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CASENOTE

FORCING THE ISSUE: APPLYING A STATUTE OF LIMITATIONS TO CHALLENGES OF AGENCY
INACTION UNDER THE ENDANGERED SPECIES ACT*Missouri v. Secretary of the Interior*¹

I. INTRODUCTION

In 1973, Congress enacted the Endangered Species Act (“ESA”) in order to save and protect vanishing species.² Under the ESA, the Secretary of the Interior (“Secretary”), in cooperation with the United States Fish and Wildlife Service (“FWS”),³ is responsible for determining which species need protection, and listing those species as endangered in the Federal Register. The ESA also mandates that when a species is considered endangered, the habitat critical for that species’ survival must be determined as well. To this end, the Secretary must designate a species’ “critical habitat” at the same time the species is listed as endangered, unless it is either not prudent or not determinable at that time.⁴

Despite Congress’ intent that the Secretary rarely invoke these exceptions,⁵ only 150 of the 1249 plants and animals currently listed as endangered have been designated a “critical habitat.”⁶ The Administrative Procedure Act (“APA”) provides for judicial review of the Secretary’s reliance on these exceptions.⁷ However, in *Missouri v. Secretary of the Interior*, the United States District Court for the Western District of Missouri held that requests for judicial review must be made within six-years following the Secretary’s reliance on either exception.⁸ This note will discuss the Congressional intent underlying the “not prudent” and “not determinable” exceptions to the Secretary’s duty to designate “critical habitat,” and the potentially harmful effects of limiting judicial review of the Secretary’s reliance on the “not determinable” exception to only six years.

II. FACTS AND HOLDING

The Secretary’s decision⁹ to deny designation of a “critical habitat” for two of Missouri’s endangered species, despite its statutory obligation to do so to the full extent possible and prudent, was an act sufficient to trigger the running of the statute of limitations against the plaintiff in *Missouri v. Secretary of the Interior*.¹⁰

Prior to 1950, interior least terns (“tern”) were prevalent along the Missouri River and its tributaries from St. Louis to Montana.¹¹ However, the terns’ nesting grounds were decimated by the construction of mainstream dams, the creation of reservoirs, and the recreational use of sandbars along the Missouri River and its tributaries from 1950 to 1985.¹² As a result, the tern population dwindled to such an alarming degree that the Secretary¹³ placed it on the endangered species list on May 28, 1985.¹⁴ At the time the tern was added to the list, the Secretary observed that

¹ 158 F. Supp. 2d 984 (W.D. Mo. 2001).

² 119 Cong. Rec. 30157 (1973).

³ 43 Fed. Reg. 870 (1975).

⁴ 16 U.S.C. § 1533(a)(3) (1994).

⁵ *Natural Resources Def. Council v. U.S. Dept. of the Int.*, 113 F.3d 1121, 1126 (9th Cir. 1997).

⁶ United States Fish and Wildlife Service, *Endangered Species Statistics*, <<http://ecos.fws.gov/servlet/TessStatReport>> (last updated Oct. 31, 2001).

⁷ 5 U.S.C. § 706 (1994).

⁸ *Missouri v. Secretary of the Interior*, 158 F. Supp. 2d 984 (W.D. Mo. 2001).

⁹ When the United States Fish and Wildlife Service makes a critical habitat designation, it is then promulgated in a joint effort with the Secretary of the Interior. For the purposes of this casenote, however, only the Secretary will be directly referred to in reference to the designation of critical habitat.

¹⁰ *Id.*

¹¹ 50 Fed. Reg. 21784, 21786 (May 28, 1985).

¹² *Id.* at 21786-87.

¹³ When the United States Fish and Wildlife Service determines that a species is “endangered” or “threatened,” that decision is promulgated in a joint effort with the Secretary of the Interior. For purposes of this casenote, however, only the Secretary will be directly referred to in reference to the listing of a species as “threatened” or “endangered.”

¹⁴ 50 Fed. Reg. 21784, 21786 (May 28, 1985).

occurrences of terns breeding on the Missouri river were rare, and only occurred on “the few stretches of river that [were] not channelized or inundated by reservoirs.”¹⁵

The pallid sturgeon (“sturgeon”), a large fish whose only known habitats are the Missouri, Mississippi, and lower Yellowstone Rivers, was added to the endangered species list on September 6, 1990.¹⁶ The Secretary listed damming of the Missouri river, channelization, altered or degraded water quality, and commercial harvest among the reasons for the diminished sturgeon population.¹⁷

The Secretary declined to designate a “critical habitat” for either the tern or sturgeon at the time of their addition to the list of endangered species.¹⁸ Nor did it choose to extend the time for designating critical habitats.¹⁹ Relying on “the best scientific and commercial information available, regarding the past, present, and future threats faced by [the tern],” the Secretary concluded that the tern would receive no “demonstrative overall benefit” through designation of a critical habitat, so such action was not prudent.²⁰ In the sturgeons’ case, the Secretary found that designation of a critical habitat was neither prudent nor determinable at the time of its addition to the endangered species list.²¹ Based on the realization that “very little was known” about the sturgeon, and concerns that publication of a critical habitat could actually render the sturgeon more vulnerable to harvesters, the Secretary stated that designation was not appropriate at that time.²²

On November 30, 2000, the FWS issued its final “biological opinion” on the U.S. Army Corps of Engineers’ (“Corps”) operation of the Missouri River Main Stem Reservoir System, the Missouri River Bank Stabilization and Navigation Project, and the Kansas Reservoir System.²³ The Secretary had previously identified the Corps’ operation of the Missouri River mainstream dams and reservoirs as a potential threat to both species’ populations.²⁴

The State of Missouri (“Missouri”) filed an action in the United States District Court for the Western District of Missouri to compel the Secretary to designate a “critical habitat” for both species.²⁵ Both parties stipulated that there were no material facts in dispute, and cross-motioed for summary judgment.²⁶

In its motion, the Secretary asserted that the claim was time-barred under 28 U.S.C. § 2401(a), and should be dismissed for lack of jurisdiction.²⁷ Missouri argued that the court should compel the Secretary to designate a “critical habitat” because that designation was mandated by statute, and had been “unlawfully withheld or unreasonably delayed,” which made the statute of limitations inapplicable.²⁸

The District Court concluded that the Secretary “took affirmative action to not designate critical habitat[s]” because it was either “not determinable” and/or “not prudent” at the time.²⁹ The court held that the decision not to designate critical habitats for either of those reasons was an act sufficient to trigger the running of the statute of limitations against Missouri.³⁰ Accordingly, Missouri’s motion for summary judgment was dismissed, and the Secretary’s motion was granted.³¹

¹⁵ *Id.*

¹⁶ 55 Fed. Reg. 36641 (Sept. 6, 1990).

¹⁷ *Id.* at 36642, 36645.

¹⁸ *Missouri*, 158 F. Supp. 2d at 986.

¹⁹ *Id.*

²⁰ 50 Fed. Reg. 21784, 21790 (May 28, 1985).

²¹ 55 Fed. Reg. 36641, 36646 (September 6, 1990).

²² *Id.*

²³ *Missouri*, 158 F. Supp. 2d at 986.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 988.

²⁸ *Id.* at 989.

²⁹ *Id.* at 990.

³⁰ *Id.*

³¹ *Id.*

III. LEGAL BACKGROUND

A. *Endangered Species Act*

The recognition that various species of fish, wildlife, and plants in the United States had been rendered extinct as a result of the nation's economic growth and development, and inadequate conservation measures, coupled with the belief that more species would be sacrificed without government intervention, prompted Congress to enact the Endangered Species Act in 1973.³² Congress had previously attempted to resolve these concerns by enacting the Endangered Species Preservation Act in 1966³³ and the Endangered Species Conservation Act in 1969.³⁴ However, those acts failed to provide the federal government with the kind of management tools needed to act early enough to save vanishing species.³⁵

The ESA was designed to provide federal agencies with the necessary authority lacking in the 1966 and 1969 Acts³⁶ by: (1) mandating a listing procedure for both threatened or endangered species,³⁷ (2) expressly prohibiting public and private "taking"³⁸ of those listed species,³⁹ (3) establishing a procedure for land acquisition for the protection of listed species,⁴⁰ and (4) providing for federal and state cooperation to ensure compliance.⁴¹

The first explicit purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."⁴² Although the ESA authorized the federal government to acquire land as a means to "conserve, protect, restore, or propagate"⁴³ endangered or threatened species, it did not originally require designation of a critical habitat for any listed species.⁴⁴ In fact, "[t]he only mention of critical habitat [was] found in section 7, which mandate[d] that...all 'actions authorized, funded, or carried out by the federal agencies not' result in the destruction or modification of habitat of such species which is determined by the Secretary...to be critical."⁴⁵

In 1974 the Secretary appointed the FWS as the ESA's lead agency within the Department of the Interior.⁴⁶ In 1975, the FWS, in cooperation with the National Marine Fisheries Service ("NMFS"), published a notice in the Federal

³² 119 Cong. Rec. 30157 (1973) (later codified in part under 16 U.S.C. § 1531(a) (1994)). "[H]alf of the recorded extinction's of animals over the past 2,000 years have occurred in the most recent 50-year period." 119 Cong. Rec. 30165 (1973). "It seems that man may lose more than he thinks...If man is going to grow sufficient food for himself; find cures for the diseases that plague him, and expand his understanding of how his own body functions, he will have to derive much of the needed knowledge from his fellow species." 119 Cong. Rec. 30166 (1973).

³³ 16 U.S.C. §§ 668aa et. seq.

³⁴ 16 U.S.C. §§ 668aa et. seq.

³⁵ Tammy Hinshaw, J.D., *Criminal Prosecution Under the Endangered Species Act of 1973*, 128 A.L.R. Fed 271 (1995). (The 1966 and 1969 Acts were lacking in three respects: (1) they failed to adequately provide for the acquisition of habitat lands for endangered species, (2) they included only certain federal agencies in the statutory scheme and made any conservation mandates of those agencies contingent upon considerations of practicability and compatibility with the particular agency's primary mission, and (3) they failed to expressly prohibit the taking of domestic endangered species.) The passing of the ESA repealed the 1966 and 1969 Acts. 119 Cong. Rec. 30162 (1973).

³⁶ 119 Cong. Rec. 30162 (1973) ("[The 1966 and 1969 Acts] are sound, as far as they go, but later events have shown that they do not go far enough.")

³⁷ 119 Cong. Rec. 30158 (1973) (Endangered Species Act as originally proposed under H.R. 37, 93rd Cong. § 4 (1973). Now codified under 16 U.S.C. § 1533(a)(1) (1994)). "Under [the 1966 and 1969 Acts], the Federal Government was unable to adequately provide conservation and protection measures to those species which had not yet met the technical definition of 'extinct,' but due to a variety of factors were closely approaching that population level." 119 Cong. Rec. 30164 (1973).

³⁸ The term "take" is defined by 16 U.S.C. 1532 (1994) to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

³⁹ 119 Cong. Rec. 30159 (1973) (Endangered Species Act as originally proposed under H.R. 37, 93rd Cong. § 9 (1973). Now codified under 16 U.S.C. § 1538(a)(1) (1994)).

⁴⁰ 119 Cong. Rec. 30158 (1973) (Endangered Species Act as originally proposed under H.R. 37, 93rd Cong. § 5 (1973). Now codified under 16 U.S.C. § 1534(a)(2) (1994)).

⁴¹ 119 Cong. Rec. 30158-59 (1973) (Endangered Species Act as originally proposed under H.R. 37, 93rd Cong. §§ 6-7 (1973). Now codified under 16 U.S.C. §§ 1536(a) & 1538(a) (1994)).

⁴² 119 Cong. Rec. 30157 (1973) (Endangered Species Act as originally proposed under H.R. 37, 93rd Cong. § 2 (1973). Now codified under 16 U.S.C. § 1531(b) (1994)).

⁴³ 119 Cong. Rec. 30158 (1973) (Endangered Species Act as originally proposed under H.R. 37, 93rd Cong. § 5 (1973)).

⁴⁴ Thomas F. Darin, *Comment: Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 Harv. Envtl. L. Rev. 209, 212 (2000).

⁴⁵ *Id.*

⁴⁶ 43 Fed. Reg. 870 (1975).

Register “describing how ‘critical habitat’ would be determined for listed species pursuant to section 7 of the [ESA].”⁴⁷ One year later, the FWS and NMFS sent “*Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973*” to all federal agencies.⁴⁸

The FWS’s definition of “critical habitat” appeared in the Code of Federal Regulations (“C.F.R.”) in 1978.⁴⁹ It provided:

“Critical Habitat” means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.⁵⁰

Although Congress had intended to increase the tools available to the Secretary to save endangered species under the ESA, the extent of that power was not revealed until *Tennessee Valley Authority v. Hill*,⁵¹ when the Court interpreted the scope of the Secretary’s authority under Section 7.⁵² In *Hill*, the Secretary designated a portion of the Tennessee River as a “critical habitat” for the snail darter, a small fish added to the endangered species list in 1975.⁵³ At the time of this designation, the Tennessee Valley Authority (“TVA”) was nearing completion of the Tellico Dam (“Tellico”), a multi-million dollar federally funded construction project on the Tennessee River that would destroy the snail darter’s habitat when it became operational.⁵⁴ Although millions of federal tax dollars were invested in the project, the Secretary declared that section 7 of the ESA prohibited completion of the dam, as it would “result in the modification or destruction of [the snail darter’s] critical habitat area.”⁵⁵ The Court agreed with the Secretary, holding that, under the plain language of the ESA, the TVA would be in violation of section 7 if the Tellico was completed and operated as planned.⁵⁶ Concluding that the intention of Congress was to afford endangered species the highest priority regardless of the cost, the Court enjoined the TVA from finishing the construction of the Tellico.⁵⁷

1. 1978 Amendments to the ESA

Less than five months after *Hill*, Congress amended the ESA.⁵⁸ This amendment significantly altered the ESA’s 1973 provisions by, among other things, creating the “Endangered Species Committee.”⁵⁹ This committee, which was comprised of seven members,⁶⁰ was given the right to review designation of critical habitat and grant exemption from

⁴⁷ 43 Fed. Reg. 870 (1975).

⁴⁸ *Id.*

⁴⁹ *Id.* at 874-75; 50 C.F.R. 402 (1978).

⁵⁰ 43 Fed. Reg. 874-75 (1975).

⁵¹ 437 U.S. 153 (1978).

⁵² Thomas F. Darin, Comment: *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 Harv. Envtl. L. Rev. 209, 212 (2000) (Darin referred to this as an early “landmark” decision testing the ESA’s critical habitat provision.).

⁵³ *Id.* at 153, 162.

⁵⁴ *Id.* at 162.

⁵⁵ *Id.*

⁵⁶ *Id.* at 172. “One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies to ‘insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence’ of endangered species or ‘result in the destruction or modification of such habitat.’” *Id.*

⁵⁷ *Id.* at 174. The majority also noted that “this view of the [ESA] will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.” *Id.*

⁵⁸ Pub. L. No. 95-632, 92 Stat. 3751 (1978).

⁵⁹ *Id.*

⁶⁰ The seven members of the committee were: (1) the Secretary of Agriculture, (2) the Secretary of the Army, (3) the Chairman of the Council of Economic Advisors, (4) the Administrator of the Environmental Protection Agency, (5) the Secretary of the Interior, (6) the Administrator of the National Oceanic and Atmospheric Administration, and (7) one individual from each affected State, appointed by the President. “The Committee has been nicknamed the God-Squad because it is the only governmental entity able to decide that a federal agency action may cause a federally listed species to become extinct.” Eric L. Garner & Michelle Ouellette, *Future Shock? The law of the Colorado River in the Twenty-First Century*, 27 Ariz. St. L.J. 469, 506 n. 101 (1995).

section 7's requirement for federal agencies to refrain from acting in any way that would conflict with the "no-jeopardy clause."⁶¹ The Endangered Species Committee was authorized under this amendment to exempt any federal agency from compliance with the "no-jeopardy" provision if it found that the public interest in the agency's action clearly outweighed the benefits of conserving the species or its critical habitat, or if "reasonable mitigation and enhancement measures"⁶² were available to minimize the adverse affects of the agency's action.⁶³

Congress further supplemented the ESA in 1978 by inserting its own definition of "critical habitat" into the statutory regime.⁶⁴ Under Congress' definition, "critical habitat" consisted of the "specific areas within the geographical area occupied by the species at the time it is listed,"⁶⁵ and "the specific areas outside the geographical area occupied by the species at the time it is listed... upon a determination by the Secretary that such areas are essential for the conservation of the species."⁶⁶ Congress' definition was much more restrictive than the version promulgated by the FWS for several reasons: (1) it limited the "critical habitat" designation to the specific geographical areas occupied by the species at the time it was listed, (2) the designation could not include the entire area occupied by a listed species unless the Secretary expressly concluded such action was necessary, and (3) it prohibited any designation of critical habitat outside the geographical area occupied by the species unless the Secretary deemed it essential to the listed species' survival.⁶⁷

Congress provided an exception to the duty to designate critical habitat in Section 11 of the 1978 ESA amendments by mandating that the Secretary must designate critical habitat, "to the maximum extent prudent."⁶⁸ Under a separate requirement within the same section, the Secretary was compelled to consider the "relevant impact" likely to result from designating a critical habitat.⁶⁹ Congress made it clear that the Secretary had a duty to weigh the benefits of designating critical habitat for a listed species against the potentially harmful consequences to others resulting from that decision.⁷⁰ The Secretary could "exclude any such area" from the critical habitat if it concluded that the potential for harm caused by designating a particular area as critical to a species' survival, outweighed the potential benefit to the species.⁷¹ However, the Secretary was barred from exercising this discretion if, "based on the best scientific and commercial data available," the decision not to designate an area as critical habitat was likely to result in the species' extinction.⁷²

⁶¹ Pub. L. No. 95-632 § 7, 92 Stat. 3751 (1978). The "no-jeopardy clause" refers to the portion of the ESA's amended section 7 requirement, which is now codified under 16 U.S.C. 1536(a)(2) (1994), and states in pertinent part that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary... to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section." Andrew S. Noonan, *Just Water Over the Dam? A Look at the Endangered Species Act and the Impact of Hydroelectric Facilities on Anadromous Fish Runs of the Northwest*, 28 Idaho L. Rev. 781, 786, 802 n. 50 (1992).

⁶² According to Pub. L. No. 95-632, § 4 (Nov. 10, 1978), "reasonable mitigation and enhancement measures" included: live propagation, transplantation, and habitat acquisition and improvement.

⁶³ Pub. L. No. 95-632, at § 7, 92 Stat. 3751 (1978).

⁶⁴ *Id.*

⁶⁵ There is a further requirement under this subsection that the area must possess the physical and biological features essential to the conservation of the species, which may require special management considerations or protection. *Id.*

⁶⁶ *Id.*

⁶⁷ Thomas F. Darin, Comment: *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 Harv. Envtl. L. Rev. 209, 215 (2000).

⁶⁸ Pub. L. No. 95-632, at § 11, 92 Stat. 3751 (1978). "At the time any such regulation is proposed, the Secretary shall... to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat." *Id.*

⁶⁹ Pub. L. No. 95-632, at § 11, 92 Stat. 3751(1978).

⁷⁰ *Id.* The decision in *Hill* came as a result of the absence of this particular type of requirement in the statute. Not surprisingly, Congress ordered the Tellico Dam project to be immediately considered for exemption upon approval of the 1978 amendments to the ESA. Further, if no decision was given within 90 days of the ratification of the 1978 amendments, the Tellico dam was to be automatically exempted from the requirements of section 7 of the ESA. Pub. L. No. 95-632, at § 11, 92 Stat. 3751(1978).

⁷¹ Pub. L. No. 95-632, at § 11, 92 Stat. 3751(1978). "The Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species." *Id.*

⁷² *Id.*

2. 1982 Amendments to the ESA

The 1982 ESA amendments included two important additions, now codified at 16 U.S.C. § 1533(a)(3) (1994), that affected the Secretary's duty to designate critical habitat.⁷³ First, Congress required the designation of a critical habitat by the Secretary to be made "concurrently" with the Secretary's decision to list a species as endangered.⁷⁴ Second, Congress supplemented the existing exception to the Secretary's duty to designate critical habitat concurrent with a species' listing by adding a "not determinable exception."⁷⁵

Despite Congress' two attempts in four years to clarify the language of the statute, courts across the country have continued to delineate the rights and obligations of the Secretary under the ESA for nearly twenty years following its final amendments.

3. The "Not Prudent" Exception

The Code of Federal Regulations ("C.F.R.") states, in the "Criteria for Designating Critical Habitat," that "[c]ritical habitat shall be specified to the maximum extent prudent...at the time a species is proposed for listing."⁷⁶ Designation of a critical habitat is considered "not prudent" under the C.F.R. when the identification of critical habitat would likely lead to increased taking of the species or when designation "would not be beneficial to the species."⁷⁷

The "not prudent" exception has been the most commonly cited reason by the Secretary for choosing not to designate a critical habitat.⁷⁸ The Ninth Circuit Court of Appeals, in *Natural Resources Defense Council v. U.S. Department of the Interior*, explained the congressional intent behind this exception.⁷⁹ In *Natural Resources*, the Secretary listed the California gnatcatcher⁸⁰ as a "threatened" species, but stated that designation of a critical habitat for the gnatcatcher was not prudent because identifying the habitat could increase the risk that landowners would "deliberately destroy" the gnatcatcher's habitat.⁸¹ Further, the Secretary found that the designation of the habitat would have no appreciable benefit for the gnatcatcher.⁸² Though the issue was not raised at trial, the Ninth Circuit began its opinion by determining that the Secretary's "decision not to designate critical habitat for gnatcatchers [was] ripe for immediate review."⁸³ After ruling on the issue of justiciability, the court examined the Secretary's use of the "not prudent" exception.⁸⁴ The Ninth Circuit held that the Secretary improperly relied on the "not prudent" exception by failing to adequately weigh the "pros and cons" of designation, and unacceptably expanded the narrow "statutory construction for imprudent designations into a broad exemption for imperfect designations,"⁸⁵ which was inconsistent with the "clear congressional intent" of the ESA.⁸⁶

⁷³ Pub. L. No. 97-304, 96 Stat. 1411 (1982).

⁷⁴ "The Secretary, by regulation promulgated in accordance with subsection (b) of this section...shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of that species which is then considered to be critical habitat." Pub. L. No. 97-304, § 2, 96 Stat. 1411 (1982). Now codified at 16 U.S.C. § 1533(a)(3)(A) (1994).

⁷⁵ 16 U.S.C. § 1533(a)(3) was amended to read: "The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable." Pub. L. No. 97-304, § 2, 96 Stat. 1411 (1982). Now codified at 16 U.S.C. § 1533(a) (1994).

⁷⁶ 50 C.F.R. § 424.12(a) (2001).

⁷⁷ 50 C.F.R. § 424.12(a)(1)(i-ii) (2001).

⁷⁸ Thomas F. Darin, Comment: *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 Harv. Envtl. L. Rev. 209, 224 (2000). "In a study of listings from 1980 to 1988, the [Service] cited 'not prudent' as the reason for no designation in 317 of 320 cases." *Id.*

⁷⁹ *Natural Resources Def. Council v. U.S. Dept. of the Int.*, 113 F.3d 1121 (9th Cir. 1997).

⁸⁰ The California gnatcatcher is "a songbird unique to coastal southern California and northern Baja California." *Id.* at 1123.

⁸¹ *Id.*

⁸² *Id.*

⁸³ The plaintiffs had previously argued at trial that the Secretary and Service failed to protect the gnatcatcher's critical habitat by allowing the construction of a toll-road to interfere those areas. On appeal, the Secretary and Service argued that the issue was moot due to the recent completion of the toll-road. The Ninth Circuit court addressed this issue at the outset of the opinion, holding that "regardless of the status of the site-specific developments...this general programmatic harm" was ripe for judicial resolution. *Id.* at 1124.

⁸⁴ *Id.* at 1124.

⁸⁵ *Id.* at 1125-26.

⁸⁶ The Ninth Circuit relied on legislative comments in rendering this decision, citing committee notes, which read in part: "the committee intends that in most situations the Secretary will...designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species." *Id.* at 1126.

4. *The "Not Determinable" Exception*

The second exception listed under the C.F.R.'s "Criteria for designating Critical Habitat," is that "[c]ritical habitat shall be specified to the maximum extent...determinable...at the time a species is proposed for listing."⁸⁷ Critical habitat is not determinable, according to the C.F.R., when there is either insufficient information to analyze the impact of the designation, or when the biological needs of the particular species are not sufficiently well known to permit identification of an area as critical habitat.⁸⁸ The ESA requires that the Secretary, within one year after publishing a "not determinable" decision concurrently with the listing of a species as endangered, must either choose to designate critical habitat, or provide notice that the one-year period is being extended.⁸⁹ However, the analogous C.F.R. restricts those options.⁹⁰ While both the statute and the C.F.R. provide that a one-year extension is available if critical habitat cannot be determined at the time of listing, the C.F.R. limits the Secretary's right to further postpone that decision beyond one additional year.⁹¹ After a maximum of two years from the date of listing,⁹² the C.F.R. requires that the Secretary publish a final regulation designating critical habitat, to the maximum extent prudent, based on the information available at that time.⁹³

In addition to the precise wording of the C.F.R., the "not determinable" exception has also been interpreted by three leading judicial opinions, each focusing on a separate aspect of this exception. In *Northern Spotted Owl v. Lujan*, the Secretary listed the northern spotted owl as "threatened,"⁹⁴ but deferred designation of a critical habitat, stating that it was not determinable at the time.⁹⁵ The plaintiffs alleged that the Secretary had violated the ESA and the APA⁹⁶ by failing to designate critical habitat.⁹⁷ The defendants argued that the ESA automatically granted the Secretary a one-year extension to designate critical habitat if it is not determinable at the time of listing.⁹⁸ The District Court found that, "absent extraordinary circumstances," the designation of critical habitat should coincide with the final listing decision.⁹⁹ Finding that the Secretary breached its affirmative duty to gather the necessary information in order to make a critical habitat designation, the court held that the failure to designate critical habitat was "arbitrary, capricious, and contrary" to its duties under both the APA and the ESA.¹⁰⁰

The main problem with the "not determinable" exception has been that it permits an inexcusable agency delay.¹⁰¹ Two cases highlight this problem. First, the spikedace and loach minnows were listed as threatened in 1986, but were not designated a critical habitat.¹⁰² The final listing publications stated that a critical habitat designation "must be made by June 18, 1987," for both the spikedace¹⁰³ and loach minnow.¹⁰⁴ However, neither species was designated a critical habitat until eight years later¹⁰⁵ when litigation finally prompted the Secretary to act.¹⁰⁶ *Forest Guardians v. Babbitt*¹⁰⁷ also addressed the Secretary's non-compliance with the two-year maximum¹⁰⁸ delay of critical habitat designation. In *Forest*

⁸⁷ 50 C.F.R. § 424.12(a) (2001).

⁸⁸ 50 C.F.R. § 424.12(a)(2)(i-ii) (2001).

⁸⁹ 16 U.S.C. § 1533(b)(6)(A)(ii)(I-II) (1994).

⁹⁰ 50 C.F.R. § 424.17(b)(2) (2001).

⁹¹ 50 C.F.R. § 424.17(b)(2) (2001).

⁹² This assumes that the criteria under 16 U.S.C. § 1533(b) have been met, and the Secretary has properly published its intention to extend the period allotted for designation.

⁹³ 50 C.F.R. § 424.17(b)(2) (2001).

⁹⁴ A "threatened" species is a species "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1994).

⁹⁵ *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (Wash. W.D. 1991).

⁹⁶ 5 U.S.C. § 706 (1994).

⁹⁷ *Northern Spotted Owl*, 758 F. Supp. at 624.

⁹⁸ *Id.*

⁹⁹ *Id.* at 626.

¹⁰⁰ *Id.* at 629.

¹⁰¹ Thomas F. Darin, *Comment: Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 *Harv. Envtl. L. Rev.* 209, 228 (2000).

¹⁰² 51 Fed. Reg. 23769 (July 1, 1986); 51 Fed. Reg. 39468 (Oct. 23, 1986).

¹⁰³ 51 Fed. Reg. 23774 (1986).

¹⁰⁴ 51 Fed. Reg. 39476 (1986).

¹⁰⁵ 59 Fed. Reg. 10906 (March 8, 1994); 59 Fed. Reg. 10898 (March 8, 1994).

¹⁰⁶ *Catron County Bd. Of Commr's, New Mexico v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996).

¹⁰⁷ 174 F.3d 1178 (1999).

¹⁰⁸ *Supra* n. 92.

Guardians, the Secretary, after already exhausting its available two-year grace period, had not designated critical habitat for the Rio Grande silvery minnow¹⁰⁹ three and a half years after its initial listing.¹¹⁰ The plaintiffs motioned the court to review the Secretary's failure to issue a final decision on the silvery minnow's critical habitat, and declare the Secretary in violation of its non-discretionary duty under the ESA.¹¹¹ The Secretary argued that "fiscal impracticability" prevented it from designating critical habitat.¹¹² Due to a moratorium on spending imposed by Congress in 1995, which had created an enormous backlog of non-discretionary duties, the Secretary believed that it should be allowed more time to make a final determination of critical habitat.¹¹³ The Tenth Circuit Court of Appeals concluded that the Secretary had not fulfilled its non-discretionary duty to designate critical habitat,¹¹⁴ and that the APA requires that a reviewing court must compel agency action unlawfully withheld, or unreasonably delayed.¹¹⁵ The court held that the limitations in funding did not justify the Secretary's failure to comply with its mandatory, non-discretionary duties under the ESA, and that the Secretary was compelled to act under the APA in accordance with that requirement.¹¹⁶

B. Administrative Procedure Act

Judicial review of agency behavior is permitted under the APA in order to ensure that federal agencies comply with their legislated duties.¹¹⁷ The statute states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall... (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions" that are found to be improper.¹¹⁸

The primary distinction between the two subsections is that the first¹¹⁹ deals with agency inaction, while the second¹²⁰ controls in claims challenging a final action of an agency. Although the statute states that the court shall compel agency action if it is unlawfully withheld or unreasonably delayed, there has been "much judicial review of agency inaction and delay" over the past several decades.¹²¹ As a result, a split in authority has developed as to whether a federal agency may choose to exercise discretion and refuse to act by a mandatory agency deadline.¹²² The D.C. Circuit Court of Appeals has allowed broad agency discretion as it relates to the unreasonableness of the delay, in the face of obvious violations by federal agencies of their non-discretionary statutory deadlines.¹²³ However, the Ninth and Tenth Circuits have held that when a federal agency fails to act within the mandatory deadline set by Congress, then it is an unreasonable delay and a reviewing court must compel the agency to act.¹²⁴ The United States Supreme Court has yet to rule on this issue; therefore other courts remain free to adopt whichever rationale they find most persuasive.

¹⁰⁹ Described as "a stout silver fish with emerald reflections reaching lengths of up to 3 1/2 inches." *Id.* at 1181.

¹¹⁰ *Id.* at 1182.

¹¹¹ *Id.*

¹¹² *Id.* at 1182-83.

¹¹³ *Id.* at 1184-84.

¹¹⁴ *Id.* at 1186.

¹¹⁵ *Id.* at 1190.

¹¹⁶ *Id.* at 1193.

¹¹⁷ Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 William and Mary L. Rev. 1545, 1546 (2001).

¹¹⁸ 5 U.S.C. § 706 (1994). A partial list of reasons identified by the statute for finding an agency action improper includes agency actions, findings, and conclusions that are: arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, contrary to constitutional right, in excess of statutory jurisdiction, without observance of procedure required by law, unsupported by substantial evidence, or unwarranted by the facts.

¹¹⁹ 5 U.S.C. § 706(1) (1994).

¹²⁰ 5 U.S.C. § 706(2) (1994).

¹²¹ Zaller, 42 William and Mary L. Rev. at 1554.

¹²² *Id.*

¹²³ *Id.* at 1554-60. (citing decisions in *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984); *In re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991); *In re United Mine Workers of America Intern. Union*, 190 F.3d 545 (D.C. Cir. 1999)).

¹²⁴ See *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249 (10th Cir. 1998); *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

When the APA is invoked to challenge a final agency action, 5 U.S.C. § 706(2) controls. This section gives a reviewing court the discretion to review and reverse agency decisions that it finds improper.¹²⁵ The reviewing court views agency actions with substantial deference, setting them aside only when they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.¹²⁶ This narrow scope of review means that a reviewing court will not substitute its own judgment for that of the agency, unless the agency's decision directly collides with substantive statutory commands, or fails to follow the correct procedural requirements of the statute.¹²⁷ In order for a court to uphold the agency's decision, generally the decision need only be rational, which has not been a difficult requirement to meet.¹²⁸

C. Statute of Limitations

The statute governing the time allotted to commence an action against the United States for any cause of action other than a tort is 28 U.S.C. § 2401(a) (1994). It reads in pertinent part, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Section 2401(a) is the applicable statute in actions for judicial review brought pursuant to the APA.¹²⁹ The C.F.R. is silent on Section 2401(a), so case law has largely determined the scope of this statute. Generally, statutes of limitations represent judgment on the part of the legislature that the "right to be free from stale claims in time" prevails over the right to prosecute those claims.¹³⁰ Courts must strictly observe the statute of limitations requirement, and rarely impose exceptions.¹³¹

The United States cannot be sued without first giving its consent, and a statute of limitations is one way to imply consent according to *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, North Dakota and South Dakota v. U.S.*, which stated:

The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The applicable statute of limitations is a term of consent. [A] plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action.¹³²

Section 2401(a) is the applicable statute of limitations governing challenges of "agency actions."¹³³ However, determining when the right of action first accrues depends on whether those actions are being challenged on procedural or substantive grounds.¹³⁴ When a plaintiff challenges the substance of an agency's promulgation of a regulation, then the "cause of action accrued when the regulation was formally issued, namely when it first appeared in the Federal Register."¹³⁵

¹²⁵ *Supra* n. 118.

¹²⁶ *Citizens Awareness Network, Inc., v. U.S. Nuclear Regulatory Com'n.* 59 F.3d 284, 290 (1st Cir. 1995) (citing *Motor Vehicle Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 41 (1983)).

¹²⁷ *Puerto Rico Sun Oil Co. v. U.S. E.P.A.*, 8 F.3d 73, 77 (1st Cir. 1993).

¹²⁸ *Id.*

¹²⁹ See *Wind River Mining Corp. v. U.S.*, 946 F.2d 710, 715 (9th Cir. 1991).

¹³⁰ See *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

¹³¹ *Soriano v. U.S.*, 352 U.S. 270 (1957).

¹³² *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, North Dakota and South Dakota v. U.S.*, 895 F.2d 588, 592 (9th Cir. 1990).

¹³³ *Florida Keys Citizens Coalition, Inc. v. West*, 996 F. Supp. 1254, 1256 (S.D. Fla. 1998).

¹³⁴ *Id.*

¹³⁵ *Id.*

IV. INSTANT DECISION

In the instant decision, the District Court began its analysis by discussing the statutory construction of the ESA.¹³⁶ The District Court observed that, with few exceptions, under 16 U.S.C. § 1533(a)(3) Congress requires the Secretary to designate a “critical habitat” for a species concurrently with its recognition of that species as endangered or threatened.¹³⁷ However, the Secretary was required to do so only “to the maximum extent prudent and determinable.”¹³⁸ Because the statute itself did not define this language, the District Court looked to federal regulation and case law to determine the meaning of those terms.¹³⁹

The District Court interpreted 50 C.F.R. § 424.12(a)(1) to mean that designation of a critical habitat is considered “not prudent” when such a designation would result in increased human taking of the species, or when it would not benefit the species.¹⁴⁰ Citing *Natural Resources Defense Council v. U.S. Department of the Interior*,¹⁴¹ the District Court concluded that a “not prudent” determination by the Secretary was a final and reviewable agency action.¹⁴² Without citation, the court added that when the Secretary determined that a critical habitat is “not prudent,” then a critical habitat determination for the listed species is not required.¹⁴³

In assessing the “not determinable” exception, the District Court pointed out that, under the ESA, if the Secretary concluded that the critical habitat was “not determinable,” then the designation of a critical habitat could be postponed for an additional year.¹⁴⁴

Regardless of the exception(s) upon which the agency bases its final decision, it has the duty to state its reasons for doing so in the final published decision listing the species as endangered.¹⁴⁵ The District Court observed that the Secretary complied with this mandate in both the tern and sturgeons’ final listings as endangered species.¹⁴⁶

After determining the legal significance of the Secretary’s decision not to designate a critical habitat, the analysis shifted to the Secretary’s statute of limitations argument.¹⁴⁷ According to 28 U.S.C. § 2401(a), claims against the United States are barred “unless the complaint is filed within six years after the time the right of action first accrues.”¹⁴⁸ “A plaintiff’s cause of action challenging a final regulation accrues ‘when the regulation was formally issued, namely when it is first published in the Federal Register.’”¹⁴⁹

Missouri contended that the Secretary’s decision not to designate a critical habitat was not a legal action capable of triggering the statute of limitations. Rather it was a decision to unlawfully withhold, or unreasonably delay its congressionally mandated duty to act.¹⁵⁰ Therefore, the authority of the court to compel the Secretary to designate critical habitats for the tern and sturgeon was both available and justified under the APA, regardless of the fact that more than six years had elapsed between the publishing of the decisions and the filing of the complaint.¹⁵¹ In support of its claim, Missouri cited *American Canoe Association, Inc. v. U.S. Environmental Protection Agency*,¹⁵² where the United States District Court for the Eastern District of Virginia concluded that the “application of a statute of limitations to a claim of unreasonable delay is grossly inappropriate, in that it would mean the [federal agency] could immunize its allegedly unreasonable delay from judicial review simply by extending the delay for over six years.”¹⁵³ Missouri also relied on

¹³⁶ *Missouri*, 158 F. Supp. 2d at 986-87.

¹³⁷ *Id.*

¹³⁸ *Id.* at 986.

¹³⁹ *Id.* at 986-87.

¹⁴⁰ *Id.*

¹⁴¹ 113 F.3d 1121 (9th Cir. 1997).

¹⁴² *Missouri*, 154 F. Supp. 2d at 987.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 989.

¹⁴⁷ *Id.* at 988.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 989.

¹⁵¹ *Id.* (citing 5 U.S.C. § 706(1)).

¹⁵² 30 F. Supp. 2d 908. (E.D. Va. 1998).

¹⁵³ *Missouri*, 158 F. Supp. 2d at 989.

Forest Guardians v. Babbitt,¹⁵⁴ which ruled that “when Congress, by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline.”¹⁵⁵

The court rejected this argument, stating that Missouri’s complaint did not make any allegations that the Secretary unreasonably delayed or unlawfully withheld its decision under 5 U.S.C. § 706(1).¹⁵⁶ Rather, Missouri had specifically challenged the Secretary’s decision to invoke one of the two available exceptions to that duty, claiming that it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law under 5 U.S.C. § 706(2).”¹⁵⁷ Because Congress had bifurcated the statute and made the distinction between the failure of an agency to act, and the arbitrary and capricious act of an agency, the court believed that Missouri was challenging affirmative acts made by the Secretary.¹⁵⁸ Therefore, the court held that the Secretary’s decision not to designate a critical habitat for a species because it was either “not prudent” or “not determinable” was an act sufficient to trigger the running of the statute of limitations against the plaintiff.¹⁵⁹ Because more than six years had passed since the publication of both decisions in the Federal Register, the court ruled that Missouri’s claim was time-barred under the statute of limitations.¹⁶⁰

V. COMMENT

It appears that no case other than the instant decision has ever considered whether the Secretary’s decision to forego its duty to designate a critical habitat is an act sufficient to trigger the running of the six-year statute of limitations against a plaintiff under 28 U.S.C. § 2401. Both the tern and the sturgeon were denied designation of a critical habitat based on the Secretary’s determination that it was “not prudent” to do so when the species were listed as endangered.¹⁶¹ Relying on precedent that the “not prudent” determination was a final agency action that could be judicially scrutinized under the APA,¹⁶² and that publication of that determination in the Federal Register initiated Missouri’s right to sue,¹⁶³ the District Court¹⁶⁴ logically ruled that Missouri’s claim was time-barred.¹⁶⁵

However, the facts in the instant decision are unique because the Secretary cited both the “not prudent” and “not determinable” exceptions as justifications for choosing not to designate a critical habitat for a single species.¹⁶⁶ The “not prudent” exception is considered a final agency decision,¹⁶⁷ while the “not determinable” exception allows the Secretary to postpone making a final decision.¹⁶⁸ This placed the District Court in an unusual position because the Secretary had validly postponed its duty to act for at least one year, while simultaneously giving Missouri the right to seek judicial review under the APA by publishing a final and reviewable decision in the Federal Register.¹⁶⁹

Clearly the District Court acknowledged that there was a difference between the two exceptions. It pointed out that the “not prudent” exception was found by the Ninth Circuit Court of Appeals to be a final agency action.¹⁷⁰ However, the “not determinable” exception allows the Secretary a grace period in which to designate a critical habitat.¹⁷¹ Once that grace period is exceeded, the Secretary’s failure to designate a critical habitat is considered a continuing violation of its mandatory obligation.¹⁷² Further, the District Court emphasized that Congress bifurcated 5 U.S.C. § 706 of the APA; making a distinction between an agency’s failure to act under § 706(1), and acting in an arbitrary or capricious manner

¹⁵⁴ 174 F.3d 1178 (10th Cir. 1999).

¹⁵⁵ *Missouri*, 158 F. Supp. 2d at 989.

¹⁵⁶ *Id.* at 990.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 990-91.

¹⁶¹ *Id.* 990.

¹⁶² *Id.* at 989.

¹⁶³ *Id.*

¹⁶⁴ For purposes of the Comment section, the “District Court” refers to the United States District Court for the Western District of Missouri.

¹⁶⁵ *Missouri*, 158 F. Supp. 2d at 990-91.

¹⁶⁶ *Id.* at 990.

¹⁶⁷ *Supra* n. 79.

¹⁶⁸ *Supra* n. 97, 115.

¹⁶⁹ *Missouri*, 158 F. Supp. 2d at 990.

¹⁷⁰ *Id.* at 989.

¹⁷¹ *Id.* at 987.

¹⁷² *Id.* at 989.

under § 706(2).¹⁷³ Because the District Court agreed that *American Canoe* and *Forest Guardians* prohibited application of a statute of limitations to claims brought pursuant to § 706(1),¹⁷⁴ it stressed that Missouri had challenged the Secretary's acts as arbitrary and capricious pursuant to § 706(2) in the original complaint. Surprisingly, after laboring to discern between these key elements of the ESA and APA, the District Court extended the holding to include publication of the "not determinable" exception as an agency action capable of commencing the running of the statute of limitations against a plaintiff.¹⁷⁵

The rationale for needlessly extending the holding to include the "not determinable" exception is the most puzzling question created by the instant decision. Confining the holding to the "not prudent" exception would have made the legal significance of the "not determinable" exception a moot point. In 1991 the Secretary decided that it was not prudent to designate a critical habitat for the sturgeon.¹⁷⁶ Even if a critical habitat for the sturgeon could be determined in 2001, that fact would make it no more prudent for the Secretary to designate it. Nevertheless, the District Court chose to extend its holding to include the "not determinable" exception as a triggering event, which could result in one of several changes in the future.

Under *Missouri v. Secretary of the Interior*, a plaintiff would accrue the right to challenge the Secretary's decisions as soon as a species is listed as endangered in the Federal Register. However, this logic immediately presents a glaring defect. If the Secretary chose to defer designation of a critical habitat for the species because it is not determinable at the time, up to two years could elapse before the Secretary would be obligated to make a final decision regarding the species' critical habitat.¹⁷⁷ Even though the statute of limitations would be running against the plaintiff, the Secretary's delay in making a designation would be legally justified for at least the first two years of the six-year statute of limitations. It is unlikely that a plaintiff would be successful by challenging an agency's delay during the lawful grace period, so there would be little incentive to file a complaint during that time.

If this were the only effect of the application of a statute of limitations, it would be relatively harmless for potential plaintiffs. A plaintiff would simply need to be mindful to file her complaint after the grace period has elapsed, but within six years after the species is listed as endangered. However, the effect may be more harmful since plaintiffs must consider the statute of limitations as it relates to the current split of authority regarding whether federal agencies may exercise discretion in refusing to act by mandatory deadlines under the APA.¹⁷⁸

Under the approach adopted by the Ninth and Tenth Circuit Courts of Appeals, an agency's withholding of action beyond a mandatory deadline is unreasonable.¹⁷⁹ A reviewing court applying this approach must compel the agency to comply with its duty.¹⁸⁰ On the other hand, the D.C. Circuit Court of Appeals believes that federal agencies can have valid reasons for delaying action beyond a mandatory deadline.¹⁸¹ In response, it has created a six-factor balancing test to determine the necessity of compelling an agency to act once a deadline has passed.¹⁸² The Ninth, Tenth, and D.C. Circuit Courts of Appeals formed their respective approaches under the assumption that a statute of limitations was not applicable to a claim brought pursuant to § 706(1) of the APA. Predictably, the instant decision will create new concerns under either approach.

Under the approach of the Ninth and Tenth Circuits, prior to the instant decision, a plaintiff could wait until it was beneficial for the species in order to file a complaint against the Secretary pursuant to § 706(1). A "not determinable" exception is invoked by the Secretary due to a lack of information pertaining to either the needs of a listed species, or the likely impact of a critical habitat designation. That information may not always become available within six years after the species is listed as endangered. For example, the instant decision points out that the sturgeon was listed as endangered

¹⁷³ *Id.* at 990.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 55 Fed. Reg. 36641, 36646 (Sept. 6, 1990).

¹⁷⁷ *Supra* to 92, 93.

¹⁷⁸ Zaller, 42 William & Mary L. Rev. at 1554.

¹⁷⁹ See *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249 (10th Cir. 1998); *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

¹⁸⁰ *Missouri*, 158 F. Supp. 2d at 989.

¹⁸¹ See *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984); *In re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991); *In re United Mine Workers of America Intern. Union*, 190 F.3d 545 (D.C. Cir. 1999)

¹⁸² *Supra* n. 178 at 1556-57.

in 1990.¹⁸³ At that time “very little was known” about the sturgeon, but the Secretary cited the Corps’ operation of the Missouri River mainstream dams as a potential threat.¹⁸⁴ It took ten more years for the Secretary to receive the FWS’s final biological opinion on the Corps’ operation of the Missouri River Main Stem Reservoir System.¹⁸⁵

A primary policy of the ESA is to protect and conserve the habitat necessary for the survival of endangered species.¹⁸⁶ Assuming a plaintiff wishes to accomplish this specific goal, the best strategy is to wait until the appropriate information becomes available before filing a complaint. By waiting, a plaintiff could be assured that the Secretary would be compelled to act once there is adequate information available to make a beneficial designation of a critical habitat. This would not necessarily be the case when the statute of limitations requires that a complaint must always be filed within six years after the Secretary deems critical habitat “not determinable.” Assuming the Secretary had no more information about the species six years after listing it as endangered, a plaintiff would have to choose whether it is better to file a complaint to compel the Secretary to act with inadequate information, or waive the right forever. There is no question that jurisdictions applying the Ninth and Tenth Circuits’ approach will compel the Secretary to comply with its duty.¹⁸⁷ The issue, however, is whether forcing the Secretary to designate a critical habitat based on inadequate information will have any real benefit for the species at all. An even more problematic result may occur in jurisdictions choosing to apply the D.C. Circuit Court’s six-factor test. Under this approach, a plaintiff would not simply have to decide whether a species would benefit if the Secretary were compelled to designate it a critical habitat without adequate information, but a plaintiff would also bear the burden of convincing the court that forcing the Secretary to act with inadequate information outweighs the reasonableness of delaying designation until the needed information becomes available.

The District Court almost certainly reached the correct result in *Missouri v. Secretary of the Interior*. Missouri chose to file its complaint more than six years after the Secretary published its final decisions that critical habitat designations were not prudent for the tern or sturgeon. A determination that designation of a critical habitat is not prudent is not based on a lack of information. Therefore, there is little reason for a plaintiff not to challenge it as soon as it is published. However, extending this same rationale to the “not determinable” exception has a dissimilar effect. The “not determinable” exception, by its very nature, may warrant the passage of a considerable amount of time in order for the Secretary to acquire the necessary information to make an informed decision. In theory, the Secretary should take no longer than two-years to determine a critical habitat for an endangered species. Realistically, however, it may actually benefit the species for the Secretary to take longer in order to gather the necessary information. Consequently, the District Court’s imposition of a statute of limitations, if adopted by other jurisdictions, is likely to either force the Secretary to make more uninformed critical habitat designations, or shield the Secretary from ever having to make a decision at all.

VI. CONCLUSION

It is not clear the extent to which *Missouri v. Secretary of the Interior* will influence courts in other jurisdictions. It is a District Court decision, and therefore other Districts are not bound by its holding. On the other hand, it is the only case addressing this question in the context of the ESA, and it will not be appealed.¹⁸⁸ Courts addressing this issue in the

¹⁸³ *Missouri*, 158 F. Supp. 2d at 989.

¹⁸⁴ *Id.* at 986, 988.

¹⁸⁵ *Id.* at 986.

¹⁸⁶ 16 U.S.C. § 1531(b) (1994).

¹⁸⁷ This assumes that the Secretary has exhausted the grace period.

¹⁸⁸ When the United States is a defendant. Federal Rule of Appellate Procedure 4(a)(1)(B) requires that a notice of appeal be filed within 60 days following the district court’s order and judgment. Missouri neither filed, nor requested an extension to file, a notice of appeal within 60 days following the District Court’s ruling.

future may find it persuasive due to the efficiency of applying a bright line rule that protects the Secretary from defending against claims that could have easily been filed within six years. However, the most likely effect is that other courts will distinguish *Missouri v. Secretary of the Interior* to the extent that it contradicts analogous APA precedent by applying a statute of limitations to reviews of agency delay or inaction. If not, “critical habitat” designations may become just as scarce as the species they are designed to protect.

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