very difficult. Factor in the size of the plot and the problem becomes all the more difficult. Courts may permit an "ecological" barometer in this type of situation, but very few have shown sympathy when FWS pleads insufficient resources. *But cf.* Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1256 (10th Cir. 1998) (recognizing that "[a]gency actions are driven (and constrained) as much by agency funding as by agency policy and statutory directive"). In any event, this is bound to cause severe problems for FWS.

156. See Bock & Human, *supra* note 153, at 175 (noting that FWS's enforcement budget "has been raised to \$8 million, but conservation biologists within and outside the FWS suggest that a budget of \$120 million would be required to carry out the task of listing endangered species properly"). In any case, it is clear that FWS is woefully underfunded to perform its job to the statutory standard.

157. See Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45 (2002) (noting that "the Clinton and George W. Bush Administrations have argued repeatedly that designation of critical habitat is a needless and expensive diversion of agency resources with little to no practical benefit to the species"). The theory that critical habitat is needless is borne out of a belief that listing will provide the most benefit to the most species. See also Bruce Babbitt, *Bush Isn't All Wrong About the Endangered Species Act*, N.Y. TIMES, Apr. 15, 2001, § 4, at 11.

158. J.B. Ruhl, *Biodiversity Conservation and the Ever Expanding Web of Federal Laws Regulating Non-Federal Lands: Time for Something Different?*, 66 U. COLO. L. REV. 555, 595



After years of courts expressing displeasure with FWS's discretion in this area, the Fifth Circuit recently closed the door on FWS's practice of finding nearly every designation "not prudent" or "not determinable."<sup>159</sup> In *Sierra Club v. United States Fish and Wildlife Service*, the court held that FWS must designate critical habitat within one year of listing, absent rare circumstances.<sup>160</sup>

*Sierra Club* is even more problematic for FWS in light of another recent case, *New Mexico Cattle Growers v. United States Fish and Wildlife Service*.<sup>161</sup> There, the Tenth Circuit reaffirmed that FWS must engage in a full-scale economic analysis of each critical habitat designation. The court held that, after the economic analysis is completed, FWS must determine whether the economic burden outweighs the ecological benefit and may exclude land from critical habitat on that basis. The service had skirted the economic analysis requirement by using a questionable "baseline" approach that eliminated most of the economic impacts of designation, instead attributing them to listing.<sup>162</sup> This greatly reduced the cost of an analysis and eliminated most of the cost-benefit inquiries.<sup>163</sup> Landowners and commentators questioned this mode of analysis for years before the Tenth Circuit invalidated it.<sup>164</sup> After *New Mexico Cattle Growers*, it is clear that the FWS must consider every economic effect attributable to critical habitat designation.

These two cases represent a difficult dilemma for the agency. Environmental groups sue to force designations within the very brief statutory time frame and the court orders FWS to comply. Given the shortage of resources and the costs of both designation and economic analysis, it is difficult, if not impossible, for FWS to conduct its task correctly in such a limited time. Rather than face contempt sanctions and

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(1995) (observing that FWS has been forced by litigation to designate critical habitat in many instances).

159. See, e.g., *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001).

160. For a full discussion of *Sierra Club*, see Part A *infra*.

161. 248 F.3d 1277 (10th Cir. 2001).

162. *Id.* at 1280.

163. Remember, the FWS "may" choose not to designate an area as critical habitat if the costs of designation outweigh the benefit to the species. See Part I.C *supra*. Since FWS dramatically lowered the economic impacts attributable to the listing by raising the "baseline," there was no need to determine at what point the economic costs would outweigh the ecological benefits (and no need to defend such a determination, either way, in court). If FWS must include all costs attributable to listing, rather than all costs *solely* attributable to listing, it becomes much more difficult to ignore the cost-benefit analysis.

164. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001).

further litigation, FWS races to complete the designation and analysis.<sup>165</sup> The end product is usually shoddy work and uses baseline economic analysis.<sup>166</sup> Groups adversely affected by the designation then sue to invalidate it and have been highly successful. The FWS ends up back at square one: a listed species with no critical habitat. Thus, the FWS's already meager resources are wasted in its bureaucratic two-step through the courts, which is aimed at avoiding only the most immediate problems.

### A. FWS Must Designate Critical Habitat at the Time of Listing

While FWS has had repeated problems in the critical habitat arena, the text of section 4 is fairly clear: in almost all circumstances, FWS must designate critical habitat at the time it lists a species.<sup>167</sup> The FWS may refuse to designate critical habitat if it is either "not prudent" or "not determinable."<sup>168</sup> Because the terms are left undefined in the Act itself, the agency defined them.<sup>169</sup> According to the FWS regulations, a designation is not prudent if it would not be beneficial to the species or if it would actually harm the species.<sup>170</sup> The regulations state that a designation is not determinable when either the biological needs of the species are not known or "information sufficient to perform required analyses of the impacts of the designation is lacking."<sup>171</sup> If FWS

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165. See, e.g., Peter J. Gardner, *Owl Redux*, VT. B.J. Dec. 28, 2002, at 33, 35 (noting that, "[i]n response to a court order to designate critical habitat in an effort to save the northern spotted owl, the Bush Administration...moved in April, 1991, to place restrictions on more than eleven million acres of forest" in a very short time).

166. See, e.g., *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1227 (E.D. Cal. 2003). In this case, decided well after *New Mexico Cattle Growers*, the court-ordered designation was completed in a short time frame, resulting in the use of a method "for evaluating the economic impacts related to critical habitat designation... 'substantially similar' to that utilized by the service in *New Mexico Cattle Growers*." *Id.* The court thus proceeded to strike down the designation. *Id.* at 1239.

167. 16 U.S.C. § 1533(a)(3)(A) (2000) (FWS "shall, concurrently with making a determination...that the species is an endangered species or a threatened species, designate any habitat...which is then determined to be critical").

168. 16 U.S.C. § 1533(a)(3) (2000).

169. See 50 C.F.R. § 424.12(a)(1) (2002).

170. 50 C.F.R. § 424.12 (2002):

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

171. *Id.*

determines that a designation is not prudent, the matter is concluded. If it decides that a designation is not determinable, it may extend the period for designation by up to one year.<sup>172</sup>

In *Sierra Club*, FWS failed to designate critical habitat for the threatened Gulf sturgeon because it determined that critical habitat designation did not provide additional protection for the species.<sup>173</sup> Instead, FWS determined that designation was “not prudent.”<sup>174</sup> The *Sierra Club* challenged this finding and objected to FWS’s blanket policy of avoiding critical habitat designation.<sup>175</sup>

The reason FWS held this position is somewhat complex. Recall that the purpose of designating critical habitat is only to ensure that government actions, rather than private projects, do not have adverse effects on habitat needed for survival or recovery.<sup>176</sup> FWS regulations defined adverse modification as that which reduced both survival *and* recovery of the species.<sup>177</sup> This definition effectively wrote recovery out of the language, because, by definition, anything that affects survival also affects recovery but anything that affects only recovery (*i.e.*, does not affect survival) is insufficient to trigger the protection. Anything that reduces the chance of survival would cause jeopardy and is banned under section 7 as soon as a species is listed. FWS regarded critical habitat designation as merely duplicating the jeopardy protections and, therefore, viewed designation as a waste of resources. The FWS determined that designation of critical habitat was “not prudent” under agency regulations because designation was not “beneficial to the species.”<sup>178</sup>

The *Sierra Club* court held that FWS’s judgment that critical habitat designations did nothing to aid species robbed the statutory text

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172. 16 U.S.C. § 1533(b)(6)(A)(ii)(II) (2000).

173. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 436 (5th Cir. 2001).

174. *Id.* at 437.

175. *Id.*

176. That is, private persons may destroy critical habitat without punishment unless their action results in the take of a listed species. An individual or government agency that adversely modifies habitat may be guilty of a take if there is actual injury or death to a specific member of the listed species. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995). Designation of critical habitat under section 4 thus helps protect species by forcing the agency to engage in consultation if critical habitat may be adversely modified and offering reasonable and prudent alternatives to that modification. See 16 U.S.C. § 1533(b) (2000).

177. See 50 C.F.R. § 402.14 (2002) (“Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.”) (emphasis added).

178. *Sierra Club*, 245 F.3d at 437.

of its meaning and subverted congressional intent.<sup>179</sup> According to the court, Congress had stated that critical habitat was to be designated at the time of listing and that “not prudent” determinations should be limited to situations in which either the designation harmed the species or the particular designation would not aid the particular species.<sup>180</sup>

The court found that the legislative history of the ESA supported the interpretation that FWS must generally designate critical habitat.<sup>181</sup> The 1978 amendments to the Act added critical habitat and some members considered “the designation of critical habitat [to be] more important than the designation of an endangered species itself.”<sup>182</sup> In describing the amendment, its sponsor noted that “[i]t simply requires that at the time a species is declared to be threatened or endangered, the appropriate habitat be designated.”<sup>183</sup> Thus, the Tenth Circuit concluded that Congress meant to require critical habitat designation at the time the species was listed unless there was a compelling reason not to do so.<sup>184</sup>

The *Sierra Club* court explained that FWS regulations had improperly defined “adverse modification of critical habitat.”<sup>185</sup> Since critical habitat is aimed at recovery of the species, the court reasoned that “adverse modification” should be defined as that which is detrimental to the survival *or* recovery of the species rather than survival *and* recovery of the species.<sup>186</sup> To do otherwise, the court explained, would erase conservation from the equation, a clear contradiction of the statutory definition. The court invalidated the “not prudent” decision and struck down the regulatory definition as facially invalid.<sup>187</sup> Thus, the court

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179. *Id.* at 443.

180. See H.R. REP. NO. 95-1625, at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467.

181. See *Sierra Club*, 245 F.3d at 442-43.

182. Statement of Senator Garn, 124 CONG. REC. S21575 (1978) (noting also that “when a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know not only of the existence of an endangered species but also of the extent and nature of the habitat that is critical to the continued existence of that species”).

183. *Id.*

184. For a laundry list of judicially forced designations, see Darin, *supra* note 140, at 229-31. Strangely, it seems that Congress never intended to set so many regulations through litigation. In the debates over the need to make the Act more flexible, Senator Malcolm Wallop of Wyoming opined that the *TVA v. Hill* decision would lead to an avalanche of legal challenges designed “to stop Federal projects as a primary goal and in a way never intended by Congress.” 124 CONG. REC. 9805 (1978) (statement of Sen. Wallop). Ironically, this was the same year that Congress decided to add the requirements for designating critical habitat at the time of listing. While trying to avoid one problem with the Act’s inflexibility, Congress seems to have added another.

185. *Sierra Club*, 245 F.3d at 443.

186. *Id.*

187. *Id.*

recognized that critical habitat *does* provide additional protection for species by ensuring that their opportunity for recovery is not damaged.

*Sierra Club* will result in drastic changes in FWS's implementation of the ESA. First, FWS must define adverse modification in terms of survival *or* recovery. If a habitat modification adversely affects only a species' opportunity to recover, it now violates section 7(a)(2). This has major implications for both designation of critical habitat and the way section 7 is administered. While this means that FWS must designate critical habitat, it also means that agencies may no longer authorize, fund, or carry out activities that will modify critical habitat in a manner that will affect recovery negatively.

Second, critical habitat designation can no longer be avoided as "not prudent" on the basis that designation, in general, will not benefit species.<sup>188</sup> Since a "not determinable" finding only permits a one-year delay, FWS must now designate critical habitat for all species within one year of listing regardless of financial constraints. As long as conservation groups continue to bring suit to force designation, FWS will continue to lose and will have no choice but to designate habitat for each species.

Post-*Sierra Club*, FWS must designate critical habitat and cannot avoid doing so on the grounds that it is not cost-effective.<sup>189</sup> However, given the resource constraints placed upon the agency by Congress, it is difficult to see how FWS will be able to fulfill its statutory mandates for designation. FWS will be hard pressed to list any species if all its resources are focused on designation.<sup>190</sup> Since the avalanche of litigation aimed at forcing critical habitat designation is likely to persist and courts are rarely sympathetic to FWS's pleas of poverty,<sup>191</sup> environmentalists will most likely continue to be successful in compelling critical habitat designation.

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188. There still could be situations in which designation is not prudent, but arguably those would be limited to situations in which the species would be harmed or in which critical habitat would literally provide no additional benefit. Still, since every species needs habitat to survive, designation is likely to be beneficial unless sufficient state, local, and private conservation measures render additional habitat unnecessary.

189. Technically, *Sierra Club* is only binding in the Fifth Circuit. Other courts, though, have found *Sierra Club's* reasoning persuasive. See *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 275 F. Supp. 2d 1136 (C.D. Cal. 2002). See also *N.M. Cattle Growers*, 248 F.3d at 1283. It is likely that this ruling has nationwide implications.

190. See Notice of Intent to Clarify the Role of Habitat in Species Conservation, 64 Fed. Reg. 31,871, 31,872 (June 14, 1999) [hereinafter Notice of Intent].

191. See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189 (10th Cir. 1998) (holding that lack of agency resources is not a defense to an injunction but may be a defense to a contempt citation once an injunction issues). *But cf.* *Ctr. for Biological Diversity & Cal. Native Plant Soc'y v. Norton*, 212 F. Supp. 2d 1217, 1221 (S.D. Cal. 2002) (exercising judicial discretion to consider the FWS's budgetary shortfalls).

## B. *New Mexico Cattle Growers: Forcing FWS to Engage in Meaningful Economic Analysis*

FWS's critical habitat procedures have also been challenged for improperly ignoring the economic impacts of designation.<sup>192</sup> When FWS designates critical habitat, it is required to prepare an economic impact analysis detailing the financial effects of designation.<sup>193</sup> FWS may exclude an area from designation if it determines that the economic benefits of excluding the area outweigh the ecological benefit of including the area.<sup>194</sup> In addition, the analysis provides the community with a way of assessing, in readily understandable terms, the types of activities that will be restrained and the local impact likely to flow from those restrictions.<sup>195</sup>

In *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service*,<sup>196</sup> another cattle ranchers' group alleged that FWS was improperly avoiding the economic analysis required for designation.<sup>197</sup> There, New Mexico Cattle Growers argued that FWS used a legally insufficient economic analysis that failed to take into account the "economic impact, and any other relevant impact, of specifying any particular area as critical habitat" as required by the Act.<sup>198</sup>

This analysis, known as the "incremental baseline approach," takes economic effects caused by both designation *and* another factor, such as listing, and moves them below the "baseline," where they are not

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192. William Snape III et al., *Protecting Ecosystems Under the Endangered Species Act: The Sonoran Desert Example*, 41 WASHBURN L.J. 14, 21-22 (2001) (noting recent challenges based on improper economic impacts).

193. See 16 U.S.C. § 1533(b)(2) (2000). This section also requires that the designation take into account "any other relevant impact." While it is still unclear what that means, several commentators have suggested that it includes effects such as impacts on military training and readiness. See Amy Armstrong, *Critical Habitat Designations Under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protections*, 10 S.C. ENVTL. L.J. 53, 75 (2002). See also Joseph M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn't*, 20 STAN. ENVTL. L.J. 133, 188 (discussing the different approaches circuit courts have taken in determining the scope of "any other relevant impact").

194. See 16 U.S.C. § 1533(b)(2) (2000). Despite this discretion, FWS may not exclude an area if doing so would result in the extinction of the species. *Id.*

195. See Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 435 (1996) (noting that "[i]n important ways, economic analysis of environmental protection measures—and of public policy measures more generally—set the agenda for debate about the environment").

196. 248 F.3d 1277 (10th Cir. 2001).

197. *Id.* at 1280-81.

198. *Id.* at 1282 (quoting 16 U.S.C. § 1533(b)(2)).

considered in the required analysis.<sup>199</sup> Instead of considering all impacts of a designation, this approach addresses only those that would not occur *but for* the designation,<sup>200</sup> thereby disregarding any impact that may also result from other causes. The take provision of section 9 bans the modification of *any* habitat that results in actual injury to a listed species, regardless of whether the habitat is designated as critical.<sup>201</sup> Because critical habitat is that which is necessary for survival or recovery, the FWS claimed that any modification of critical habitat would result in actual injury and therefore be prohibited by section 9; that is, any restriction would exist regardless of whether the land was designated.<sup>202</sup> FWS argued that considering the effects that resulted from both listing and designation would impermissibly inject economic analysis into the listing process.<sup>203</sup> Therefore, FWS excluded them from the economic analysis.<sup>204</sup>

In *New Mexico Cattle Growers*, FWS argued that the designation would “result in no additional protection for the flycatcher nor have any additional economic effects beyond those that may have been caused by listing and by other statutes.”<sup>205</sup> This approach is predicated on the theory that designation cannot result in additional burdens to the community because designation does not provide any benefit to the

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199. See Linda A. Malone, *Recent Developments Concerning Environmental Law and Agriculture*, 7 DRAKE J. AGRIC. L. 341, 350 (2002) (explaining baseline approach). Aside from listing, other causes permitting exclusion of economic impacts include state law restrictions. The FWS recently discounted some of the effects of a critical habitat designation in California because that state’s Environmental Quality Act and Endangered Species Act include restrictions similar to the ESA’s listing provisions. See Ruth Langridge, *Changing Legal Regimes and the Allocation of Water Between Two California Rivers*, 42 NAT. RESOURCES J. 283, 301 (2002) (noting that “[t]he 1970 California Environmental Quality Act (CEQA), the 1970 California Endangered Species Act (CESA), and the 1970 California Wild and Scenic Rivers Act paralleled their federal counterparts”).

200. See *N.M. Cattle Growers*, 248 F.3d at 1280.

201. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

202. See 50 C.F.R. § 17.3 (1998); see also *Palila v. Haw. Dep’t of Land & Natural Res.*, 852 F.2d 1106 (9th Cir. 1988).

203. Listing decisions are to be made on the best scientific and commercial data and are to disregard economics entirely. 16 U.S.C. § 1533(b)(1)(A) (2000).

204. The theory behind excluding economic effects that are attributable both to listing and critical habitat designation is that listing of the species (which occurs prior to or simultaneously with the designation) will have economic impacts that must not be considered and that it would be unfair to account for them in the critical habitat portion of the final rule.

205. See *N.M. Cattle Growers*, 248 F.3d at 1280, citing DIV. OF ECON., U.S. FISH AND WILDLIFE SERV., *ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE SOUTHWESTERN FLYCATCHER S3* (1997).

species.<sup>206</sup> If FWS had determined that there was a significant burden on the community, it would then have had to determine whether that burden outweighed the benefits to the species, a perilous exercise to be sure.<sup>207</sup> However, FWS did not need to determine whether the burden to the community outweighed the benefit to the species because, under its approach, there was no measurable economic impact. Conversely, the New Mexico Cattle Growers argued that the designation had clear economic effects, regardless of whether these effects provided additional benefits.<sup>208</sup> They argued that FWS's interpretation essentially wrote meaningful economic analysis out of the ESA.<sup>209</sup>

While the ESA mandates that FWS conduct an economic analysis, it does not lay out the procedures for doing so and does not indicate which factors must be counted and which factors may be ignored. FWS argued that its interpretation was reasonable and deserved deference in light of *Chevron*.<sup>210</sup> The Tenth Circuit disagreed, announcing that it would determine Congress's intent using "traditional tools of statutory interpretation."<sup>211</sup> The court first noted that *Chevron* deference was not due in this case "[b]ecause the statutory interpretation resulting in the baseline approach ha[d] never undergone the formal rule making

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206. This is partly because FWS had effectively excluded recovery from the definition of "adverse modification" as mentioned previously in Part III.A *supra*. See also 50 C.F.R. § 402.14 (2002). Since it added no further protections, the logic goes, it could have no further impacts. Note that *Sierra Club*, 245 F.3d 434 (5th Cir. 2001), flatly rejected the theory that designation results in no additional protections. This should further weaken, if not cripple, FWS's argument that designation has no additional impacts. It is not clear whether the FWS will revise its opinion regarding additional burdens in light of *Sierra Club*, but it has not developed a different method of analysis thus far. See Economic & Planning Systems, Inc., *Final Draft Report: Economic Analysis of Critical Habitat Designation for the Baker's and Yellow Larkspurs*, at <http://sacramento.fws.gov/ea/Documents/Larkspurs%20EA%20draft.pdf> (last visited Mar. 5, 2004) (using essentially the same baseline test rejected in *New Mexico Cattle Growers* but attributing the costs generated by listing to other questionable factors).

207. See 16 U.S.C. § 1533(b)(2) (2000). It is important to note that the Act permits, but does not require, FWS to exclude areas from designation if the burden outweighs the benefit. See *id.* ("The Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat....") (emphasis added). Still, it is hard to imagine a situation in which such a decision would not be arbitrary and capricious or the subject of great outrage in the impacted community.

208. See Plaintiffs' Opening Brief at 21, *N.M. Cattle Growers* (No. 98-0275-BB/DJS-ACE) [hereinafter Plaintiffs' Brief]; see also Brief of Amicus Curiae Pacific Legal Foundation at 10, *N.M. Cattle Growers* (No. 98-0275-BB/DJS-ACE) [hereinafter Amicus Curiae Brief].

209. See Plaintiffs' Brief, *supra* note 208, at 18; see also Amicus Curiae Brief, *supra* note 208, at 8.

210. *N.M. Cattle Growers*, 248 F.3d at 1281.

211. *Id.* (quoting *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446, (1987)).



process."<sup>212</sup> Interpretations not adopted in a formal rulemaking are not entitled to *Chevron* deference but are useful only to the extent that they persuade the court.<sup>213</sup>

The court dismissed the baseline approach, finding it "not in accord with the language or intent of the ESA."<sup>214</sup> It characterized FWS's approach as a "but for" method, noting that, under the baseline approach, "unless an economic impact would not result but for the [Critical Habitat Designation (CHD)], that impact is attributable to a different cause (typically listing) and is not an 'economic impact...of specifying any particular area as critical habitat.'"<sup>215</sup> According to the court, this policy resulted from an improper regulatory definition of "adverse modification," because the "root of the problem" was FWS's position that designations provided no benefit to the species.<sup>216</sup> Rather, the court emphasized that designation creates additional protections for species as well as burdens on landowners.<sup>217</sup>

Further, the court explained that Congress intended for all critical habitat designations to include economic analyses,<sup>218</sup> despite FWS's argument that abandoning the baseline approach would be "injecting economic analysis into the listing decision."<sup>219</sup> In fact, the panel concluded, Congress must have intended this kind of balancing when it placed the cost-benefit language into the critical habitat

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212. *Id.*

213. See *Reno v. Koray*, 515 U.S. 50, 61 (1995). *But cf.* *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) ("[W]hether the Secretary has consistently applied the interpretation embodied in the citation [is] a factor bearing on the reasonableness of the Secretary's position."). Note that the courts in *New Mexico Cattle Growers*, *Arizona Cattle Growers*, and *Sierra Club* also failed to grant *Chevron* deference and did so for a different reason. This is an emerging trend, especially in the area of natural resources, and deserves far more exploration than I can afford to give it in this article. Suffice it to say, however, that three different courts of appeals (the Tenth, Ninth, and Fifth Circuits) have found different ways around *Chevron*. This leads one to conclude that, at the very least, *Chevron* deference has been considerably diminished.

214. *N.M. Cattle Growers*, 248 F.3d at 1285.

215. *Id.* at 1283 (quoting 16 U.S.C. § 1533(b)(2) (emphasis added)).

216. *Id.* The court also indicated substantial agreement with the Fifth Circuit's decision in *Sierra Club* but noted that the regulations defining adverse modification were not properly before the court. *Id.* This is a strong suggestion that the Tenth Circuit would also be inclined to strike down FWS's regulatory definition of "adverse modification."

217. *Id.* at 1284 ("[T]he fact that the FWS says that no real impact flows from the CHD does not make it so.").

218. *Id.* at 1285.

219. *Id.* The argument is that the protections of critical habitat and listing overlap and that counting the effects that overlap will somehow count the effects of listing. This is preposterous, because the only thing the economic analysis can affect is whether particular land is designated as critical habitat. Even if all land is excluded as too costly, the listing and its attendant protections remain.

provision.<sup>220</sup> Acknowledging the possibility that its decision could end up excluding certain areas from designation,<sup>221</sup> the court of appeals then set aside the designation, remanded the case to the district court, and instructed FWS to issue a new critical habitat designation and a proper economic analysis.<sup>222</sup>

Significantly, the court of appeals held that FWS must consider all effects of designation even if they are “co-extensive” with other causes.<sup>223</sup> According to the court, Congress intended FWS to consider not only the economic effects but also the effects of listing.<sup>224</sup> Thus, if listing causes \$100 million in effects and designation causes \$25 million, it is insufficient for FWS to consider only the \$25 million. Rather, it must look at the incremental effect of that \$25 million considering that the total damage is \$125 million.<sup>225</sup>

FWS has since conceded that the decision in *New Mexico Cattle Growers* is correct, has “voluntarily” vacated other critical habitat designations as improper, and has applied the Tenth Circuit’s ruling nationwide.<sup>226</sup> The implications of this decision are monumental and

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220. *Id.* (“Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.”). The logical limit of this principle is unclear. Must FWS consider an effect that flows mostly from listing? Seventy-five percent from listing? Fifty percent? This will have to be clarified in future litigation. *But see* Amicus Curiae Brief, *supra* note 208, at 12 (arguing that FWS must “avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives”) (quoting *Bennet v. Spear*, 520 U.S. 154, 176-77 (1997)).

221. *N.M. Cattle Growers*, 248 F.3d at 1285.

222. *Id.* at 1286.

223. *Id.* at 1285.

224. *Id.* (“Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation.”).

225. The difference of forcing FWS to place the impacts of designation in context could be quite significant. In the above hypothetical, the old analysis would have FWS weighing \$25 million in impacts against the benefit to the species. Difficult as that is, the question is further complicated by looking at the actual impact of that \$25 million, considering that the community has already suffered \$100 million in damages due to the listing. That \$25 million could well be the straw that breaks the camel’s back, sending businesses into bankruptcy and so forth.

226. *See, e.g.,* Bldg. Indus. Legal Def. Found. v. Norton, 231 F. Supp. 2d 100, 104 (D.D.C. 2002). *See also* Ctr. for Biological Diversity & Cal. Native Plant Soc’y v. Norton and Bldg. Indus. Legal Def. Found. v. Norton (*consolidated*), 212 F. Supp. 2d 1217 (S.D. Cal. 2002). In both *Building Industry Legal Defense Foundation* and *Center for Biological Diversity*, FWS asked the court to permit voluntary remand of the designation to fix the economic analysis problems. The voluntariness of these vacations, however, is clouded, as FWS has only vacated its designations as the result of lawsuits. Further, it appears that FWS has only slightly changed its practices. Though it no longer uses the same baseline approach, it has simply shifted to another baseline approach, again discounting effects that are also attributable to other causes. *See* Economic & Planning Systems, Inc., Draft Report, *Economic*

affect every critical habitat designation ever made. If an impact arises from a designation, even only partially, *New Mexico Cattle Growers* demands that FWS consider it. More importantly, because FWS has used the baseline approach in almost every designation, *New Mexico Cattle Growers* suggests that those designations may be illegal and may be struck down if challenged.<sup>227</sup> Thus, this decision potentially calls into question the validity of every existing critical habitat designation.

### **C. The Cumulative Effect of *Arizona Cattle Growers*, *Sierra Club*, and *New Mexico Cattle Growers* Is a Significant Blow to FWS's Discretion and Will Seriously Alter Agency Practice**

When read together, these three cases severely limit FWS's discretion and force the agency to work strictly within the statutory framework of the ESA. *Arizona Cattle Growers* significantly reduced FWS's ability to place environmental conditions on permits by creating a high standard for the FWS to meet. Before issuing an ITS with conditions, the FWS must show that a take is reasonably certain to occur and may not rely on unsupported estimates. Any mandatory conditions must be related to the take.<sup>228</sup> If a take is reasonably certain to occur, FWS must produce either a specific number of takes that will be permitted or demonstrate why it is not possible to articulate the quantity. FWS may no longer issue permit conditions at will, shifting the burden of ecosystem protection onto private parties. Neither may it set vague standards for determining when the authorized level of take has been exceeded, leaving FWS free to find a violation based on nonspecific factors. Rather, FWS must now issue ITSs only when appropriate and must be as clear as possible in voicing the standards and conditions. This

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*Analysis of Critical Habitat Designation for Vernal Pool Species*, at <http://sacramento.fws.gov/ea/Documents/DraftVernalPoolSpeciesEArev.pdf> (last visited May 14, 2004). It is unlikely that this analysis will withstand judicial scrutiny, given the general language of *New Mexico Cattle Growers*.

227. Again, this decision's precedential value is technically limited to the Tenth Circuit. Since FWS has indicated its agreement with the general premise, however, these challenges will continue to be brought and will continue to be successful.

228. This language is reminiscent of the terminology used in the land use cases *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In these two cases, the U.S. Supreme Court held that a permit condition on land use was invalid unless it bore a substantial relationship to the impact of the proposed use and was roughly proportional to the impact of the proposed use. In the environmental context, one could argue that FWS may not issue a permit condition through an ITS unless it is substantially related to the impact of the take and proportional to the impact of the take. One could reasonably say that *Arizona Cattle Growers* is both the *Nollan* and *Dolan* of Incidental Take Permitting.

will provide applicants and business people the thing they want most in conducting their affairs: greater certainty.

While *Arizona Cattle Growers* will alter agency practices by forcing more objectivity in permit conditions, *Sierra Club* and *New Mexico Cattle Growers* constitute a total disaster for FWS when read together. After these decisions, FWS must designate critical habitat with almost every listing and environmental groups will sue to force them to do so if necessary. With short, court-ordered deadlines and too few resources, FWS will continue to rush, failing to complete an in-depth economic analysis for each designation. Since the reason FWS was not doing critical habitat designations in the first place was a lack of resources,<sup>229</sup> it is difficult to see how the FWS will be able to comply with *New Mexico Cattle Growers*. An appropriate economic analysis is costly and will be all the more difficult to produce given the landslide of designation-forcing lawsuits that are certain to follow these two cases.<sup>230</sup> Environmental groups will no doubt press forward with their attempts to force designations while landowners and affected parties will not back away from their efforts to overturn the resulting hasty, unscientific, and potentially disastrous designations. FWS no longer has the discretion to avoid designating habitat and it may not pick and choose which economic effects to count and which to ignore. This will place the FWS in an impossible position in which it will not be able to do much of anything without losing a lawsuit.<sup>231</sup>

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229. See Susan D. Daggett, *NGOs as Lawmakers, Watchdogs, Whistle-blowers, and Private Attorneys General*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 99, 111 (2002) ("Because of the huge number of court orders and injunctions obtained against the FWS and because of the limited budget available for listing activities, environmental organizations and litigators now control virtually all of the FWS' listing activities."). Daggett points out that environmental groups are setting the agenda at FWS, creating an environment of regulatory chaos. See *id.* She argues that, while the result may be ad hoc, this could actually result in greater benefits to the species. See *id.* at 112 ("On the other hand, citizen-driven prioritization is not necessarily bad from an environmental standpoint, because the species that citizen groups tend to care about are those that make the biggest difference from an ecological standpoint."). The corollary to this is, of course, that industry groups will be just as eager to challenge these hastily made designations. See, e.g., *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197 (E.D. Cal. 2003) (Complaint for Declaratory and Injunctive Relief brought to overturn the designation of critical habitat for the Alameda whipsnake). See also *Nat'l Ass'n of Home Builders v. Norton*, No. 99-CIV-00-0903-PHX-SRB, 2001 WL 1876349 (D. Ariz. 2001) (Order Vacating and Remanding the Critical Habitat Designation for the Cactus ferruginous pygmy-owl).

230. Indeed, this point receives further discussion in Part III. It is an emerging area in which industry groups and affected landowners are seeking to invalidate critical habitat. For the moment, FWS has apparently refused to engage in a meaningful economic analysis despite its apparent concession that *New Mexico Cattle Growers* was correctly decided.

231. Possible solutions to this dilemma are listed in Part V *infra* but are unlikely to occur given the political problems involved in amending the Act.

In fact, this precise scenario has recently transpired in Northern California, where FWS was forced to designate habitat through litigation and then had the designation invalidated in a second suit. In May of 2003, a federal district court struck down the hasty designation of habitat for the Alameda whipsnake in *Home Builders Association of Northern California v. United States Fish and Wildlife Service*.<sup>232</sup> Originally, FWS listed the whipsnake without designating critical habitat and environmental groups sued to force that designation in 1999.<sup>233</sup> The FWS settled the case that same year and agreed to propose critical habitat by March 1, 2000, with a final designation no later than September 1 of that year.<sup>234</sup> The FWS published a final rule designating critical habitat for the snake on October 3, 2000.<sup>235</sup>

Approximately seven months later, a group of private landowners, trade associations, and the state chamber of commerce brought an action for declaratory and injunctive relief seeking to overturn the designation on several grounds.<sup>236</sup> The FWS agreed that the rule failed to comply with the ESA and sought voluntary remand, which the plaintiffs opposed because it would have left the admittedly invalid rule in place during the remand period.<sup>237</sup> Judge Ishii of the Eastern District of California ruled that he did not have discretion to keep the old designation in place during remand and struck it down on several grounds, including faulty economic analysis.<sup>238</sup>

In a rather embarrassing opinion for FWS, Judge Ishii held that the FWS "failed to complete the basic tasks required under the ESA to designate as critical habitat."<sup>239</sup> The court agreed with the plaintiffs that FWS did not follow the economic analysis required by *New Mexico Cattle Growers*,<sup>240</sup> and that, because it was rushed to designate, the service failed to

- (1) identify the "physical or biological features" that are "essential to the conservation of the species;"
- (2) identify

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232. 268 F. Supp. 2d at 1239.

233. *Id.* at 1203.

234. *Id.*

235. *Id.* See also Final Determination of Critical Habitat for the Alameda Whipsnake (*Masticophis lateralis euryxanthus*), 65 Fed. Reg. 58,933 (Oct. 3, 2000).

236. *Home Builders Ass'n*, 268 F. Supp. 2d at 1204.

237. *Id.*

238. *Id.* at 1203.

239. *Id.* at 1204.

240. *Id.* at 1209. FWS could hardly have complied with *New Mexico Cattle Growers*, as the opinion was issued after the designation for the whipsnake. That this rule was issued post-*New Mexico Cattle Growers* highlights the fact that each designation issued before *New Mexico Cattle Growers* used the same analysis and is therefore of suspect legality.

the “specific areas within the geographical area occupied by the species” where the essential “physical or biological features” are found; (3) determine that those “specific areas” where the essential features are found “may require some special management considerations or protection;” and (4) identify the “geographical area occupied by the species” at the time the species was listed. Plaintiffs contend that the [FWS] has not adequately accomplished any of these necessary tasks.<sup>241</sup>

Judge Ishii questioned how FWS could purport to determine the specific areas occupied by the species that contained the essential physical and biological features without determining which physical and biological features the species required.<sup>242</sup> In addition to the *New Mexico Cattle Growers* grounds, Judge Ishii struck down the rule because FWS failed to conduct the site-specific analysis required to determine which specific parcels of land were critical habitat and which were not.<sup>243</sup> Judge Ishii’s ruling forces the FWS to engage in the time-consuming process of analyzing whether each parcel of land within the designation area is actually critical habitat, rather than simply designating a large area around lands thought to contain critical habitat.<sup>244</sup>

This represents the worst of all possible scenarios for FWS: environmentalists sue to force a designation on a short time frame. Certain to lose the suit, FWS settles and designates quickly but sloppily. When parties injured by the designation bring suit to overturn the designation, FWS must concede that it was done illegally and invalidate it. Like the whipsnake case, all this process accomplishes is a waste of both time and the very limited resources of FWS’s budget.<sup>245</sup>

With the massive backlog of listed species for which FWS has not designated critical habitat,<sup>246</sup> it appears that environmentalists will

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241. *Id.* at 1204.

242. *Id.*

243. *Id.* at 1207.

244. *Id.*

245. Note that the process took four years from the filing of the complaint to force designation to the final decision that overturned the designation. *Id.* at 1202. In the meantime, FWS was forced to spend its scarce resources on legal fees and human resources to complete the designation and fight the suits, yet the whipsnake was in no better position in May of 2003 than it was in May of 1999.

246. There are nearly 300 species classified as either “proposed” or “candidate” species as of January 1, 2003. See *Threatened and Endangered Species System (TESS)*, at [http://ecos.fws.gov/tess\\_public/TESSWebpageNonlisted?listings=0&type=both](http://ecos.fws.gov/tess_public/TESSWebpageNonlisted?listings=0&type=both) (last modified May 14, 2004). FWS and NMFS have designated critical habitat for only 450 of the more than 1200 eligible species. See *id.* at [http://ecos.fws.gov/tess\\_public/TESSWebpage](http://ecos.fws.gov/tess_public/TESSWebpage) (last visited May 14, 2004).

continue to set the agenda at FWS.<sup>247</sup> A large portion of the budget is consumed by lawsuits to force critical habitat, the resulting designations, and further lawsuits to overturn the designations. This formula leaves little, if any, resources for listing species. Thus, these suits to force critical habitat designation actually have a negative effect on overall species protection in that they divert resources meant for species protections, including listing, into designations and lawsuits.<sup>248</sup>

#### IV. THE JUDICIAL TREND LIMITING FWS'S DISCRETION AND AUTHORITY WILL CONTINUE

The FWS's discretion and authority regarding critical habitat have been severely crippled by the aforementioned cases. Still, two areas of FWS's designation process present fertile ground for further legal challenges. First, while FWS is charged with specifying particular areas as critical habitat rather than designating wide swaths of land,<sup>249</sup> FWS rarely engages in the kind of site-specific "surgical" designations that the

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247. FWS allocated all of the fiscal year 2001 listing budget for Region 2 to complying with court orders and settlement agreements. *Ctr. for Biological Diversity v. Norton*, 163 F. Supp. 2d 1297, 1301 (D.N.M. 2001). One must only look at the numbers to understand the degree to which environmental groups are setting FWS's agenda. Congress placed a \$9 million cap on FWS listing activities for FY 2002, along with a sub-cap of \$6 million for critical habitat determinations for already-listed species. FWS anticipates that it will spend the entire \$6 million critical habitat sub-cap to comply with pending court orders and settlement agreements. *Ctr. for Biological Diversity & Cal. Native Plant Soc'y*, 212 F. Supp. 2d at 1221. The court went on to note that "in FY 2002, the Region 1 Office must work on critical habitat determinations for approximately 290 species to comply with court orders and court approved settlements." *Id.* at 1223. This is a significant part of the reason why FWS listed a meager 11 species in 2001. See *Number of U.S. Species Listings Per Calendar Year (as of Dec. 31, 2001)*, at [http://endangered.fws.gov/stats/List\\_cy2001.PDF](http://endangered.fws.gov/stats/List_cy2001.PDF) (last visited May 14, 2004).

248. For example, FWS recently announced that it cannot list an endangered species of Yosemite toad due to budgetary problems, although FWS found that nearly one-half of the toad population has disappeared. 12-Month Finding for a Petition to List the Yosemite Toad, 67 Fed. Reg. 75,834 (Dec. 10, 2002). See also Don Thompson, *Money Woes Endanger Yosemite Toad, Government Says*, SFGATE.COM (Dec. 10, 2002), at [www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2002/12/10/state1930EST0130.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2002/12/10/state1930EST0130.DTL) (last visited May 14, 2004). Failing to understand that it is at least partially responsible for the current state of affairs, the Center for Biological Diversity "promise[d] the decision 'will just land them back in court.'" Don Thompson, *Money Woes Endanger Yosemite Toad, Government Says*, ASSOCIATED PRESS, Dec. 10, 2002, available at <http://www.yosemite.org/newsroom/clips/2002/december/121002.htm> (last visited May 24, 2004). The Center has sued to force several designations that have been challenged, including habitat for the Alameda whipsnake. *Ctr. for Biological Diversity, Alameda Whipsnake*, available at <http://www.sw-center.org/swcbd/species/whipsnake/index.html> (last visited May 14, 2004).

249. See 16 U.S.C. § 1633(b)(2) (2000).

Act suggests it should, due to its lack of resources.<sup>250</sup> Only land *essential* to the conservation of the species may be designated.<sup>251</sup> FWS may not generally designate “the entire geographical area which can be occupied.”<sup>252</sup> Secondly, FWS designates “supporting lands” that it deems necessary for the survival of the species, even though these supporting lands can never be occupied by the species and such designation is arguably contrary to Congress’s intent.<sup>253</sup> These frequent “over-designations” are likely to be challenged and, given the trend towards cutting agency authority and discretion, may well be overturned.

### A. FWS’s “Over-Designation” of Critical Habitat Is Ripe for Challenge

FWS must designate critical habitat at the time the species is listed.<sup>254</sup> In order for FWS to designate habitat as critical, the habitat must be essential to the conservation of the species.<sup>255</sup> However, section 3(5)(C) states that most potential habitat is rarely critical. Rather, “except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.”<sup>256</sup> Even assuming that this means essential to the recovery of the species,<sup>257</sup> it still must be essential rather than just useful or beneficial.<sup>258</sup>

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250. See, e.g., Proposed Critical Habitat Designation for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 67 Fed. Reg. 59,884 (Sept. 24, 2002) [hereinafter Fairy shrimp Designation]. Indeed, the service has frequently complained that site specific designation “needs to be a much less labor intensive process.” Notice of Intent, *supra* note 190, at 31,873.

251. See 16 U.S.C. § 1632(5)(A) (2000).

252. 16 U.S.C. § 1632(5)(C) (2000).

253. See Fairy shrimp Designation, *supra* note 250, at 59,899. The endangered Fairy shrimp requires “vernal” or seasonal pools for its habitat. If the surrounding uplands are modified to interfere with water run-off, the vernal pools cannot exist and, thus, neither can the species. Even though the fairy shrimp can never occupy the uplands, FWS designates them anyway. See *id.*

254. See 16 U.S.C. § 1532(5) (2000).

255. 16 U.S.C. § 1532(5)(A)(ii) (2000).

256. 16 U.S.C. § 1532(5)(C) (2000).

257. Conservation and recovery have essentially the same meaning under the Act. Conservation is defined in the Act as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3) (2000). Recovery is defined in FWS regulations as “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.” 50 C.F.R. § 402.02 (2002). Environmental groups have persuasively argued that the use of the phrase “essential to the conservation of the species” in the definition of critical habitat means that designation should include lands that are necessary for conservation, not just survival. See Ray Vaughn, *State of Extinction: The Case of*



Further, the legislative history of section 3(5)(C) clarifies that all *potential* habitat is usually not *critical* habitat. Senator Jake Garn (R-Utah), in offering the critical habitat amendment, specifically stated, "it is also my intent that the extent of the term 'critical habitat' not necessarily be coterminous with the entire range of the...species. In fact, I would expect in most cases that it would not be."<sup>259</sup> The House of Representatives' reports also indicate agreement with Senator Garn's intentions. In explaining its purpose for defining the term "critical habitat" for the first time, the Merchant Marines and Fisheries Committee stated,

In the committee's view, the regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat. Under the definition of critical habitat in H.R. 14104 (the House bill that eventually amended the act), air, land or water areas would be designated critical habitat only if their loss would *significantly decrease the likelihood of conserving the species in question*. The committee believes that this definition narrows the scope of the term as it is defined in the existing regulations.<sup>260</sup>

Thus, both the text and legislative history of the amendment make it clear that all potential habitat is not critical.

Although FWS's own regulations acknowledge the distinction between critical and potential habitat, FWS frequently blurs the line between the two.<sup>261</sup> For example, in a recent omnibus rule for 15 species

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*the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569 (1995) (arguing "the designation of 'critical habitat' for species listed under the ESA and the development of 'recovery plans' for each of those species are the main mechanisms in section 4 for accomplishing the goal of recovery"). *But cf.* Kristin M. Fletcher & Sharonne E. O'Shea, *Essential Fish Habitat: Does Calling It Essential Make It So?*, 30 ENVTL. L. 51, 80 (2000) (arguing that the FWS has discretion to limit the designation to survival alone). Others disagree with that formulation, but as it seems to follow from the plain text of the Act, I will proceed on the basis that critical habitat indeed contains a recovery element.

258. While that seems obvious, FWS has had a difficult time justifying which lands are essential, as opposed to those that are merely suitable but not essential. The dictionary defines essential as "of, relating to, or constituting essence: inherent; of the utmost importance: basic, indispensable, necessary." "Useful," on the other hand, is "capable of being put to use; *esp.*: serviceable for an end or a purpose." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1297 (10th ed. 1993).

259. See Statement of Senator Garn, *supra* note 182.

260. H.R. REP. NO. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475 (emphasis added).

261. See 50 C.F.R. § 424.12(e) (2002) ("[T]he Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a

of endangered and threatened Fairy shrimp and plants, FWS proposed designation of almost two million acres of critical habitat in California.<sup>262</sup> In making the proposal, the FWS flatly admitted that “no experimental studies have been conducted to determine the specific habitat requirements of longhorn fairy shrimp.”<sup>263</sup> FWS attempted to solve this problem by limiting the designation to land currently occupied by the species, but simple occupation of habitat is not enough to make it critical. If land is occupied, it must also possess physical and biological features essential to the conservation of the species and must at least potentially require special management considerations.<sup>264</sup> However, FWS never conducted studies to determine the specific habitat requirements of the species nor explained how it determined the management plan for the land.<sup>265</sup>

Instead, FWS should have issued a “not determinable” finding, extending the timeline for designation by one year.<sup>266</sup> This would have permitted FWS to collect or generate the information necessary to

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designation limited to its present range would be inadequate to ensure the conservation of the species.”). The source of this “blurring” of the lines is that the statute requires FWS to determine what habitat is critical for the recovery of the species before it has had a chance to determine what recovery will be for that particular species. For a thorough discussion of this problem, see Perry E. Hicks, *Designation Without Conservation: The Conflict Between the Endangered Species Act and Its Implementing Regulations*, 19 VA. ENVTL. L.J. 491 (2000) (arguing that the Interior Department’s regulations seem to conflict with the text of the Act.). Hicks’s article, published in 2000, foresaw the decision in *Sierra Club*. The Fifth Circuit Court of Appeals agreed with Hicks and struck down the regulations.

262. The designation actually included some land in Oregon as well, but only in one county. The vast majority of the designation is in 36 California counties, stretching from Redding to Riverside. See Gregory T. Broderick, *Fish & Wildlife’s Anti-people Agenda*, at <http://www.cppf.org/CPR/Columns/1106AntiPeopleAgenda.html> (last visited Mar. 12, 2004).

263. Fairy shrimp Designation, *supra* note 250, at 59,900.

264. See 16 U.S.C. § 1532(5) (2000).

265. While it is understandable for FWS to designate land that is occupied by the species, it defies logic to say that one may determine the features that are “essential to the conservation of the species” without knowing the specific habitat requirements of the species. It is a further mystery how FWS determined that the land may require special management considerations if one does not know the way in which land must be managed to protect the species.

266. The FWS must make the decision whether to list a species within one year of receiving a petition to list and finding that such a petition may be warranted. 16 U.S.C. § 1533(b)(3)(B) (2000). If it decides to list, the FWS must publish a final rule designating critical habitat within one year. 16 U.S.C. § 1533(b)(6)(A) (2000). If critical habitat is not then determinable, FWS may extend the period for designation by one year. 16 U.S.C. § 1533(b)(6)(C)(ii) (2000). See also Darin, *supra* note 140, at 221.

determine critical habitat in a scientific and legal manner.<sup>267</sup> If FWS were then unwilling or unable to collect the information to make the designation, environmental groups would then likely have been able to force the designation through litigation.<sup>268</sup> On the other hand, if FWS were to make a designation based on little or no scientific information before collecting adequate data, it would be open to an attack that its actions were arbitrary and capricious.<sup>269</sup> This example illustrates how the requirements of section 3(5)(C) and section 4(a)(3)(A) put FWS in the impossible position of following a court order to designate when it knows that any designation is likely to be overturned by yet another court.

### **B. Supporting Lands: May They Be Designated as Critical Habitat Even Though They Can Never Be Occupied?**

Another area in which FWS will soon face litigation is in designating "supporting" lands as critical habitat. In the recent omnibus Fairy shrimp designation, FWS designated occupied pools, unoccupied upland areas, and swales.<sup>270</sup> While only the seasonal vernal pools are actually inhabited by the species, FWS asserted that protecting the pools alone was insufficient to maintain and recover the species.<sup>271</sup> Further, FWS argued that the supporting lands were "essential for the conserva-

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267. See Darin, *supra* note 140, at 228 (arguing that FWS has a duty to collect data in making critical habitat decisions). It appears that the "not determinable" finding is only an extension that imposes an affirmative duty on FWS.

268. Indeed, both *Sierra Club* and the vernal pool designation proceeded more or less on these grounds. See Fairy shrimp Designation, *supra* note 250, at 59,884. See also *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 436-38 (5th Cir. 2001).

269. Indeed, this is a growing threat for FWS. Though the statute states that designations must be made on the basis of the best scientific and commercial data available, there must be some data available. It is doubtful that guessing or extrapolation would pass muster under the arbitrary and capricious standard.

270. Swales are low-level drainage ways.

271. See Fairy shrimp Designation, *supra* note 250, at 59,899. Although the uplands are not actually occupied by vernal pool crustaceans, they nevertheless are essential to the conservation of vernal pool habitat and crustaceans because they maintain the aquatic phase of vernal pools and swales. Associated uplands are also essential to provide nutrients that form the basis of the vernal pool food chain, including a primary food source for the vernal pool crustaceans. *Id.* In other cases, altering the supporting lands will cause the pools to occur year round. *Id.* While this may sound good, year round water makes the area attractive to the Fairy shrimp's natural predators and, therefore, causes the habitat to be unsuitable for Fairy shrimp. It is important, therefore, to have uplands that "contribute to the filling and drying of the vernal pool, and maintain suitable periods of pool inundation, water quality, and soil moisture for vernal pool crustacean hatching, growth and reproduction, and dispersal, but not necessarily every year." *Id.* Upland areas are also "a source of nutrients for vernal pool organisms." *Id.* at 59,885.

tion of the species” because they helped provide nutrients and helped regulate both the timing and amount of water in the vernal pools.<sup>272</sup> The FWS, therefore, designated the entire “vernal pool complex” as critical habitat,<sup>273</sup> even while characterizing the habitat as unoccupied.<sup>274</sup> Although it has no set definition of vernal pool complex, the FWS notes,

A landscape that supports a vernal pool complex is typically grassland, with areas of obstructed drainage that form the pools. Vernal pools can also be found in a variety of other habitats, including woodland, desert, and chaparral. The pools may be fed or connected by low drainage pathways called “swales.” Swales are often themselves seasonal wetlands that remain saturated for much of the wet season, but may not be inundated long enough to develop strong vernal pool characteristics.<sup>275</sup>

The FWS also asserts that designating the uplands is necessary because some vernal pools may not occur at the right time and for the proper duration if the surrounding area is not maintained appropriately.<sup>276</sup>

There remains a strong argument, however, that FWS is unauthorized to designate supporting lands. After all, it is highly unlikely that Congress intended critical habitat to include land that a species could never occupy if it did not intend for FWS to designate *all* land that a species could occupy. While “essential for the conservation of the species” is not defined in the statute, the term “habitat” must have a logical stopping point. Looking at the legislative history, it is clear that Congress only authorized FWS to designate land as unoccupied habitat if it could in fact later be occupied by the species. The committee reports, for example, caution FWS to “be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species.”<sup>277</sup> Given Congress’s warning, it appears that FWS is designating as critical habitat land that is not habitat at all.<sup>278</sup> The

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272. *Id.* at 59,899 (uplands areas are essential “because they maintain the aquatic phase of vernal pools and swales. Associated uplands are also essential to provide nutrients that form the basis of the vernal pool food chain, including a primary food source for the vernal pool crustaceans.”).

273. *Id.*

274. *Id.*

275. *Id.* at 59,885.

276. *Id.* at 59,900.

277. H.R. REP. NO. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468.

278. *See, e.g.,* Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv., 268 F. Supp. 2d 1197, 1215 (E.D. Cal. 2003) (noting that FWS “admi[tted] that some areas within the critical habitat boundary are not actually critical habitat”).

practice of designating these "supporting lands" exceeds agency authority and may soon be struck down.

Further, it is easy to see how an overeager FWS employee might push the concept of "supporting lands" too far,<sup>279</sup> given the intricate interrelationships in nature.<sup>280</sup> As *New Mexico Cattle Growers, Sierra Club,*

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279. This is the "one ecosystem" theory that proceeds on the basis that every modification of nature affects every other part of nature. By writing this article, for example, I have (needlessly) caused several trees to be cut down and turned into a paper sacrifice to the gods of legal scholarship. Cutting down these trees has eternally and irreversibly altered the natural landscape and thus has changed the ecosystem forever. While this is obviously the "one ecosystem" theory taken to its extreme, it is hard to see the logical stopping point for the concept of supporting lands. If this seems so attenuated that no reasonable person would advance such a theory, it is less so than some of the theories put forth to explain how the Commerce Clause power justifies the ESA's application to "intrastate" species. See, e.g., Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on the Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 783-93 (2002).

Under the biodiversity rationale for aggregation, individual species are important only in that each species potentially affects the preservation of large numbers of species. Many species that lack individual commercial value perform important "ecosystem services" such as the decomposition of organic matter, renewal of soil, mitigation of floods, purification of air and water, or partial stabilization of climatic variation....Because the preservation of as many endangered species and threatened species as possible significantly affects interstate commerce by maintaining biodiversity, the aggregation of all endangered and threatened species is justifiable under the *Wickard* rule.

*Id.* at 78687. See also Dave Owen, *Gibbs v. Babbitt*, 28 *ECOLOGY* L.Q. 377 (2001) (arguing that aggregate effects supply the necessary Commerce Clause connection for the ESA). *But see* John C. Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 *MICH. L. REV.* 174, 199-204 (1998) (arguing that *Wickard* and Court interpretations through *Lopez* do not extend far enough to support the biodiversity/ecosystem argument for regulation under the Commerce Clause).

280. It must also be noted that sometimes scientists lose sight of process in favor of the laudable goal of species protection. One need only think back to the example of government scientists taking hair from a lynx at an animal preserve and planting it in an area that was being surveyed for lynx protection. See *BOSTON GLOBE*, Mar. 7, 2002, at A2. This story did not go unnoticed in Congress. See 148 *CONG. REC.* H1324-01 (daily ed. Apr. 16, 2002) (statement of Rep. Osborne) (The former University of Nebraska football coach noted that, "according to testimony, others within government agencies were aware of the planted lynx hair and did not report it."). The biologists explain that they "submitted three samples of lynx fur they falsely labeled as having been collected in two Washington state national forests to test the lab's ability to analyze lynx DNA." Audrey Hudson, *GAO: Lynx Fur Hoax Was No Secret*, *WASH. TIMES*, available at [http://www.cdfc.org/lynx\\_hoax\\_no\\_secret.htm](http://www.cdfc.org/lynx_hoax_no_secret.htm) (last visited Mar. 12, 2004). However, the GAO has reported that "government scientists knew they should not have submitted falsely labeled samples into a national lynx survey and that some supervisors were aware but took no action." *Id.* This indicates that some FWS employees may be willing to break the law in order to designate greater areas as critical habitat. Given the breadth of the "supporting lands" concept, the temptation to extend designation will likely also be great.

and *Arizona Cattle Growers* illustrate, courts have been increasingly skeptical of FWS's authority, especially where it asserts boundless discretion. In light of these recent rulings, courts are likely to invalidate the above practices.

## V. POSSIBLE SOLUTIONS: CAN REASONABLE, ECOLOGICALLY SENSIBLE MEASURES OVERCOME POLITICS?

As the discussion above illustrates, FWS either needs more funding for the listing process or more time to designate critical habitat to comply with these rulings.<sup>281</sup> As recently noted by administration officials, the Act is "broken" and in need of reform,<sup>282</sup> but a legislative solution remains unlikely. Senator Lincoln Chafee (R-R.I.), for instance, recently proposed moving designation of critical habitat to the recovery planning stage and setting a timetable for recovery plans.<sup>283</sup> This would permit designation at the time of listing only if FWS found that it was essential to avoid species extinction.<sup>284</sup> Recognizing that critical habitat designations are time sensitive, expensive, and backlogged, the Chafee proposal would have prohibited suits for a reasonable period of time and formed a "priority ranking system for the development and revision

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281. To give one an idea of how "little" the federal government actually spends on the listing and critical habitat designation, "the President's 2004 Budget provides \$129 million for the FWS endangered species program. The budget increases the ESA listing program by 35 percent to address a litigation-driven workload." BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2004, at 558, available at <http://www.whitehouse.gov/omb/budget/fy2004/interior.html> (last visited Mar 4, 2004). That 35 percent increase provides a total of only \$12,286,000 for dealing with section 4 obligations, including listing, de-listing, designating critical habitat, and reviewing public petitions. *Id.* The resolution requires that FWS use roughly 75 percent of the \$12 million to designate critical habitat for already-listed species. *Id.*

By way of comparison, this is roughly the same amount appropriated to the U.S. Botanic Garden. See *id.* at 24. The U.S. Botanic Garden puts on such important educational events as "The History of Tea," at <http://www.usbg.gov/education/events/The-History-of-Tea.cfm> (last visited Mar. 4, 2004), and "A Passion for Basil," at <http://www.usbg.gov/education/events/A-Passion-for-Basil.cfm> (last visited Mar. 4, 2003). This minimal funding makes it difficult for FWS to meet its statutory obligations.

282. Julie Cart, *The State, Species Protection Act "Broken,"* available at <http://www.la-times.com/news/science/environment/la-me-species14nov14,1,1435236.story?coll=la-new-s-environment> (last visited Mar. 4, 2004) ("Assistant Secretary of Interior Craig Manson criticized the critical-habitat provision of the law...We didn't anticipate the potential conflicts. We have to recognize that, A, we can't protect everything, and, B, we have to carefully examine whether we should try to protect everything, and at what cost?").

283. See JOHN H. CHAFEE, AMENDMENTS TO THE CRITICAL HABITAT REQUIREMENTS OF THE ENDANGERED SPECIES ACT OF 1973, S. REP. NO. 106-126 (1999).

284. *Id.*

of recovery plans.”<sup>285</sup> The priority ranking system would have allowed the agency to set its own agenda, stopping environmental groups from forcing FWS to act.

Senator Chafee’s bill would have solved many of the problems FWS faces in administering the ESA. Listing is a relatively inexpensive process but critical habitat designation requires significant amounts of money and manpower.<sup>286</sup> The FWS prefers to avoid designating critical habitat if it can because it is drawn from the same budget line-item as listing,<sup>287</sup> which gets FWS more bang for its regulatory buck.<sup>288</sup> Because designation is mandatory, the failure to designate is ripe ground for the environmental citizen-suits<sup>289</sup> that will continue to consume much of FWS’s resources. Senator Chafee’s solution would have eliminated the problem by moving critical habitat designation to the recovery stage, thereby providing a more efficient way to protect species given the agency’s limited resources. The bill was favorably reported to the Senate but progressed no further.<sup>290</sup> The only reasonable explanation is that the political price for reforming the Act was simply too high, even though it was a sensible change.

At least 12 congressional bills aimed at reforming the ESA were introduced in 2003, but none of them has made it to the president’s desk.<sup>291</sup> One of these, the Endangered Species Recovery Act of 2001, would have called for “survival” habitat to be designated at the time of listing and critical habitat to be determined at the recovery plan stage.<sup>292</sup> Though it garnered 80 co-sponsors in the House of Representatives,

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285. *Id.*

286. See Amy Armstrong, *Critical Habitat Designations Under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protection*, 10 S.C. ENVTL. L.J. 53, n.123 (2002). See also Notice of Intent, *supra* note 190, at 31,872.

287. See Notice of Intent, *supra* note 190, at 31,873 (noting that “[t]he consequence of the critical habitat litigation activity is that we are utilizing much of our very limited listing program resources in litigation support defending active lawsuits and Notices of Intent (NOIs) to sue relative to critical habitat, and complying with the growing number of adverse court orders”).

288. *Id.*

289. The ESA permits “any person” to bring a suit to force FWS to perform a nondiscretionary duty. See 16 U.S.C. § 1540(g) (2000).

290. See 145 CONG. REC. S9525 (daily ed. July 28, 1999) (Senator Chafee reporting on the Bill to the Full Senate).

291. See NESARC: National Endangered Species Act Reform Coalition—Legislative Information—Current Bills, at <http://www.nesarc.org/leginfo.htm> (last visited Mar. 12, 2004).

292. See ENDANGERED SPECIES RECOVERY ACT OF 2001, H.R. 4579, 107th Cong. (2d Sess., 2001).

including current minority leader Nancy Pelosi (D-CA), the bill once again died in committee.<sup>293</sup>

Sadly, these examples highlight the tough political obstacles facing even sensible alterations to the Act and indicate that legislative solutions are unlikely. Most of the action, then, will continue to take place in court, with species in need of protection losing in the long run. As long as environmental groups continue to force designations on an impossible (though legislatively required) timeline, aggrieved parties will continue to bring suit to overturn those hastily done designations. The FWS is likely to remain in the unfortunate position of either violating a court order by failing to designate on time or violating the statutory requirements by designating illegally.<sup>294</sup> Faced with the specter of contempt sanctions, it is likely that FWS will continue to perform deficient designations and live to face further lawsuits another day.

## CONCLUSION

In *Arizona Cattle Growers*, *New Mexico Cattle Growers*, and *Sierra Club*, the Ninth, Tenth, and Fifth Circuit Courts of Appeals have demonstrated a trend toward limiting agency discretion and enforcing statutory mandates. After these opinions, FWS must designate critical habitat within the statutory timeline, must do so according to statutory procedures, and may only do so after the proper economic analysis. FWS must not issue ITSs unless it can prove that there is a reasonable certainty that individual members of an endangered species are likely to be taken.

More importantly, these three cases demonstrate a developing trend toward limited administrative authority and less administrative discretion, confirmed by such recent cases as *Homebuilders Association of Northern California*. With environmental and industry lawsuits against FWS showing no signs of slowing, the trend limiting agency discretion will continue. Several areas are ripe for challenge including the over-

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293. This bill has been introduced a number of times and passed the House in the second session of the 106th Congress but did not get out of the Senate. In the 107th Congress, the bill was referred to the House Committee on Resources and the House Committee on Ways and Means but was never referred back to the whole House. See 148 CONG. REC. H1618, 1619 (daily ed. Apr. 24, 2002). Its counterpart in the Senate, S.911, met a similar fate. See 147 CONG. REC. S5118 (daily ed. May 17, 2001). Fortunately, the Senate found time during that session to pass crucial measures like S. Res. 15, congratulating the Baltimore Ravens for winning Super Bowl XXXV. See 147 CONG. REC. S833-34 (daily ed. Jan. 30, 2001).

294. See, e.g., *Ctr. for Biological Diversity v. Norton*, 163 F. Supp. 2d 16 1297, 1300 (D.N.M. 2001) (“Without sufficient funding or a change in the mandatory tasks required by Congress, the [FWS] cannot fulfill the myriad of mandatory listing duties.”).



designation of critical habitat, especially regarding "supporting lands." Since it is almost impossible for the FWS to comply with the terms of the ESA, it will continue to lose lawsuits and environmentalists will keep setting the agenda at FWS. While a legislative solution would significantly ease the administration of the Act, ESA reform is politically difficult if not impossible. Thus, gridlock, inefficiency, and court battles are likely to continue to drain the resources meant for species protection. For now, we are more likely to see further ineffective and inefficient action by FWS, more headaches for landowners, and less protection for truly endangered species.