Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 4
Issue 1 *1996*

Article 6

1996

# Butting Heads: NEPA and ESA, When Designation of a Critical Habitat under the Endangered Species Act Conflicts with NEPA's Environmental Impact Statement Documentation Requirements

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# Butting Heads: NEPA and ESA. When Designation of a Critical Habitat Under the Endangered Species Act Conflicts with NEPA's Environmental Impact Statement Documentation Requirements

*Catron County Board of Commissioners v U.S. Fish and Wildlife*[1]

by Cynthia Giltner

## I. INTRODUCTION

The National Environmental Protection Act of 1969 (NEPA) was enacted in an effort to require federal agencies to evaluate and consider the environmental impact of their actions.[2] A few years later, Congress enacted the Endangered Species Act of 1973 (ESA) which requires the listing of endangered or threatened species, and the protection of their habitats.[3] These two federal acts conflict regarding the Secretary of the Interior's duty when preparing an Environmental Impact Statement (EIS) as required by NEPA, and his duty when designating a critical habitat area as required by ESA. Recently, the Tenth Circuit analyzed the question raised by this conflict and ordered the Secretary to comply with NEPA when designating a critical habitat.[4]

The Tenth Circuit incorrectly answered the conflict for several reasons. First, the requirements of NEPA and ESA are "functionally equivalent," and therefore do not need to be complied with simultaneously. Second, federal courts must uphold a federal agency's decision unless that reason was unreasonable,[5] and in the instant case, the Secretary's decision was reasonable. Third, NEPA was designed to 'give way' to conflicting statutes, while ESA was not.[6] Hence, in the conflict raised in the instant case, ESA trumps NEPA. Fourth, congressional silence on this issue should be interpreted to be approval of the Secretary's procedures. Notice published in the Federal Register, prior Secretarial action, case law, and the opinion of the Council on Environmental Quality all presented opportunities for Congress to express its disagreement with the Secretary's decision.[7] Congress did not express disagreement. Congressional silence suggests that the Secretary is following ESA as Congress intended.

## II. FACTS AND HOLDING

The Plaintiff-Appellee, Catron County Board of Commissioners (County), filed suit against the United States Fish and Wildlife Service, the Secretary of the Interior,[8] and various other governmental officials[9]. Appellee alleged the Defendants-Appellants (Secretary) did not comply with the Administrative Procedure Act, the Endangered Species Act (ESA), and the National Environmental Policy Act of 1969 (NEPA)[10] when the Secretary designated certain lands[11] as critical habitat.[12] The County sought injunctive relief to prevent the Secretary from implementing and enforcing the designation of critical habitat.[13] The Secretary sought to have designated certain land as critical habitat which is home to the spikedace and the loach minnow, both threatened species under the ESA.[14] The proposed critical habitat acreage included 74 miles of river habitat located within Catron County, New Mexico. Much of the land encompassing the river habitat is actually owned by the

[1] 75 F.3d 1429 (10th Cir. 1996).

[2] 1969 U.S.C.C.A.N. 2751.

[3] 1982 U.S.C.C.A.N. 2807.

[4] Catron County Board of Commissioners v. U.S. Fish and Wildlife, 75 F.3d 1429, 1432 (9th Cir. 1996).

[5] Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1177 (9th Cir. 1982).

[6] *See infra* note 185.

[7] *See* Douglas County v. Babbitt, 48 F.3d 1495, 1504 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996), and *reh'g denied*, 116 S. Ct. 1292 (1996). *See also Catron County*, 75 F.3d at 1438.

[8] Bruce Babbitt.

[9] Richard Smith, Acting Director of the U.S. Fish and Wildlife Service; John Rogers, Regional Director of Region 2 of the U.S. Fish and Wildlife Service; and Sam Spiller, Field Supervisor, Region 2, U.S. Fish and Wildlife Service.

[10] *Catron County*, 75 F.3d at 1429.

[11] *Id.* at 1432. The proposed designation constituted nearly 74 miles of river habitat located within the County.

[12] *Id.* Concurrent with his determination that a species is endangered or threatened, the Secretary is required to designate any habitat of such species to be a critical habitat. 16 U.S.C. § 1533 (a)(3)(A). It is within the Secretary's discretion to exclude any area from critical habitat, unless he determines that such exclusion will result in the extinction of the endangered or threaten species. 1 U.S.C. § 1533(b)(2). The result of a designation of a critical habitat is that any action authorized, funded or carried out by a Federal agency may not destroy or modify the critical habitat of any endangered or threatened species. 1978 U.S.C.C.A.N 9457.

[13] *Catron County*,75 F.3d at 1432. The County initially filed suit in June 1993. In April 1994 the County filed its motion for injunctive relief.

[14] *Id. See*, 51 Fed.Reg. 23,769 (spikedace); 39,468 (loach minnow) (1986).

County.[15] The County alleged the designation of its land as critical habitat would cause it injury because that would prevent the County's efforts at the diversion and impoundment of water supplied by the river.[16] Without such control over the river, the likely result would be flood damage to county-owned property, including the fairgrounds, roads and bridges.[17] Additionally, such flood damage would injure the local economy.[18] The County sought to have the Secretary comply with NEPA and perform an EIS to avoid the risk of "real environmental harm . . . through inadequate foresight and deliberation."[19]

In 1986, the Secretary adopted final regulations listing the spikedace and loach minnow as endangered species, as required by ESA.[20] Concurrently with that listing, the Secretary extended the deadline for the final designation of the critical habitat.[21] The designation of critical habitat subsequently became effective in April 1994.[22] In the Secretary's initial proposal listing of the endangered species in this case, he asserted he was "not required to comply with the documentation requirements of NEPA, claiming that Secretarial actions under § 1533 of the Endangered Species Act . . . are exempt from NEPA as a matter of law."[23]

The United States District Court for the District of New Mexico held that the Secretary failed to comply with NEPA requirements in designating certain lands as critical habitat.[24] On appeal, the Secretary sought reversal of the district court's finding that he must comply with NEPA[25] and prepare an EIS.[26] The Tenth Circuit Court of Appeals affirmed the district court decision.[27] The Tenth Circuit held that when designating critical habitat under the ESA, and when such designation constitutes major federal action significantly affecting the quality of the human environment, the Secretary of the Interior must comply with NEPA by preparing an Environmental Impact Statement (EIS).[28]

## III. LEGAL BACKGROUND

### A. Legislative History

Federal legislation for protection of endangered species was originally enacted as the Endangered Species Preservation Act of 1966.[29] That particular statute was repealed by the Endangered Species Act of 1973.[30] The 1973 Act[31] remains in force today, yet has been amended five times.[32] Essentially, the current Endangered Species Act (ESA) provides for: the management, conservation, and recovery of endangered and threatened species of fish and wildlife. The Act provides for the listing by the Secretaries of Commerce and the Interior of threatened and endangered species of flora and fauna, prohibits certain activities involving such species, establishes a permitting system, and provides for enforcement measures.[33]

Section 5 of ESA[34] embodies

[15] *Catron County*, 75 F.3d at 1429, 1438. The opinion is not clear concerning the number of affected acres owned by the County.
[16] *Id.* at 1433.
[17] *Id.* at 1429, 1437-1438.
[18] *Id.* at 1437-1438.
[19] *Id.* at 1433.
[20] *Id.* at 1432.
[21] *Id.*
[22] *Id.* The opinion does not state the reason for the eight year delay.
[23] *Id.*
[24] *Id.* The district court also granted the County's motion for injunctive relief, however, the order was stayed pending the outcome of the appeal.
[25] *Id.* at 1433.
[26] *Id.* at 1433, 1434. The issue of standing was also raised by defendants. The appellate court found plaintiffs had standing based on the following:
1. Injury in fact was shown by plaintiffs in their assertion that their property could be threatened by flood damage if the designation was made;
2. Causal link was found between the plaintiff's likely injury and the conduct complained of;
3. Redressability was met by a showing of a "substantial likelihood" that compliance with NEPA by the Secretary would redress the claimed injuries; and
4. In that NEPA does not provide for a private cause of action, plaintiff had standing when suing under the APA. *Id.* at 1433, 1434.
[27] *Id.* at 1432.
[28] *Id.* at 1439.
[29] 1973 U.S.C.C.A.N. 2989, 2990.
[30] *Id.* at 2989.
[31] 16 U.S.C. §§ 1531-1544.
[32] The amendments occurred in 1976, 1978, 1979, 1982, and 1988.
[33] 1982 U.S.C.C.A.N 2807.
[34] 16 U.S.C. § 1533.

the procedures to be followed when listing a species as endangered or threatened. This section also grants the Secretary of the Interior the power to designate an area as a critical habitat.[35] Legislative history regarding § 5 states that the "Secretary [has] broad authority to acquire any real property ... which he finds necessary for the purpose of conserving, protecting, restoring, or propagating any endangered or threatened species."[36] Similarly, the purpose of the Act was to provide an effective means to conserve, protect, and restore the ecosystems upon which endangered or threatened species depend for survival.[37] Under ESA, the definition of critical habitat includes "air, land or water areas ... only if their loss would significantly decrease the likelihood of conserving the species in question."[38]

Congress has directed that all agencies of the federal government are to cooperate in the implementation of the goals of ESA concerning conservation, protection, and restoration of designated ecosystems.[39] In this pursuit, federal agencies are required to take steps to make certain that actions authorized by it do not harm a listed species or the species' designated critical habitat.[40]

During discussion of the 1973 amendment of the ESA, the Committee which reviewed the proposed amendments reiterated that the power of acquiring a critical habitat is imperative for ESA to be effective.[41] The Act, therefore, must vest adequate authority in the Secretary to acquire such habitat.[42]

The 1978 proposed amendments to ESA sought, *inter alia*, to introduce flexibility into the Act[43] by adding a provision to allow an exemption from the requirements of § 7.[44] The exemption allows noncompliance with § 7 if a federal agency can show that there are no reasonable and prudent alternatives to the agency's project.[45] The proposed exemption has been adopted and is now incorporated at ESA § 7(g).[46]

The committee report of the 1978 amendments stated that the exemption which may be granted under § 7(g) is not a major federal action for the purposes of NEPA "if an environmental impact statement which discusses impacts on endangered or threatened species or their critical habitats has been prepared."[47]

Federal legislation for general protection of the environment was enacted by Congress with the National Environmental Policy Act of 1969 (NEPA).[48] The purpose of NEPA was to obtain "broad and independent" overviews of the quality of the natural environment,[49] and to suggest measures to improve the environmental situation.[50] NEPA requires reporting of such overviews to Congress and to the general public with recommendations on steps which can be taken to improve the quality of the environment.[51] NEPA provisions are to be complied with "to the fullest extent possible."[52] NEPA "requires any federal agency proposing a 'major Federal action significantly affecting the quality of the human environment' to prepare what is known as an Environmental Impact Statement (EIS)."[53]

When proposed and adopted, NEPA was met with little opposition.[54] The House Committee recognized that environmental concerns significantly effect the public's everyday life, and sought to establish a system to require an independent review of the interre-

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[35] *Id.*

[36] 1973 U.S.C.C.A.N. at 2994.

[37] *Id.* at 2995.

[38] 1978 U.S.C.C.A.N. 9453, at 9475.

[39] 1973 U.S.C.C.A.N. at 2997.

[40] *Id.*

[41] *Id.* at 3004.

[42] *Id.*

[43] 1978 U.S.C.C.A.N. 9453.

[44] Section 7 of the ESA (as amended in 1978), "requires Federal agencies to insure that any action authorized ... by them does not jeopardize the continued existence of listed species or destroy or adversely modify the critical habitat of any endangered or threatened species." 1979 U.S.C.C.A.N. 2557, 2561.

[45] 1978 U.S.C.C.A.N. at 9464.

[46] In 1982, ESA was amended with the intent to make the Act a more effective and efficient tool for the conservation of endangered or threatened species. In 1982, Congress did consider other revisions to § 7(a) of ESA, yet did not change the substantive duty of § 7(a)(2). *See,* 1982 U.S.C.C.A.N. at 2824.

[47] 1978 U.S.C.C.A.N. at 9490.

[48] 42 U.S.C. § 4321 et seq.

[49] 1969 U.S.C.C.A.N. 2751.

[50] *Id.* at 2754.

[51] *Id.*

[52] 42 U.S.C. § 4332.

[53] *Catron County*, 75 F.3d at 1434.

[54] 1969 U.S.C.C.A.N. at 2752-2753.

lated problems associated with environmental quality and federal actions.[55] The goal was to "reverse what seems to be a clear and intensifying trend toward environmental degradation."[56]

As reported by the Committee, testimony at the hearings reflected the belief that the council established by NEPA would not conflict with the previously established interdepartmental council, which included the Secretary of the Interior.[57] The committee report also stated it was "well aware that the problems with which this legislation attempts to deal are long term, and that not all eventualities ... are foreseeable."[58] A requirement to make studies and recommendations relating to environmental considerations should therefore allow adaption to changing circumstances (emphasis added).[59]

For "major Federal Actions significantly affecting the quality of the human environment," NEPA mandates the preparation of an Environmental Impact Statement (EIS).[60] The EIS must include a detailed statement concerning any adverse environmental effects which cannot be avoided should a proposal be implemented, and must include alternatives to the proposed action.[61]

In 1975, a Senate committee sought to clarify the procedures required by NEPA in the preparation of EISs.[62] Specifically, there was uncertainty of whether federal agencies could delegate EIS preparation duties to consultants and to state governments.[63] The purpose of the proposed amendment to NEPA was to remedy procedural difficulties arising from a decision of the Court of Appeals for the Second Circuit,[64] and subsequent rulings.[65] Rulings in those cases held that "NEPA requires full and independent preparation of all EIS's (sic) by the federal agency."[66] The amendment permits state preparation of an EIS as long as the federal agency also participated in the preparation and evaluation of the EIS project.[67] This legislative response was appropriate, the Senate committee believed, because the judicial interpretation potentially exposed NEPA to criticism which could lead to an erosion of the statute's strength.[68]

**B. Judicial History**

Only one year prior to the decision in *Catron County*, the Ninth Circuit Court of Appeals ruled on a similar case.[69] The issue in that case also was whether NEPA applies to the designation of a critical habitat under ESA.[70] The Ninth Circuit held that it does not.[71]

Similar to the instant case, plaintiffs in *Douglas County* sued the Secretary of the Interior alleging failure to comply with the requirements of NEPA in its designation of certain federal land as critical habitat.[72] The Secretary argued that ESA procedures supplant NEPA procedures, and hence, NEPA does not apply to designations of critical habitat.[73] Parties submitting amicus briefs argued that requiring an EIS would "frustrate the purposes of both NEPA and the ESA."[74]

The Ninth Circuit, convinced by NEPA's legislative history, concluded that the "ESA procedures for designating a critical habitat replace the NEPA requirements"[75] The court noted that Congress provided a procedure for the designation of a critical habitat in the 1978 amendments to ESA.[76] The Ninth Circuit concluded that the changes to ESA

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[55] *Id.* at 2753.

[56] *Id.*

[57] The interdepartmental Environmental Quality Council, created by Executive Order No. 11472, dated May 29, 1969 was a body which included the Secretary of the Interior. *Id.* at 2754.

[58] *Id.* at 2760.

[59] *Id.*

[60] 42 U.S.C. § 4332(C).

[61] 42 U.S.C. § 4332(C)(ii), (iii).

[62] 1975 U.S.C.C.A.N. 859.

[63] *Id.* at. 859, 861.

[64] Conservation Society v. Secretary, 423 U.S. 809 (1975).

[65] Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105, (D.N.H. 1975); and Swain v. Brinegar, 542 F. 2d 364 (7th Cir. 1975).

[66] 1975 U.S.C.C.A.N. at 860.

[67] *Id.*

[68] *Id.* at 864.

[69] *Douglas County*, 48 F.3d 1495 (9th Cir. 1995).

[70] *Id.* at 1497.

[71] *Id.* at 1502.

[72] *Id.* at 1497.

[73] *Id.* at 1499.

[74] *Id.*

[75] *Catron County*, 75 F.3d at 1503.

[76] The 1978 ESA amendments were made eight years after the enactment of NEPA, implying that Congress was well aware of NEPA requirements. These amendments to ESA allowed for the consideration of economic impact of a designation

made NEPA requirements seem superfluous and hence displaced NEPA's informational requirements.[77]

The *Douglas County* court also concluded that ESA conflicts with NEPA in that ESA allows the Secretary to exclude from critical habitat any area which the benefit of exclusion outweighs the harm which would be caused by inclusion, yet NEPA mandates the Secretary to include all areas without which a species would become extinct, and the Secretary may not consider the environmental impact of such designation.[78] The Ninth Circuit, therefore, interpreted the NEPA mandate to be in direct conflict with the requirements of ESA.[79]

In *Douglas County*, the court concluded that Congress made an "implicit choice to accept the Secretary's policy not to prepare EISs when designating critical habitats."[80] The court reasoned that evidence of this choice was present in the 1988 Amendments to ESA.[81] Those amendments did not change the critical habitat provision, hence the court concluded that Congress had accepted the Secretary's interpretation of ESA.[82]

Also to support its decision, the *Douglas County* court looked to precedent. A 1981 case[83] held that when listing a species as endangered or threatened, the Secretary did not have to comply with NEPA.[84] Because of the similarity in the process, the *Douglas County* court reasoned that when designating a critical habitat compliance with NEPA was not required by ESA.

Next, the Ninth Circuit looked to the Federal Register to analyze Congressional intent.[85] In 1983, the Secretary "announced in the Federal Register his decision not to prepare an Environmental Assessment[86] (and therefore the subsequent EIS) before making critical habitat designations."[87] The court noted that when Congress considered ESA amendments in 1988, however, no response was made to the Secretary's 1983 announcement.[88] Because Congress was silent, the Ninth Circuit concluded this was persuasive evidence that the Secretary's interpretation was the one Congress intended.[89]

The Ninth Circuit also found that the goals of designating a critical habitat under ESA and the documentation requirements of NEPA are similar enough so that both are not required simultaneously.[90] The court held the similarities of NEPA's and ESA's purposes are evident by their language. NEPA's purpose is to "promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment"[91] and to protect the environment from further damage.[92] ESA's purpose is to designate critical habitats for endangered species for the preservation of the environment and to "prevent the irretrievable loss of a natural resource."[93] The court thus found that the designation of a critical habitat under ESA advances the purpose of NEPA and may therefore it may not be necessary to comply with both Acts.[94]

The Ninth Circuit then looked to the language of the Act itself. NEPA language requires all federal agencies to comply with NEPA "to the fullest extent possible."[95] Case

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and required the Secretary to provide notice to residents in the affected area. Congressional records indicate that the committee wished to add flexibility to the requirements of the ESA regarding the procedures required for designating a critical habitat. *Id.* at 1503. *See*, H.R.Rep. No. 1625, 95th Cong., 2d Sess. 14, reprinted in 1978 U.S.C.C.A.N. at 9464.

[77]*Catron County*, 75 F.3d at 1503.

[78]*Id. See*, 16 U.S.C. § 1533(b)(2).

[79]*Douglas County*, 48 F.3d at 1503.

[80]*Id.* at 1504.

[81]*Id.*

[82]*Id.*

[83]Pacific Legal Foundation v. Andrus, 657 F.2d 829, 835 (6th Cir. 1981).

[84]Dicta in *Pacific Legal Foundation* suggested that designation of a critical habitat under ESA might be the 'functional equivalent' of procedures required by an EIS under NEPA. *See Douglas County*, 48 F.3d at 1504.

[85]*Douglas County*, 48 F.3d at 1504.

[86]"For proposed actions the environmental effects of which are uncertain, the agency must prepare an Environmental Assessment (EA) to determine whether a significant effect will result from the proposed action. Based upon the EA, the agency must either make a 'finding of no significant impact' (FONSI) or determine if a significant environmental impact will result, thus requiring the preparation of an EIS." *Catron County*, 75 F.3d at 1434, citations omitted.

[87]48 Fed.Reg. 49,244 (1983).

[88]*Douglas County*, 48 F.3d at 1504.

[89]*Id.*

[90]*Id.* at 1506.

[91]*Id.* (citing Metropolitan Edison Co. v. People against Nuclear Energy, 460 U.S. 766, 772 (1983)).

[92]*Id.* at 1506.

[93]*Id.* (citing *Pacific Legal Foundation*, 657 F.2d at 837).

[94]*Id.*.

[95]42 U.S.C. § 4332(2)(C).

law had interpreted this language to mean that "NEPA was not intended to repeal by implication any other statute."[96] A House conference committee report[97] stated that NEPA applies *unless* "the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."[98] Because of this language, the Ninth Circuit was convinced that "Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements."[99]

In sum, the *Douglas County* court found that the Secretary was not required to comply with NEPA when designating a habitat under ESA "because (1) Congress intended that the ESA critical habitat procedures displace the NEPA requirements, . . . and (3) to apply NEPA to the ESA would further the purpose of neither statute."[100]

The U.S. Court of Appeals for the Sixth Circuit[101] considered a similar issue when the question before it was whether a federal agency must comply with NEPA in filing an EIS before listing a species as endangered. In *Pacific Legal Foundation v. Andrus*, decided in 1981, the Sixth Circuit held that NEPA's requirement to file an EIS conflicts with ESA, therefore NEPA must give way.[102] Hence, the Fish and Wildlife Service was not required to comply with NEPA before listing certain species as endangered.[103]

The Sixth Circuit supported its holding by first noting that the filing of an EIS does not serve the purposes of ESA.[104] Because the Secretary is required by ESA to list a species as endangered or threatened based on five factors,[105] while NEPA does not vest discretion in the Secretary to consider those factors, the court found that NEPA merely supplemented the existing goals of ESA.[106]

The court then held that the Secretary's listing of a species as endangered or threatened "furthers the purposes of NEPA even though no impact statement is filed."[107] The court noted that NEPA was designed to establish a national policy which would encourage harmony between man and his environment, to curtail damage to the environment, to enlarge man's knowledge of ecological systems and natural resources, and to provide the mechanism for accomplishing these goals.[108] Similarly, when the Secretary lists species as endangered under authority provided him by the ESA, he too is working to preserve the environment, and he "enhances the ability to learn about the ecosystems."[109] Hence, to require the Secretary to file an impact statement would only hinder his efforts under the ESA, yet when the Secretary acts within the mandates of the ESA, he also accomplished the goals of NEPA.[110]

Additionally, the Court noted that the Supreme Court has previously held that NEPA was not intended to

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[96]*Douglas County*, 48 F.3d at 1502 (citing Merrell v. Thomas, 807 F.2d at 779).

[97]*Reprinted at* 1969 U.S.C.C.A.N. at 2770.

[98]*Douglas County*, 48 F.3d at 1502.

[99]*Id.* at 1503.

[100]*Id.* at 1507-1508.

[101]Perhaps it should be noted from the outset that the Sixth Circuit seems to hold ill feelings toward NEPA, as evidenced by its statement in this decision that "[t]his Court is reluctant to make NEPA more of an obstructionist tactic to prevent environment-enhancing action that it may already have become." *Pacific Legal Foundation*, 657 F.2d at 838.

[102]*Pacific Legal Foundation*, 657 F.2d at 838.

[103]*Id.* at 829, 835. Note that this case focused on a federal agency's listing of a species as endangered, and not the subsequent act of designating a critical habitat. The opinion noted, however, that at the time of the alleged violation of NEPA in this case, "once the listing was made, all federal agencies were to consult with the Secretary and insure their actions did not jeopardize the existence of an endangered species or result in the destruction or modification of the habitat of such species." *Id.* at 829.

[104]*Id.* at 835.

[105]The five factors are listed at 16 U.S.C.A. § 1533(b)(1) (1974) and are as follows:
(1) the present or threatened destruction, modification, or curtailment of its habitat or range;
(2) overutilization for commercial, sporting, scientific or educational purposes;
(3) disease or predation;
(4) the inadequacy of existing regulatory mechanisms; or
(5) other natural or manmade factors affecting its continued existence.

[106]*Pacific Legal Foundation*, 657 F.2d at 835.

[107]*Id.* at 837.

[108]*Id.*

[109]*Id.*

[110]*Id.*

override or repeal other statutes.[111] Pointing out that NEPA is to be complied with "to the fullest extent possible,"[112] the Court stated that this language is not a loophole, but a directive that all agencies are to comply with NEPA, "unless there is a statutory conflict with the agency's authorizing legislation that expressly prohibits or makes full compliance impossible."[113]

The Sixth Circuit also supported its holding by stating that the filing of an EIS would not serve the purposes for which it is required, namely to insure that a federal agency considers the impact of its actions.[114] The Secretary is required under the ESA to make his findings based on the best scientific data available, yet for the EIS required by NEPA the Secretary has "no authority to consider environmental factors,"[115] therefore, preparation of an EIS regarding listing of an endangered species is "a waste of time."[116]

The Sixth Circuit interpreted NEPA's legislative history to suggest that "NEPA was not intended to be applied to agencies whose function was to protect the environment."[117] The Conference Report of the 1969 hearings on enactment of NEPA evidence that provisions of NEPA were not designed to cause a change in the manner in which environment-enhancement agencies carry out their protection authority.[118] Thus, the court concluded, Congress did not intend to require the Secretary to file an EIS before listing a species as threatened or endangered.[119]

The Sixth Circuit, however, specifically left open the question of whether, after the 1978 Amendment to ESA, the ESA may provide the functional equivalent of an impact statement when designating a critical habitat as required by ESA.[120]

Courts have often interpreted legislative intent to require all federal agencies to comply with the directives set out in NEPA.[121] A limitation was set, however, by the U.S. Supreme Court when it held that the language of NEPA "was not intended to repeal by implication any other statute."[122] Rather, all federal agencies are required under NEPA to review their policies and procedures to determine whether there are any deficiencies or inconsistencies which would prohibit full compliance with the purposes and provisions of NEPA.[123] If Congress has designated a procedure that differs materially from procedures required by NEPA,[124] then the federal agency need not comply with NEPA. This "material difference" has been characterized as an irreconcilable or fundamental conflict between NEPA and the federal agency's authority.[125] Therefore, case law supports the conclusion that NEPA requirements must be met, unless the "obligations of another statute are clearly mutually exclusive with the mandates of NEPA."[126]

Other courts have focused on the reasonableness of an agency's decision. These decisions have cited NEPA's provision at § 4332 for support that an agency decision specifically not to prepare an EIS must be upheld by the federal courts, unless the agency's decision is unreasonable.[127] An agency decision which is fully informed and well-considered may not be overruled by the federal courts substituting their judgment for the agency's.[128] An elaboration on this standard was stated by the District Court of Tennessee which held:

> An agency determination whether or not to prepare an EIS is reviewable under a "reasonableness" standard. The court is to review the administrative records as well as other evidence to determine whether the agency adequately considered the values set out in NEPA and

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[111] *Id.* at 836 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548 (1978), and United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 692-94 (1973)).

[112] 42 U.S.C. § 4332(2).

[113] *Pacific Legal Foundation*, 657 F.2d at 833.

[114] *Id.* at 836.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 838.

[118] *Id.* at 838, n11.

[119] *Id.* at 840.

[120] *Id.* at 835.

[121] Flint Ridge Dev. Co. v. Scenic Rivers Assn., 426 U.S. 776, 788 (10th Cir. 1976).

[122] United States v. SCRAP, 412 U.S. at 694.

[123] *Id.*

[124] Merrell v. Thomas, 807 F.2d 776, 779 (9th Cir. 1986).

[125] Flint Ridge Dev. Co. v. Scenic Rivers Assn., 426 U.S. at 788.

[126] Davis v. Morton, 469 F.2d 593, 598 (10th Cir. 1972).

[127] Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1177 (9th Cir. 1982).

[128] Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) (citing Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985)).

the potential environmental effects of the project before the agency reaches its decision on whether an EIS was necessary. If the agency engaged in this analysis and reasonably concluded that no EIS was required, that decision will be upheld.[129]

## IV. INSTANT DECISION

The Tenth Circuit affirmed the district court's holding that the Secretary of Interior did fail to comply with NEPA as required when he designated certain lands within Catron County as critical habitat.[130]

The appellate court first looked to relevant precedent on the issue and specifically examined cases where compliance with NEPA is excused when there is a statutory conflict between the agency's authorizing legislation and the requirements of NEPA.[131] The appellate court noted that "conflict" has been found in instances where compliance with both statutes is impossible.[132] First, when compliance with NEPA and another statute is impossible, "NEPA must give way."[133] Compliance with NEPA is only to the "fullest extent possible,"[134] and is not intended to repeal any other statute.[135]

Second, the court noted that compliance with NEPA has also been excused where requirements in the statutes would essentially result in duplication, "rendering compliance with both superfluous."[136] This exception to NEPA has often been referred to as the "functional equivalent" test.[137] Where the particular action being taken by the Secretary is subject to rules and regulations that in essence duplicate the NEPA rules and regulations, NEPA must give way.[138]

In the instant decision, however, the appellate court did not find either of the above exceptions applicable.[139] The court looked to the focus of the ESA critical habitat designation, and did not find the obligations of both ESA and NEPA to be functionally equivalent or in conflict.[140]

The appellate court found that the ESA requirements only partially fulfilled NEPA's requirements, and that partial fulfillment is not satisfactory.[141] The court noted that the purposes of ESA and NEPA are not identical.[142] ESA's core purpose is the protection of endangered or threaten species.[143] NEPA however, is a procedural statute for the purpose of informing governmental agencies of the possible environmental results of their actions.[144] The court stated that if it were to interpret NEPA "as merely requiring an assessment of detrimental impacts upon the environment," such interpretation would diminish the purpose of the Act to inform governmental officials of the

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[129]Ocoee River Council v. Tennessee Valley Authority, 540 F. Supp. 788, 795 (D.C. Tenn., 1981).

[130]*Catron County*, 75 F.3d at 1432.

[131]*Id.* at 1435.

[132]*Id.*.

[133]*Id.* (quoting from *Flint Ridge*, 426 U.S. at 788).

[134]42 U.S.C. § 4332.

[135]*See infra* note 185.

[136]*Catron County*, 75 F.3d at 1435.

[137]*Id.* at 1435. *See also Pacific Legal Foundation*, 657 F.2d at 834 (providing citations to cases where a functional equivalent has been found). Some cases have held that for the functional equivalent test to be met, all elements must be required by each statute. Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973). Other cases have held that all elements do not have to be satisfied by each statute. Amoco Oil Co. v. EPA, 501 F.2d 722, 750 (D.C. Cir. 1974). Criteria required to meet the functional equivalent test has been stated as follows:

> The functional equivalent exemption developed in common law for situations where an agency achieves NEPA's objective of full disclosure of environmental effects through means comparable to an EIS. In general, under the functional equivalent exception, an agency with expertise in environmental matters is not obligated to comply with the formal EIS process prior to taking a particular action, if two criteria are met. First, the agency's authorizing statute must provide 'substantive and procedural standards [that] ensure full and adequate consideration of environmental issues.' (citing Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257.) Second, the agency must afford an opportunity for public participation in the evaluation of environmental factors prior to arriving at a final decision.

APPLICABILITY OF SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL PROTECTION ACT OF 1969 TO RESPONSE ACTIONS UNDER SECTION 104 OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980. September 1, 1982, 1982 WL 45416, *4.

[138]*Catron County*, 75 F.3d at 1435 (citing *Flint Ridge*, 426 U.S. at 788-91, quoting United States v. SCRAP, 412 U.S. 669, 694 (1973)).

[139]*See Catron County*, 75 F.3d at 1438.

[140]*Catron County*, 75 F.3d at 1436.

[141]*Id.* at 1437.

[142]*Id.*

[143]*Id.*

[144]*Id.*

results of their actions.[145] Finally, the appellate court stated that the goals of ESA will be furthered by compliance with NEPA.[146]

In sum, the appellate court held that because the requirements of NEPA and ESA were not mutually exclusive, nor duplicative, and because compliance with one would further the goals of the other, the Secretary must comply with NEPA by preparing an EIS when designating critical habitat under ESA.[147]

The court also considered the Secretary's argument that Congressional silence on the matter should be interpreted as endorsement of the Secretary's actions.[148] The court acknowledged that when Congress revisits a statute, yet does not revise or repeal the statute, that is persuasive evidence that Congress endorses the interpretation of the statute.[149] The court noted that in this case there was no evidence of congressional awareness of the interpretation given to NEPA's impact statements with regard to ESA.[150] The court concluded that the legislative history, including Congressional silence, did not "indicate congressional endorsement of the Secretary's" interpretation of NEPA when designating critical habitats.[151]

The appellate court did acknowledge that other circuits have ruled differently on this issue by holding that the Secretary need not comply with NEPA's documentation requirements.[152] However, the Tenth Circuit Court found that in light of precedent in its circuit, and a careful analysis of the facts, the Secretary must comply with NEPA and prepare an EIS when designating a critical habitat.[153]

## V. COMMENT

The Tenth Circuit in *Catron County* incorrectly decided that the Secretary must comply with NEPA for several reasons.

First, the procedures involved in preparation of an EIS and in designating a critical habitat under ESA are 'functionally equivalent,' or duplicative, and therefore not required. NEPA requires federal agencies proposing a major federal action to prepare an EIS. The primary purposes of an EIS are: (1) to consider environmental impact of the action; (2) to inform the public; and (3) to enable those outside the agency to evaluate the agency's actions.[154] In the critical habitat designation required of ESA, the Secretary must use the best scientific and commercial data available, consider economic and any other relevant impact of the action, notify the public of the proposed action, and allow for public comment.[155]

The purposes and requirements of these two provisions are similar enough to be functionally equivalent. Essentially, the functional equivalent argument[156] is that steps required by one process are similar to the steps required for another process.[157] Therefore, to answer the question of whether the designation of a critical habitat and the preparation of an EIS are functionally equivalent, the steps for each must be considered.

The first relevant provision of ESA is § 5,[158] wherein the Secretary is directed to designate species as endangered or threatened when certain criteria are met, and simultaneously designate any habitat which is considered to be critical habitat for such species.[159] After consideration of the impact of the critical habitat designation, the Secretary may exclude an area from critical habitat only if he concludes that it is more beneficial than harmful to make such exclusion.[160] However, if the Secretary concludes it is more beneficial to exclude an area, he still must designate it as critical habitat if not doing so would result in the extinction of the listed species.[161] Section 5 of the ESA does not vest much discretion in the

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 1438. The Secretary based his argument in this regard on four facts: (1) that the Sixth Circuit ruling in *Pacific Legal Foundation* excluded compliance with NEPA in designating a critical habitat, (2) that the CEQ issued a letter in 1983 which indicating that the Secretary need not preparing NEPA impact statements when listing a species as endangered, (3) that in 1983 the Secretary announced in the Federal Register "his intention not to pre PA impact statements in connection with regulations promulgated under § 1533(a) of ESA," and, (4) that during the 1988 ES/ mend nt hearings Congress did not "revise or repeal" any of the judicial and executive interpretations of "NEPA noncompliance i on with actions under § 1533 of ESA." *Id.*

[149] *Id.* at 1438.

[150] *Id.* at 1437.

[151] *Id.* at 1439.

[152] *See Douglas County*, 484 F.3d at 1495. *See also Pacific Legal Foundation*, 657 F.2d at 829.

[153] *Catron County*, 75 F.3d at 1436.

[154] *Id.* at 1434.

[155] *Id.* at 1434, 1435.

[156] *Supra*, note 154.

[157] *Douglas County*, 48 F.3d at 1504 n.10.

[158] 16 U.S.C. § 1533.

[159] 16 U.S.C. § 1533(a)(3)(A).

[160] 16 U.S.C. § 1533(b)(2).

[161] *Id.*

Secretary when designating a critical habitat.[162] "Congress has not given the Secretary discretion to consider environmental factors other than those relating directly to preservation of species."[163]

The second relevant requirement under ESA § 5 is notice. When the Secretary designates a critical habitat, he must give notice of his proposal to government officials and to the public near the area to be designated, and invite comment on his proposal.[164] If any person requests to comment on the proposed action, a hearing must be held promptly.[165] The Secretary must publish the complete text of his proposed designation in the Federal Register within 90 days before the effective date of the designation.[166] Actual notice, however, must be given to the appropriate State agency.[167]

Examination of the other relevant statute, NEPA, is also required. Procedures required by NEPA are drafted to insure that environmental consequences are considered in decision-making by federal agencies.[168] To assure that this purpose is met, 40 C.F.R. §§ 1500-1508 contains guidelines for preparing an EIS. A summary of those guidelines follows: First, an EIS must compare the environmental impacts of the proposed action against the impacts of alternative action.[169] The comparisons should be based upon (1) environmental impacts of alternatives and of the proposed action, (2) any unavoidable adverse environmental effects caused by the implementation of the proposed action, (3) the relationship between short-term uses and the maintenance and enhancement of long-term productivity of the environment, and (4) any irreversible effects on resources which would be involved by implementation of the proposal.[170] This comparison should result in a clear presentation to enable the agency and the public to make informed decisions. Additionally, the preparing agency shall indicate its preferred alternative, "unless another law prohibits the expression of such a preference." The EIS must also provide a description of the "environment of the area to be affected."[171]

The CFR also requires that, to the fullest extent possible, agencies prepare draft EISs "concurrently with and integrated with environmental impact analysis and related surveys and studies required by ... the Endangered Species Act."[172] This language may be interpreted to allow the critical habitat designation under ESA to be integrated with NEPA's impact statement.[173]

Additionally, the CFR allows any documentation required by NEPA to be combined with other agency documentation "to reduce duplication and paperwork."[174]

As is evident by the term "guidelines," the guidelines in the CFR do not require strict application by the courts. Rather, courts look to the sufficiency of an EIS by examining the particular facts and circumstances surrounding the project and the extent of detail required which is "necessarily related to the complexity of the environmental problems involved."[175]

Essentially, what is required by NEPA is disclosure of any potential environmental impacts of a major federal action. Notice procedures required for designation of a critical habitat under ESA seem to make the NEPA procedure redundant and unnecessary. The "congressional mandate for public participation in the designation process, . . . displaces NEPA's procedural and informational requirements."[176]

In sum, the requirements of ESA for designating a critical habitat of a listed species, and the requirements of NEPA in preparation of an EIS are so similar as to qualify as functionally equivalent. When

[162]*See* 50 C.F.R. § 424.12 for the specific criteria for designating critical habitat.

[163]*Douglas County*, 48 F.3d at 1507 (citing 16 U.S.C. § 1533(b)(2)).

[164]16 U.S.C. § 1533(5).

[165]16 U.S.C. § 1533(b)(5)(E) requires the hearing to be held within 45 days after the date of publication of the general notice.

[166]16 U.S.C. § 1533(b)(5)(A)(i).

[167]The appropriate agency is the "State agency in each State in which the species is believed to occur, and to each county . . . in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii).

[168]7 C.F.R. § 650.1(d).

[169]40 C.F.R. § 1502.14.

[170]40 C.F.R. § 1502.16.

[171]40 C.F.R. § 1502.15.

[172]40 C.F.R. § 1502.25.

[173]This interpretation is suggested by taking the conclusions of *Douglas County* to their logical end. The court in *Douglas County* held that (1) the requirements for designating critical habitat under ESA displaced NEPA, (2) NEPA does not apply to federal acts which do not alter the physical environment, and (3) that ESA preserves the environment, thereby furthering the goals of NEPA without requiring an EIS. In sum, these individual premises can come to the result that ESA and NEPA may be integrated in this procedure.

[174]40 C.F.R. § 1506.4.

[175]Olmsted Citizens for a Better Community v. United States, 606 F.Supp. 964, 974 (D. Minn. 1985) (citing Robinson v. Knebel, 550 F.2d 422, 426 (8th Cir. 1977)).

[176]*Douglas County*, 48 F.3d at 1503.

procedures are functionally equivalent, NEPA has given way to other statutes. This, the "giving way" of NEPA, is the proper result in the instant case.

The second reason why the Tenth Circuit incorrectly decided *Catron County* is because federal courts must uphold a federal agency's decision unless that decision was unreasonable. The standard of review was not mentioned in the *Catron County* opinion, yet the standard should have been as other courts have established; one of "reasonableness."[177]

Case law has supported the specific proposition that an agency decision not to prepare an EIS must be upheld by the federal courts, unless that decision is unreasonable.[178] Also, in several federal circuit courts, it is established practice that an agency's decision that other particular procedures do not require preparation of a EIS will be upheld unless unreasonable.[179]

The Secretary's decision in the instant case appears to have been reasonable for several reasons. First, upon the Secretary's determination that two species inhabiting the area were endangered, and after public notice and hearing, the Secretary designated certain areas in which the species live as critical habitat. In this designation, the Secretary was following previously established methods and procedures. Second, in 1983 the Secretary had published his determination that when designating a critical habitat, he did not need to prepare an EIS. This decision was contained in the Federal Register,[180] and did not draw negative reaction from Congress. Third, the Secretary was also relying on a 1983 letter issued by the Council on Environmental Quality (CEQ),[181] which indicated that the Secretary no longer needed to prepare NEPA impact statements when listing species as threatened or endangered.[182] Fourth, in 1994, when the Secretary was challenged on a similar decision, the Sixth Circuit upheld his decision that it was unnecessary to comply with NEPA in designating a critical habitat.[183] For each of these reasons, the Secretary's decision was reasonable and should have been upheld.

A third reason why the Tenth Circuit court's decision is in error is because NEPA was designed to "give way" to other statutes when they conflict. NEPA is to be complied with "to the fullest extent possible,"[184] and this has been interpreted to mean that the statute was "not intended to repeal by implication any other statute."[185] Because the requirements of NEPA and ESA in the instant case conflict, NEPA should be subordinate to the requirements of ESA.

As explained above, the process required of the Secretary in designating critical habitat is redundant of the process required by NEPA.[186] Also, the notice and hearing requirement of ESA is redundant of NEPA requirements. For these reasons, both statutes cannot be complied with simultaneously. The statute which falls in this case is NEPA. Therefore, the Secretary should comply only with the provisions of ESA in designating a critical habitat.

Lastly, the Tenth Circuit court's decision was incorrect in its interpretation of Congressional silence.[187] When Congress considered the most recent amendments to ESA, two factors were present which presumably gave notice to Congress of the issue in *Catron County.*[188]

[176]*Douglas County*, 48 F.3d at 1503.

[177]*But see* Olmstead Citizens for a Better Community v. United States, 606 F. Supp. 964, 971 (Minn. Dist. Ct. 1985) (stating that the standard of review is "arbitrary and capricious" when reviewing agency action under NEPA).

[178]Foundation for North American Wild Sheep v. United States Department of Agriculture, 681 F.2d 1172, 1177 (9th Cir. 1982) (citing Portela v. Pierce, 650 F.2d 210, 213 (9th Cir. 1981); City and County of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir 1980); and (City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975). *Also see* Jones v. Gordon, 792 F.2d 821, 827 (9th Cir. 1986).

[179]*Id.* An interesting quandary is presented by the Ninth Circuit in its footnote 24. At that footnote, it states that the appopriate standard of review for actions of a federal agency mandated by a directive is the "reasonableness" standard. Also, it states that because an EIS is mandated in certain instances, the reasonableness standard is appropriate when considering a decision not to prepare an EIS. It may be impossible, therefore, to reconcile the argument that an agency's decision cannot be overturned unless unreasonable with the position that an EIS is not a mandatory directive.

[180]48 Fed.Reg. 49,244-45 (1983).

[181]48 Fed.Reg. 49,244 (1983).

[182]*Catron County*, 75 F.3d at 1438.

[183]*Pacific Legal Foundation*, 657 F.2d at 835.

[184]42 U.S.C. § 4332.

[185]*Pacific Legal Foundation*, 657 F.2d at 836 (citing Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc., 435 US. 519, 548, and United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. at 692-94).

[186]ESA requires the Secretary to consider economic and other impacts using the best scientific data available, which are also the impacts of concern to NEPA. *Douglas County*, 48 F.3d at 1503.

[187]Recall that the 1988 amendments to ESA did not include a change to the substantive portion of § 7. *Supra*, note 46.

First, the Sixth Circuit held in 1981 that NEPA did not apply when the Secretary listed a species as endangered or threatened, and suggested in dicta that the same result would apply to a designation of critical habitat.[189] Second, in 1983 the Secretary announced in the Federal Register his determination that an EIS was not necessary in designation of critical habitats.

Hence, previous case law and comment in the Federal Register pointed to the potential conflict between NEPA and ESA, yet Congress did not act on this interpretation. It would be expected that Congress would speak up to the judicial branch and other legislative agencies if they were not acting as Congress intended. Congress did not respond to either interpretation. Although silence is not by any means conclusive, a better argument is made for acceptance than rejection when silence is the response to one's statements. Because Congress was silent in this regard, it can reasonably be inferred that the Secretary of the Interior was acting in compliance with congressional intent when designating critical habitats according to ESA, while not following NEPA.

Lastly, NEPA should have given way in *Catron County* because following ESA would lead to a satisfactory result. This result would protect the environment because the Secretary's designation of a critical habitat functioned as envisioned by the drafters of the statute. The Secretary carefully considered the status of the endangered species, considered environmental and other impacts of the designation, published his proposed findings, gave notice, and held public hearings. To require compliance with NEPA in this situation would be repetitive, resulting in nothing more than a waste of money and time.

## VI. CONCLUSION

The *Catron County* court incorrectly decided the issue before it. The court should have held that NEPA is superseded by ESA when the Secretary designates a critical habitat. While the *Catron County* decision did not follow the logic of the Ninth Circuit in its decision in *Douglas County*, the logic expressed in the latter case is more compelling.[190]

Because ESA requires the Secretary to list species as endangered or threatened when certain criteria are met, and to designate their habitat as critical, this supplants an EIS requirement. The critical habitat designation already takes into account environmental impact because such designation must consider the continued existence of a species and its natural environment.

While the consideration of economic and other impacts of federal action is important, NEPA must be viewed in a common-sense approach. To require NEPA to be complied with when the results of the studies cannot effect the Secretary's designation of a critical habitat under the ESA is not sensible.

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[188]*Catron County*, 75 F.3d at 1438.

[189]*Douglas County*, 48 F.3d at 1504 (citing *Pacific Legal Foundation*, 657 F.2d at 835).
mandatory directive.

[190]When circuits are in conflict, it is possible that the issue will be heard by the United States Supreme Court to resolve the conflicting interpretations among the circuits.