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MaryJo Wlazlo

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ESA GIVES A "HOOT" ABOUT THE OWL:
FOREST CONSERVATION COUNCIL v.
ROSBORO LUMBER CO.

I. INTRODUCTION

Man's negative impact on the environment is one of the most controversial issues facing the United States today. The rising rate of species extinction, combined with pressing environmental concerns, has clashed with strong economic and social interests to produce a major topic of debate.¹ Stark warnings about the threat of wildlife extinction prompted Congressional enactment of legislation "to remedy the species decline and extinction problem."² The Endangered Species Act of 1973 (ESA or Act) was a result of Congress's concern of this issue.³ Despite Congress's efforts to protect and conserve endangered species, species extinction continues to progress at an alarming rate.⁴ In several recent crises, concern for

1. David P. Berschauer, *Is the "Endangered Species Act" Endangered?*, 21 Sw. U. L. REV. 991, 991-92 (1992). Berschauer notes that the concern about man's impact on the environment first became a major topic of public debate in the mid-1960s. *Id.* at 991. The debate continues today as various ideals and values surface by different people who all claim to be "environmentalists." *Id.* at 1000.

2. Keith Saxe, Note, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399, 408 (1988). In 1966, Congress began a course of action that focused on the threat of species extinction. *Id.*

Prior to passage of any legislation, Congress had repeatedly been warned about the severity and cause of the wildlife extinction problem:

[M]an and his technology has [sic] continued at an ever-increasing rate to disrupt the natural ecosystem. This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife. The truth in this is apparent when one realizes that half of the recorded extinctions of mammals over the past 2,000 years have occurred in the most recent 50-year period.

National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 386 (D. Wyo. 1987) (quoting *Hearings on Endangered Species before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 202 (1973) (statement of Assistant Secretary of the Interior Nathaniel P. Reed)).

3. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-44 (1994), as amended by 16 U.S.C.A. §§ 1531-44 (West Supp. 1995)).

4. "[P]rojections are that an average of 100 species per day will be vanishing by the end of the century." Rudy Abramson, *Wildlife Act: Shield or Sword?*, L.A. TIMES, Dec. 14, 1990, at A1. The destruction of habitat which has accompanied economic development has caused the decline and extinction of numerous species. See generally Saxe, *supra* note 2, at 399-408 (outlining historic decline of American wildlife to modern threats of wildlife survival). One author writes:

the protection afforded endangered species under ESA has violently collided with an industrial and developmental view that gives economic interests the highest priority.⁵

*Forest Conservation Council v. Rosboro Lumber Co.*⁶ illustrates a recent conflict between ESA and economic interests involving the Northern Spotted Owl and the timber industry.⁷ The issue addressed by the *Rosboro* court was whether ESA permits citizen suits alleging only a future injury to a protected species.⁸

Part II begins with a discussion of the statutory background that led to the enactment of ESA. Then, it addresses how prior courts have interpreted ESA; focusing particularly on the approaches courts have taken as to whether ESA authorizes injunctions against a future injury to a protected species. Part III discusses the circumstances of *Rosboro*. Parts IV and V analyze the Ninth Circuit's interpretation of ESA, and the court's holding that claims of a future injury to a protected species are actionable under ESA. Part VI considers the implications of *Rosboro* and the possible effects of the court's decision.

[B]y tomorrow morning we shall almost certainly have one less species on Planet Earth than we had this morning. It will not be a charismatic creature like the tiger. It could well be an obscure insect in the depths of some remote rainforest. It may even be a creature that nobody has ever heard of. But it will have gone. A unique form of life will have been driven from the face of the earth forever.

DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 7 (1989) (emphasis omitted) (quoting NORMAN MYERS, *THE SINKING ARK: A NEW LOOK AT THE PROBLEM OF DISAPPEARING SPECIES* 3 (1979)).

5. See generally Berschauer, *supra* note 1, at 1000-06 (discussing clash in values between conservation and preservation). One commentator suggested two extreme strategies for dealing with the major increase in species extinction in light of human progress and development. *THE PRESERVATION OF SPECIES* 3 (Bryan G. Norton ed. 1986).

One strategy is to press forward with the task of technologizing nature. On this strategy, the human species would strive to increase its independence from nature and natural systems by continuing to create artificial environments and replace the services now derived from natural ecosystems with services derived from technological sources. A second extreme strategy would be to retreat from technological progress, reverse the trend toward manmade environments, and try to save as much of as many remaining natural systems as possible.

Id.

6. 50 F.3d 781 (9th Cir. 1995).

7. For further discussion of the conflict between the Northern Spotted Owl and the timber industry, see *infra* note 190 and accompanying text.

8. *Rosboro*, 50 F.3d at 783.

II. BACKGROUND

A. Legislative Background

Prior to the enactment of the Endangered Species Act of 1973, two wildlife conservation acts had been passed. The first major Congressional concern for the preservation of endangered species was addressed by the Endangered Species Preservation Act of 1966.⁹ The Act authorized the Secretary of the Interior (Secretary) to identify the species threatened with extinction, and to acquire wildlife habitat lands for preservation.¹⁰ Three years later Congress enacted the Endangered Species Conservation Act of 1969, which continued the 1966 Act, while broadening federal involvement in the preservation of endangered species.¹¹

While the 1966 and 1969 Acts established the foundation for the federal protection effort, neither Act warranted notable practi-

9. S. REP. NO. 307, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. Prior to the 1966 legislation, federal involvement with endangered species had been quite limited. MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 318 (rev. & expanded ed. 1983). Various measures had previously been enacted (including Lacey Act of 1900, Black Bass Act of 1926, The Migratory Bird Treaty Act of 1918, and Land and Water Conservation Fund Act of 1965). *Id.* However, these laws were limited in terms of both the nature of wildlife protected and the nature of protection afforded. *Id.*; *see generally* Michael E. Field, *The Evolution of the Wildlife Taking Concept From Its Beginning To Its Culmination in the Endangered Species Act*, 21 Hous. L. Rev. 457 (1984) (tracing concept of wildlife "taking" as it appears in law from its earliest conception to its fullest expression under Endangered Species Act of 1973).

10. BEAN, *supra* note 9, at 319-20. The 1966 Act achieved a dual objective. S. REP. NO. 307, *supra* note 9, at 2, *reprinted in* 1973 U.S.C.C.A.N. at 2990. First, it authorized and directed the Secretary to originate and carry out a "comprehensive program to conserve, restore, and where necessary to bolster wild populations to propagate selected species of *native* fish and wildlife, including game and non-game birds, that he found to be threatened with extinction." *Id.* Second, the Act revamped the authorities of the Secretary relating to the management and administration of the National Wildlife Refuge System. *Id.*

The 1966 Act was a significant first step in the effort to protect species, but it had several limitations. BEAN, *supra* note 9, at 321. For example, the Act did not prohibit the "taking" of endangered species. *Id.* The Act did not restrict interstate commerce in endangered species, and it mandated very little habitat protection. *Id.* Finally, the Act applied only to native wildlife, extending no protection to foreign species. *Id.*

11. S. REP. NO. 307, *supra* note 9, at 2, *reprinted in* 1973 U.S.C.C.A.N. at 2990. Some of the deficiencies of the 1966 Act were remedied by the 1969 Act. The 1969 Act expanded the 1966 Act in at least three significant respects. *Id.* First, the 1969 Act authorized the Secretary to list species threatened with worldwide extinction, and to prohibit their importation into the United States. *Id.* Second, the Act adopted an indirect approach to the taking of endangered species by banning the transportation or sale of wildlife taken in violation of any federal, state, or foreign law. *Id.* at 2991. Third, the 1969 Act increased the amount authorized to be appropriated to acquire lands for "conserving, protecting, restoring, or propagating any endangered species." *Id.*

cal impact.¹² By 1973, both Congress and President Nixon realized that the existing Acts “ ‘simply [did] not provide the kind of management tools needed to act early enough to save a vanishing species.’ ”¹³ Despite the limited impact, the Conservation Acts of 1966 and 1969 certified that the federal government had a legitimate interest in the global protection of wildlife threatened with extinction.¹⁴

Various Congressional hearings and proceedings were held in 1973, which ultimately shaped Congress’s view of ESA.¹⁵ The proceedings were replete with expressions of concern regarding the alarming rate of wildlife extinction, and the risk that might lie in

12. See Jeffery P. Robbins, Note, 21 GA. J. INT’L & COMP. L. 575, 577 (1991). The statutes had several critical deficiencies. *Id.* For example, neither statute contained meaningful enforcement provisions; neither statute addressed habitat destruction - the greatest threat to endangered species; and neither statute expressly prohibited the “taking” of imperilled domestic wildlife. *Id.*; see also Saxe, *supra* note 2, at 409 (recognizing flaws inherent in prior Conservation Acts). Testimony offered at legislative hearings on ESA indicated that four requirements must be remedied for the bill to become effective:

(1) The bill must provide the Secretary with sufficient discretion in listing and delisting animals so that he may afford present protection to those species which are either in present danger of extinction or likely within the foreseeable future to become so endangered;

(2) the bill must provide protection throughout the nation for animals which are either endangered or threatened;

(3) the bill must lift the statutory restrictions that existing law places on authorization of monies for habitat acquisition from the Land and Water Conservation Fund Act, and extend to the Secretary land acquisition powers for such purposes from existing legislation; and

(4) finally, it became apparent in hearings that many established State agencies could in the future, or do now provide efficient management programs for the benefit of endangered species.

S. REP. NO. 307, *supra* note 9, at 3, reprinted in 1973 U.S.C.C.A.N. at 2991.

13. Saxe, *supra* note 2, at 409 (quoting President’s Environmental Message of February 8, 1972, 8 WEEKLY COMP. PRES. DOC. 218, 223-24 (Feb. 8, 1972)).

14. Robbins, *supra* note 12, at 578.

15. In 1972, new endangered species legislation was first introduced into both houses of Congress. ROHLF, *supra* note 4, at 23. The dominant theme of Congressional discussion was the need to devote whatever effort and resources were necessary to prevent further reduction of wildlife resources. George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 321 (1975). The Senate bill passed unanimously in July of 1973. ROHLF, *supra* note 4, at 24. An overwhelming majority of the House passed its version in September of 1973. *Id.* The Conference Committee adopted most of the House bill, but retained specific features of the Senate bill. Coggins, *supra*, at 321. The committee report was issued in December 1973, and adopted by both Houses without amendment. *Id.* On December 28, 1973, the President signed the Endangered Species Act of 1973 into law. *Id.* See generally ROHLF, *supra* note 4, at 23-24 (discussing Senate and House bills’ proposed legislation prior to ESA’s enactment); Coggins, *supra*, at 321-22 (examining Congressional discussion prior to ESA’s enactment).

the loss of any endangered species.¹⁶ “Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet.”¹⁷

B. Endangered Species Act of 1973

In 1973, Congress responded by enacting a revitalized Endangered Species Act.¹⁸ In its final version, ESA “represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹⁹ ESA not only serves to preserve and protect threatened wildlife, but also recognizes the vital need to preserve a habitat.²⁰

In developing legislation to protect species at risk, Congress found that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and

16. Typifying these concerns is the Report of the House Committee on Merchant Marine and Fisheries on H.R. 37; a bill which contained the essential features of the subsequently enacted Endangered Species Act of 1973. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178 (1978). The Report stated:

From the most narrow possible point of view, *it is in the best interests of mankind to minimize the losses of genetic variations*. The reason is simple: they are potential resources. They are keys to puzzles we cannot solve, and may provide answers to questions which we have not yet learned to ask.

To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulations in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed - or had it been driven out of existence before we knew its potentialities - we would never had tried to synthesize it in the first place.

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up . . . which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.

The institutionalization of that caution lies at the heart of H.R. 37.

Id. (quoting H.R. REP. NO. 93-412, pp. 4-5 (1973)) (alteration in original).

17. *Id.* at 178-79.

18. ESA §§ 2-18, 16 U.S.C. §§ 1531-44.

19. *Hill*, 437 U.S. at 180. One commentator described ESA as “‘the first federal statute to embody a truly comprehensive federal effort at wildlife preservation.’” Saxe, *supra* note 2, at 409 (quoting M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 17-18 (rev. ed. 1983)).

20. See ESA § 2(b), 16 U.S.C. § 1531(b) (describing purposes of ESA); see *infra* note 23 (providing statutory language of § 1531(b)); see Robbins, *supra* note 12, at 578; see also Lynda Graham Cook, Comment, *Lucas and Endangered Species Protection: When “Take” and “Takings” Collide*, 27 U.C. DAVIS L. REV. 185, 193 (1993) (noting that ESA demonstrates federal government’s desire to protect species).

conservation."²¹ Based on these findings and the fact that species preservation is of invaluable importance, Congress enacted ESA.²² As expressed by Congress in the opening paragraphs of ESA, conservation of species was a primary goal.²³

ESA contains several provisions that seek to protect and preserve the habitat of endangered species²⁴ and threatened species.²⁵ The Act authorizes the Secretary to maintain a list of all species in danger of extinction, and to determine whether any species of wildlife is endangered or threatened.²⁶ Once a species is listed as en-

21. ESA § 2(a)(1), 16 U.S.C. § 1531(a)(1). Additionally, Congress found that "other species . . . have been so depleted in numbers that they are in danger of or threatened with extinction." *Id.* § 2(a)(2), § 1531(a)(2).

22. "The Congress finds and declares that . . . these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* § 2(a)(3), § 1531(a)(3).

23. The stated purposes of ESA are twofold:

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

ESA § 2(b), 16 U.S.C. § 1531(b). For a description of endangered species, see *infra* note 24. For the definition of threatened species, see *infra* note 25.

In furtherance of these purposes, the federal legislature further declared that it is "to be the policy of Congress that all Federal departments and agencies *shall* seek to *conserve endangered species* and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." ESA § 2(c)(1), 16 U.S.C. § 1531(c)(1) (emphasis added). ESA specifically defines "conserve" as "to use and the use of *all methods and procedures which are necessary* to bring *any endangered species* or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 3(3), § 1532(3) (emphasis added).

24. ESA defines "endangered species" as:

[A]ny species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

ESA § 3(6), 16 U.S.C. § 1532(6). The term "species" is defined to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 3(16), § 1532(16). Species of wildlife that have been listed as endangered are located at 50 C.F.R. § 17.11 (1993).

25. ESA defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." ESA § 3(20), 16 U.S.C. § 1532(20). Species of wildlife that have been listed as threatened are located at 50 C.F.R. § 17.11 (1993).

26. ESA § 4(a), 16 U.S.C. § 1533(a). The key determination from which other consequences of ESA follow is the determination to list a species as endangered or threatened. BEAN, *supra* note 9, at 334. Due to the significance of that determination, ESA prescribes a detailed procedure to follow. *Id.* The listing process was revised in both the 1978 and 1982 Endangered Species Act Amendments. *See id.* at 335-36 (outlining changes in listing process and explaining reasons for

dangered, it automatically becomes subject to stringent protections under ESA.²⁷ ESA provides significant protection by making it a crime to “take” any plant or animal listed as an endangered species.²⁸

C. The “Taking” Prohibition Under ESA

Under ESA, the “taking” of endangered species is expressly forbidden.²⁹ This prohibition provides in pertinent part: “it is unlawful for *any person* subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.”³⁰ The Act broadly defines “take” as “har-

amendments). Under the current ESA, the Secretary determines whether a species is endangered or threatened by any one of the following factors: “the present or threatened destruction, modification, or curtailment of its habit or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.” ESA § 4(a)(1)(A)-(E), 16 U.S.C. § 1533(a)(1)(A)-(E). The Secretary also determines the geographical areas essential to the conservation of listed species, and designates as “critical habitat” those areas requiring special management. *Id.* § 3(5), § 1532(5). Once a species has been classified as endangered or threatened, the Secretary is instructed to “issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” *Id.* § 4(d), § 1533(d). Every five years the Secretary must review all listed species to determine whether the status of those species should be removed or changed. *Id.* § 4(c)(2), § 1533(c)(2).

27. Restrictions pertaining to endangered species include prohibitions against importation, exportation, sale or shipment in interstate commerce in the course of commercial activity, and possession of any species “taken” in violation of ESA. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1). All of the prohibitions apply automatically to endangered species, but none apply automatically to threatened species. BEAN, *supra* note 9, at 345. Rather, under ESA, the “Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such [threatened] species.” ESA § 4(d), 16 U.S.C. § 1533(d).

28. ESA § 9(a), 16 U.S.C. § 1538(a). For a discussion of penalties imposed on those who violate ESA’s various prohibitions, see *infra* note 38 and accompanying text.

29. ESA § 9(a)(1)(B)-(C), 16 U.S.C. § 1538 (a)(1)(B)-(C). ESA only prohibits the taking of endangered species of fish and wildlife, not the taking of threatened species of fish and wildlife. See generally Steven G. Davison, *Alteration of Wildlife Habitat As A Prohibited Taking Under The Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155 (1995) (discussing “takings” of endangered and threatened species). However, the Fish and Wildlife Service (FWS) has adopted a regulation that provides that it is unlawful for any person to take any listed threatened species of wildlife. See 50 C.F.R. § 17.31 (a) (1993).

30. ESA § 9(a)(1)(B), 16 U.S.C. § 1538 (a)(1)(B) (emphasis added). The term “person” is defined broadly as:

an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

ass," "harm," or one of several other enumerated descriptions.³¹ Although ESA does not define any of the terms included within the definition of the term "take," the Fish and Wildlife Service (FWS) has promulgated regulations defining the term "harm."³²

While ESA prohibits the taking of endangered species, Congress has enacted several extremely narrow exceptions to the taking prohibition.³³ In certain circumstances ESA may exempt a person from the Act's prohibition on takings involved in land development which modifies or destroys species' habitat.³⁴ For example, the Secretary may permit a taking of wildlife, otherwise prohibited by ESA,

Id. § 3(13), § 1532(13).

31. ESA § 3(19), 16 U.S.C. § 1532 (19). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.*

32. 50 C.F.R. § 17.3 (1994). "Harm" in the definition of "take" "means 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 FWS has also promulgated a regulation defining the term "harass." *Id.* "Harass" "means 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." *Id.*

The FWS's definition of "harm" recited above is a redefinition effective in 1981. See generally Davison, *supra* note 29, at 178-98 (discussing FWS's regulation defining "harm"). FWS's original regulation of "harm" was promulgated on September 26, 1975. *Id.* FWS's original promulgation defined "harm" as follows:

"Harm" in the definition of "take" in the [ESA] means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm"

Id. (quoting 50 C.F.R. § 17.3 (1975)). The 1975 definition was amended in 1981. For further discussion of the 1981 "harm" regulation and its accompanying legislative history, see *infra* notes 100-107 and accompanying text.

33. United States v. Billie, 667 F. Supp. 1485, 1488 (S.D. Fla. 1987) ("Congress has drawn several extraordinarily narrow exceptions to the [ESA's] prohibitions.")

34. See Davison, *supra* note 29, at 164-65 (discussing exemptions from ESA's "takings" prohibitions).

if the taking is incidental to lawful activities,³⁵ or if the taking is for scientific purposes.³⁶

Two types of enforcement are authorized for violations of ESA's prohibitions.³⁷ Public enforcement, through which criminal

35. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B). This provision states: "The Secretary may permit, under such terms and conditions as he shall prescribe . . . any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* To obtain an incidental "takings" permit, a person must present a habitat conservation plan (HCP) to the FWS that specifies -

- (i) the impact that will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

ESA §§ 10(a)(2)(A)(i)-(iv), 16 U.S.C. §§ 1539(a)(2)(A)(i)-(iv).

After opportunity for public comment, a permit will be issued if the Secretary finds the plan satisfactory, and determines that:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met.

ESA §§ 10(a)(2)(B)(i)-(v), 16 U.S.C. §§ 1539(a)(2)(B)(i)-(v); *see also* *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (discussing incidental "take" requirements and applying requirements to continued registration of strychnine pesticide). Although an incidental "takings" permit may allow land development to modify or destroy wildlife, submission of an HCP can be costly, complicated, and time-consuming. Davison, *supra* note 29, at 166 (citing Robert D. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 NAT. RESOURCES & ENV'T 21 (1993)). *See generally* Richard E. Webster, *Habitat Conservation Plans Under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243 (1987) (examining development and implementation of HCP in accordance with ESA).

36. ESA § 10(a)(1)(A), 16 U.S.C. § 1539(a)(1)(A). The statute provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe . . . any act otherwise prohibited . . . 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 . . ." *Id.*; *see also* ESA § 10(e), 16 U.S.C. § 1539(e) (permitting Indians, Aleuts, or Eskimos who are Alaskan Natives residing in Alaska and, in some circumstances, other non-native permanent residents of Alaskan native villages, to "take" endangered or threatened species, but only if "taking" is primarily for subsistence purposes and only subject to such regulations as Secretary may issue upon determination that such "taking" materially and negatively affect species).

37. *See generally* BEAN, *supra* note 9, at 373-74 (discussing public and private enforcement of ESA); Coggin, *supra* note 15, at 335-36 (discussing citizen suits under ESA).

or civil penalties are imposed, is monitored by the Secretary and the Department of Justice.³⁸ The power to enjoin ESA violations may also be exercised by private citizens under ESA's citizen suit provision.³⁹ This liberal citizen suit provision authorizes any person to enjoin any other person from violating a provision of the Act.⁴⁰

D. Development of Case Law

The courts reacted rapidly to the enactment of ESA.⁴¹ Early judicial interpretation supported a narrow reading of the Act's lan-

38. Penalties are imposed on those who violate ESA's various prohibitions. BEAN, *supra* note 9, at 346-48. Penalties differ depending on the violator's state of knowledge, whether the violation concerns an endangered or threatened species, and in some instances, the violator's business. *Id.* Penalties include fines up to \$50,000; imprisonment; possible revocation or suspension of federal leases, permits, or licenses; and forfeiture of any guns, equipment, vessels, aircraft or vehicles used in the unlawful activity. See ESA § 11, 16 U.S.C. § 1540. The Act also authorizes the Attorney General to seek injunctive relief against violators. *Id.* § 11(e)(6), § 1540(e)(6). "The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of [ESA] or regulation issued under authority thereof." *Id.*

39. ESA's citizen suit provision is located at ESA § 11(g), 16 U.S.C. § 1540(g). See *infra* note 40 (providing statutory language of citizen suit provision).

40. ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A).

[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is *alleged to be in violation* of any provision of [ESA] or regulation issued under the authority thereof.

Id. (emphasis added). The citizen suit provision also authorizes suits to compel the Secretary to perform any nondiscretionary duty with respect to the listing of species. *Id.* § 11(g)(1)(C), § 1540(g)(1)(C).

Before anyone may commence a civil suit, ESA requires that she or he give written notice of an intention to do so to the Secretary and alleged violators. *Id.* § 11(g)(2)(A), § 1540(g)(2)(A). This enables the Secretary to begin appropriate action against the alleged violator, or if the Secretary himself is the alleged violator, to remedy the violation. BEAN, *supra* note 9, at 374. ESA specifies that notice must be given at least 60 days prior to commencing a suit. ESA § 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i). For various reasons, many courts have not required strict compliance with this time restriction. BEAN, *supra* note 9, at 374 (discussing courts' justifications for ignoring this requirement, including: newness of statute; compliance with spirit of notice requirement; waiver by defendants; and assertion that citizen suit provision is not sole remedy for ESA violations). Finally, the citizen suit provision authorizes the award of attorney's fees and other litigation costs to any party, whenever a court determines such award to be appropriate. ESA § 11(g)(4), 16 U.S.C. § 1540(g)(4).

41. Environmental organizations sensed ESA was a new tool they could utilize to further their goals and they acted quickly. Robbins, *supra* note 12, at 579. For example, nine months after ESA was enacted, the Sierra Club amended its complaint in *Sierra Club v. Froehlke*, 392 F. Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976), to allege a violation of ESA. *Id.* at n.32. In *Froehlke*, the Sierra Club filed suit to halt construction of the Meramac Park Lake Dam Project in Missouri. *Froehlke*, 392 F. Supp. at 131. Sierra Club claimed that the project would

guage which allowed the courts to construe ESA "reasonably."⁴² Subsequent courts, however, broadly interpreted ESA, ruling that Congress intended endangered species to be granted the highest priority.⁴³ The broad interpretation theory was brought before the Supreme Court in *Tennessee Valley Authority v. Hill*.⁴⁴ In that case, the Supreme Court affirmed the Sixth Circuit's holding that the plain language and legislative history of ESA warranted an expansive interpretation.⁴⁵ *Hill* represented the Supreme Court's approval of the broad interpretation given ESA by a majority of the recent judicial opinions.⁴⁶

In addition to providing precedent for future courts as to the proper interpretation of ESA, *Hill* significantly impacted the debate of whether ESA authorizes suits that allege only *future* injury to protected wildlife. Conflict between ESA and "progress" was inevitable, and arose dramatically in *Hill*.⁴⁷ The Supreme Court determined that the plain language of ESA required halting the completion of a \$100 million dam to save the snail darter, a plain three-inch fish.⁴⁸

jeopardize the existence of the endangered Indiana bat by destroying its habitat. *Id.* at 143.

42. See *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). In the appellate court decision of *Froehlke*, the Eighth Circuit stressed that ESA must be construed reasonably. *Id.* at 1304. The court ultimately held that since only a few bats would be affected, no violation of the Act existed. *Id.* at 1305. The narrow reading of the Act's language permitted the court to ensure a "reasonable" outcome. See *id.* at 1301.

43. See *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 169-70 (D.D.C. 1977) (construing ESA broadly so that FWS regulations governing hunting of migratory game birds were held invalid).

44. 437 U.S. 153 (1978). In *Hill*, citizens and conservation groups sued the TVA to permanently halt the completion of an 80% constructed dam over the Little Tennessee River. *Id.* at 172. The group alleged that completion of the dam would stop the free flow of waters, and destroy the critical habitat of the snail darter - a three inch long fish that lived in the waters of the Tennessee River. *Id.* at 158. They further alleged that the dam would put the existence of the species in jeopardy. *Id.* at 166.

45. The Court emphasized that "[t]he plain intent of Congress in enacting the statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.* at 184.

46. *Id.*

47. For a discussion of the facts in *Hill*, see *supra* note 44 and *infra* note 48.

48. *Hill*, 437 U.S. at 172-73. The Secretary formally listed the snail darter as an endangered species, on October 8, 1975. *Id.* at 161. It was noted that "the snail darter is a living entity which is genetically distinct and reproductively isolated from other fishes." *Id.* (quoting Fed. Reg. 47505 (1975)). The Secretary determined that the snail darter lives only in the portion of the Tennessee River which would be completely inundated as a consequence of the construction of the dam. *Id.* The Secretary subsequently declared the area of the river which would be affected by the dam to be the "critical habitat" of the snail darter. *Id.* at 162. Even though TVA had expended billions of dollars in the dam project, and neared com-

In reaching its decision, the Court adopted a standard that prioritizes preservation of endangered species, instead of applying the traditional test of balancing parties' interests.⁴⁹ The Court noted that Congress has made it "abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."⁵⁰ Consequently, the Court did not require the plaintiffs to establish that defendant's activities had already killed or injured a snail darter.⁵¹

Since *Hill*, courts have taken various approaches in determining whether ESA authorizes injunctions against a future injury to a protected species.⁵² The debate often focuses on ESA's definition

pletion, the Supreme Court ordered the lower court to issue a permanent injunction to halt the dam's operation, since it threatened to destroy the snail darter's critical habitat. *Id.* at 172.

49. The Court stated that the "language, history, and structure" of ESA demonstrated Congress' determination that the balance of hardships and the public interest tip heavily in favor of endangered species. *Id.* at 174, 187-88, 194-95. "Thus, Congress removed from the courts their traditional equitable discretion in injunction proceedings." *Friends of the Earth v. United States Navy*, 841 F.2d 927, 933 (9th Cir. 1988). " 'We may not use equity's scales to strike a different balance.' " *Id.* (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)).

50. *Hill*, 437 U.S. at 194; see also Berschauer, *supra* note 1, at 997 n.48 ("[E]conomic interests must yield to the conservation of an endangered or threatened species when a determination has been made that a species will be "taken" . . . as defined under the Act").

Hill has repeatedly been cited by subsequent courts to demonstrate the weight Congress placed on the protection of endangered and threatened species. *E.g.*, *Fund for Animals, Inc. v. Turner*, No. CIV.A.91-2201 (MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991) (mem.). In *Fund for Animals*, plaintiffs sought to enjoin defendants from authorizing a sport hunt of the grizzly bear in Northwestern Montana. *Id.* at *1. It was estimated that three bears would be "taken" during the hunt. *Id.* at *8. Even though there was not even a remote possibility that the hunt would eradicate the species, the court concluded that Congressional intent of ESA must prevail. *Id.* (citing *Hill*, 437 U.S. at 174). In light of the Congressional mandate, the court concluded that the possible loss of only a few grizzly bears "taken" through the hunt, amounted to a significant and irreparable "harm." *Id.* Accordingly, the court issued an order enjoining federal defendants from authorizing the sport hunting of grizzly bears. *Id.* at *9.

51. *Hill*, 437 U.S. 153 (1978). Evidence that showed the dam would destroy the snail darter in the future provided sufficient basis for the injunction. *Id.* In 1978, Congress responded to the *Hill* decision by amending ESA. See Endangered Species Act Amendments of 1978, Pub. L. No. 95632, 92 Stat. 3751. Although the amendments provided an exemption process for projects deemed to be of overwhelming importance, the Tellico Dam project did not pass the process. See ESA § 7(h), 16 U.S.C. § 1536(h); see also Richard E. Webster, *Habitat Conservation Plans under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243, 246 n.22 (1987) (noting that ultimately, legislation permitted dam to be completed). Despite the exemption process provision of ESA, the strength of *Hill* continues today. *Id.* at 246.

52. For a discussion of the various approaches courts have taken in determining whether ESA authorizes injunctions against a future injury to a protected species, see *infra* notes 54-79 and accompanying text.

of "take," and the scope of the term "harm," as defined in the "taking" definition.⁵³

There has been considerable conflict among the courts regarding the validity of enjoining actions that pose a future or imminent threat of injury to protected species. Several cases support the conclusion that Congress intended to authorize plaintiffs to enjoin such actions, while other cases appear to prohibit such a conclusion.⁵⁴ In other cases, it remains uncertain whether a court would enjoin an action that poses a future threat of injury.⁵⁵

A frequently cited Ninth Circuit opinion supports the assertion that ESA authorizes petitioners to enjoin an imminent threat of injury to endangered species. In *Palila v. Hawaii Department of Land & Natural Resources*,⁵⁶ the court held that habitat degradation that *could* result in extinction of an endangered species constituted harm, and thus, a taking within the meaning of ESA.⁵⁷ In *Palila*, the Sierra Club and other environmental parties brought an action under ESA on behalf of the Palila.⁵⁸ The plaintiffs claimed that the State's practice of maintaining sheep in the Palila's critical habitat

The precise issue in *FCC v. Rosboro Lumber Co.*, the case at issue in this Note, is "whether the district court correctly interpreted ESA to foreclose *citizen suits* that only allege a *future* injury to a protected species." 50 F.3d 781 at 783. For a discussion of ESA's citizen suit provision, see *supra* notes 39-40 and accompanying text. No other court has addressed precisely whether ESA § 11(g) (citizen suit provision) precludes suits over wholly future ESA provisions. Brief for Appellee at 26, *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995) (No. 94-35070) [hereinafter *Brief for Appellee*].

53. For a definition and discussion of the term "take" under ESA, see *supra* notes 29-31 and accompanying text. For a definition and discussion concerning "harm," see *supra* note 32 and accompanying text.

54. For a discussion of cases supporting the conclusion that Congress intended to enjoin actions that pose a future threat of injury to protected species, see *infra* notes 56-64 and accompanying text. For a discussion of cases that prohibit the assertion that Congress intended such enjoinder, see *infra* notes 65-74 and accompanying text.

55. These cases that appear uncertain as to whether a court would enjoin an action that posed a future threat of injury to a protected species involve ongoing or continuous violations of ESA. See *infra* note 79 (discussing cases of ongoing ESA violations). Since those cases involve a past violation that continued into the future, it is difficult to determine whether the court would hold similarly if no violation occurred.

56. 852 F.2d 1106 (9th Cir. 1988). *Contra* Sweet Home Chapter of Communities for a Greater Or. v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), *modifying per curiam* 1 F.3d 1 (D.C. Cir. 1993), *rev'd*, 115 S. Ct. 2407 (1995).

57. 852 F.2d at 1110.

58. The Palila is a six-inch long finch-billed bird found only on the slopes of Mauna Kea on the Island of Hawaii. *Id.* at 1107. As an endangered species under ESA, the bird has legal status and can "wing[] its way into federal court as a plaintiff in its own right." *Id.*

constituted an unlawful taking under ESA.⁵⁹ The circuit court concluded that habitat destruction which could drive the Palila to extinction falls within the interpretation of harm.⁶⁰

59. *Id.* The plaintiff's original action claimed that feral goats and sheep that were allowed to run wild in the Palila's critical habitat amounted to a "taking" under ESA. *Id.* The district court found in favor of plaintiffs, and ordered the Department to remove the animals because they were destroying the mamane-naio woodlands, upon which the Palila depend. *Id.* In 1984, plaintiffs reopened the original proceeding, by amending its complaint, to add mouflon sheep as destructive animals to be removed from the Palila's habitat. *Id.* In 1986, the district court ruled in favor of plaintiffs finding that the presence of the sheep "harmed" the Palila within the meaning of 50 C.F.R. § 17.3. *See id.*; *see supra* note 32 and accompanying text discussing the C.F.R. definition of "harm." The Ninth Circuit affirmed the district court's finding, but for reasons different than those stated in the district court's opinion. *Palila*, 852 F.2d at 1107, 1110.

60. *Palila*, 852 F.2d at 1108. The State Department of Land and Natural Resources (Department) contended that the district court construed the definition of "harm" in 50 C.F.R. § 17.3 too broadly. *Id.* at 1107-08. The Department argued that "actual harm" only includes those activities which result in immediate destruction to the Palila; thus, challenging the finding that habitat destruction which *could* drive the Palila to extinction constituted harm. *Id.* at 1108. The Ninth Circuit confronted this issue recognizing that the scope of the definition of "harm" was significant since it "sets the limit on what acts . . . violate the [ESA's] prohibition against "taking" an endangered species." *Id.* In reaching its conclusion, the court focused on the Secretary's promulgations of a revised definition of harm. *Id.* In the promulgation notice, the Secretary let stand the district court's interpretation of harm. *Id.* (construing harm to include habitat destruction that could result in extinction of Palila). For a discussion of the Secretary's original 1975 promulgation of "harm," and 1981 amended version of "harm," *see supra* note 32.

The Ninth Circuit further supported the Secretary's interpretation of "harm" because it follows the plain language of ESA, serves the overall purpose of ESA, and is consistent with the policy of ESA as evidenced by the legislative history. *Palila*, 852 F.2d at 1108. *Contra Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *modifying per curiam*, 1 F.3d 1 (D.C. Cir. 1993), *rev'd*, 115 S. Ct. 2407 (1995).

While the Ninth Circuit determined in *Palila* that the FWS's "harm" definition was a permissible interpretation of ESA, *Sweet Home* rejected *Palila*, creating a split among the Circuits. *Sweet Home*, 17 F.3d at 1478. On March 11, 1994, the D.C. Circuit held the FWS's "harm" regulation invalid. *Id.* at 1472. In that case, *Sweet Home* Chapter of Communities for a Greater Oregon, and other parties who were dependent on the forest products industry had previously sued to invalidate a number of FWS regulations under ESA. *Id.* at 1464. Originally, the United States District Court for the District of Columbia found the regulations valid, and plaintiffs appealed. *Id.* The Court of Appeals affirmed. 1 F.3d 1 (D.C. Cir. 1993). On petition for rehearing, the D.C. Circuit held that the FWS regulation defining "harm" was invalid. 17 F.3d at 1472. The court found that the "harm" definition was neither clearly authorized by Congress nor a "reasonable interpretation" of the statute. *Id.* at 1464 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). *Sweet Home* was thus in direct conflict with *Palila*. *Id.* at 1478; *see also Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1313 (W.D. Wash. 1994) (noting conflict in circuits created by *Sweet Home*). On June 25, 1995, the Supreme Court reversed the *Sweet Home* decision. 115 S. Ct. 2407 (1995) (upholding Secretary's definition of "harm"). *See generally*, Dr. Nancy Grief, *Is Habitat Modification that Kills or Injures Endangered Wildlife a Prohibited Taking Under the Endangered Species Act?*, 35 NAT. RESOURCES J. 189 (1995) (discussing *Palila* decisions in conjunction with *Sweet Home* decisions).

Further support that a mere likelihood of future injury is sufficient to state a "harm" violation and obtain an injunction is found in *National Wildlife Federation v. Burlington Northern Railroad, Inc.*⁶¹ In *Burlington*, petitioners claimed that the actions of Burlington Northern Railroad, Inc. (Burlington) constituted a prohibited "taking" under ESA.⁶² The Ninth Circuit held that to prevail under a takings argument, petitioners must prove that there is a reasonable likelihood of future harm to the protected species.⁶³ The court concluded that it is not necessary to show future harm with "certainty;" however, it is necessary to show that future harm is "sufficiently likely."⁶⁴

Other cases have taken a stricter approach in determining what is necessary to constitute enjoinable harm. These cases demand proof that a defendant's actions caused actual harm to wild-

61. 23 F.3d 1508 (9th Cir. 1994).

62. *Id.* at 1509. In 1988-89, three Burlington trains carrying corn derailed in northwestern Montana, spilling approximately 10,000 tons of corn. *Id.* at 1510. The corn spill attracted grizzly bears to the site to feed. *Id.* By October 1990, at least seven bears in northwestern Montana were killed by the Burlington trains. *Id.*

The National Wildlife Federation (NWF) and Great Bear Foundation filed suit, claiming that Burlington's acts constituted a "taking" of grizzly bears in violation of ESA. *Id.* at 1509-10. NWF alleged that Burlington violated ESA when the trains struck and killed the grizzlies, which were allegedly attracted to the corn supply. *Id.* NWF further claimed that the corn spills violated ESA by modifying grizzly bear feeding behavior and "harming" the grizzlies and their habitat. *Id.*

63. *Id.* at 1509. The Ninth Circuit agreed that the bear fatalities constituted a "prohibited taking" under ESA, but concluded that NWF did not demonstrate enough likelihood of future injury to the bears to justify an injunction. *Id.* *Burlington* was a preliminary injunction case, however, the principles are applicable to cases under ESA. See *id.* at 1510 (discussing preliminary injunctions under ESA).

64. *Id.* at 1512. The court clarified:

We are not saying that a threat of extinction to the species is required before an injunction may issue under ESA. This would be contrary to the spirit of the statute, whose goal of preserving threatened and endangered species can also be achieved through incremental steps. However, what we require is a definitive threat of future harm to protected species, not mere speculation.

Id. at 1512 n.8; see also *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995), *appeal dismissed sub nom.* *Marbled Murrelet v. Babbitt*, 61 F.3d 911 (9th Cir. 1995). In *Marbled Murrelet*, the Environmental Protection Information Center, Inc. (EPIC) and the marbled murrelet, an endangered seabird, brought suit against Pacific Lumber Co. (Pacific) to enjoin the implementation of Pacific's timber harvest plan. *Id.* at 1344. Plaintiffs contended that Pacific's harvesting of 137 acres in the marbled murrelet's habitat would result in a taking of the species. *Id.* at 1345. The District Court asserted that to prevail in an injunctive action under ESA, "[f]uture harm to a species need not be shown with certainty . . . but 'mere speculation' will not suffice." *Id.* at 1367 (quoting *Burlington*, 23 F.3d at 1512 n.8). Since plaintiffs established that Pacific's proposed timber harvest would impose a definite threat of future harm to the marbled murrelet, the court ordered the permanent injunction. *Id.*

life.⁶⁵ A notable decision issued by the First Circuit, *American Bald Eagle v. Bhatti*, held that even a “significant risk” of future injury is not harm and does not allow an activity to be enjoined.⁶⁶ In this case, the court dismissed an ESA taking claim, that deer hunting should be enjoined due to the potential risk to threatened bald eagles.⁶⁷ The court concluded that the proper standard for establishing a taking under ESA has been “unequivocally defined as a showing of ‘actual harm.’”⁶⁸

Adopting a restrictive view of “taking,” additional courts have dismissed “future risk of takings claims,”⁶⁹ and others have required

65. See cases cited *infra* notes 66-74 and accompanying text.

66. 9 F.3d 163 (1st Cir. 1993).

67. *Id.* at 166-67. The Massachusetts Division of Fisheries and Wildlife operates a restoration project for bald eagles on Quabbin Reservation. *Id.* at 164. Legislation was enacted by the State of Massachusetts to permit a limited deer hunt at Quabbin under the Metropolitan District Commission’s authority. *Id.* Appellants filed suit to enjoin the limited deer hunt, on the ground that it constituted a prohibited taking of the bald eagle, an endangered species, under ESA. *Id.* Appellants alleged that:

[S]ome of the deer shot by hunters during the Quabbin hunt would not be recovered but would die thereafter within the feeding area of the Quabbin bald eagles; these deer . . . would contain lead in their bodies from the lead slugs used by the hunters as ammunition; and bald eagles would feed on these unrecovered deer carcasses, consume a portion of the lead in the deer, and be harmed by the lead.

Id. The district court denied the preliminary injunction concluding that appellants failed to show a reasonable likelihood of success on the merits. *Id.* An appeal followed, and the First Circuit affirmed. *Id.* at 167.

68. *Id.* at 165. Appellants asked the court to establish a numerical standard for determining which actions constitute a “taking” of protected wildlife. *Id.* The First Circuit rejected the request, finding nothing in ESA, its regulations, or legislative history to support an arbitrary numerical standard. *Id.* The court, instead, held that “[c]learly . . . for there to be ‘harm’ under the ESA, there must be *actual* injury to the listed species.” *Id.* at 166 (emphasis added). Since there was no evidence in the record of harm to the bald eagles from the deer hunt, the court dismissed the action. *Id.*

The First Circuit applied a strict interpretation of ESA, and rejected the district court’s liberal interpretation. *Id.* The district court stated that in order for plaintiffs to prevail they must show that the deer hunt posed a significant risk of harm to the bald eagle. *Id.* at 166 n.5. The First Circuit expressly rejected this liberal requirement, adopting a more demanding burden. *Id.* at 166 & 166 n.5 (“By requiring the plaintiffs to show only a ‘significant risk of harm’ instead of ‘actual harm,’ the district court required a lower degree of certainty of harm than we interpret the ESA to require.”).

69. See *Morrill v. Lujan*, 802 F. Supp. 424, 430 (S.D. Ala. 1992) (denying injunction in ESA citizen suit where there was no proof that “defendant[’s] [construction] project will constitute a ‘taking’ of the Perdido Key beach mouse”) (emphasis added); *State of California By and Through Brown v. Watt*, 520 F. Supp. 1359, 1387-88 (C.D. Cal. 1981), *aff’d in part*, 683 F.2d 1253 (9th Cir. 1982), *rev’d on other grounds*, 464 U.S. 312 (1984) (noting that “threat [of a taking] would still not constitute a ‘taking’ under the [ESA]” because “in prohibiting ‘taking,’ the draftsmen of the [ESA] envisioned a more immediate injury”); *North Slope Borough v. Andrus*, 486 F. Supp. 332, 362 (D.D.C. 1979), *aff’d in part, rev’d in part*, 642 F.2d

actual injury to wildlife to constitute a prohibited "taking."⁷⁰ In *Pyramid Lake Paiute Tribe of Indians v. United States Department of Navy*,⁷¹ the Ninth Circuit rejected an ESA "taking" claim where the plaintiff did not prove that the challenged action "actually caused" any injury to the cui-ui, an endangered species of fish.⁷² On account of the evidence failing to demonstrate that defendant's actions had harmed the cui-ui, the court concluded that there was no "taking" under ESA.⁷³ In dismissing ESA claims without considering future "takings," several cases, including prevalent Ninth Circuit opinions, have determined that "harm" itself requires proof of a current injury.⁷⁴

Jurisprudence focusing on citizen suits under ESA has been sparse.⁷⁵ The Supreme Court has not ruled on ESA's citizen suit provision. However, the Court interpreted identical language in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*.⁷⁶ In *Gwaltney*, the Supreme Court construed the meaning of the citizen

589 (D.C. Cir. 1980) (emphasizing that ESA "do[es] not require the government to halt all activity merely because there is a possibility that agency action will result in a 'taking' at some future time") (emphasis added); cf. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (rejecting argument that immediate injury is necessary to constitute ESA "taking").

70. See *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990).

71. 898 F.2d 1410 (9th Cir. 1990).

72. *Id.* at 1420. The Pyramid Lake Paiute Tribe of Indians alleged that the Navy's practice of leasing acreage and contiguous water rights to local Nevada farmers was in violation of ESA. *Id.* at 1412. The Indians alleged that this practice seriously threatened the continued viability of an endangered species of fish, the cui-ui, by contributing to a significant decrease in the water level of Pyramid Lake. *Id.* at 1420-21. The district court held that the Navy's actions were not in violation of the Act, and the Tribe appealed. *Id.* at 1414.

73. *Id.* at 1420 ("Because the evidence does not demonstrate that the Navy's outlease program has 'harmed' the cui-ui, we note that there is no 'taking' under [ESA]."); see also *Pacific Northwest Generating Coop. v. Brown*, 25 F.3d 1443 (9th Cir. 1994), amended, 38 F.3d 1058 (9th Cir. 1994) (court refused to ban all salmon fishing as ESA "takings" where there was only potential risk that any given fish harvesting operation would "take" protected salmon species).

74. See *Pyramid Lake*, 898 F.2d at 1420; see also *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 939-40 (D. Mont. 1992) ("harm" requires proof that challenged action "is actually killing or injuring grizzly bears"); *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 389 (D. Wyo. 1987) (dismissing grizzly bear taking claim at summary judgement where "there were no bear mortalities" over past year).

75. For a discussion of the citizen suit provision of ESA, see *supra* notes 39-40 and accompanying text. The citizen suit provision only provides jurisdiction over a suit against a person "who is alleged to be in violation" of ESA. ESA § 11(g), 16 U.S.C. § 1540(g).

76. 484 U.S. 49 (1987).

suit provision of the Clean Water Act.⁷⁷ The Court held that the most natural reading of the language in the citizen suit provision requires “plaintiffs [to] allege a state of either continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”⁷⁸ Cases following *Gwaltney* have adopted a similar approach.⁷⁹

III. FACTS

In 1992, Rosboro Lumber Company (Rosboro) applied for a permit to harvest timber located on private lands in Oregon.⁸⁰ The Oregon Department of Forestry granted the permit, but noted that the proposed activity would occur on land adjacent to the 1991 nesting site of a pair of Northern Spotted Owls.⁸¹ To cut the timber

77. Under the Clean Water Act, “private citizens may commence civil actions against any person ‘alleged to be in violation of’ the conditions of either a federal or state . . . permit.” *Gwaltney*, 484 U.S. at 54 (quoting 33 U.S.C. § 1365(a)(1)) (emphasis added). Comparing the citizen suit provision of the Clean Water Act with the citizen suit provision of ESA, it is apparent that the language contained in both provisions is virtually identical. See ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A) (ESA’s citizen suit provision). “[A]ny person may commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of [ESA].” *Id.* (emphasis added). For further discussion of ESA’s citizen suit provision, see *supra* notes 39-40 and accompanying text.

78. *Gwaltney*, 484 U.S. at 58. The Supreme Court held that the Clean Water Act does not permit citizen suits for wholly past violations. *Id.* at 65. While the fact pattern in *Gwaltney* elicited that precise holding, the Supreme Court reached a broader “natural reading” of the statutory language contained in ESA’s citizen suit provision. See *id.*; see also Brief for Appellee, at 24. The Court concluded that “citizens . . . may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation.” *Gwaltney*, 484 U.S. at 58 (emphasis added).

79. See, e.g., *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 669 (9th Cir. 1988) (concluding that use of present tense “alleged to be in violation” only allows suits to abate ongoing violations); *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) (emphasizing that “citizen suits can address only ongoing violations” (citing *Gwaltney*, 484 U.S. at 49)).

80. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 782 (9th Cir. 1995). Rosboro (Defendant-Appellee) applied to the Oregon Department of Forestry for a permit to clearcut approximately 40 acres of timber on land situated in Lane County, Oregon. *Id.* The application indicated that the activity would occur in an area that was a “‘threatened or endangered species site.’” *Id.*

81. *Id.* The U.S. Fish and Wildlife Service (FWS) determined the Northern Spotted Owl to be a threatened species pursuant to ESA. 55 Fed. Reg. 123, 26114 (1990). For a definition of “threatened species” under ESA, see *supra* note 25. The FWS noted that the Northern Spotted Owl is threatened throughout its range, due to the loss and adverse modification of its habitat. The owl’s habitat has been effected by timber harvesting, and aggravated by such disastrous events as fire, volcanic eruption and wind storms. 55 Fed. Reg. 123, 26114. The FWS’s rule thus extended ESA’s protection to the Northern Spotted Owl. *Id.* The rule took effect July 23, 1990. *Id.*

In *Rosboro*, the Oregon Department of Forestry prepared a forest inspection report when granting Rosboro’s permit. *Rosboro*, 50 F.3d at 782. In addition to

at the proposed site, it was necessary for Rosboro to travel over federally administered land.⁸²

In June 1992, the Federal Bureau of Land Management (BLM) authorized Rosboro to build an access road over the federal land. Although the road permit was approved, the BLM commented that construction of the project would occur within a half mile of the nesting site of spotted owls in Swartz Creek.⁸³ Consequently, BLM warned Rosboro that its project may result in an incidental "taking" of the owls.⁸⁴ Rosboro never applied for an incidental "taking" permit, but proceeded to build the access road during the summer of 1992.⁸⁵

On September 9, 1992, Forest Conservation Council (FCC) filed a citizen suit⁸⁶ against Rosboro, seeking to enjoin the logging company from clearcutting the timber on private land.⁸⁷ The district court concluded that ESA requires a plaintiff to show either a

noting that Rosboro's activity would occur on land adjacent to the owls' nesting site, the report indicated that Rosboro's compliance with the State of Oregon's forest practice rules would not necessarily meet the requirements of ESA. *Id.* For a discussion of requirements under ESA, see *supra* note 35 and accompanying text.

82. *Rosboro*, 50 F.3d at 782. Rosboro applied for a permit from the Federal Bureau of Land Management (BLM) to build a road over its land. *Id.*

83. The record indicates that timber harvest on the private land would occur 130 feet away from the Northern Spotted Owls' nest. Brief for Appellee, at 3. The published Ninth Circuit opinion indicated that BLM authorized Rosboro to build the access road in June 1991. However, given the corresponding dates and events that occurred, it is believed that the correct date is June 1992. See *Rosboro*, 50 F.3d at 782.

84. *Rosboro*, 50 F.3d at 782. ESA protects endangered species by making it unlawful to "take" any such species. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B); see *supra* notes 29-31 for a discussion and pertinent language of the statutory "taking" prohibition; see also *supra* note 29 (indicating that FWS has adopted regulation that prohibits "taking" of threatened species).

85. *Rosboro*, 50 F.3d at 783. ESA provides an exception to the federal ban on taking of protected species. ESA § 10(a), 16 U.S.C. 1539(a) (permitting anyone who plans to engage in activity that will result in "incidental take" to apply for permit from FWS); see *supra* note 35 and accompanying text for discussion and pertinent statutory language of this exception. In granting Rosboro permission to construct the access road, BLM advised Rosboro of its responsibility to first obtain an incidental take permit from FWS. *Rosboro*, 50 F.3d at 783.

86. FCC sued Rosboro under the citizen suit provision of ESA (ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A)). *Rosboro*, 50 F.3d at 782.

87. *Rosboro*, 50 F.3d at 783. FCC alleged that because Rosboro failed to apply for an incidental take permit, its proposed logging activity constituted a take in violation of ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). *Id.* In support of its allegation, FCC offered evidence to show that Rosboro's proposed timber harvest is "reasonably certain to injure the Swartz Creek owl pair by significantly impairing their essential behavioral patterns, including breeding, feeding, and sheltering." *Id.* at 783.

FCC sued Rosboro in the United States District Court for the District of Oregon. *Id.* FCC and Rosboro subsequently filed cross motions for summary judgment. *Id.* On November 18, 1993, the district court denied FCC's motion for

past or current injury to a protected species.⁸⁸ Accordingly, the court held that FCC's claim of a future injury to the Northern Spotted Owls was insufficient to establish a "taking" under ESA.⁸⁹

FCC appealed the district court's order granting judgment in favor of Rosboro.⁹⁰ The Ninth Circuit reversed, and held that ESA permits citizen suits to enjoin future harm to protected species.⁹¹

IV. NARRATIVE ANALYSIS

The issue addressed in *Rosboro* was whether the correct interpretation of ESA forecloses citizen suits alleging only future injury to a protected species.⁹² In rejecting this contention, the Ninth Circuit focused on the statutory language, purpose, and structure of ESA, in addition to applicable case law.⁹³

Before elaborating on ESA and relevant case law, the court first determined that the dispute involved the scope of the term "harm" as used in ESA.⁹⁴ The court then identified the main contentions of the parties. Rosboro claimed that "harm" only includes actions that constitute a past or current injury to a protected species, or actions that threaten such species with extinction.⁹⁵ Alternatively,

summary judgement, and granted Rosboro's motion for summary judgement. *Rosboro*, 50 F.3d at 783.

88. *Rosboro*, 50 F.3d at 783. FCC only alleged a future injury to the Swartz Creek Northern Spotted Owls, and did not claim that Rosboro's activity would threaten the species extinction; therefore, the district court concluded that FCC's suit was premature. *Id.*

89. *Id.* at 782. The district court's holding was based on the taking provision of ESA (ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B)). *Id.*

90. *Id.*

91. *Id.* at 788. The Ninth Circuit held that FCC's suit to enjoin Rosboro's timber harvest is actionable under ESA. *Id.* On account of conflicting facts as to whether the timber harvest is "reasonably certain to impair the Swartz Creek owl pair's essential behavioral patterns," the Ninth Circuit remanded for an appropriate finding on that issue. *Id.*

92. The United States District Court for the District of Oregon construed ESA to foreclose citizen suits alleging only a future injury. *Id.* at 783. On appeal, the Ninth Circuit addressed whether this is the proper interpretation of ESA. *Id.*

93. For a discussion of the Ninth Circuit's interpretation of ESA's statutory language, see *infra* notes 97-110 and accompanying text. For a discussion of the court's analysis of ESA's purpose, see *infra* notes 111-116 and accompanying text. For a discussion of the Ninth Circuit's treatment of the structure of ESA, see *infra* notes 117-123 and accompanying text. For a discussion of the *Rosboro* court's focus on case law, see *infra* notes 124-134 and accompanying text.

94. *Rosboro*, 50 F.3d at 783. The court made this determination by first noting that ESA makes it unlawful for anyone to "take" any endangered or threatened species pursuant to ESA § 9, 16 U.S.C. § 1538. *Id.* The court then recited ESA's definition of "take" as laid out in ESA § 3(19), 16 U.S.C. § 1532(19) (" 'Take' is defined to mean . . . 'harm'") *Id.*

95. *Rosboro*, 50 F.3d at 783.

FCC contended that “harm” includes actions that pose an imminent threat of injury to a protected species, including habitat modifications impeding the recovery of such species.⁹⁶ The Ninth Circuit adopted FCC’s view, concluding that ESA authorizes citizens to seek an injunction against an imminent threat of harm to a protected species.

A. Statutory Language

The Ninth Circuit began its analysis of the statutory language by considering the plain language of ESA’s “taking” and “harm” provisions.⁹⁷ Turning to ESA’s legislative history for guidance in interpreting the statutory provisions, the court determined that “take” is to be interpreted broadly.⁹⁸ By drawing a connection between ESA provisions at issue, the court determined that an imminent threat of harm to a species easily falls within the broad scope of Congress’s definition of “take.”⁹⁹

Rosboro relied on the Secretary’s definition of harm, which requires “actual” injury to wildlife, to support the contention that an injunction can be issued only against injuries that have already occurred, or are presently ongoing.¹⁰⁰ Further, Rosboro argued that the plain meaning of the term “actually” requires a petitioner to establish that a challenged activity already caused, or presently is causing, an injury to wildlife.¹⁰¹ Rosboro, therefore, asserted that claims of a future injury are not actionable.¹⁰² The Ninth Circuit was not persuaded and dismissed Rosboro’s argument after review-

96. *Id.* at 784.

97. *Id.* at 784. The court reiterated that it is unlawful for anyone to take a protected species. *Id.*; see *supra* text accompanying note 30 (stating relevant statutory language of “taking”). The court then turned to the term “harm,” finding that “[ESA] defines ‘take’ as any action that . . . ‘harms’ wildlife.” *Rosboro*, 50 F.3d at 784 (citing ESA § 3(19), 16 U.S.C. § 1532 (19)).

98. *Rosboro*, 50 F.3d at 784. The legislative history stated: “‘Take’ is to be ‘defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.’” *Id.* (quoting S. REP. NO. 307, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2995).

99. *Id.* “It is clearly conceivable that one can inflict great harm on a protected species by creating an imminent threat of harm to that species. Such a threat therefore falls easily within the broad scope of Congress’ definition of ‘take.’” *Id.*

100. *Id.* at 784-85. In 1981, the Secretary issued a re-definition of the term “harm.” *Id.* “Harm in the definition of ‘take’ . . . means 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.* at 784 (quoting 50 C.F.R. § 17.3).

101. *Id.* at 784.

102. *Id.*

ing prior legislative history.¹⁰³ The court stated that the Secretary's use of the term "actually" was not intended to foreclose claims of an imminent threat of injury.¹⁰⁴ Rather, the court noted that the Secretary inserted the "actually kills or injures wildlife" phrase to prevent claims involving only habitat modification, without any attendant requirement of death or injury to protected species.¹⁰⁵ The court concluded that since there was no evidence in the legislative history that required a present or prior injury, claims of future injury were permissible.¹⁰⁶

Additionally, Rosboro argued that FCC's claim was barred since the Secretary indicated, in its commentary to the final redefinition of "harm," that a claim for a "potential injury" to wildlife would not be actionable.¹⁰⁷ The *Rosboro* court rejected this argument by distinguishing between "potential injury" and "imminent threat" of injury.¹⁰⁸ Relying on the contrasting dictionary definitions, the court reasoned that the terms are plainly distinct.¹⁰⁹ The court, thus, concluded that a showing of an imminent threat to a

103. *See id.* at 784 (relying on 46 Fed. Reg. 54748-49 (1981)).

104. *Id.*

105. *Id.* The court determined that "actually kills or injures wildlife" was inserted into the redefinition of "harm" because the Secretary was concerned that the old definition of "harm" could be construed to mean habitat modification *alone* without any accompanying requirement of death or injury to protected wildlife. *Id.* (citing 46 Fed. Reg. 213, 54748-49 (1981)). According to the court, the phrase was inserted to remedy such an improper interpretation. *Id.*

106. *Id.* The court examined in-depth, the "harm" redefinition, and its explanatory commentary to decide that no historic injury to protected species is required. *Id.* "So long as some injury to wildlife occurs, either in the past, present, or future, the injury requirement of the Secretary's new definition would be satisfied. We conclude that a showing of an *imminent* threat of injury to wildlife suffices." *Id.* (emphasis added).

107. *Rosboro*, 50 F.3d at 784 (citing 46 Fed. Reg. 213, 54748, 54749 (1981)). In the preamble to the definition of "harm," it was stated that "[h]arm" covers actions . . . which actually (as opposed to potentially), cause injury . . ." 46 Fed. Reg. 213, 54749 (1981) (quoting 40 Fed. Reg. 44412, 44413 (September 26, 1975)). For further discussion of the preamble to the "harm" regulation, see *infra* notes 150-51 and accompanying text.

108. *Rosboro*, 50 F.3d at 784-85. The court relied on the dictionary definitions of "potential" and "imminent." "'Potential' means 'existing in possibility.'" *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1939)). "'Imminent' means 'ready to take place; near at hand.'" *Id.* at 785 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1939)).

109. *Id.* at 785. According to the court, "potential injury" denotes only injury that may or may not occur. *Id.* In contrast, FCC claims that Rosboro's timber activity creates an "imminent threat" of death or injury to the Northern Spotted Owls (i.e., about to occur). *Id.*

protected species is sufficient to maintain a citizen suit under ESA.¹¹⁰

B. Statutory Purpose

The Ninth Circuit next considered the underlying purpose of ESA to resolve any ambiguity surrounding the term "harm."¹¹¹ The court noted that ESA was enacted to: protect endangered and threatened species; prevent their further decline; and authorize citizen suits seeking an injunction against an imminent threat of harm to such species.¹¹² The court determined that foreclosing citizen suits claiming an imminent threat of harm to protected species "is contrary to the letter and spirit of the statute's purpose — to *conserve* endangered species."¹¹³

The Ninth Circuit bolstered its rationalization by referring to propositions established by the Supreme Court regarding the purpose of ESA.¹¹⁴ In *Tennessee Valley Authority v. Hill*, the Court emphasized that in adopting ESA, Congress intended to protect threatened species at any cost.¹¹⁵ In light of this proposition, the

110. *Rosboro*, 50 F.3d at 784. The Ninth Circuit noted that other courts have held that the Secretary "juxtaposed the terms 'actually' and 'potentially' to specify the degree of certainty that harm would befall a protected species, as opposed to the timing of the injury." *Id.* at 785. For a discussion of other courts that have addressed the Secretary's use of the terms "potentially" and "actually," see *infra* note 130.

111. *Rosboro*, 50 F.3d at 785. The court reasoned that when Congress has not clarified an issue, the court must "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Id.* (quoting *United States v. Koyomejian*, 946 F.2d 1450, 1453 (9th Cir. 1991) (citations omitted)).

112. *Id.* The court pointed to the events prior to the enactment of ESA and various ESA provisions. *Id.* at 783, 785. ESA was enacted in 1973 "in response to growing public concern about extinctions of various species of fish, wildlife, and plants caused by economic growth and development untempered by adequate concern and conservation." *Id.* at 783 (citing ESA § 2(a), 16 U.S.C. § 1531(a)). The court then referred to the two stated purposes of ESA: "(1) 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved' and (2) 'to provide a program for the conservation of such . . . species.'" *Id.* at 785 (quoting ESA § 2(b), 16 U.S.C. § 1531(b)). For a further discussion of the purposes in enacting ESA, relevant statutory provisions and legislative history, see *supra* notes 2, 9-23 and accompanying text.

113. *Rosboro*, 50 F.3d at 785.

114. For a discussion of the Supreme Court's interpretation of ESA, see *supra* notes 44-51 and accompanying text (discussing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

115. *Rosboro*, 50 F.3d at 785 (" '[T]he plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, whatever the cost.'" (quoting *Hill*, 437 U.S. at 184)). For the facts surrounding *Hill* and further

Rosboro court remarked about the difficulty in preserving an endangered species once a member of that species has been injured.¹¹⁶

C. Statutory Structure

The Ninth Circuit then examined the overall structure of ESA. The court concluded that the Congressional inclusion of the citizen suit provision, and the Attorney General's enforcement provision in ESA permitted claims of an imminent threat of injury to wildlife to be actionable.¹¹⁷

The court recognized that ESA's citizen suit provision contains no requirement that claims be based on past injury to wildlife. Therefore, the court held that the provision, by its very nature, is directed at future actions.¹¹⁸ By focusing on the legislative history of the citizen suit provision, the court supported its declaration that "Congress anticipated citizen suits to enjoin prospective injuries."¹¹⁹

Analyzing the Attorney General's enforcement provision in conjunction with the citizen suit provision,¹²⁰ the court noted that both provisions authorize suits "to enjoin any person who is alleged to be in violation of [ESA]." ¹²¹ The Ninth Circuit relied on the legislative history of the Attorney General's enforcement provision to explain that Congress authorized injunctive relief to prevent prospective harm.¹²² Noting that Congress modeled the Attorney

discussion of the prominent Supreme Court opinion, see *supra* notes 44-51 and accompanying text.

116. *Rosboro*, 50 F.3d at 785. "[T]he Supreme Court noted [that] '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.'" *Id.* (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531 (1987)). Thus, the Ninth Circuit accepted FCC's argument that forcing FCC to wait until after harm had been inflicted would "render their claims moot before they became ripe." *Id.*

117. *Id.*

118. *Id.*

119. *Id.* "'[C]itizen actions . . . allow any person . . . to seek remedies involving injunctive relief for violations or potential violations' (emphasis added)." *Id.* (quoting H.R. REP. 412, 93d Cong., 1st Sess. 19 (1973), reprinted in 1973 U.S.C.A.N. 979).

120. *Id.* "'[L]anguage used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute.'" *Id.* (quoting *Mertens v. Hewitt Assoc.*, 113 S. Ct. 2063, 2070 (1993)).

121. *Rosboro*, 50 F.3d at 785; see *supra* note 40 (providing statutory language to citizen suit provision); see *supra* note 38 (providing statutory language to Attorney General's enforcement provision).

122. *Rosboro*, 50 F.3d at 786. The court referred to a prior Senate report to emphasize Congress' explanation:

Injunctions provide greater opportunity to attempt resolution of conflicts *before* harm to a species occurs The ability to enjoin a violation of the Act rather than the ability only to prosecute a completed viola-

General's enforcement provision after the citizen suit provision, the court inferred that Congress implicitly intended citizens to enjoin a "potential violator" "before harm to a species occurs."¹²³

D. Case Law

In determining that a showing of future injury to an endangered or threatened species is actionable under ESA, the court addressed a prior Ninth Circuit opinion, *Palila v. Hawaii Department of Land & Natural Resources*.¹²⁴ In the instant case, the Ninth Circuit reaffirmed its prior *Palila* holding that " 'habitat destruction that could result in extinction' constitutes a 'taking' in violation of [ESA]."¹²⁵ In *Palila*, the court upheld an injunction against prospective harm, and rejected the State's assertion that ESA prohibits only activities which effectuate the immediate destruction of the *Palila*'s food sources.¹²⁶

The Ninth Circuit then recognized that other case law supported interpreting ESA as authorizing injunctions against future injury to a protected species. In *Tennessee Valley Authority v. Hill*, the Supreme Court prohibited the future operation of a dam that threatened to destroy the critical habitat of the endangered snail

tion will better serve the interest of the public, the *potential* violator and the *potentially* harmed species.

Id. (quoting S. REP. NO. 418, 97th Cong., 2d Sess. 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1411) (alteration in original).

123. *Id.* Finally, the court focused on an exception to the citizen suit provision to once more demonstrate that Congress intended to halt imminent threats of injury to protected species. *Id.* Although the citizen suit provision requires plaintiffs to give defendants 60 days notice before filing suit, ESA § 11(g)(2)(C), 16 U.S.C. § 1540(g)(2)(C), provides an exception for actions that " 'pos[e] a significant risk to the well-being of any [protected species].'" *Id.* (quoting ESA § 11(g)(2)(C), 16 U.S.C. § 1540(g)(2)(C)); *see supra* note 40 for the relevant statutory language of the citizen suit exception. Since petitioners may seek relief immediately after notifying the Secretary, the court concluded that this exception illustrates Congress' intent to enjoin imminent threats of injury to protected species. *Rosboro*, 50 F.3d at 786.

124. For a discussion of the facts and holding of *Palila*, *see supra* notes 56-60 and accompanying text.

125. *Rosboro*, 50 F.3d at 786 (quoting *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1110 (9th Cir. 1988)). In *Palila*, the Ninth Circuit affirmed the lower court's ruling that required the State to remove mouflon sheep that ate the mamane-naio trees upon which *Palila* birds depend. *Id.* Evidence had indicated that mouflon sheep *can* kill the mamane trees before new trees mature, which could drive the *Palila* to extinction. *Id.* The *Rosboro* court rejected the defendant's assertion that the *Palila* decision was based on the fact that mouflon sheep had already eaten some of the mamane trees. *Id.*

126. *Id.*

arter.¹²⁷ The Ninth Circuit explained that the Supreme Court did not require plaintiffs to show a past injury to the snail darter, but evidence of future injury was a sufficient basis for the injunction.¹²⁸ The *Rosboro* court next adopted the assertion made by the First Circuit in *American Bald Eagle v. Bhatti*,¹²⁹ that courts have only enjoined activity that actually harmed, or will actually harm, a protected species.¹³⁰ The Ninth Circuit completed its discussion of whether ESA precludes claims of future injury by analyzing the three cases upon which *Rosboro* relied.¹³¹ The court rejected the cases since none of the cases offered by *Rosboro* addressed the issue of whether the imminent threat of harm to a protected species was actionable under ESA.¹³²

127. *Rosboro*, 50 F.3d at 787 (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 172-73 (1978)). For a discussion of the facts of *Hill*, see *supra* notes 44 & 48. The Ninth Circuit emphasized that in reaching its decision, the Supreme Court, rather than balancing the parties' interests, afforded the endangered species the highest of priorities. *Rosboro*, 50 F.3d at 787. Thus, even though TVA had already expended billions of dollars on the dam project, the Court ordered a permanent injunction to terminate the dam's construction. *Id.*

128. *Rosboro*, 50 F.3d at 787.

129. See *supra* note 67 and accompanying text for a discussion of the facts of *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993).

130. *Rosboro*, 50 F.3d at 787. The Ninth Circuit noted that the *American Bald Eagle* court clarified the Secretary's use of the terms "actually" and "potentially" in the redefinition of harm. *Id.* According to *American Bald Eagle*, the terms were used to specify the degree of certainty that injury would inflict a protected species, as opposed to the timing of the injury. *Id.* (citing *American Bald Eagle*, 9 F.3d at 166). For a further discussion of the Secretary's use of the terms "actually" and "potentially," see *supra* text accompanying note 110.

131. *Rosboro* cited and relied upon *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *Pacific Northwest Generating Coop. v. Brown*, 25 F.3d 1443 (9th Cir. 1994); and *Pyramid Lake Paiute Tribe v. United States Dep't of the Navy*, 898 F.2d 1410 (9th Cir. 1990). *Rosboro*, 50 F.3d at 786-87. For further discussion of *Rosboro's* reliance on these cases, see *infra* note 132 and accompanying text. See also *supra* notes 76-78 and accompanying text (discussing *Gwaltney*); see also *supra* notes 71-73 and accompanying text (discussing *Pyramid Lake*).

132. The court declared that *Rosboro's* reliance on *Gwaltney*, *Pacific Northwest*, and *Pyramid Lake* was misguided. *Rosboro*, 50 F.3d at 786-87.

In *Gwaltney*, the defendants ceased violating the permit provision of the Clean Water Act prior to the commencement of plaintiff's lawsuit. *Rosboro*, 50 F.3d at 786 (citing *Gwaltney*, 484 U.S. at 53-54). In contrast to the question before the *Rosboro* court, the issue in *Gwaltney* was "whether a citizen suit could be maintained for unlawful conduct that occurred *entirely in the past*." *Id.* According to the Ninth Circuit, the Supreme Court "did not address whether citizen suits can be maintained for claims of only future violations, and in no way implied that such claims are not actionable." *Id.* at 787.

In *Pacific Northwest*, the Ninth Circuit dismissed the plaintiffs' argument that the "taking" of a listed species of salmon should not be labeled as merely "incidental." *Rosboro*, 50 F.3d at 787 (citing *Pacific Northwest*, 25 F.3d at 1452). *Rosboro* pointed out that in *Pacific Northwest* the court "explained that Congress could not have intended to prohibit all salmon fishing just because a listed species of salmon

Completing its analysis of ESA's statutory language, purpose, structure, and case law, the *Rosboro* court concluded that FCC's suit to enjoin Rosboro's timber harvest was actionable under ESA.¹³³ Further discussion of these topics is necessary to determine whether it was proper for the Ninth Circuit to hold that future injury to a protected species is actionable under ESA.

V. CRITICAL ANALYSIS

In *Rosboro*, the Ninth Circuit was called upon to determine whether ESA permits citizen suits that allege only a future injury to a protected species. Ultimately, the court held that a showing of future injury to a protected species is permissible under ESA.¹³⁴ In analyzing the Ninth Circuit's opinion in conjunction with ESA and applicable case law, it is evident that segments of the court's decision were sound. However, in light of this analysis, much of the court's reasoning remains questionable.

A. Statutory Language

The Supreme Court has indicated that an examination of relevant statutory language is an appropriate starting point for a court's analysis.¹³⁵ The *Rosboro* court started with the plain language of the "take" provision of ESA; then, referred to legislative history, and determined that "take" is to be construed broadly.¹³⁶ The court quoted the Senate Report statement that "take" is " 'defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' . . . any fish or wildlife.' " ¹³⁷ Such use of the circular statement that "take means take" is ineffective in resolv-

cannot be distinguished by sight from an unlisted species." *Id.* The *Rosboro* court concluded that *Pacific Northwest* did not address the issue at hand (whether the imminent threat of harm to a protected species was actionable under ESA). *Id.*

In *Pyramid Lake*, the Ninth Circuit did not enjoin the Navy's outlease program which diverted water from the protected cui-ui fish because the facts did not prove the Navy's program was the cause of the fish's spawning problem. *Rosboro*, 50 F.3d at 787 (citing *Pyramid Lake*, 898 F.2d at 1410). The *Rosboro* court maintained that the defect of the plaintiff's claim lay in the lack of a causal connection between the action and the injury, not in the timing of the injury, and thus rejected the case. *Id.*

133. *Rosboro*, 50 F.3d at 788.

134. *Id.* at 783.

135. See, e.g., *Hughes v. United States*, 495 U.S. 411, 415 (1990) ("As in all cases of statutory interpretation, we look first to the language of the statute itself."); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("We look first to the face of the statute.").

136. *Rosboro*, 50 F.3d at 784.

137. *Id.* (quoting S. REP. NO. 307, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2995).

ing what is meant by a wildlife "taking." The court illogically used the Senate Report to conclude that a threat of "harm" falls within the definition of "take."¹³⁸ Not only does the Senate Report not apply to "harm," but it is more appropriate to construe "harm" narrowly.¹³⁹

In addressing the "harm" regulation, the Ninth Circuit collapsed two distinct legal issues into one. Rather than resolving the "harm" regulation separate from ESA citizen suit provision, the court focused on a combination of the issues.¹⁴⁰ The merging of the two issues rendered the determination of each unclear. As a result, the court failed to precisely resolve either provision.

Furthermore, the Ninth Circuit developed internally inconsistent standards for proving "harm." The opinion first asserted that the "harm" regulation requires that "*some injury* to wildlife occurs, either in the past, present, or future."¹⁴¹ However, the very next sentence stated that "*an imminent threat of injury* to wildlife suffices," which suggested that the threat or *possibility* of injury is sufficient.¹⁴² The court created an arguably third inconsistent standard in determining that actions which are "*reasonably certain to injure* the Swartz

138. *Id.* *Rosboro* stated, "It is clearly conceivable that one can inflict great harm on a protected species by creating an imminent threat of harm to that species. Such a threat therefore falls easily within the broad scope of Congress' definition of 'take.'" *Id.* After making this conclusory statement, the court proceeded to a separate issue and never provided support for its conclusion or rationalization as to why it applied to "harm."

139. "Harm" was not included in the Committee Report definitions of "take." See S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973), reprinted in 1973 U.S.C.A.N. 2989, 2995. Therefore, the Committee Report statements on broadly interpreting "take" do not apply to "harm." " 'Harm' was added on the Senate floor, as a part of a group of 'technical and clarifying amendments,' " and its meaning was not debated. Brief for Appellee at 17 n.10 (quoting 119 CONG. REC. 25,682-83 (July 24, 1973) (remarks of the amendments' sponsor, Sen. Tunney)); see *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 527 (1982) (noting that sponsors' remarks "are the only authoritative indications of congressional intent"). " '[I]t is inconceivable that addition of a term characterized as a 'technical' insertion should be the basis for an interpretation both significantly broader than the other statutory terms" Brief for Appellee at 17 n.10 (quoting *Palila* Brief (CR 28, Def. Ex. F at 22 n.7, SER 29)).

140. Both the "harm" regulation (50 C.F.R. § 17.3) and ESA's citizen suit provision (ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A)) were at stake in *Rosboro*. *Rosboro*, 50 F.3d at 782-83. The precise legal standard of "harm" needed to be resolved, as well as, the distinct issue of whether ESA permits a citizen suit based solely on claims of future violations. *Id.* Rather than addressing these two distinct issues separately, the Ninth Circuit collapsed them, and focused on the issue of future ESA violations. *Id.* at 783.

141. *Rosboro*, 50 F.3d at 784 (emphasis added) ("So long as some injury to wildlife occurs, either in the past, present, or future, the injury requirement of the Secretary's . . . definition would be satisfied.")

142. *Id.* (emphasis added).

Creek owl pair . . . satisf[y] the ‘actual injury’ requirement.”¹⁴³ The court used phrases that are inherently contradictory, and never articulated the precise standard to be applied.¹⁴⁴

Finally, the “harm” standard issued by the court was inconsistent with the FWS’s “harm” regulation, and the preamble to the “harm” regulation.¹⁴⁵ The “harm” regulation states that an activity is an unlawful ESA “taking” of wildlife only if it “*actually* kills or injures wildlife.”¹⁴⁶ Since the “harm” regulation emphasizes this language, it logically follows that even a high possibility of future injury is not “harm.”¹⁴⁷ In deviating from the requirement of “actual harm” contained in the regulation, the Ninth Circuit decision did not provide substantial support for its departure from strict statutory interpretation of the regulation.¹⁴⁸

The preamble, supplementary information issued by the FWS in accordance with the final “harm” regulation, provides additional support that an actual injury is required, rather than a mere showing of future injury.¹⁴⁹ However, the court never addressed this persuasive piece of legislative history. The regulation’s preamble clearly indicates that a case must be dismissed where there is no definite injury to, or death of, protected wildlife.¹⁵⁰

143. *Id.* (emphasis added).

144. For example, the court concluded that “a showing of an imminent threat of injury to wildlife suffices,” however, the court never articulated what constitutes “imminent.” *Id.* at 784.

145. The FWS promulgated regulations that define the term “harm.” See 50 C.F.R. § 17.3 (1994). For further discussion of the FWS’s “harm” regulation, see *supra* notes 31-32 and accompanying text. For a discussion of the preamble to the “harm” regulation, see *infra* notes 150-51 and accompanying text.

146. 50 C.F.R. § 17.3 (emphasis added); see *supra* note 32 for complete statutory language. The “harm” regulation emphasizes the “actually kill or injure” requirement twice in its language. See *id.* The Supreme Court has recently upheld the “harm” regulation. See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407 (1995).

147. See 50 C.F.R. § 17.3. ESA itself only prohibits the “taking” of endangered species, not the possibility of a “taking.” See ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B).

148. See *Rosboro*, 50 F.3d at 784. The Supreme Court has further addressed ESA and the Secretary’s “harm” provision in an opinion issued after *Rosboro*. See *Babbitt*, 115 S. Ct. 2407 (1995). Justice O’Connor, concurring, indicates that “the regulation is limited by its terms to actions that *actually* kill or injure individual animals.” *Id.* at 2418 (emphasis added). The regulation “is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals.” *Id.*

149. See 46 Fed. Reg. 213, 54748-50 (1981) (final “harm” regulation).

150. The final rule states:

The purpose of the redefinition was to *preclude claims of a Section 9 taking . . . without any attendant death or injury of the protected wildlife. . . .* [T]he word “actually” [has] be[en] reinserted in the definition to *bukwark the need for proven injury to a species* due to a party’s

B. Statutory Purpose

The Ninth Circuit properly turned to the underlying purpose of ESA to resolve any ambiguity in the statutory language.¹⁵¹ However, the court's use of the purpose of ESA is problematic. ESA statement, which notes that the purpose of the Act is to conserve listed species and the ecosystems they inhabit, is cited by the court to support a broad construction of "harm."¹⁵² The court ignored the next subsection of ESA which places the duty to conserve only on federal agencies.¹⁵³ As previously stated by the government, reliance on ESA's broad statement of purpose cannot overcome the specific limitations Congress articulated in ESA's "taking" provisions.¹⁵⁴ ESA's non-binding purpose of protecting ecosystems does

actions. . . . [T]he final redefinition . . . [is] *precluding a taking where no actual injury is shown*. . . . [T]he Service feels that the legislative history cannot be read to prohibit habitat modification under section 9 without actual injury. . . . [T]he Service agrees with the many other comments which recognized the *need for actual injury*. . . . The final definition adds the word "actually" before the words "kills or injures" . . . to clarify that *a standard of actual, adverse effects applies to section 9 takings*. . . . To be subject to section 9, the modification or degradation must be *significant*, must *significantly impair essential* behavioral patterns, and must result in *actual injury* to a protected wildlife species.

46 Fed. Reg. 213, 54748-50 (1981) (emphasis added).

151. The *Rosboro* court noted that "[w]hen Congress has not addressed an issue, we must 'find that interpretation which can most fairly said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'" *Rosboro*, 50 F.3d at 785 (quoting *United States v. Koyomejian*, 946 F.2d 1450, 1453 (9th Cir. 1991)) (citations omitted).

152. See *Rosboro*, 50 F.3d at 785 (citing ESA § 2(b), 16 U.S.C. § 1531(b)). For a further discussion of the stated purposes of ESA and relevant statutory language, see *supra* notes 2, 16-17 & 21-23 and accompanying text.

153. See ESA § 2(c), 16 U.S.C. § 1531(c); see *supra* note 23 (providing language of § 2(c), § 1531(c)). ESA statutory provisions provide an explanation: ESA § 5 (Interagency Cooperation) (16 U.S.C. § 1536(a)(1)) creates a federal duty to carry out "conservation" programs, but ESA § 9 (Prohibited Acts) (16 U.S.C. § 1538) does not use either "conservation" or "habitat protection" language in describing duties of nonfederal parties because the duty to conserve is on federal agencies.

154. As the United States set forth in its amicus brief to the Ninth Circuit in *Palila v. Hawaii Dep't of Land and Natural Resources*, "[r]eliance on this broad statement of purpose [in § 2(b), § 1531(b)] cannot, however, overcome the limitations of the specific language Congress has chosen in Section 9 of the Act." Brief for Appellee at 16 (citing *National Wildlife Fed'n v. Gorsuch*, 696 F.2d 156, 177-78 (D.C. Cir. 1982)). "The responsibility to conserve, as defined in the Act, is specifically directed at federal agencies and activities [see ESA §§ 2(c), 7(a)(1), 16 U.S.C. §§ 1531(c), 1536(a)(1)], and not to the other persons and entities that are subject to [ESA § 9, 28 U.S.C. § 1538]." *Id.*; see also *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1508 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."); *Rodriguez v. United*

not supersede the specific limitations Congress intended on ESA "taking" concepts.

While the *Rosboro* court's reliance on the underlying purpose of ESA is misplaced, there was some validity to the court's reference to *Tennessee Valley Authority v. Hill*.¹⁵⁵ In *Hill*, the Supreme Court affirmed a broad, expansive reading of ESA.¹⁵⁶ The Supreme Court's broad interpretation of ESA provided some support for the Ninth Circuit's conclusion that the statute should be read broadly to allow citizen suits to enjoin an imminent threat of harm to protected wildlife.

C. Statutory Structure

The *Rosboro* court next attempted to justify its conclusion by simultaneously focusing on the citizen suit provision and the Attorney General's enforcement provision. This approach is inappropriate. First, rather than adhering to the plain statutory language of the citizen suit provision, the court argued that the legislative history of a later-enacted ESA provision on *federal* (not citizen) suits for injunctive relief should control over the plain meaning of the citizen suit provision.¹⁵⁷ The statutory language of the citizen suit provision is precise and unambiguous. The provision allows any person to bring a citizen suit against any other person "who is alleged to be in violation of [ESA]."¹⁵⁸ This phrase plainly requires a current violation.¹⁵⁹ Bypassing the plain meaning of the statute in favor of committee report statements of a separate ESA provision is contrary to precedent.¹⁶⁰

States, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law.").

155. 437 U.S. 153 (1978). For further discussion of the facts and holding of *Hill*, see *supra* notes 44-51 and accompanying text.

156. The Supreme Court concluded that "[t]he plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Hill*, 437 U.S. at 184. For a discussion of the holding in *Hill*, see *supra* notes 44-51 and accompanying text.

157. See *supra* note 41 (providing statutory language to ESA's citizen suit provision); see *supra* note 38 (discussing Attorney General's enforcement position).

158. ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A).

159. Since the 'alleged to be in violation' phrase plainly requires a current violation and since it has been so interpreted by many courts, this meaning simply cannot be undone by legislative history that was not voted upon. Congress can create law "only through the passage of a bill which is approved by both Houses and signed by the President," and did so only through the ESA's § 11(e)(6) and (g) language. *Patterson v. McClean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

160. Where there is "a phrase that is unambiguous - that has a clearly accepted meaning in both legislative and judicial practice - we do not permit it to be

Furthermore, many citizen suit provisions use language identical to ESA's citizen suit provision.¹⁶¹ Other courts, including the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, have interpreted the "alleged to be in violation" clause of the citizen suit provision to require a current violation.¹⁶² The Ninth Circuit should have followed the guidance of the Supreme Court and Congressional intent, rather than creating confusion by interpreting the citizen suit language in a new manner.¹⁶³

Finally, the court stated that it has "no problem *inferring* Congress' *implicit intent*" to authorize citizen suits that only allege a future injury to a protected species.¹⁶⁴ By stating that it is merely "inferring" its conclusion, the court not only seemed to recognize that it does not have a solid basis to justify its result, but exceeded the scope of established Supreme Court declarations.¹⁶⁵ It seems improbable that a future court will be willing to rely on the Ninth Circuit's "inference" of implicit intent.

D. Case Law

The Ninth Circuit completed its analysis by addressing prior judicial decisions. Difficulty arises when criticizing the Ninth Circuit's analysis since inconsistencies in the existing case law created a challenging task.¹⁶⁶ In light of prior judicial opinions, portions of

expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991).

161. See *supra* note 77 and accompanying text (noting identical language between citizen suit provision of ESA and citizen suit provision of Clean Water Act).

162. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987) (holding that language of citizen suit provision requires plaintiffs to allege continuous violation). For further discussion of the Supreme Court's interpretation of the language of the citizen suit provision, see *supra* notes 75-78 and accompanying text. See also *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 669 (9th Cir. 1988) (holding that language of citizen suit provision only allows suits to abate ongoing violation).

163. For a discussion of the Supreme Court's interpretation of the citizen suit provision, see *supra* note 173 and accompanying text & *infra* notes 185-86. For a discussion of Congressional intent regarding the citizen suit provision, see *supra* note 167 and accompanying text.

164. *Rosboro*, 50 F.3d at 786 (emphasis added).

165. *E.g.*, *Oregon Revenue Dep't v. ACF Indus., Inc.*, 114 S. Ct. 843, 850-51 (1994) ("We do not, absent unambiguous evidence, infer . . . beyond that which clearly is mandated by Congress' language.") (quoting *Cippolone v. Liggett Group, Inc.*, 505 U.S. 2608, 2614 (1992)); *id.* at 850 ("When determining the breadth of a federal statute . . . we are hesitant to extend the statute beyond its evident scope.").

166. The Ninth Circuit, for example, has been inconsistent with its own holdings. Compare *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106, 1110 (9th Cir. 1988) (holding that activity that *could* result in extinction constitutes

the court's analysis are justified, while other portions appear questionable.

The court's opinion relied on *Palila v. Hawaii Department of Land and Natural Resources*, a prior Ninth Circuit decision.¹⁶⁷ The *Palila* court's holding supported the *Rosboro* court's conclusion that FCC was authorized to enjoin a future threat of injury to the Northern Spotted Owl.¹⁶⁸ However, rather than confront another Ninth Circuit opinion that appears to conflict with *Palila*, the court dismissed it. The court claimed that *Rosboro*'s reliance on the *Pyramid Lake Paiute Tribe of Indians v. United States Department of Navy* opinion was misplaced.¹⁶⁹ In *Pyramid Lake*, the Ninth Circuit rejected an ESA "taking" claim where the action did not "actually cause" injury to the protected species.¹⁷⁰ Thus, the *Pyramid Lake* holding, which required actual injury, is contrary to the *Rosboro* holding which authorized future injury to protected wildlife.¹⁷¹

The court next rejected *Rosboro*'s reliance on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, distinguishing the Supreme Court opinion as involving the issue of citizen suits against past violations.¹⁷² While that was the fact pattern in *Gwaltney*, the Ninth Circuit failed to recognize that the Supreme Court reached a broader reading of the statutory language contained in the citizen suit provision of ESA.¹⁷³ The Supreme Court articulated that the statutory language requires "plaintiffs [to] allege a state of either

"harm," and thus ESA "taking") and *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508 (9th Cir. 1994) (concluding that *mere likelihood of future injury* is sufficient to obtain injunction) with *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (requiring *actual injury* to wildlife to constitute ESA "taking").

167. For a discussion of the facts and holding of *Palila*, see *supra* notes 56-60 and accompanying text.

168. On the facts of *Rosboro* it can be argued that *Rosboro*'s activity that *could* result in destruction of the owls amounts to a "taking." For a discussion of the facts of *Rosboro*, see *supra* notes 80-91 and accompanying text.

169. *Rosboro*, 50 F.3d at 787. For a discussion of the facts and holding of *Pyramid Lake*, see *supra* notes 71-73 and accompanying text.

170. *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990).

171. See *id.* (requiring actual injury to constitute "taking"); cf. *Rosboro*, 50 F.3d at 783 (permitting future injury to constitute "taking").

172. *Rosboro*, 50 F.3d at 787.

173. *Gwaltney* addressed the citizen suit provision of the Clean Water Act. However, its language is identical to the language of ESA's citizen suit provision. *Gwaltney*, 484 U.S. 49, 53 (1987). Compare *supra* note 77 (reciting language of citizen suit provision of Clean Water Act) with *supra* note 40 (reciting language of citizen suit provision of ESA).

continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”¹⁷⁴

Prior cases have interpreted the language contained in the citizen suit provision to exclude claims that allege only a future violation. The Ninth Circuit, itself, has repeatedly held that the identical “alleged to be in violation” language contained in the citizen suit provision does not permit a suit over a future violation.¹⁷⁵ Based on these prior interpretations, FCC’s allegation of a speculative one-time future violation of ESA, which will not result in the extinction of a species, is insufficient to establish an actionable “taking.”¹⁷⁶ The court did not completely review the language of the citizen suit provision in light of these prior courts’ holdings.

Relying heavily on *Tennessee Valley Authority v. Hill*, the Ninth Circuit asserted that the Supreme Court found future harm actionable.¹⁷⁷ While the Supreme Court issued an injunction to halt the construction of a dam in favor of protecting an endangered species, the Supreme Court did not address whether future harm is actiona-

174. *Gwaltney*, 484 U.S. at 57. The Supreme Court noted that the statutory language of the citizen suit provision only authorizes injunctive relief actions against persons who are alleged to have violated the Act as of the day of suit. *See id.* at 54-55; *see also supra* note 78 and accompanying text (discussing Supreme Court’s reading of citizen suit statutory language).

Based on *Gwaltney*’s reading of the citizen suit language, attorneys for Rosboro noted that the citizen suit provision of ESA simply prevents a premature citizen suit before any ESA violation has occurred. Brief for Appellee at 27. Thus, they argued that claims of ongoing ESA takings are permissible under *Gwaltney*. *Id.* at 27-28. Rosboro attorneys noted that FCC cited *Pahila* as a case concerning a wholly future “taking.” *Id.* at 27. However, according to the attorneys, *Pahila* involves both past and future “takings” of wildlife, and is, therefore, permitted under *Gwaltney*. *Id.*; *see also* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (ongoing federal timber activities constituted ESA taking of endangered red-cockaded woodpecker); *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (continuing pumping activity of irrigation district constituted taking of threatened winter-run salmon).

175. *See League to Save Lake Tahoe, Inc. v. Trounaday*, 598 F.2d 1164, 1173 (9th Cir.), *cert. denied*, 444 U.S. 943 (1979) (plaintiff attempts to predicate “federal jurisdiction based solely upon allegations of a *prospective* violation of the ambient air quality standards. [The] Act provides no basis for such a suit”) (emphasis added); *Plan for Arcadia, Inc. v. Anita Assoc.*, 501 F.2d 390, 392 (9th Cir.), *cert. denied*, 419 U.S. 1034 (1974) (concluding that since “no applicable standards or orders have been issued, this action will not lie” where the law only authorizes suit against a person “*alleged to be in violation of . . . an order*” (quoting citizen suit provision of Clean Air Act) (emphasis added)); *see also* cases cited *supra* note 79.

176. *See* Brief for Appellee at 24. FCC’s Amended Complaint and Brief in the United States District Court for the District of Oregon did not allege that Rosboro was in present violation of the ESA. *Id.* at n.16. Rather, FCC argued that Rosboro’s proposed timber harvesting would cause a *future* ESA “taking” of a protected owl. *Id.*

177. *See Rosboro*, 50 F.3d at 787. For a discussion of the facts and holding of *Hill*, *see supra* notes 44-51 and accompanying text.

ble under ESA.¹⁷⁸ The *Rosboro* court also interpreted *Hill* to imply that protected species will always win.¹⁷⁹ Although the purpose of ESA is to conserve endangered species, the Ninth Circuit's reading "expect[s] more from the [*Hill*] case than its facts and holding will allow."¹⁸⁰

The Ninth Circuit claimed that other circuits have recognized that ESA authorizes injunctions against a future injury to a protected species. The *Rosboro* court cited the First Circuit's *American Bald Eagle v. Bhatti* opinion to support its position that future injury is actionable; however, that case suggests the contrary.¹⁸¹ The First Circuit held that even a "significant risk" of future injury is not "harm" and does not allow an activity which merely holds the possibility of future injury to be enjoined.¹⁸² Instead, the court noted that "for there to be harm under ESA, there must be *actual* injury to

178. The existence of ESA violations "was stipulated" in *Hill* and the Supreme Court was only reviewing whether, in the face of admitted ESA violations, it should issue an injunction. See *Hill*, 437 U.S. at 156, 171-72. The Supreme Court merely cited ESA's takings provisions and the "harm" language to bolster its conclusion that ESA requires an injunction when there is found to be an ESA violation. See *id.* at 184-85.

179. *Rosboro* asserted that in *Hill*, "the Supreme Court concluded that '[t]he plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.*'" *Rosboro*, 50 F.3d at 785 (quoting *Hill*, 437 U.S. at 184) (emphasis added). *Hill* is often quoted for its assertion that "the balance has been struck in favor of affording endangered species the highest of priorities." *Hill*, 437 U.S. at 194.

180. *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994) (recognizing danger of reading *Hill* too broadly); see also *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992). In *Platte River*, the Whooping Crane Critical Habitat Maintenance Trust ("Trust") requested that F.E.R.C. insert environmental protective conditions into hydroelectric facilities' annual licenses. *Id.* at 30. The facility operated upstream from the habitat of the endangered whooping crane. *Id.* It was found that, absent protective measures, the project operations could affect the species and result in irreversible environmental damage. *Id.* at 31. Trust relied on *Hill* to argue that ESA obliges the F.E.R.C. to do "whatever it takes" to protect the species in the Platte River area, regardless of the F.E.R.C.'s authority. *Id.* at 34. The D.C. Circuit held that Trust's interpretation of *Hill* and ESA was "far-fetched," thus denying Trust's request. *Id.*

181. See *supra* notes 66-68 and accompanying text for a discussion of the facts and holding of *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993).

182. *American Bald Eagle*, 9 F.3d at 165. The *American Bald Eagle* opinion itself seems to be internally inconsistent. See *id.* at 165-66. Two of the court's statements appear to suggest future harm is actionable. For example, the First Circuit states that "courts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species." *Id.* at 166. However, the court's overriding theme, virtually all of the court's statements, and the court's actual holding state that "for there to be 'harm' under the ESA, there must be *actual injury* to the listed species." *Id.* at 166 (emphasis added).

the listed species.”¹⁸³ Reliance on *American Bald Eagle*, therefore, discredits rather than supports the *Rosboro* court’s holding, since the *Rosboro* decision permits future injury, whereas *American Bald Eagle* rejects it.

Additional cases appear to conflict with the *Rosboro* court’s result. While *Rosboro* authorized a claim of future injury, other cases have dismissed similar claims that allege a future risk of “taking.”¹⁸⁴ Those cases refused to ban activities as ESA “takings” where only a potential risk that the activity would “take” a protected species existed.¹⁸⁵ Consideration of those prior opinions may have led the court to refuse to find an enjoined “taking,” where there was only some risk that *Rosboro*’s timber harvesting would take the Northern Spotted Owl.

VI. IMPACT

Several recent crises between endangered species and economic interests have focused attention on ESA.¹⁸⁶ In one of the most publicized of these crises, the protection of the Northern Spotted Owl has created immeasurable problems for the lumber industry.¹⁸⁷ *Rosboro* exemplifies the crisis between ESA and eco-

183. *Id.* at 166 (emphasis added).

184. See cases cited *supra* note 69 and accompanying text.

185. See *Pacific Northwest Generating Coop. v. Brown*, 25 F.3d 1443, 1452 (9th Cir. 1994). In *Pacific Northwest*, the Ninth Circuit refused to ban all salmon fishing as an ESA taking where there was only a probabilistic risk that any fish harvesting operation would injure a listed salmon species. *Id.* “[I]t cannot be believed that Congress intended to ban all salmon fishing in the Columbia and Snake Rivers and in the Pacific Ocean whenever one salmon stock, indistinguishable by sight, became endangered.” *Id.*

186. Human and wildlife populations are coming into inexorably increasing conflict. Abramson, *supra* note 4, at A1. Conservationists contend that the government is failing to adequately protect endangered and threatened species, while business interests are demanding “consideration of the economic impact of saving creatures such as the spotted owl.” *Id.* In the meantime, “thousands of timber industry workers and dozens of timber dependent communities in the Northwest remain hostage in the legal and political battles over the owl.” *On the Environment . . . Consider Jobs and Owls*, 105 L.A. DAILY J. 6 (May 28, 1992).

For further discussion of the debate between environmentalists and developmentalists, see *supra* notes 1-7 and accompanying text; see also Berschauer, *supra* note 1, at 1000-1006 (discussing clash in values between environment and development).

187. “The timber industry is furious that the bird has gotten so much public support and has been able to halt much of its logging activities on public lands.” Berschauer, *supra* note 1, at 1006; see *id.* at 1006 n.99 (citing Protection Sought for Owl Living in Northwest, 18 ENVTL. REP. 1372 (1987) (“Northern Spotted Owl in decline because its critical habitat, old-growth forests, have been reduced due to logging on public lands”).

conomic interests, and its holding is likely to have serious ramifications.

As a practical matter, the ambiguous and inconsistent analysis developed by the Ninth Circuit will be troublesome for other courts to follow.¹⁸⁸ Rather than developing a model for subsequent courts, the Ninth Circuit merely contributed to the confusion in the existing law. Further, *Rosboro* seems to be an invitation for anyone embracing a cause or holding a grudge to enjoin a land use simply because such use imposes some risk of future injury to protected wildlife.¹⁸⁹ It is possible that a multitude of "taking" cases will now burden the courts as those interested in halting logging and development adopt the owl as the basis for a lawsuit.¹⁹⁰

More important is the precedent *Rosboro* sets for corporate and economic interests. While environmentalists will hail the decision, major developmental interests will look at the decision with exasperation.¹⁹¹ It is probable that species that developmentalists con-

188. "Clarification is needed to provide the district court with direction . . . and to provide direction to other courts on this recurring issue regarding the standard of proof for 'harm' to obtain a permanent injunction." Brief for Appellee at 6, *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995), *petition for reh'g, and suggestion for reh'g in banc* (No. 94-35070).

189. As commentators have already noted: " 'Instead of being the protection that it should be for endangered species, the [ESA] has become a tool for people who want to stop some particular thing It was intended as a shield and not as a sword.' " Abramson, *supra* note 4, at A1 (quoting Interior Secretary Manuel Lujan, Jr.).

190. See *Who Cares About Owls? Jobs Are More Important*, 103 L.A. DAILY J. 6 (May 9, 1990) [hereinafter *Who Cares About Owls?*]. One commentator noted that environmentalists have won many of their court room victories against loggers before the Ninth Circuit by using the owl as a basis to bring suit. *Id.*

191. The view of industrialists and developmentalists is one that gives priority to their own economic interests. Berschauer, *supra* note 1, at 1004. "They have to [take this view]. Corporate law requires directors of a corporation to have only one goal - increase corporate profits for the benefit of the shareholders." *Id.* (citing American Law Institute, *Principles of Corporate Governance: Analysis & Recommendations* § 2.01 (Tentative Draft No. 2, 1984)). The economic view is supported by religious scriptures. *Id.* For example, the Book of Genesis states:

Then God said, "And now we will make human beings . . . *They will have power over the fish, the birds, and all animals*, domestic and wild, large and small." So God created many human beings . . . He created them . . . and said, "Have many children, so that your descendants will live all over the earth and *bring it under their control. I am putting you in charge of the fish, the birds, and all the wild animals. . . .*"

Id. at 1004-05 (quoting Genesis 1:26-29 (alteration in original)).

The Book of Genesis expresses that God created the earth and all other forms of life solely for the use of humans, and humans "should dominate and assert power to control wildlife." *Id.* at 1005. Private landowners see no reason why they should not be able to develop the earth. *Id.* On the other hand, others believe that ESA values the survival of species above all other human values - economic, social, or otherwise. See *supra* notes 22-23 and accompanying text. ESA did not allow for a balancing of economic interests against the interests of protected spe-

sider insignificant will put a halt to large, industrial projects.¹⁹² Strongly adverse economic consequences could result if protected wildlife stops projects of local or regional significance. For the timber industry, in particular, the *Rosboro* decision could escalate the price of wood, increase the costs of new construction, and put many people out of work.¹⁹³ While economists debate the precise economic impact of *Rosboro*, the decision will likely cost the State of Oregon millions of dollars in foregone economic development and tax revenue.¹⁹⁴

Determining that economic growth and development was accelerating the extinction of numerous species in America, Congress enacted ESA to reduce the risk of extinction by eliminating the negative effects of development and growth.¹⁹⁵ Given this mandate for the protection of species, it is inevitable that conflicts over land will

cies. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) ("balance has been struck in favor of affording endangered species the highest of priorities").

192. Congress amended ESA to provide an exemption process for projects regarded as overwhelmingly important. However, commentators note that the process is complicated and has not been used. Berschauer, *supra* note 1, at 998 & n.55. The Endangered Species Committee, known as the God Squad, will exempt a project from the statutory ESA requirements only when:

- (i) there are no reasonable and prudent alternatives to the . . . 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;
- (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

ESA §§ 7(h)(1)(A)(i)-(iv), 16 U.S.C. §§ 1536(h)(1)(A)(i)-(iv); see also Berschauer, *supra* note 1, at 998 n.55 (discussing exemption process of God Squad).

An exemption must also include mitigation and species enhancement measures to minimize the adverse effects of the proposed project. See ESA § 7(h)(1)(B), 16 U.S.C. § 1536(h)(1)(B) (stating that reasonable mitigation includes, but is not limited to, live propagation, transplantation, and habitat acquisition and improvement). Because the exemption process is complicated and unutilized, Berschauer notes that "it can hardly be said that Congress retreated from its position under the [ESA]." Berschauer, *supra* note 1, at 998 n.55.

193. Berschauer, *supra* note 1, at 1006 (noting arguments made by members of timber industry); see *Sweet Home Chapter of Communities v. Lujan*, 806 F. Supp. 279, 282 (D.D.C. 1992) (Small landowners, logging companies and families dependent on forest products industry claimed that FWS' restrictions to enforce "harm" regulation "have forced them to lay off employees, limited their income from trust lands, reduced the timber supply, and placed some of [them] in the position of being unable to support their families.").

194. See *Court to Hear Spotted Owl Controversy*, 108 L.A. DAILY J. 1 (April 17, 1995) (discussing economic consequences of expansive definition of "harm").

195. S. REP. NO. 307, 93d Cong., 1st Sess. 3 (1973), reprinted in 1973 U.S.C.C.A.N. 2990.

arise between human progress and species protected under ESA.¹⁹⁶ While the protection of species is vital, economic growth cannot be halted as the nation moves into the 21st century.¹⁹⁷ By allowing action for future injury, *Rosboro* does not adequately recognize the limits of the social and economic costs society can afford in saving a species.

MaryJo Wlazlo

196. See Berschauer, *supra* note 1, at 994.

197. One commentator notes:

No question about it, they're cute. But is the spotted owl so cute that thousands of families of men, women and children have to abandon their jobs and homes on its behalf? That's a rhetorical question. Anyone who follows American politics and the environmental movement knows that if its a choice between people and animals today, the animals will probably win. . . . People in . . . Oregon . . . stand to lose anywhere from 9,000 to 60,000 logging jobs, not to mention the thousands of other jobs serving the timber industry (there isn't much else to do in these timber areas). . . . [T]he environmental lobby should [not] be accorded the moral high ground on this one If this nation's land laws, its courts, its federal agencies and Congress have arrived at the point that Americans have to leave their jobs and homes on behalf of 3,000 owls, then the political system is not functioning as intended.

Who Cares About Owls?, *supra* note 194, at 6.

