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TRIGGERING SECTION 7: FEDERAL LAND SALES AND "INCIDENTAL TAKE" PERMITS

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I. INTRODUCTION

Federal regulatory intervention on behalf of various threatened and endangered species of wildlife is nearing its twenty-fifth anniversary. The federal government's first major action to remedy species decline occurred when Congress passed the Endangered Species Conservation Act of 1966.[1] With this legislation, Congress augmented the authority of the Secretary of the Interior (Secretary) to acquire wildlife habitat lands for preservation.[2] Three years later, Congress passed the Endangered Species Conservation Act of 1969.[3] This act directed the Secretary to prohibit the importation of species which were determined by the Secretary to be threatened with worldwide extinction.[4]

In 1973 it became evident that the 1966 and 1969 Acts were inadequate to protect endangered species for three reasons: the acts did not provide for the adequate acquisition of habitat lands; only certain federal agencies were included in the statutory scheme; and the taking of

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1. Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926, 926-927 (*repealed by* Pub. L. No. 93-205, § 14, 87 Stat. 884, 903 (1973)), §§ 4-5, 80 Stat. 926, 927-929 (*redesignated* National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 91-135, § 12(f), 83 Stat. 275, 283 (codified at 16 U.S.C. §§ 668dd-668ee (1988)) [hereinafter Pub. L. No. 89-669].

2. *Id.* § 2, 80 Stat. at 926-27.

3. Pub. L. No. 91-135, 83 Stat. 275 (§§ 1-6 *repealed by* Pub. L. No. 93-205, § 14, 87 Stat. 884, 903 (1973)) (remainder codified as amended in scattered sections of 16 U.S.C. and 18 U.S.C.).

4. *Id.* §§ 2, 3a, 83 Stat. at 275.

threatened domestic wildlife was not expressly prohibited.[5] Both Congress and President Nixon recognized that the existing federal scheme "simply d[id] not provide the kind of management tools needed to act early enough to save a vanishing species."[6] This recognition brought forth the single most significant piece of legislation to impact both endangered wildlife in the United States, as well as the economic interest attempting to share or use the habitat of the species—the Endangered Species Act of 1973 (Act).[7] The Act was passed due to Congress' determination that unbridled economic growth and development had precipitated the extinction of various species of wildlife in the United States.[8] According to Congress, among the major causes of wildlife extinction was the destruction of natural habitat.[9]

Since its passage the Act has been used to protect a number of species of wildlife, most notably the snail darter.[10] The snail darter became famous as a result of *Tennessee Valley Authority v. Hill*,[11] when its endangered status halted the completion of the multi-million dollar Tellico Dam. In *Hill*, the Supreme Court mandated a literal approach to the provisions of the Act that specified that species were to be preserved at "whatever the cost."[12]

The Supreme Court's unequivocal deference to the literal interpretation of the Act spurred Congress to amend the Act in 1978. Congress created a procedure for federal exemption from the prohibitions of the Act. The amendments provided for an Endangered Species Committee to consider exemption applications from federal agencies, the governors of the state in which an agency action would occur, or federal permittees.[13]

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5. *See* Saxe, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399, 409 (1988).

6. S. REP. No. 307, 93d Cong., 1st Sess. 3, *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2989, 2991; The President's 1972 Environmental Program, 8 WEEKLY COMP. PRES. DOC. 218, 223-24 (Feb. 8, 1972).

7. Pub. L. No. 93-205, 87 Stat. 884 (current version at 16 U.S.C. §§ 1531-43 (1988)). *See generally* Saxe, *supra* note 5; Steckbeck, *The Hard Shells Meet the Hard Hats: A Desert Compromise Under the Endangered Species Act*, 55 INTER ALIA 2 (1990); Webster, *Habitat Conservation Plans Under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243 (1987) (articles providing helpful overviews of the Act).

8. 16 U.S.C. § 1531(a)(1) (1988).

9. *See* Saxe, *supra* note 5, at 409 (citing S. REP. No. 307, *supra* note 6, at 2).

10. The U.S. Fish and Wildlife Service listed the Snail Darter as endangered on October 9, 1975. *See* 40 Fed. Reg. 47,505-06 (1975).

11. 437 U.S. 153 (1978). *See infra* note 112-13 and accompanying text.

12. 437 U.S. at 184.

13. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 7(e)-(g), 92 Stat. 3751, 3753-57 (codified at 16 U.S.C. § 1536(e)-(g) (1988)). The Committee will exempt a project only if the applicant has no reasonable and prudent alternatives, the benefits of the action clearly outweigh the benefits of any alternatives, the action is in the public interest, and the project is of regional or national significance. 16 U.S.C. § 1536(h)(1) (1988).

Congress amended the Act again in 1982 and 1986 to allow for two kinds of takings permits.[14] Section 10(a) permits may be granted to private persons for takings pursuant to scientific study, efforts aimed at habitat enhancement, and activities causing incidental takings.[15] Section 7 provides for the Secretary to issue federal agencies a permit allowing the taking of individual specimens of endangered species when such takings are incidental to "agency action."[16] The section 7 permit granted to federal agencies differs from section 10 permits granted to private individuals in that the Secretary may grant the section 7 permit without providing the opportunity for public comment.[17] The amended Act remains a formidable defense for threatened and endangered species of wildlife against a wide range of activities. The Act potentially prevents private development, recreation, agriculture, and mineral uses of real property, which will adversely affect a threatened or endangered species.[18] In most circumstances, private parties must comply with the rigid and time-consuming procedures of section 10(a) in order to develop or use such land.

An expedient alternative to the section 10(a) procedures is the section 7 process. This section charges federal agencies with assuring that their actions will not jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of critical habitat.[19] The section 7 process may be employed if the project involves a sufficient federal nexus to be termed "agency action." The term "action," as attributed to a federal agency, is defined broadly by the United States Fish and Wildlife Service (Service) to include programs of any kind "authorized, funded or carried out by the federal government," including the granting of licenses, contracts, rights-of-way, and permits.[20]

Typically, a sufficient nexus between a private act and agency action can be established by obtaining a federal permit, such as a "dredge and fill" permit under section 404 of the Clean Water Act.[21]

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14. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1411, 1422 (codified at 16 U.S.C. 1539(a) (1988)); Pub. L. No. 99-659, § 411(b)-(c), 100 Stat. 3706, 3741-3742 (codified at 16 U.S.C. § 1536(b), (o) (1988)).

15. 16 U.S.C. § 1539(a) (1988).

16. *Id.* § 1536(a)-(b).

17. *Id.* § 1536(b)(4); *see id.* § 1539(c).

18. A recent example of how far reaching the prohibitions of various activities can be when a species of wildlife is designated as "endangered" is found in the Temporary Emergency Quarantine in the Desert Tortoise Natural Area and Western Rand Mountains Area of Critical Environmental Concern (ACEC); Ridgecrest Resource Area, Kern County, California, 54 Fed. Reg. 38,744 (1989).

19. 16 U.S.C. § 1536(a)-(p) (1988).

20. 50 C.F.R. § 402.02 (1989).

21. 33 U.S.C. § 1344 (1988).

Recently the Service and private parties have employed inventive techniques to trigger the provisions of section 7. In one instance, a private party triggered section 7 on a proposed solid waste landfill project in the habitat of a proposed endangered species through a consultation between the Service and the Federal Highway Administration on a new highway interchange which provided access to the landfill, but did not directly impact the species' habitat.[22] In another instance, a private party employed section 7 through a consultation on a federal right-of-way grant that provided access to the landowner's development project on land purchased from the Bureau of Land Management (BLM).[23]

In both of these situations, the agency "consultation" under section 7 resulted in the Service granting an incidental take permit covering the private actor's entire project. However, neither section 7 permit was granted solely on the sale of real property rights. Instead, it was granted pursuant to some additional nexus to agency action.[24]

If the term "agency action" includes the granting of real property rights such as licenses and rights-of-way, it follows that the granting of any real property right, *i.e.*, a sale in fee, should be considered agency action as well. Under such a rationale, the incidental taking of resident endangered species during the development of property purchased from a federal agency may come within section 7 by virtue of the development's nexus to the agency action.

The prohibitions of the Act recently have served inadvertently as land use controls, effectively barring development in some areas. Thus, the difference between obtaining a permit for the taking of a resident endangered species under section 10 or obtaining a permit under section 7 of the Act is quite significant. The complexity and length of procedures inherent in these types of permits can mean the difference between obtaining relief from the Act in a relatively short period of time, as is often the case with a section 7 permit, or waiting years for such relief, as is often true with a section 10 permit. In extreme cases, the difference can mean no relief at all.

This article analyzes the applicability of permits granted under section 7 of the Act to federal agencies,[25] pursuant to the granting of real property rights, including the outright sale of real property to private individuals. With the increased involvement of the BLM in the sale of

22. Thornton, *Takings under Endangered Species Act Section 9*, 4 NAT. RESOURCES & ENV'T, 7, 8-9 (1990).

23. *Id.*

24. *Id.* at 8.

25. 16 U.S.C. § 1536(a) (1988).

real property to private individuals, the applicability of permits granted pursuant to either section 7 or section 10 of the Act, as well as a concise definition of the term "agency action," becomes increasingly critical for both the development and environmental interest communities.

II. EFFECT OF THE ENDANGERED SPECIES ACT ON LAND USE PLANNING

The Endangered Species Act (Act) empowers the Secretary of the Interior (Secretary) to determine, on the basis of the best scientific and commercial data available, which species of wildlife are endangered or threatened.[26] The term "endangered" is attributed to a species of wildlife that is in "danger of extinction throughout all or a significant portion of its range."[27] The term "threatened" is ascribed to a species of wildlife that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"[28] because of habitat disruption, over exploration, natural causes, regulatory failures, or other factors.[29] The Act also empowers the Secretary to protect geographic areas from adverse modifications by designating as "critical habitat" certain land associated with a listed species of wildlife.[30] The term "critical habitat" is defined as a specific area within the geographical range occupied by an endangered species where the physical or biological features essential to the conservation of that species are found.[31]

The Act further protects threatened and endangered species by prohibiting any person from selling, importing, possessing, or taking any endangered species.[32] The term "taking" is broadly defined to include harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing or collecting any endangered species.[33] The Service defines "harm" as "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills wildlife by significantly impairing essential behavioral patterns."[34]

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26. *Id.* § 1533(b)(1)(A).
27. *Id.* § 1532(6).
28. *Id.* § 1532(20).
29. *Id.* § 1533(a)(1).
30. *Id.* § 1533(a)(3).
31. *Id.* § 1532(5)(A)(i).
32. *Id.* § 1538(a)(1).
33. *Id.* § 1532(19).
34. 50 C.F.R. § 17.3 (1989).

Although intended as a mechanism to protect threatened and endangered species of animals, the Act often has served as a bar to development. The Act prohibits the taking of individual specimens of an affected species or adverse modification of the species' habitat.[35] Because of this prohibition, the Act functions as a powerful land use control. In most instances land use planning is inseparable from the control of development in the critical habitat of an endangered species.[36]

Historically the Act has served to block specific actions or developments, but the 1980's saw incidences where the Act's prohibitions have restrained the growth of entire communities. For instance, California's Coachella Valley saw significant portions of "prime" Palm Springs resort property become undevelopable by the designation of the Coachella Valley fringe-toad lizard (*Uma inornata*) as an endangered species.[37] Large portions of the valley were frozen from development because most developable property in the area was transversed by the Aeolian Sand Dune Network, the critical habitat for the world's entire population of the endangered lizard. Governmental, community, and development groups developed a habitat conservation plan and received a permit to allow the taking of the lizard and its critical habitat in various areas of the valley under section 10(a) of the Act.

More pervasive examples of the Act's restraint on development are the listing of the Stephens' Kangaroo Rat (*Dipodomys stephensi*) as endangered[38] throughout large portions of California's Riverside County and the listing of the Mojave population of the Desert Tortoise (*Gopherus agassizii*) as threatened throughout vast regions of Southern California, Nevada, and Arizona.[39] Because these species of animals live throughout the desert region, any development in these vast areas potentially constitutes a taking of the subject species and would be a violation of the Act.[40] Thus, the listing of these species effectively implemented region-wide land use controls.

Zoning and land use controls traditionally consisted of particular restrictions on certain types of nuisance-causing industries.[41] In the 1920's, the United States Department of Commerce prepared and

35. 16 U.S.C. § 1538(a)(1) (1988).

36. 2 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 10.01[1] (1989).

37. *See* 50 C.F.R. § 17.11 (1989) (designating the Coachella Valley fringe-toad lizard as "endangered").

38. *Id.*

39. 55 Fed. Reg. 12,178-91 (Apr. 2, 1990).

40. *See* 16 U.S.C. § 1538 (1988).

41. 2 F. GRAD, *supra* note 36, § 10.01[1].

published a model zoning and enabling act which provided the pattern whereby states delegated zoning powers to local governments, which in turn implemented comprehensive plans, placing restrictions on urban development.[42] Thus, under the modern scheme, local government zoning authorities exert control by preventing or allowing certain forms of development or uses in specific areas conditioned on the construction of certain improvements inside and outside of a development. General zoning and land use controls, as well as conditional zoning or exactions, have been upheld by the courts on the grounds that they represent an attempt by a community, government agency, or state to determine the best use of its limited land resources for the greatest good with a showing of proper purposes to justify infringement on individual property owners.[43]

Federal intervention into the land use and zoning control arena comes indirectly through the federal government's various regulatory powers. These powers impose obligations on municipalities to enact land use controls that will carry out federal purposes.[44] The federal government also exercises power through the traditional grant-in aid mechanism by imposing a planning or land use requirement as a condition of the award of a federal grant, such as highway and airport funds.[45]

Barring development pursuant to the Act constitutes a more effective and pervasive control of land use. The Act's prohibitions, however, affect not only states or local governments, but also individuals. The Act prohibits any *person* from committing a taking of an endangered species.[46] Moreover, the civil and criminal penalties delineated in the Act are aimed directly at individuals or individual entities.[47] Therefore, regardless of the zoning designation of a piece of property or the valid granting of authority to conduct a specific use on such property by a local zoning authority, a developer is barred from initiating a development if the development actually would result in a taking.[48]

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42. *Id.* § 10.03[1][a] (discussing ADVISORY COMM'N ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT REGULATIONS (1926). The Zoning Enabling Act was followed two years later by a model planning law. ADVISORY COMM'N ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, STANDARD CITY PLANNING ENABLING ACT (1928)).

43. Crew, *Development Agreements after* Nollan v. California Coastal Commission *483 U.S. 825 (1987)*, 22 THE URBAN LAWYER 23 (1990).

44. 2 F. GRAD, *supra* note 36, § 10.02[1] (citing U.S. CONST. art. I, § 8, cl. 3).

45. *Id.*

46. 16 U.S.C. § 1538(a)(1) (1988).

47. *Id.* § 1540(a)-(b).

48. *See id.* § 1538.

III. PERMITS AND EXEMPTIONS UNDER SECTION 10(a)-(b) OF THE ENDANGERED SPECIES ACT

The fundamental protective measures of the Act are contained in section 9.[49] The section prohibits "any person"[50] from "taking"[51] an endangered or threatened species. The prohibitions of section 9 are not absolute, however. The Act provides in section 10(a) the means for a lawful taking[52] or the "incidental" taking[53] of a listed species when authorized by permit.[54] Section 10(b) gives the Secretary of the Interior (Secretary) discretion to grant exemptions to the general prohibition of any taking.[55]

A. Scientific Permits

Under section 10, the Secretary may grant permits for scientific purposes or for programs designed to enhance the propagation or survival of a listed species.[56] The party seeking a scientific permit must file an application with the Secretary to begin the permitting process.[57] Thereafter, the Secretary must publish notice in the *Federal Register*

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49. *See id.*

50. *See id.* § 1538(a).

51. "Take" is broadly defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). "Harass" is further defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1989). "Harm" is further defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* The broadness of these definitions means that section 9's prohibitions prevent virtually any activity which disrupts normal behavior patterns. Indeed, a "taking" may occur simply by one's picking up a listed endangered or threatened species and moving it. Steckbeck, *supra* note 7, at 5.

52. 16 U.S.C. § 1539(a)(1)(A) (1988) provides as follows:

> (1) The Secretary may permit, under such terms and conditions as he shall prescribe—
>
> (A) any act otherwise prohibited by section 1538 [section 9] of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section;

Id.

53. Such a taking must be "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* § 1539(a)(1)(B).

54. *See id.* § 1539(a)(1).

55. *See id.* § 1539(b).

56. *Id.* § 1539(a)(1)(A).

57. For general permit application procedures, see 50 C.F.R. 13.1-.47 (1989). All information given to the Secretary is available to the public as a matter of public record. 16 U.S.C. § 1539(c) (1988); *Cf.* Freedom of Information Act, 5 U.S.C. § 552 (1988).

of the application for the permit.[58] The notice must invite interested parties to submit written data, views, or arguments regarding the application within thirty days of the date of the notice.[59]

After considering the application and other information submitted, the Secretary may grant a permit upon finding the following: (1) the permit was applied for in good faith; (2) the permit, if granted, would not operate to the disadvantage of the endangered species; and (3) the permit, if granted, would be consistent with the purposes and policy of the Act.[60] Such scientific permits are very important for the reestablishment of species hunted or driven from their native range.[61] Without this mechanism for reestablishing breeding populations in former ranges, many endangered species experience shrinking ranges along with their shrinking populations.

B. Incidental take permits

Under section 10(a), persons whose actions may affect an endangered or threatened species may obtain an incidental take permit.[62] The incidental take permit has been successfully utilized in the development of southwest desert lands inhabited by threatened or endangered species.[63] Indeed, many commentators suggest the section 10(a)

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58. 16 U.S.C. § 1539(c) (1988). This notice requirement applies to all applications for permits and exemptions under section 10. *Id.*

59. *Id.* This 30 day period may be waived by the Secretary "in an emergency situation where the health or life of an *endangered* animal is threatened and no reasonable alternative is available to the applicant" to protect the animal's health or life. *Id.* (emphasis added). Apparently, such emergency waivers are not available for animals listed as threatened. In any event, such an emergency waiver must also be noticed in the *Federal Register* within 10 days of the issuance of the emergency permit. *Id.* All information regarding the application and permit is available to the public as a matter of public record. *Id.*

60. *Id.* § 1539(d). The "purposes and policy" of the Act are set forth in section 1531. *Id.* § 1531. Again, such findings are required for all permits issued under authority of section 10. *Id.* § 1539(d).

61. *See, e.g., Yellowstone Wants Its Wolves Back*, Las Vegas Rev.-J., May 21, 1990, at 9A, col. 1.

62. The Secretary may permit "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is *incidental to*, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (1988) (emphasis added.) The word "incidental" in the Act requires that the taking not be the purpose of the activity but, rather, that it is an inevitable result of the particular activity. *See* H.R. REP. No. 567, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2807, 2831.

63. For example, Paul Seltzer, a Palm Springs attorney, has successfully used "incidental take" permits in California's Coachella Valley, where development impacted the Coachella Valley Fringe-Toed Lizard. *See* Coachella Valley Fringe-Toed Lizard Habit Conservation Plan (1985) (available from Riverside County Planning Department, 4080 Lemon Street, 9th Floor, Riverside, CA 92501) [hereinafter Coachella Valley HCP]. Seltzer also served as chairman of a steering committee formulating a Habitat Conservation Plan for Las Vegas Valley, Nevada, seeking "incidental take" permits necessary to develop desert lands inhabited by the threatened Desert Tortoise. *See* Steckbeck, *supra* note 7, at 5.

incidental take permit is the only means by which private parties may legally develop lands inhabited by threatened or endangered species.[64]

To initiate the section 10(a) incidental take permit process, the applicant submits an official application to the Director of the U. S. Fish and Wildlife Service (Service).[65] The applicant also must prepare and submit to the Secretary an acceptable Habitat Conservation Plan (HCP).[66] The HCP must state the following: (1) the impact which will likely result from the taking contemplated; (2) the steps the applicant will take to minimize or mitigate the impacts identified, as well as funding available for implementation of these mitigation measures; (3) a discussion of alternates to the contemplated action and an explanation why those alternatives are not being utilized; (4) such other measures required by the Secretary as necessary or appropriate to fulfill the purpose of the HCP.[67] Any discussion of the impacts of activity for which an HCP is prepared necessarily must be limited in geographic scope, yet the HCP area must be large enough to provide adequate habitat and ensure a coordinated and comprehensive effort to conserve the listed species.[68] However, an HCP which is too ambitious in its scale may prove wholly unmanageable in regard to the coordination of mitigation measures and monitoring of effects.[69]

HCP preparation also requires the applicant to collect and analyze biological data within the geographic range of the HCP, including species distribution, occurrence, and ecology of all related or affected species.[70] These studies should be extensive and thorough: for exam-

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64. *See, e.g.*, Steckbeck, *supra* note 7, at 5 (citing H.R. REP. No. 835, 97th Cong., 2d Sess. 20, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2807, 2860 (House Report on the 1982 amendments to the Endangered Species Act which established section 10(a))). *See* 16 U.S.C. § 1539(a) (1988).

65. 50 C.F.R. § 17.22(b)(1) (1989). The application must include a complete description of the activity the applicant seeks to conduct and the common and scientific names of the species to be covered by the "incidental take" permit. If known, the application must include the number, age, and sex of the individual members of the species to be taken. *Id.* § 17.22(b)(1)(i)-(ii).

66. 16 U.S.C. § 1539(a)(2)(A) (1988). Generally, an HCP must take the form of the San Bruno Mountain Habitat Conservation Plan (1982) (available from San Mateo County Planning Division, 590 Hamilton Avenue, 2d Floor, Redwood City, California 94063) [hereinafter San Bruno Mountain HCP]. In formulating the substantive requirements of HCPs, Congress indicated that it expects HCP planners to use the San Bruno Mountain HCP as a model for future HCPs. H.R. REP. No. 567, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. CODE. CONG. & ADMIN. NEWS 2807, 2871.

67. 16 U.S.C. § 1539(a)(2)(A) (1988). *See, e.g.*, San Bruno Mountain HCP, *supra* note 66. *See also* Webster, *supra* note 7; U.S. FISH & WILDLIFE SERVICE, DRAFT CONSERVATION PLANNING GUIDELINES, REGION 1 (June 19, 1989) (intended for use as guidelines for applicants following statutory requirements for the required HCP).

68. *See, e.g.*, San Bruno Mountain HCP, *supra* note 66.

69. U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 6.

70. 50 C.F.R. § 17.22 (1989); *cf.* 1 San Bruno Mountain HCP, *supra* note 66, at V-12 to -13

ple, the San Bruno Mountain HCP conducted an exhaustive two-year biological study involving as many as fifty field personnel,[71] and the Coachella Valley HCP included biological opinion statements by nine different biologists.[72] The Service will recommend the number, type, and scope of studies necessary for the HCP upon request of the applicant.[73]

The applicant's HCP must list and explain all proposed activities which may cause an incidental taking, such as real estate development, mining, grazing, or recreational activities.[74] The HCP also should adequately discuss cumulative impacts of the proposed activities and should analyze likely future actions.[75] Ideally, this section of the HCP should provide a comprehensive analysis which will enable the incidental take permit applicant and the Service to determine the level of takings within the HCP area and the impact of these takings.[76] The incidental take permit application and the HCP must explain not only how the applicant intends to monitor the HCP and mitigate the impacts of any takings, but also provide for how the plan and the mitigation measures will be funded.[77]

The mitigation plans of the HCP are crucial to its validity. Most commentators argue that in order for an HCP to be fully effective mitigation must surpass development.[78] Mitigation measures may include rehabilitating degraded habitat, artificially creating new habitat,[79] restricting vehicle access or species egress, establishing buffer zones, and establishing public education programs.[80] Thorough miti-

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(briefly discussing the potential presence of endangered species for which the applicant had not applied for an "incidental take" permit, including the San Bruno Elfin Butterfly, Bay Checkspot Butterfly and San Francisco Garter Snake). Indeed, HCP expert Paul Seltzer has admitted that the HCP process invariably turns up other potentially listed species. *See* Manning, *Endangered Desert Tortoise Gets Blame for 'Economic Harm, Suffering' to Valley*, Las Vegas Sun, September 10, 1989, Section A, Col. 2. *Cf.* Department of Interior/Clark County/Kerr-McGee APEX Mitigation Agreement, Nevada Site, app. C at 6 (signed Oct. 26, 1989) (on file with the Secretary of the Interior) [hereinafter Kerr-McGee Mitigation Agreement].

71. H.R. REP. No. 567, *supra* note 66, at 31-32.

72. Coachella Valley HCP, *supra* note 63, at app. A-1.

73. U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 7.

74. *Id.* at 8.

75. *Id.*; *cf.* 50 C.F.R. § 402.14(g)(1989) (requiring the Service to review cumulative effects based on information provided by the agency).

76. Steckbeck, *supra* note 7, at 6.

77. *Id.* (citing U.S. FISH & WILDLIFE SERVICE, *supra* note 67); *see* 16 U.S.C. § 1539(a)(2)(A) (1988). For a good example of an explanation of funding, monitoring and mitigation planning, though not as part of an HCP, see Kerr-McGee Mitigation Agreement, *supra* note 70.

78. *See, e.g.*, Steckbeck, *supra* note 7, at 6.

79. Creation of new habitat may require a permit under section 10(a), rather than an incidental take permit, if the species is to be introduced into the new habitat.

80. U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 10. The Kerr-McGee Mitigation

gation measures may not only enhance the chances of survival, they may also bolster the legal sufficiency of the HCP if challenged.[81] As an essential ingredient of informed decision-making, the applicant must set forth any alternatives which were considered and rejected that would not result in a taking.[82]

The Service has authority, delegated by the Secretary[83] to exercise oversight and to invoke further requirements which it considers necessary to the HCP.[84] Most often, the Service will impose on-going monitoring by an administrative body or entity to ensure that the applicant carries forth the monitoring and mitigation duties imposed[85] and to ensure the incidental take does not exceed the levels proposed by the HCP and the permit, if granted.[86] After compiling the required information, the applicant then submits the application and HCP to the Secretary through the Service.[87] The Service then decides, after opportunity for public comment,[88] to issue or deny the permit.[89]

Agreement, *supra* note 70, at app. C (Biology), required Kerr-McGee Chemical Corporation to erect tortoise-proof fencing around its construction site in order to keep wandering Desert Tortoises out of harm's way. The mitigation plans also required translocation of tortoises within the site, creation of a buffer zone around the site, and establishment of a public education program.

81. *See* Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985).

82. U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 11-12; *see* 16 U.S.C. § 1539(a)(2)(A)(iii) (1988). *Cf.* National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1988) (requiring federal agencies to submit detailed statement including alternatives to major federal actions significantly affecting the human environment).

83. 16 U.S.C. § 1539(a)(2)(A)(iv) (1988).

84. U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 12.

85. In many instances, a division of the situs state's equivalent of the U. S. Fish and Wildlife Service will assume these monitoring duties.

86. U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 12. The Secretary must revoke an incidental take permit if the permittee exceeds the "take" levels indicated by the HCP. *See* 16 U.S.C. § 1539(a)(2)(c) (1988).

87. 16 U.S.C. § 1539(a)(2)(A)-(B) (1988).

88. *Id.* § 1539(a)(2)(B).

89. *Id.*; 50 C.F.R. § 17.22(b)(i)(iv)(1989).

> General criteria indicate that the permit will be denied if:
>
> (A) The applicant has been assessed a civil penalty or been convicted of criminal wrong-doing related to the activity for which the application has been filed;
>
> (B) The applicant has failed to disclose material information or made false statements as to any material fact in connection with the application;
>
> (C) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;
>
> (D) The authorization requested potentially threatens a wildlife or plant population; or
>
> (E) Further inquiry reveals the applicant is not qualified to perform the required actions stipulated by the permit.

U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 14.

> The Fish and Wildlife Service will issue the 10(a) permit, subject to Section 7 [16 U.S.C. § 1536 (1986)] consultation if the applicant meets the following six criteria:
>
> (A) The taking will be incidental; . . .

C. *Hardship Exemptions*

In certain very narrow circumstances a person may be granted an exemption to the Act's prohibition on taking[90] of a listed species.[91] If a person enters into a contract with respect to a listed species of fish, plant, or other wildlife before notice of the proposed listing of that species,[92] and the subsequent listing of that species will cause "undue hardship"[93] to the contracting party, the Secretary may exempt the contracting party from the application of section 9.[94] In this instance the Secretary grants the exemption under section 10(b) of the Act.

(B) The permit applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; . . .
(C) The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforseen [sic] circumstances will be provided; . . .
(D) The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild; . . .
(E) The applicant will ensure that other measures that the Director may require as being necessary or appropriate will be provided; and . . .
(F) The Director is assured that the conservation plan will be implemented.

U.S. FISH & WILDLIFE SERVICE, *supra* note 67, at 15-17. *See also* 50 C.F.R. §§ 17.22(b)(2), .32(b)(2) (1989).

90. *See supra* notes 49-55 and accompanying text.

91. *See generally* 16 U.S.C. § 1539(b) (1988) (outlining requirements for the hardship exemption).

92. Notice of consideration of a species for listing as an endangered species refers to the date of publication in the *Federal Register*. *See generally id.* § 1533. The Secretary is required to publish notice in the *Federal Register* within 90 days of receiving a petition to list a species from any interested person. The notice must set forth the Secretary's findings as to whether the petitioned action is warranted by the scientific or commercial information in the petition. *Id.* § 1533(b)(3)(A). The petition process is governed by 16 U.S.C. §§ 1533(b), 1540(g)(1)(B) (1988), and 5 U.S.C. § 553(e) (1988).

93. "Undue hardship" or "undue economic hardship" includes, but is not limited to the following:

(A) substantial economic loss resulting from inability caused by [the Act] to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;
(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under [the Act]; or
(C) curtailment of subsistence taking made unlawful under [the Act] by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

16 U.S.C. § 1539(b)(2) (1988). The Secretary may require such further showing of economic hardship as he sees fit. *Id.* § 1533(b)(3).

94. Section 9 contains the Act's prohibitions against "takings." *See supra* notes 49-55 and accompanying text. The exemption granted by section 10 is granted only "to minimize hardship" to the contractor, and the contractor is exempted only "to the extent the Secretary deems appropriate." 16 U.S.C. § 1539(b)(1) (1988).

To apply for the section 10(b) exemption, the contractor must submit an application to the Secretary containing "such information as the Secretary may require to prove hardship."[95] The 10(b) hardship exemption is of limited duration,[96] and the exemption from the takings prohibition applies only to the fish, wildlife, or plants specified by the Secretary.[97] Further, no such exemption may be granted if the specimens taken are to be used in a commercial activity.[98]

IV. INCIDENTAL TAKE PERMITS UNDER SECTION 7: HISTORY AND PROCEDURES

The Endangered Species Preservation Act of 1966 was the first legislation specifically enacted to protect endangered species.[99] This Act contained four important provisions, which included the following: (1) directing the Secretary of the Interior (Secretary) to carry out a program in the United States conserving selected species of native fish and wildlife; (2) authorizing the acquisition of endangered species habitat to be included in the National Wildlife Refuge system; (3) requiring the preparation of an official list of endangered species; and (4) directing the Departments of the Interior, Agriculture, and Defense to protect species of native fish and wildlife threatened with extinction and preserve their habitats on and within their jurisdiction as far as practical and consistent with the primary purposes of the departments' agencies.[100] Although an important step in the protection of wildlife, the Act contained no provision which prohibited the taking of endangered species.[101] In addition, the agencies involved were only directed to protect wildlife habitat "insofar as practicable and consistent with the primary purposes" of the agencies.[102]

Congress enacted the Endangered Species Conservation Act of 1969[103] to correct problems that arose out of the 1966 Act. The 1969 Act increased the amount of money that the Secretary could spend to

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95. 16 U.S.C. § 1539(b)(1) (1988).

96. No exemption shall be for a duration of more than one year from the date of publication of the notice of consideration. *Id.* § 1539(b)(1)(A). The Secretary may limit the exemption as to time, area, or any other factor of applicability. *Id.* § 1539(b)(3).

97. *Id.* § 1539(b)(1).

98. *Id.* § 1539(b)(1)(C). *See* 50 C.F.R. § 23.23(f) (1989) (containing species of wildlife and fauna placed in appendix I, II, and III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249). *See also id.* §§ 17.11-.12.

99. Pub. L. No. 89-669, *supra* note 1.

100. *Id.*; S. REP. No. 418, 97th Cong., 2d Sess. 1-2 (1982).

101. Pub. L. No. 89-669, *supra* note 1.

102. *Id.* § 1(b), 80 Stat. at 926.

103. Pub. L. No. 91-135, 83 Stat. 275 (§§ 1-6 repealed 1973) (remainder codified as amended in scattered sections of 16 U.S.C. and 18 U.S.C.).

acquire suitable habitat for endangered species. It also changed the definition of "fish and wildlife" to include "any wild mammal, fish, wild bird, amphibian, reptile, mollusk or crustacean."[104] Perhaps most important, the 1969 Act created a world-wide list of endangered species and prohibited the importation of any of those animals into the United States.

Congress soon found the 1969 Act inadequate as well. The 1969 Act still did not prohibit the taking of endangered species, and agencies were only directed to protect habitat if it was practicable and consistent with their primary purposes.[105] Unfortunately, agencies rarely found protection of wildlife or habitat to be consistent with agency action.

Four years later Congress enacted the Endangered Species Act of 1973[106] in an attempt to correct the problems of the previous acts. The 1973 Act covered "any member of the animal kingdom" as well as extending its coverage, for the first time, to protect plant life.[107] A threatened species category also was added in order to protect certain animals before they reached the point of becoming endangered.[108] Undoubtedly, the most important provision of the 1973 Act is that it prohibits the taking of endangered species.[109]

As originally enacted, section 7 of the Endangered Species Act required interagency cooperation and, like the National Environmental Policy Act,[110] generally applied to all agencies. Section 7 of the 1973 Act imposed strict requirements on all federal agencies to ensure the adequate protection of wildlife and their habitat.[111] Section 7, in effect, "prohibited the undertaking of any project that would jeapordize the existence of any endangered or threatened species, or that would result in the destruction or modification of its habitat."[112]

Congress amended section 7 after its successful application in *Tennessee Valley Authority v. Hill*[113] halted a major project—the Tellico

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104. *Id.* § 1(2), 83 Stat. at 275.

105. Saxe, *supra* note 5, at 409.

106. Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1543 (1988)).

107. *Id.* § 2, 87 Stat. at 884.

108. *Id.* § 4, 87 Stat. at 886.

109. *Id.* § 9, 87 Stat. at 893.

110. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1988).

111. Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (current version at 16 U.S.C. § 1536 (1988)).

112. 3 F. GRAD, TREATISE ON ENVIRONMENTAL LAW (1990) § 12.04[7], at 12-187; *see* 16 U.S.C. § 1536 (1988).

113. 437 U.S. 153 (1978).

In this case, the Supreme Court held that Section 7 imposes a firm duty on Federal agencies to take no action that will jeopardize an endangered species or its critical habitat. In *Hill*, the critical habitat of the snail darter (a 3-inch, tannish-colored, spe-

Dam. Congress became concerned by the economic consequences of the *Hill* decision. As a result, Congress acted to prevent the recurrence of situations in which the protection of endangered species blocked major federal projects, regardless of the economic consequences.

To be exempted from the requisites of the 1973 Act, the applicant had to meet strict requirements by showing that there were no reasonable and prudent alternatives, the benefits of the action were in the public interest, and the project was of regional or national significance.[114] Additionally, a three member review board, consisting of representatives of the Department of the Interior, the affected state, and an administrative law judge, had to certify to the Endangered Species Committee that an applicant had met certain specified criteria before the exemption could be granted.[115] The review board would then prepare and submit a report to the Committee, which voted on whether to grant the exemption. Under the 1978 amendment, the decision of whether to grant the exemption had to be made within 360 days.[116]

Industry representatives complained that the section 7 exemption process was time consuming and unworkable.[117] In response to these complaints, Congress amended section 7 again in 1982 to shorten the exemption process.[118] The 1982 amendment allowed a decision to be made on the exemption within 180 days from the date of application.

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cies of perch) would have been destroyed by the operation of the nearly completed, 78 million dollar Tellico Dam on the Tennessee River. The snail darter had been discovered only 4 months prior to the passage of the Endangered Species Act—well after the construction of the Dam had gotten underway. After the passage of the Act, the respondents in *Hill* and others petitioned the Secretary of the Interior to list the snail darter as an endangered species. After following the mandated procedures, the Secretary listed the snail darter and identified the Tennessee River above the Tellico Dam as its critical habitat. This citizen suit to enjoin the operation of the Dam immediately followed. In affirming the grant of a permanent injunction, the Supreme Court rejected the TVA's interpretation—shared by both the House and Senate Committees which approved subsequent appropriations for the dam—that the Endangered Species Act did not apply to projects in progress and to the Tellico Dam in particular. The Court said that the language was clear and absolute, admitting of no exceptions. The Court cited the legislative history to show that Congress intended the protection of endangered species to have the "highest priorities." The Court also refused to imply a Congressional exemption from the passage of subsequent appropriations, nor did it find that any of the "hardship exemptions" applied.

3 F. GRAD, *supra* note 112, § 12.04[7], at 12-187 to -188.

114. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3757-58 (codifed at 16 U.S.C. § 1536 (1988)).

115. *Id.*

116. *Id.*

117. S. REP. No. 418, 97th Cong., 2d Sess. 4 (1982).

118. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 4, 96 Stat. 1411, 1417 (codified at 16 U.S.C. § 1536 (1988)).

This significantly reduced the previous time limitation of 360 days. In addition, the 1982 amendment did away with the review board, replacing it with the Secretary of the Interior—or the Secretary of Commerce in decisions involving opinions of the Fish and Wildlife Service—who must hold a formal hearing with an administrative law judge presiding. The Secretary also had to prepare a detailed report in consultation with members of the Endangered Species Committee before an exemption can be granted.[119]

Congress amended the Act in 1982 to resolve potential conflicts between sections 7 and 9.[120] Under the provisions of the 1973 Act, federal agencies receiving favorable biological opinions remained subject to the section 9 prohibition against taking any endangered species of fish or wildlife.[121] This seemed to place agencies in danger of substantial penalties arising from an accidental taking, even though they had complied with all of the provisions of the Act.[122]

The amendment allowed the Secretary, after concluding that no jeopardy would occur to an endangered species, to provide a written statement specifying the extent of the incidental take of the endangered species granted an agency and outlining any methods to be followed in order to minimize these takings.[123] If the federal or private action complies with these measures, any incidental taking of an endangered species will not be considered a violation of section 9 of the Act.[124] Failure to abide by these measures will result in the action remaining subject to the prohibition against takings contained in section 9.[125]

Section 7 of the Act has not undergone any major changes since 1982. The Act remains a viable method of protecting wildlife and its habitat from the actions of both the government and private parties. While as yet untested, there is nothing to indicate that the provisions of section 7 should not apply to private parties or individuals who purchase land directly from federal agencies.

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119. *Id.*

120. S. REP. No. 418, 97th Cong., 2d Sess. 20 (1982).

121. *Endangered Species Act, 1982: Oversight Hearings on S. 2309 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess. 6 (1981) (statement of Mr. J. Stevenson, Department of Commerce, discussing previous problems encountered by the Corps of Engineers when dredging Cape Canaveral).

122. *Id.*

123. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 4, 96 Stat. 1417, 1426 (codified at 16 U.S.C. § 1536 (1988)).

124. S. REP. No. 418, 97th Cong., 2d Sess. 5 (1982).

125. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 4, 96 Stat. 1417, 1426 (codified at 16 U.S.C. § 1536 (1988)).

A. Consultation Process

Section 7 of the Act has been called "the conscience of contemporary environmental law."[126] Consultation is at the heart of section 7. It sets the process in motion and provides the information necessary for determining[127] whether a project: may proceed as planned, should be halted, should be modified to avoid impacts on a given species, or has impacts which should be accepted and an exemption granted—*i.e.*, a section 7 permit—allowing it to proceed.[128] Consultation is required in all cases involving "agency action,"[129] and only after consultation,[130] may the Secretary grant a section 7 permit.

The permitting process begins with consultation between the federal agency proposing an action implicating the Act and the Department of the Interior concerning possible adverse effects of the agency's project upon a protected species. After consultation begins, neither the federal agency nor a private party awaiting federal approval may "make any irreversible or irretrievable commitment of resources"[131] foreclosing project alternatives consistent with preservation of the spe-

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126. Houck, *The "Institutionalization of Caution" Under § 7 of the Endangered Species Act: What Do You Do When You Don't Know?*, 12 Envtl. L. Rep. (Envtl. L. Inst.) 15,001 (1982).

127. *Id.*; *see* 16 U.S.C. § 1536(a)(2) (1988).

128. The "permit" portion of section 7 provides the following:

> (4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—
>
> (A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;
>
> (B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and
>
> (C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title; the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—
>
> (i) specifies the impact of such incidental taking on the species,
>
> (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,
>
> (iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and
>
> (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

16 U.S.C. § 1536(b)(4) (1988).

129. *Id.* § 1536(a)(2). "Action" is defined as "[a]ll activities or programs of any kind authorized, funded, or carried out in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitats . . . ." 50 C.F.R. § 402.02 (1989).

130. *See generally* 50 C.F.R. § 402 (1989) (outlining consultation procedures).

131. 16 U.S.C. § 1536(d) (1988).

cies.[132] After the consultation process, the Secretary must issue an opinion to explain and describe how the proposed action would affect the species in question, and recommend reasonable alternatives which would avoid jeopardizing the species or its habitat.[133] If the proposed action will not threaten the survival of the species, the Secretary may issue an incidental take permit to the agency.[134] If the Secretary's opinion indicates that the action will threaten a protected species, the federal agency, the governor of the affected state, or a federal permit applicant may apply to the Secretary for an exemption from section 7(a).[135]

1. Information Request

Whenever a federal agency intends to undertake agency action, the agency must ask the Secretary "whether any species which is listed or proposed to be listed may be present in the area of such proposed action."[136] The Secretary may respond to the request for information by informal consultation or written response. Informal consultation is an optional process and includes discussions, correspondence, and informal meetings between the Fish and Wildlife Service (Service) and any federal agency seeking the assistance of the Service.[137] If, during informal consultation, the Secretary determines that the contemplated action is not likely to affect adversely a listed species or critical habitat, no further action is necessary.[138] If informal consultation indicates a likely effect on a listed species, or the Service indicates that a threatened or endangered species may be present at the site of the proposed action, formal consultation is required.[139] Any failure formally to request information may be a harmless, *de minimis* procedural violation, as long as a Biological Assessment (BA) is prepared for a given site.[140]

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132. *Id.*
133. *Id.* § 1536(b)(3)(A).
134. *Id.* § 1536(b)(4).
135. *Id.* § 1536(g).
136. *Id.* § 1536(c)(1); *see* Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985).
137. 50 C.F.R. § 402.13 (1989).
138. *Id.*
139. *Id.* § 402.14(a).
140. *See* Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985) (adhered to district court's characterization of failure to request information as *de minimis* procedural error, but ruled agency failure to prepare Biological Assessment when it knew endangered species was present was agency error requiring injunctive relief).

2. *Biological Assessment*

If informal consultation or the Service response to a written request indicates that an endangered or threatened species may be present, the Act requires the agency to conduct a BA.[141] The BA evaluates the potential effects of the proposed action on listed and proposed endangered species and critical habitats to determine whether they are likely to be affected adversely by the action.[142] In addition, the BA is used to determine whether a "formal consultation"—for listed species—or "conference"—for proposed species—is necessary.[143]

Any person may prepare a BA under the supervision of the federal agency and in cooperation with the Service.[144] The BA is initiated by either a written request to the Director of the Service (Director) for listed or proposed species and habitat or a written notification that a listed species and habitat are being included in a BA. If the notice requests information, the Director must provide any information requested within thirty days.[145] A BA also may be part of an overall environmental assessment.[146]

De minimis violations of the procedures set forth above may not be grounds for setting aside or enjoining agency action.[147] However, "once an agency is aware that an endangered species may be present in the area of its proposed action, the [Act] requires it to prepare a biological assessment . . . ."[148] Failure to prepare the BA is grounds for injunctive relief.[149]

The contents of a BA are discretionary on the part of the agency contemplating action and depend on the nature of the agency's action.[150] Factors which may be considered for inclusion in a BA include the following: (1) the results of on-site inspections to determine if listed or proposed species are present; (2) the views of recognized experts on the species; (3) a review of literature and other information; (4) analysis of effects of the action on the species and habitat, including cumulative effects; and (5) an analysis of alternate actions.[151]

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141. 16 U.S.C. § 1536(c)(1) (1988); 50 C.F.R. § 402.12 (1989); *Peterson*, 753 F.2d. at 769.
142. 50 C.F.R. § 402.12(a) (1989).
143. *Id.*
144. *Id.* § 402.12(b)(1).
145. *Id.* § 402.12(c)-(d).
146. *See Peterson*, 753 F.2d at 763-764. In many instances an Environmental Assessment is used to comply with the National Environmental Policy Act of 1969, as well as the Endangered Species Act. *See* 16 U.S.C. § 1536(c)(1) (1988).
147. *See Peterson*, 753 F.2d at 763.
148. *See id.*
149. *See id.* at 764; *see also* 16 U.S.C. § 1540(g)(1)(A) (1988).
150. 50 C.F.R. § 402.12(f) (1989).
151. *Id.*

On completion of the BA, the agency contemplating action must submit it to the Director for review. Formal consultation may be initiated concurrent with the submission of the assessment.[152] The federal agency must use the BA in determining whether formal consultation or conference is required.[153] If an agency determines through a BA that an endangered species or a critical habitat may be affected by its actions, the agency must initiate formal consultation.[154] Formal consultation shall not be initiated by the agency until a BA has been completed and submitted to the Director of the Service in accordance with section 402.12, Code of Federal Regulations.[155]

3. Formal Consultation

Formal consultation is initiated by a written request to the Secretary which must include the following:

> (1) A description of the action to be considered;
> (2) A description of the specific area that may be affected by the action;
> (3) A description of any listed species or critical habitat that may be affected by the action;
> (4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
> (5) Relevant reports, including any environmental impact statement, environmental assessment or biological assessment prepared; and
> (6) Any other relevant available information on the action, the affected listed species or critical habitat.[156]

After a request to initiate formal consultation has been issued, the agency may make no irreversible commitment of resources to the action.[157]

The Service responsibilities during formal consultation include the following:

> (1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection

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152. *Id.* § 402.12(j). The Director must respond within 30 days as to whether or not he concurs with the findings of the BA. *Id.* § 402.14(i). The period for formal consultation is 90 days unless extended by consent of all parties. *Id.* § 402.14(e).

153. *Id.* §§ 402.10, .14.

154. *Id.* § 402.14(a).

155. *Id.* § 402.14(c).

156. *Id.*

157. 16 U.S.C. § 1536(d) (1988).

> of the action area with representatives of the federal agency and the applicant.
>
> (2) Evaluate the current status of the listed species or critical habitat.
>
> (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
>
> (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.[158]

The Service must discuss factors (1) through (3) with the acting agency and the applicant, as well as the basis for any finding in the biological opinion and availability of reasonable and prudent alternatives if, in the Service's opinion, the action is likely to jeopardize the continued survival of the species or harm its critical habitat in violation of section 7.[159] During formal consultation, the Service must formulate discretionary conservation recommendations which will assist the agency in reducing or eliminating the impacts that the action will have on the listed species or critical habitat.[160]

In formulating its biological opinion and any measures or alternatives indicated therein, the Service must use the best scientific and commercial data available. Appropriate consideration must be given to any beneficial actions taken by the agency or applicant. The Service should include any actions taken prior to the initiation of consultation in its study.[161]

The actual contents of the biological opinion as written must include the following:

> (1) A summary of the information on which the opinion is based;
>
> (2) A detailed discussion of the effects of the action on listed species or critical habitat; and
>
> (3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop

158. 50 C.F.R. § 402.14(g)(1)-(4) (1989).
159. 16 U.S.C. § 1536(a)(2) (1988); 50 C.F.R. § 402.14(g)(5) (1989).
160. 50 C.F.R. § 402.14(g)(6) (1989).
161. *Id.* § 402.14(g)(8).

such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.[162]

4. *Discussion of Cumulative Effects*

During formal consultation the Service must evaluate the overall "effects"[163] of the agency's contemplated action on the listed species or critical habitat.[164] This includes an evaluation of the action's "cumulative effects."[165] The biological opinion issued after formal consultation is only required to include a detailed discussion of the effects of the action on listed species or critical habitat, not the cumulative effects.[166]

The regulations use a complex definition for "effects." Briefly summarized, "effects" includes the following: (1) direct effects of the proposed action; (2) effects that are caused by the proposed action and are later in time, but which are reasonably certain to occur; (3) effects of actions that are part of the proposed action and depend upon the proposed action for their justification—*e.g.*, granting of rights-of-way to a construction site as dependent upon execution of a mitigation agreement; (4) when the proposed action is part of a larger planned action, "effects" includes effects of other actions which are also part of the larger planned action and which depend upon the larger planned action for their justification; and (5) effects of actions with no independent utility apart from the proposed action.[167] All

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162. *Id.* § 402.14(h).

163. *Id.* "Effects of the action" are

> the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Id. § 402.01.

164. *Id.* § 402.14(g).

165. Cumulative effects are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.* § 402.02.

166. *Id.* § 402.14(h)(2). The biological opinion must include "a detailed discussion of the *effects of the action* on listed species or critical habitat." *Id.* (emphasis added). Despite the possible interpretation that "effects" includes "effects" of the action as well as "cumulative effects," the two terms are not synonymous. *See, e.g.*, Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987) (articulating the difference between effects and cumulative effects as defined by the regulations).

167. 50 C.F.R. § 402.02 (1989).

these effects are considered in light of the cumulative effect of all past and contemporaneous federal, state, and private activities on the species or critical habitat in the area of the proposed action.[168] In contrast, "'cumulative effects' are those effects of *future State or private* activities, not involving federal activities, that are reasonably certain to occur"[169] within the area of the proposed action.[170]

If an action is authorized by a statute that "allows the agency to take incremental steps toward the completion of the action," the Service may, at the request of the agency, issue a biological opinion on the incremental step being considered, including its views on the entire action.[171] On the issuance of a biological opinion analyzing the effects of an incremental step toward the completion of the final action, the agency may proceed with or authorize the relevant incremental step if:

> (1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);
>
> (2) The federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;
>
> (3) The federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;
>
> (4) The incremental step does not violate section 7(c) of the Act concerning irreversible or irretrievable commitment of resources; and
>
> (5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.[172]

Arguably, the above language authorizes the agency to proceed incrementally while maintaining formal consultation upon the cumulative effects of the action. As stated above, even a biological opinion issued on an incremental step need not discuss cumulative effects, as long as the cumulative effects are considered in the ongoing formal consultation. Indeed, the effects [173] of each incremental step are added to the environmental baseline and must be discussed in each subsequent step's biological opinion.

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168. *Id.* (defining the "environmental baseline").

169. *Id.* (emphasis added).

170. *See* National Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979 (1976).

171. 50 C.F.R. § 402.14(k) (1989).

172. *Id.*

173. *See supra* note 143 and accompanying text (containing the requirements of the biological assessment).

B. *Incidental Take Permit*

When a "no jeopardy" biological opinion is issued, the opinion must include a statement concerning incidental take that specifies the following: the amount or extent of the incidental taking of the species, reasonable and prudent measures that the Director considers necessary or appropriate to minimize the previously-identified impacts, terms and conditions with which the agency or applicant must comply to implement the measures specified above, and the procedures to be used in handling or disposal of any individuals taken.[174] This statement, once issued, is the incidental take permit of section 7.[175]

The "reasonable and prudent measures" recommended to minimize the impact of incidental taking must be based on the best scientific data available and may not alter the basic design, location, scope, duration and timing of the action and may involve only minor changes. The agency or applicant undertaking the action must provide monitor reports to the Service.[176] "If during the course of the action the amount or extent of incidental taking . . . is exceeded, the Federal agency must reinitiate consultation immediately."[177]

C. *Exemption*

The Secretary must determine the following from consultation: (1) whether an irresolvable conflict exists between completion of the proposed project and preservation of the species or its critical habitat; (2) whether the applicant has consulted in good faith and has made a reasonable effort to develop and consider modifications or reasonable and prudent alternatives to the proposed agency action which will avoid jeopardizing the species or a critical habitat, and has conducted any biological assessment required of it; and (3) whether the applicant has refrained from making any irretrievable commitment of resources.[178]

If the answers to these questions are affirmative, the Secretary then submits a report to the Endangered Species Committee, discussing the following:

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174. 50 C.F.R. § 402.14(g)(7), (i) (1989). Such mitigation measures usually require on-going involvement by a federal agency, usually the Fish & Wildlife Service, even in instances where federal land is sold to private parties for development. In such circumstances, this on-going involvement may well be the federal nexus of "agency action" required for a section 7 permit.

175. *See* 16 U.S.C. § 1536(b)(4) (1988).

176. 50 C.F.R. § 13.45 (1989).

177. *Id.* § 402.14(i)(4).

178. 16 U.S.C. § 1536(g)(3) (1988).

> (A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;
>
> (B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;
>
> (C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and
>
> (D) whether the federal agency concerned and the exemption applicant refrained from making an irreversible or irretrievable commitment of resources.[179]

The Endangered Species Committee, composed of six heads of specified federal agencies and one person from each affected state designated by the President on recommendation of the state's governor,[180] may grant an exemption by a vote of at least five members, if it determines the following:

> (i) there are no reasonable and prudent alternatives to the agency action;
>
> (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
>
> (iii) the action is of regional or national significance; and
>
> (iv) neither the federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources.[181]

Any exemption granted also must require that reasonable mitigation measures, including live propagation, transplant action, and habitat acquisition, be adopted to minimize the adverse effects of the agency action.[182] Denial of an exemption application is deemed a final agency action,[183] and the Act expressly provides for direct review in the appropriate federal court of appeals.[184]

V. THE GRANTING OF REAL PROPERTY RIGHTS AS AGENCY ACTION

A section 7 permit cannot be employed unless there is agency action sufficient to trigger the statute. Arguably, the sale of certain real

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179. *Id.* § 1536(g)(5).
180. *Id.* § 1536(e)(3), (g)(2)(B).
181. *Id.* § 1536(h)(1)(A).
182. *Id.* § 1536(h)(1)(B).
183. *Id.* § 1536(g)(3).
184. *Id.* § 1536(n).

property rights by a federal agency might establish the requisite nexus. A review of the historic and current state of real property law leads to the conclusion that the categorization of various real property interests changes over time and is open to interpretation.

A. Principles of Real Property

The shape and structure of real property law in the United States can be traced back to the feudal system developed by William the Conqueror.[185] Real property rights resulted from the tenant's privilege of holding land under an overlord rather than owning the land,[186] and they consisted "in part of land for use and occupancy, and in part of a congerie of rights and privileges correlative to customary services and duties owed by the humbler tenants living within the manorial extent."[187] This system resulted in a land holder having both the status of tenant and lord.[188]

Under the later doctrine of estates, ownership was measured in terms of time.[189] The maximum allowed interest, the freehold estate in fee simple, had potentially infinite duration.[190] Out of this estate, the owner could create freehold and non-freehold estates of lesser duration, such as the estate for life, estate for years, and periodic estate.[191] Thus, an estate in land could be defined as a real property interest which is or may become possessory and is measured in terms of duration.[192] Both the outright sale and the leasing of real property could be categorized as the transfer of an estate in real property.

Non-possessory interests in real property, such as easements and rights-of-way, comprised a significant portion of real property rights by 1839.[193] An easement is commonly defined as a non-possessory interest in the real property of another.[194] The non-possessory status of an easement excludes it from the definition of an estate *per se*, but it remains an interest in real property, not a mere contractual right.[195] Similar non-possessory interests in real property include the right to remove oil and minerals from another's land, commonly called a

185. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 2 (1962).
186. W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 1 (1965).
187. C. MOYNIHAN, *supra* note 185, at 3.
188. W. BURBY, *supra* note 186, § 1.
189. C. MOYNIHAN, *supra* note 185, at 28.
190. *Id.*
191. *Id. See* RESTATEMENT OF PROPERTY § 9 comment d (1936).
192. RESTATEMENT OF PROPERTY § 9 (1936).
193. *See* Gale, *Preface* to S. MAURICE, GALE ON EASEMENTS at vii (1972).
194. W. BURBY, *supra* note 186, § 23.
195. J. BRUCE & J. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 1.01 (1988).

profit, and a right-of-way.[196] The conveyance of a right-of-way, for all practical purposes, creates an easement.[197]

The confusion over categorizing an interest in real property is intensified when there is a possessory grant of property for a specified purpose. In such cases, the granting clause in the deed apparently conveys a fee interest, but the instrument then provides that the specified land must be used for a particular purpose, such as a right-of-way or a road.[198] Although the transfer of a possessory interest in real property for a specific possessory use is generally viewed to create a fee simple absolute or a defeasible fee,[199] some courts have viewed certain rights-of-way as conveying a like interest.[200]

Nonetheless, whether a possessory estate or a non-possessory estate, whether a fee or an easement, all such categories share a common characteristic. They describe an interest in real property. The act which conveys a fee interest in real property or transfers a right-of-way interest in real property is essentially the same action. It effects the transfer of an interest in real property. As explained later, this characterization may be important to the applicant seeking a section 7 permit.

B. Disposal of Federal Property

The power to manage or otherwise dispose of federal real property has been vested in the hands of Congress since the inception of the republic.[201] The United States Supreme Court interpreted this constitutionally vested power over one hundred years ago as follows:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.[202]

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196. *Id.* ¶ 1.04[1]-1.06[1].

197. Macerich Real Estate Co. v. City of Ames, 433 N.W.2d 726, 728-29 (Iowa 1988).

198. J. BRUCE & J. ELY, *supra* note 195, ¶ 1.06[2]; *see generally* R. KRATOVIL & R. WARNER, REAL ESTATE LAW § 6.07(a) (8th ed. 1983).

199. J. BRUCE & J. ELY, *supra* note 195, ¶ 1.06[2][b].

200. *See generally* Coleman v. Missouri Pac. R.R., 745 S.W.2d 622 (Ark. 1988) (deeds to railroad found to convey fee rather than create easements); Safeco Title Ins. Co. v. Citizens & S. Nat'l Bank, 380 S.E.2d 477, 479 (Ga. App. 1989) (right-of-way deed conveyed a fee simple estate restricted to the perpetual use of the property solely as a road).

201. U.S. CONST. art. IV, § 3, cl. 2.

202. Gibson v. Chouteau, 80 U.S. 92, 99 (1871).

It is estimated that better than one-third of the nation's land is owned by the federal government.[203] A number of federal agencies exercise authority over the management of such federally owned real property. These agencies include the following: Department of Defense, Nuclear Regulatory Commission, General Services Administration, Federal Power Commission, Soil Conservation Service of the Department of Agriculture, National Forest Service of the Department of Agriculture, Geological Survey of the Department of Interior, Bureau of Land Management of the Department of Interior, National Parks Service of the Department of the Interior, and Fish and Wildlife Service of the Department of the Interior.[204] Most federal lands are under the management authority of the Bureau of Land Management (BLM).[205] For purposes of this article, the BLM is used as a model.

The management, use, and disposal of federal interest in real property by the BLM is governed by the Federal Land Policy and Management Act of 1976 (FLPMA).[206] In passing FLPMA, Congress declared it to be the policy of the United States to periodically and systematically inventory federal lands and plan their present and future use.[207] FLPMA charges the Secretary of the Interior (Secretary), through the BLM, with the management of most federal lands and the transfer of related real property rights.[208] Here, Congress has defined the term "right-of-way" to include easements, leases, and permits or licenses to occupy, use, or traverse public lands.[209]

More important than the actual definition of the term right-of-way is a criteria for the disposal of public land. This type transfer is effected either by outright sale or the granting of another real property interest, such as a right-of-way. The Secretary is authorized by Congress to grant right-of-way interests in a fashion similar to the conveyance in fee of such lands.[210]

Congress, through FLPMA, has mandated that the BLM take specific steps in the conveyance of public land in fee,[211] as well as the granting of leases and easements[212] and rights-of-way.[213] The granting

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203. 2 F. GRAD, *supra* note 36, § 12.01.
204. *Id.* § 12.02.
205. *Id.* § 12.01.
206. Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1784 (1988)).
207. *Id.* § 102, 90 Stat. 2743, 2744 (codified at 43 U.S.C. § 1701(a)(2) (1988)).
208. 43 U.S.C. § 1701 (1988).
209. *Id.* § 1702(f).
210. *See generally id.* §§ 1761-1771 (defining terms and procedures for government grant of right-of-way).
211. *Id.* § 1713; *see generally* 43 C.F.R. § 2711.1 (1989) (delineating public land sales procedures).
212. 43 C.F.R. § 2920.4-.5 (1989).
213. *See id.* § 2802.1-.5.

of all such real property interests by the BLM requires the review of applicable land use plans, a bidding or application process, a review of such bids or applications, and the actual granting of the real property right.[214] In short, the federal government, through the BLM, dispenses or conveys interests in real property through similar procedures, by the authority of a single act of Congress. The only real difference is the tendering of bids instead of applications.[215] With a few minor differences, the conveyance of real property interests by the federal government is largely treated in a uniform manner, whether that real property interest could be characterized as the conveyance of a possessory or a non-possessory interest. The action by the BLM, in either instance, is of the same character and scope—the granting of an interest in real property.

C. *The National Environmental Policy Act Analogy*

The primary issue in determining the applicability of section 7 to any given project is whether the requisite federal nexus of agency action exists.[216] Agency action is defined by the Act[217] and by Fish and Wildlife Service regulations,[218] but relatively little case law exists to show where the boundaries of agency action lie. The National Environmental Policy Act (NEPA),[219] like section 7, applies only in circumstances where federal action is contemplated.[220] Therefore, an analysis of the various circumstances found to constitute "action" under NEPA may be useful in analyzing section 7 of the Act.

The majority of actions which occur in the United States are beyond the reach of NEPA because these actions are not "federal."

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214. *Id.*

215. *Id.* §§ 2802.1-.5, 2902.4-.5.

216. *See* 16 U.S.C. § 1536(a)(1) (1988).

217. Agency action is "any action authorized, funded, or carried out by" the agency contemplating the applicability of section 7. *Id.* § 1536(a)(2).

218. Agency action is "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (1989).

219. 42 U.S.C. §§ 4321-4361 (1988).

220. However, NEPA is applicable only to "*major* Federal actions *significantly affecting the quality of the human environment.*" *Id.* § 4332(2)(C) (emphasis added). Nevertheless, whether a specific project or activity is federal action remains the primary threshold issue. Once federal action is established, the inquiry may proceed to determine if the action is "major" and "significantly affect[s] . . . the human environment." J. BONINE & T. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION § (B)(3), at 24-45 (1984). In analyzing the proposed action to determine whether it is "agency action," one should remember that the takings prohibition of the Endangered Species Act applies to private individuals and governments, whether local or national. 16 U.S.C. § 1538 (1988). Only section 7 requires the "agency action" nexus to be applicable to the permit process. *Id.* § 1536.

Nevertheless, it is clear that "federal action" is intended to be a broadly inclusive term and, as a result, a surprising number of state, local, or seemingly private actions have federal connections.[221] When the Department of Transportation decides to build a highway and pays ninety percent of the costs, the action is clearly federal.[222] NEPA also applies, however, when "federal action has enabled a project to come to fruition."[223] For example, federal money may impact an otherwise private development so substantially that the requirements of NEPA are imposed on the project.[224] Even a lease of land between private parties may entail a sufficient federal nexus to trigger NEPA if the lease requires government approval for some reason.[225]

Although federal action at some significant level triggers the procedural requirements of NEPA, agency inaction, even if discretionary, does not.[226] Thus, when federal agencies take active steps to sell federal lands to private entities for development, this action is seen as sufficient federal involvement for imposing NEPA's requirements.[227] Unfortunately, no case has considered whether the sale of federal land likewise triggers section 7 of the Act.

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221. *See* J. BONINE & T. MCGARITY, *supra* note 220, § (B)(3), at 24-25.

222. *Id.* Such a funding scheme would also make the highway project agency action under section 7. *See* 16 U.S.C. § 1536(a)(1) (1988). The source of the funds is not necessarily the controlling factor in determining whether any given project, built with federal money, is a federal project. Other factors include whether the agency has discretion to withhold the money, whether the agency has substantive review of the planning process and the amount and significance of the federal aid to the project. *See, e.g.*, Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979) (no federal action in state transportation project at systems planning stage); Ely v. Velde, 497 F.2d 252 (4th Cir. 1974) (state must comply with NEPA because of federal funding and contacts).

223. Natural Resources Defense Council, Inc. v. Hodel, 435 F. Supp. 590, 599 (D. Or. 1977), *aff'd*, 626 F.2d 134 (9th Cir. 1980) (agreement between Bonneville Power Administration (BPA) and private and public utilities and customers was federal action despite the fact that BPA had not planned, financed, or constructed power plant). *But see* Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants*, 60 VA. L. REV. 114, 135 (1974).

224. *See, e.g.*, Silva v. Romney, 473 F.2d 287, 289-91 (1st Cir. 1973) (the imposition of NEPA's requirement of analysis and disclosure of environmental impact deemed consistent with Congressional policy for developer "linked with a federal grantor" of mortgage guarantees and interest grants). *Cf.* 50 C.F.R. § 402.02 (1989) (included as "agency action" under section 7 of the Endangered Species Act are "all activities or programs . . . funded, or carried out, in whole or in part, by federal agencies.").

225. *See, e.g.*, Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (lease of Indian Pueblo's land to a developer requiring approval of Bureau of Indian Affairs held sufficient federal involvement to require preparation of Environmental Impact Statement under NEPA).

226. *See* Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980); Alaska v. Andrus, 591 F.2d 537, 590-92 (9th Cir. 1979).

227. *See, e.g.*, Rhode Island Comm. on Energy v. General Servs. Admin., 397 F. Supp. 41 (D.R.I. 1975) (GSA execution of conditional sales contract constitutes federal action).

D. *Granting of Real Property Rights Is Agency Action*

The Endangered Species Act defines agency action as "any action authorized, funded or carried out by such agency."[228] Although the federal courts have not provided a comprehensive definition of the term "agency action," or outlined any test for deciding whether an act should be considered "agency action" for purposes of the Act, there is a body of case authority which, when taken as a whole, outlines parameters which would include the sale of property by the federal government within the scope of the term "agency action."

In the landmark case of *Tennessee Valley Authority v. Hill*,[229] the Supreme Court gave the above statutory definition a broad scope. Chief Justice Burger, writing for the majority, indicated that not only prospective actions, but all actions contemplated by an agency are subject to the scrutiny of the Act.[230] In *Hill*, the Court found that the completion and operation of a dam which would eradicate the known population of an endangered species was agency action for purposes of section 7 of the Act.[231] According to the Court:

> One would be hard pressed to find a statutory provision whose terms are 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 an endangered species or "*result* in the destruction or modification of habitat of such species . . . ." This language admits of no exception.[232]

By the tone and conviction of the Court's opinion in *Hill*, it would appear that the sale of real property, being an action which is "carried out" and "authorized" by a federal agency, would come within the scope of the term "agency action." Although cases do not address the issue of agency action *per se*, there is federal case authority indicating that the conferring of lease rights, most notably in situations involving the sale of oil and gas leases, is agency action sufficient to invoke section 7 of the Endangered Species Act.

In *North Slope Borough v. Andrus*,[233] the District of Columbia Circuit held that the Department of Interior must undergo a section 7 consultation when leasing property rights for future oil and gas explo-

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228. 16 U.S.C. § 1536(a)(2) (1988).
229. 437 U.S. 153 (1978).
230. *Id.* at 173.
231. *Id.*
232. *Id.* (quoting 16 U.S.C. § 1536 (1976)).
233. 642 F.2d 589 (1980).

ration. Interestingly, the court came to this conclusion after deciding that the lease sale itself was just one step in the development of the area.[234] The court stated that "caution can only be exercised if the agency takes a look at all the possible ramifications of the agency action."[235]

In *Village of False Pass v. Clark*,[236] the Ninth Circuit found that the Outer Continental Shelf Lands Act, prescribed three distinct stages of offshore oil and gas activities: leasing, exploration, and development and production.[237] The court found that although the sale of an oil and gas lease was only one stage in this process, the granting of such lease rights alone did not conclusively indicate that the development and production stages would occur on the property. However, consultation under section 7 of the Act still applied to the granting of lease rights.[238]

Although these court decisions generally do not address the issue of whether a section 7 permit would be available in the individual fact situations, it can be inferred that section 7's full range of prohibitions, requirements, and available exemptions would apply. Moreover, it is important to note that in each of these cases, an agency of the federal government is granting a real property right to a private individual. It is the private individual's potential use of the real property right conferred which brings the Department of Interior's act within the realm of section 7. As stated by the court in *North Slope:*

> The relevant statutes—ESA, NEPA, OCSLA [Outer Continental Shelf Lands Act]—all insist on foresight. Evaluating an outer continental shelf project in the light of all contemplated and congruous actions merely reflects that "pumping oil" and not "leasing tracts" is the aim of congressional policy.[239]

Thus, a strong argument can be made that whenever a federal agency confers real property rights, whether lease rights, license rights, rights-of-way, or a sale in fee, the subsequent actions of the grantee in regard to real property rights must be taken into consideration during a federal agency's consultation with the Fish and Wildlife Service under section 7 of the Act. It then would follow that private

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234. *Id.* at 607.
235. *Id.* at 608 (quoting North Slope Borough v. Andrus, 486 F. Supp. 332, 351 (D.D.C. 1980)).
236. 733 F.2d 605 (9th Cir. 1984).
237. *Id.* at 609.
238. *Id.* at 609-12.
239. North Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980).

acts which result in the actual taking of an endangered species would be incidental to the same agency action. This would make such takings eligible for a section 7 taking permit granted by the Fish and Wildlife Service.

It should be noted that the far-reaching effects of an act of a federal agency have been found to come within the term "agency action" for purposes of the Act. In *Defenders of Wildlife v. Environmental Protection Agency*,[240] the Eighth Circuit found that the approval of certain pesticides for public use by the EPA was "agency action." Some of these approved pesticides resulted in the unauthorized taking of various endangered species. The court found that such takings were incidental to the EPA's action of approval, even though the pesticides in question were developed, produced, marketed, and actually used by private actors.[241] The court went on to point out that the EPA's actions could, in the future, be exempted by the Secretary pursuant to the granting of a section 7 incidental take permit.[242]

The Ninth Circuit dealt with the effects of the federal leasing of property for agricultural purposes in *Pyramid Lake Paiute Tribe of Indians v. United States Department of Navy*.[243] In *Pyramid Lake*, the Department of the Navy intended to lease property to private parties for agricultural purposes. This case did not deal directly with the issue of whether agency action existed. The court, however, did hold that the Navy acted properly in consulting with the Fish and Wildlife Service under section 7 of the Act where the agricultural use of the leased property in question contributed to the depletion of downstream water flows and the water level of a nearby lake which jeopardized a species of fish listed as endangered.[244] In effect, the court validated a situation where action by a private party which potentially impacts an endangered species not actually on the property concerned is brought within the scope of federal agency action pursuant to the granting of a real property right.

VI. CONCLUSION

The scope and effect of federal regulatory intervention on behalf of wildlife has grown since its birth in the Endangered Species Conservation Act of 1966. The initial effect of regulatory efforts was the prohibition of development in obvious wildlife areas. Recent designations

240. 882 F.2d 1294 (8th Cir. 1989).
241. *Id.* at 1301.
242. *Id.*
243. 898 F.2d 1410 (9th Cir. 1990).
244. *Id.*

of species of wildlife as threatened or endangered, however, have resulted in development prohibitions in urban and urban fringe areas. In addition, the interrelation between private and federal government interests in land ownership has blurred the distinction between private and federal development. Arguably, this may work to the advantage of the developer seeking an incidental take permit, because the Act provides a more expedient mechanism for permitting the incidental taking of threatened or endangered species when the taking is made pursuant to an act of the federal government.

Substantial precedent exists indicating that the granting of real property rights by way of easements, rights-of-way and leases, constitute sufficient federal agency action to bring otherwise private development within the scope of the section 7 permitting process. Thus far, the issue of granting real property rights in fee through an outright sale of real property has not been addressed directly when the section 7 consultation and permitting process has been invoked. This is largely due to the practice of granting ancillary rights-of-way or other lesser property rights along with the fee.

There is no basis, however, for making a distinction between the granting of various real property rights in determining whether or not federal agency action exists for purposes of the section 7 permitting process. The sale of property by the federal government to private industry or individuals for development is considered sufficient federal involvement to invoke similar NEPA provisions and requirements. Indeed, the actual mechanism to which federal agencies, such as the BLM, must adhere is strikingly similar when either selling real property or otherwise granting a lesser interest in property.

The scope of this application of section 7 is narrow. Section 7 obviously would not apply where one private individual attempts to develop land purchased from another private individual. Only when the land is under the control of the federal government during formal or informal consultation, and the necessary procedures are followed, will a private purchaser be able to make use of section 7. Furthermore, subsequent purchasers must seek exemption or the proper permits under section 10(a)'s more laborious procedures.

It appears, therefore, that an attempt to bring a private development within the scope of section 7 should be validated when the private development is on property purchased directly from the federal government. Although this fact situation is likely to be a case of first impression if challenged, the validity of invoking the section 7 process is supportable on a number of legal theories and is likely to be upheld. As a practical matter, land sold under the protection of a section 7 incidental take permit usually will require continuous monitoring or

implementation of mitigation measures. As long as the agencies are involved in these on-going actions, the legal sufficiency of a section 7 permit, even when the land is in private hands, seems beyond challenge.