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Christine O. Gregoire

Robert K. Costello

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THE TAKE AND GIVE OF ESA ADMINISTRATION: THE NEED FOR CREATIVE SOLUTIONS IN THE FACE OF EXPANDING REGULATORY PROSCRIPTIONS

Christine O. Gregoire* & Robert K. Costello†

Abstract: Salmon play a significant role in the culture, economy, and ecology of Washington State. Their threatened extinctions have led to a string of listings under the federal Endangered Species Act. This Article considers our response to these listings and the relationship of that response to federal oversight. Part I discusses how the ESA will affect the actions and activities of state and local governments and the citizens they serve. Part II discusses the need for latitude on the part of the federal agencies in assessing the value of state conservation and recovery efforts. This Article concludes that the plight of our salmon and their listings under the ESA will require creative solutions by governments, businesses, and individual citizens. The federal agencies responsible for administering the ESA must in turn be allowed the flexibility to recognize and appropriately credit all state efforts in recovery and conservation, even if those efforts are prospective and voluntary.

We in the Pacific Northwest have strong reasons to protect, preserve, and restore the region's wildlife and ecosystems. The natural wonders and resources of the Pacific Northwest attract and keep people here. More than any other creature, salmon symbolize this region's heritage, culture, and beauty. They are critical to the native ecosystems, the economy, and the culture of Washington; they also have long-standing value to the residents of this state. Moreover, salmon are of special

* Christine O. Gregoire was elected to her second term as Washington State Attorney General in November 1996. She is the 16th individual and the first woman to hold the position. Ms. Gregoire has a B.A. in Education from the University of Washington, and a J.D. and honorary doctor of laws degree from Gonzaga University. After graduating from law school in 1977, Ms. Gregoire began her legal career as an assistant attorney general. In 1982 she was named the state's first woman Deputy Attorney General. Between 1988 and 1992, Ms. Gregoire served as the Director of the Washington State Department of Ecology. She continues to work on environmental protection issues, having chaired the Environment and Energy Legislative Committee of the National Association of Attorneys General.

† Robert K. Costello is a Senior Assistant Attorney General and head of the Fish and Wildlife Division of the Washington State Attorney General's Office. Mr. Costello is a 1977 graduate of the University of Puget Sound with a B.A. in Business Administration. He received his J.D. from the University of Puget Sound School of Law in 1982. Throughout most of his 17 years with the Attorney General's Office, Mr. Costello has represented natural resource agencies and practiced in the areas of natural resource, environmental, and Indian law.

importance to our Indian tribes. Treaties have consistently recognized the vital role these fish play in Indian diet, religion, and economy.¹

Despite salmon's tremendous importance to our way of life, we have permitted these magnificent fish to dwindle to the point where some populations may not survive. Many populations are now in danger of extinction or are likely to become extinct in the foreseeable future.²

Since 1991, the National Marine Fisheries Service (NMFS), an agency within the U.S. Department of Commerce, has listed fifteen salmon species that originate in or migrate through Washington as threatened or endangered under the Endangered Species Act (ESA).³ Three others are

1. See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979) (noting that tribes in Washington "depended heavily on anadromous fish as a source of food, commerce, and cultural cohesion" and were entitled by treaty to take up to 50% of available salmon).

2. Under section 3 of the Endangered Species Act (ESA), a "species" includes "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16) (1994). The National Marine Fisheries Service (NMFS) considers a salmon population to be a distinct population segment, and therefore a species under the ESA, if the population represents an "evolutionarily significant unit," or ESU. See 56 Fed. Reg. 58,612 (1991), for the criteria NMFS uses to determine whether a population qualifies as an ESU. However, a pending action alleges that NMFS has violated the federal Administrative Procedure Act in not promulgating the criteria through formal rulemaking procedures. See *Common Sense Salmon Recovery v. Daley*, No. 99CV01093 (D.D.C. filed May 4, 1999).

3. The Endangered Species Act is codified as amended at 16 U.S.C. §§ 1531-1544 (1994). The following are Washington salmon that have been listed under the ESA: Snake River sockeye (endangered), 50 C.F.R. § 222.23 (1998); upper Columbia River steelhead (endangered), 50 C.F.R. § 222.23(a); Snake River spring and summer chinook (threatened), 50 C.F.R. § 227.4(g) (1998); Snake River fall chinook (threatened), 50 C.F.R. § 227.4(h) (1998); Snake River Basin steelhead (threatened), 50 C.F.R. § 227.4(l) (1998); lower Columbia River steelhead (threatened), 50 C.F.R. § 227.4(m) (1998); Puget Sound chinook (threatened), 64 Fed. Reg. 14,308, 14,319 (1999) (to be codified at 50 C.F.R. § 223.102(a)(16)); lower Columbia River chinook (threatened), 64 Fed. Reg. 14,308, 14,321 (to be codified at 50 C.F.R. § 223.102(a)(17)); upper Willamette River chinook (threatened), 64 Fed. Reg. 14,308, 14,323 (to be codified at 50 C.F.R. § 223.102(a)(18)); upper Columbia River spring chinook (endangered), 64 Fed. Reg. 14,308, 14,324 (to be codified at 50 C.F.R. § 224.101(a)); Hood Canal summer chum (threatened), 64 Fed. Reg. 14,508, 14,513 (1999) (to be codified at 50 C.F.R. § 223.102(a)(12)); Columbia River chum (threatened), 64 Fed. Reg. 14,508, 14,513 (to be codified at 50 C.F.R. § 223.102(a)(13)); upper Willamette River steelhead (threatened), 64 Fed. Reg. 14,517, 14,524 (to be codified at 50 C.F.R. § 223.102(a)(14)); middle Columbia River steelhead (threatened), 64 Fed. Reg. 14,517, 14,525 (1999) (to be codified at 50 C.F.R. § 223.102(a)(15)); and Ozette Lake sockeye (threatened), 64 Fed. Reg. 14,528, 14,533 (1999) (to be codified at 50 C.F.R. § 223.102(a)(19)). Many documents relating to the listing of these fish are available on the Internet. See NMFS Northwest Regional Office, *NMFS Northwest Home Page* (visited Aug. 1, 1999) <<http://www.nwr.noaa.gov>>.

candidates for listing.⁴ Three more species in the salmon family are listed or proposed for listing.⁵

Although the listings are recent, the decline of our salmon stocks has not happened overnight. Salmon have been in decline for over a century.⁶ As early as 1922, the Washington Supreme Court observed that “[i]t is a well-known fact that the salmon industry of the state is rapidly disappearing.”⁷ In its proposed listing of Puget Sound chinook, NMFS identified several contemporary causes and warned that their effects will be amplified as salmon populations continue to decline.⁸ Among the causes NMFS identified were blockage or degradation of habitat, reduction of genetic diversity resulting from hatchery releases, and high rates of commercial exploitation.⁹ Many factors have contributed to the blockage or degradation of habitat. Among them are the decline in water quality; logging; agricultural practices; diking, draining and filling of freshwater and estuarine wetlands; and changes in temperature and flow regime associated with damming and water diversion.¹⁰

The recent listings of Puget Sound chinook and chum salmon are not the first to affect our state. Beginning with Snake River sockeye in 1991, NMFS has listed several species of salmon from the Columbia River Basin.¹¹ A great deal of litigation has resulted.¹² The Columbia River Basin

4. See 60 Fed. Reg. 38,011, 38,022 (1995) (lower Columbia River/southwest Washington coho); 60 Fed. Reg. 38,011, 38,024 (Puget Sound/Strait of Georgia coho); 63 Fed. Reg. 11,750, 11,760 (1998) (Baker River (Skagit watershed) sockeye).

5. See 50 C.F.R. § 17.44(v) (1998) (Columbia River bull trout (threatened)); 63 Fed. Reg. 31,693 (1998) (to be codified at 50 C.F.R. § 17.44(w)) (proposed June 10, 1998) (coastal Puget Sound bull trout (proposed threatened)); 64 Fed. Reg. 16,397 (1999) (to be codified at 50 C.F.R. § 223.102(a)(20)) (proposed Apr. 5, 1999) (southwest Washington/Columbia River coastal cutthroat trout (proposed threatened)).

6. See generally James A. Crutchfield & Giulio Pontecorvo, *The Pacific Salmon Fisheries: A Study of Irrational Conservation* (1969); Courtland L. Smith, *Salmon Fishers of the Columbia* (1979); Charles F. Wilkinson & Daniel K. Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. Kan. L. Rev. 17 (1983).

7. *Vail v. Seaborg*, 120 Wash. 126, 130, 207 P. 15, 16 (1922).

8. See 63 Fed. Reg. 11,482, 11,494 (1998).

9. See *id.* at 11,494–95.

10. See *id.*

11. See *supra* note 3.

12. Many challenges were directed toward biological opinions concerning the operation of the Federal Columbia River Power System. See, e.g., *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999); *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118 (9th Cir. 1997); *Idaho Dep’t of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995). See also *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996) (alleging state-

is currently in the grip of controversy over dam breaching, water management, riparian land use, and other ESA-related issues.¹³

The relationship between the well-being of our natural resources and the well-being of our people has attracted attention. Although not always successful, local efforts to conserve salmon have been ongoing since statehood. During its first session, the Washington legislature established the Office of Fish Commissioner to enforce laws “for the propagation, protection and preservation of food fishes and oysters in the public waters of the State of Washington.”¹⁴ Since then, the legislature has acted many times to protect salmon, and the Washington Attorney General’s Office has supported and defended those state conservation efforts.¹⁵ Despite governmental intervention, however, many salmon populations have become nearly extinct.

Congress enacted the Endangered Species Act in 1973 to conserve endangered and threatened species, as well as the ecosystems on which they depend.¹⁶ Congress found that human activities, “untempered by adequate concern and conservation,”¹⁷ had rendered some animals and plants extinct

managed Columbia River salmon fisheries violated ESA); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075 (9th Cir. 1995) (questioning Bonneville Power Administration’s decision to augment river flows to benefit salmon); *Pacific Northwest Generating Coop. v. Brown*, 38 F.3d 1058 (9th Cir. 1994) (challenging federal agencies’ response to ESA listings of Columbia River salmon).

13. The Northwest Power Planning Council maintains an electronic newsletter that keeps abreast of ESA-related developments in the Columbia Basin. See Northwest Power Planning Council, *Columbia River Basin Bulletin* (visited Aug. 1, 1999) <<http://www.nwppc.org/bulletin/bulletin.htm>>.

14. 1889–1890 Wash. Laws 233.

15. See, e.g., *State v. Crown Zellerbach Corp.*, 92 Wash. 2d 894, 602 P.2d 1172 (1979) (Attorney General assisted in successful criminal prosecution of company that violated conditions of hydraulics permit issued to protect fish life); *Washington Kelpers Ass’n v. State*, 81 Wash. 2d 410, 502 P.2d 1170 (1972) (Attorney General successfully defended statute restricting salmon fishing gears); *Frach v. Schoettler*, 46 Wash. 2d 281, 280 P.2d 1038 (1955) (Attorney General successfully defended statute restricting salmon fishing in ocean); *State ex rel. Campbell v. Case*, 184 Wash. 334, 47 P.2d 24 (1935) (Attorney General successfully defended initiative banning fish traps); *McMillan v. Sims*, 132 Wash. 265, 231 P. 943 (1925) (Attorney General successfully defended rule closing Skagit Bay to commercial salmon fishing); *Vail v. Seaborg*, 120 Wash. 126, 207 P. 15 (1922) (Attorney General successfully defended rule restricting salmon fishing in Puget Sound); *Barker v. State Fish Comm’n*, 88 Wash. 73, 152 P. 537 (1915) (Attorney General successfully defended 1915 Fisheries Code); *Purse Seine Vessel Owners Ass’n v. State*, 92 Wash. App. 381, 966 P.2d 928 (1998) (Attorney General successfully defended administrative decision not to open commercial herring spawn-on-kelp fishery).

16. See 16 U.S.C. § 1531(b) (1994).

17. 16 U.S.C. § 1531(a)(1) (1994).

in the United States and threatened others with extinction.¹⁸ Congress also found that encouraging states to develop and maintain their own conservation programs would serve national interests.¹⁹

At the national level, the ESA represents a far-reaching attempt to save endangered species. At the local level, the ESA represents overlying legislation that affects the physical, cultural, and legal landscapes in which we live. Because the ESA is a federal law that preempts inconsistent state laws, it can diminish the independence we have long cherished unless we take the initiative to recover and protect our salmon.

The listings of salmon under the ESA present both opportunities and challenges for the Pacific Northwest. Threatened extinctions have triggered the ESA and have forced us to consider ways to prevent the loss of this cherished resource. In this regard, the ESA is not an obstacle to be avoided, but a talisman to be followed. In this arena, we face the loss of more than just the fish.

In many ways, our native salmon are like the proverbial canary in the coal mine. Salmon have many of the same physical needs as we humans. Clean water is central among those needs. The decline of our salmon runs is partly due to the decline in the quantity and quality of our water. This causal relationship signals a threat to our own basic needs.

The commonality of interests between salmon and humans extends beyond our shared physical needs. Abundant salmon stocks support recreational and commercial fisheries and fishery-dependent industries, which are vital to our state's economy. Moreover, healthy salmon stocks offer employment and economic potential for thousands of Washington residents.²⁰

Salmon and their habitat are assets which, while intangible at times, are of immense value. Salmon are a part of our image and our culture. They symbolize cold, clear water in our rivers and streams and in the Puget Sound. They symbolize sound stewardship of our forests and agricultural lands. They symbolize preservation of the wild and scenic parts of our state. In short, they symbolize the Pacific Northwest. It is

18. See 16 U.S.C. § 1531(a)(2) (1994).

19. See 16 U.S.C. § 1531(a)(5) (1994). See generally S. Rep. No. 93-307 (1973), reprinted in 1973 U.S.C.C.A.N. 2989.

20. See Governor's Rural Community Assistance Team, Washington State Rural Dev. Council, *Endangered Communities: Existing and Potential Secondary Economic Impacts of Salmon Recovery Initiatives* (1996).

these qualities which keep us here. It is these qualities which attract our nation's best and brightest to come live and work here.

The people of Washington understand that what is good for salmon is also good for water quality, the economy, and their own well-being. In other words, what is good for salmon is also good for them. The effort to save our salmon should not be seen as a question of how many fish we must recover before returning to old ways. The effort is not a fight over salmon, but a fight to protect the quality of life that makes the Pacific Northwest a special place. It is a fight to save ourselves.

The challenge is to preserve simultaneously our salmon, our way of life, and our independence. We can meet that challenge only by changing the way in which governments, private citizens, and businesses approach this unique problem. As mentioned above, the ESA represents an opportunity and an incentive to help ourselves. Successful recovery of our salmon requires collective effort. This effort will be comprised of changes mandated by legislation, changes designed and implemented collaboratively by both the public and the private sectors, and voluntary changes motivated by the knowledge that salmon recovery is in our own best interest.

Whether we view the ESA as an opportunity or a threat, it will prompt us to act and respond differently in the conduct of our daily affairs. The federal agencies responsible for administering the ESA will ensure that we do so.²¹ However, these federal agencies must be allowed the flexibility to recognize and credit state conservation efforts when they administer the ESA, for example, when making listing and delisting decisions. The creative solutions we devise, and the voluntary measures we undertake must be accorded some value in the federal agencies' assessment of our progress in protecting and recovering listed salmon.

This Article discusses our response to ESA listings and the need for federal flexibility in considering that response. Part I describes how the ESA will affect the actions and activities of state and local governments and the citizens they serve. Part II discusses the need for federal agencies to be flexible when they assess the value of state conservation and

21. Under a Memorandum of Understanding dated August 28, 1974, NMFS has ESA jurisdiction over anadromous fish species such as salmon, while the U.S. Fish and Wildlife Service, an agency within the U.S. Department of the Interior, has ESA jurisdiction over other species. *See also* 16 U.S.C. § 1532(15) (1994) (dividing ESA authority primarily between Department of Commerce and Department of the Interior).

recovery efforts, regardless of whether they are regulatory or voluntary, permissive or mandatory.

I. HOW THE ESA WILL AFFECT STATE AND LOCAL GOVERNMENTS AND THE CITIZENS THEY SERVE

A. *Structure of the ESA*

The ultimate goal of the ESA is to return endangered and threatened species to the point where they no longer need the statute's protection.²² To achieve this goal, the ESA has three basic missions: (1) to identify species needing protection and the means necessary to protect and recover those species; (2) to prevent harm to listed species; and (3) to prevent and punish the taking of listed species and the destruction of their habitats.²³

Three major sections form the backbone of the ESA—sections 4, 7, and 9. Section 4 contains the process for listing and delisting endangered and threatened species, the designation of their critical habitat, and the development of a recovery plan.²⁴

Section 7 requires federal agencies to “insure” that any action they authorize, fund, or take “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”²⁵ If a federal agency determines that its action may impact listed salmon, it must consult with NMFS.²⁶ This obligation can affect anyone seeking federal action, funding, or authorization.

As part of section 7 consultation, NMFS prepares a biological opinion analyzing the effects of the agency action on the listed species and its critical habitat.²⁷ If NMFS concludes that the action is likely to jeopardize that species' continued existence, it may specify reasonable and prudent alternatives. If, on the other hand, NMFS concludes that no

22. See 16 U.S.C. § 1531(b) (1994) (indicating that purpose of ESA is to “conserve” endangered species); 16 U.S.C. § 1532(3) (1994) (defining conservation as, “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”).

23. See 16 U.S.C. § 1531(b).

24. See 16 U.S.C. § 1533 (1994).

25. 16 U.S.C. § 1536(a)(2) (1994). Section 7 is codified at 16 U.S.C. § 1536 (1994).

26. See 16 U.S.C. § 1536(c)(1).

27. See 16 U.S.C. § 1536(b)(3).

jeopardy exists, it may issue an incidental take statement.²⁸ This statement authorizes the agency action even though endangered or threatened species may incidentally be taken.²⁹

State and local governments may be able to utilize the section 7 consultation when their activities are so intertwined with those of the federal government that it would be impractical to analyze them separately. For example, in *Ramsey v. National Marine Fisheries Service*, NMFS argued that when the planning of state-regulated Columbia River salmon fisheries is intertwined with the planning of federally regulated ocean fisheries, section 7 consultation is available to the states “as part of ocean harvest management.”³⁰ The district court agreed, concluding that “[section] 7 is the most appropriate, and perhaps the only workable venue for ESA compliance” by Washington and Oregon in their regulation of Columbia River fisheries.³¹ In affirming the district court, the Ninth Circuit held that Washington did not violate the ESA because its fishing regulations were “contemplated by an incidental take statement issued under section 7 . . . and are conducted in compliance with the requirements of that statement.”³²

Section 9 prohibits the “taking” of endangered species.³³ Federal regulations broadly define “take” to include the destruction of habitat as well as the killing of individual animals.³⁴ The agencies that administer the ESA may adopt rules to prohibit the taking of threatened species.³⁵ They have done so for most threatened species.³⁶ Section 9 also makes it

28. See 16 U.S.C. § 1536(b)(4) (setting forth content of incidental take statement).

29. Section 9 of the ESA otherwise prohibits the taking of endangered species. See 16 U.S.C. § 1538 (1994). Federal rules prohibit the taking of most threatened species. See 50 C.F.R. §§ 17.31, 227.21 (1998).

30. *Ramsey v. National Marine Fisheries Serv.*, No. 94-761-MA, op. and order at 13–14 n.8 (D. Or. Apr. 4, 1995).

31. *Id.* at 17.

32. *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir. 1996).

33. See 16 U.S.C. § 1538. The ESA prohibits any person from “tak[ing] any [endangered] species within the United States or the territorial seas of the United States.” 16 U.S.C. § 1538(a)(1)(B).

34. See *infra* notes 37–38 and accompanying text.

35. See 16 U.S.C. § 1533(d) (1994).

36. See 50 C.F.R. § 17.31 (1998) (prohibiting taking of threatened species under jurisdiction of U.S. Fish and Wildlife Service); 50 C.F.R. § 227.21 (1998) (prohibiting taking of certain threatened salmon). In *Sierra Club v. Clark*, 755 F.2d 608, 612 (8th Cir. 1985), the U.S. Fish and Wildlife Service argued that § 1533(d) gave it the authority to allow public trapping of threatened wolves. The Eighth Circuit disagreed, noting that under § 1532(3), the Service lacked authority to adopt regulations allowing the public to take threatened species except “in the extraordinary case where population pressures within the ecosystem cannot be otherwise relieved.” *Id.* at 614; *cf.* *Christy v.*

unlawful for any person to “attempt to commit, solicit another to commit, or cause to be committed” any offense defined in the ESA.³⁷ The term “person” is broadly defined to include individual citizens as well as “any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State . . . [and] any State, municipality, or political subdivision of a State.”³⁸

The ESA defines the term “take” to encompass a wide variety of actions, including to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³⁹ Federal regulations further define “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”⁴⁰ This definition has withstood challenge before the U.S. Supreme Court.⁴¹ The same regulation defines “harass” as an “intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns.”⁴²

The take prohibitions of section 9 can be enforced either by the federal government or by private individuals pursuant to the citizen suit provisions of the ESA.⁴³ The Act fosters citizen suits by allowing successful plaintiffs to recover attorney fees and other costs.⁴⁴

1. The Take Prohibitions of Section 9 Are Expansive and Will Require Us to Modify Our Actions

The take prohibitions of the ESA and their implementing regulations will require us—the citizens, businesses, and government agencies of this state—to modify many of our regular activities we normally engage in. Otherwise, these activities may constitute a take, which consists of the following three elements: (1) an act or omission which (2) causes

Hodel, 857 F.2d 1324, 1333 (9th Cir. 1988) (finding that regulation allowing controlled hunting of grizzly bears to relieve population pressure was supported by rational basis).

37. 16 U.S.C. § 1538(g).

38. 16 U.S.C. § 1532(13) (1994).

39. 16 U.S.C. § 1532(19) (1994).

40. 50 C.F.R. § 17.3 (1998).

41. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

42. 50 C.F.R. § 17.3.

43. See 16 U.S.C. § 1540 (1994).

44. See 16 U.S.C. § 1540(g)(4).

(3) injury or death to a listed species or injury to the habitat on which it depends.

Courts would likely find that direct assault on a listed species or elimination of an essential component of its habitat constitutes a section 9 violation.⁴⁵ More subtle actions or activities, however, may similarly be prohibited. In *Palila v. Hawaii Department of Land & Natural Resources*, the department's maintenance of feral goats and sheep in the endangered palila birds' habitat gave rise to a take violation.⁴⁶ The palila is found only in a small forested area on the slopes of Mauna Kea in Hawaii; the feral goats and sheep ate the leaves, stems, seedlings, and sprouts of a particular kind of tree on which the palila primarily depended for food and shelter.⁴⁷ In holding that the Department's actions constituted a take, the Ninth Circuit affirmed the district court's finding that those actions endangered the palila.⁴⁸ The Ninth Circuit supported its conclusion with the legislative finding that the greatest threat to endangered species is the destruction of their natural habitats.⁴⁹

Other courts have reached similar conclusions. In *Sierra Club v. Lyng*,⁵⁰ the district court found that the U.S. Forest Service had committed a take of the red cockaded woodpecker by managing federal timberlands so as to produce only even-aged tree stands. Clearcutting practices, the court said, impaired the "essential behavioral patterns" of the woodpecker, resulting in a section 9 violation.⁵¹

Causation under section 9, like in tort law, can be direct or indirect.⁵² Causation may be attributable directly to the defendant or to a third

45. An example is *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998), in which Mr. McKittrick was successfully prosecuted by the U.S. Fish and Wildlife Service for intentionally shooting an endangered gray wolf imported from Canada. Gray wolves, although endangered in most areas of the United States, are plentiful in Canada. However, according to the Ninth Circuit, "gray wolves are protected by the ESA based on where they are found, not where they originate. Canadian gray wolves that migrate into the United States [naturally] assume protected status when they cross the border." *Id.* at 1173 (citations omitted).

46. *See* 639 F.2d 495 (9th Cir. 1981).

47. *See Palila v. Hawaii Dep't of Land & Resources*, 471 F. Supp. 985, 989-90 (D. Haw. 1979).

48. *See Palila*, 639 F.2d at 497-98.

49. *See id.* at 498; *see also Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108 (9th Cir. 1988).

50. 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part and vacated in part sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

51. *Id.* at 1271.

52. *See Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 697-702 (1995).

party.⁵³ Moreover, the act need not be the only cause of the prohibited effect, or even the most important cause; it need only be a contributing cause.⁵⁴

The injury under section 9 includes direct injury or death to a particular animal, significant habitat modification or degradation, or injury to the recovery prospects of a listed species.⁵⁵ Thus, actions that produce a substantial risk of injury to a species can constitute a take even if no member of the species has been physically injured.⁵⁶ Courts have not allowed an “experimental approach” to the survival of endangered species.⁵⁷

The ESA does not require that injury occur before an action can be enjoined.⁵⁸ The definition of “harass” includes the concept of threatened or potential injury. A take may result from injury to an animal or its habitat; it may also arise from decreased chances for recovery. According to the *Palila* court, habitat destruction that prevents the recovery of a species by affecting its essential behavioral patterns constitutes actual injury and effects a taking under section 9 of the ESA.⁵⁹

Generally, unintentional and unknowing acts cannot escape scrutiny under the take prohibition. However, the knowledge or mental state of the actor becomes relevant when punishment is concerned. Knowing violations are crimes, while civil penalties may be levied without proof of mental state.⁶⁰ Therefore, in the absence of an incidental take authorization, persons who catch listed salmon or yard logs through a salmon-bearing stream may be guilty of a take under the ESA even if they neither intended nor knew of the consequences of their actions. Those who are involved in projects that will significantly degrade or modify habitats are similarly at risk.

53. See *Strahan v. Coxe*, 127 F.3d 155, 163–64 (1st Cir. 1997), *cert. denied*, 119 S.Ct. 437 (1998).

54. See *Palila*, 639 F.2d 49.

55. See *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988); 50 C.F.R. § 17.3 (1998).

56. See, e.g., *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (finding that some actions may constitute a take because they pose high risks of certain or imminent injury).

57. See *Palila*, 649 F. Supp. at 1082.

58. See *id.*

59. See *id.* at 1075.

60. See 16 U.S.C. § 1540(a) (1994).

Courts have also ruled that government agencies can violate section 9 of the ESA through indirect actions. For example, in *Sierra Club v. Yeutter*, the Fifth Circuit held that the Forest Service's management of timber stands constituted a taking of the red cockaded woodpecker.⁶¹ Similarly, the Eighth Circuit found the Environmental Protection Agency's (EPA's) registration of pesticides containing strychnine to be a taking because endangered species died from ingesting the poison, which could be distributed only pursuant to EPA's registration scheme.⁶² Finally, as discussed above, the *Palila* court held that Hawaii's practice of keeping wild goats and sheep in the habitat of the endangered palila bird constituted a taking.⁶³

2. *Potential for "Take" by Government Agencies Through Regulation, Permitting, or Failure to Regulate*

Some of the actions and activities described above obviously trigger the take prohibitions of section 9. Less apparent, however, is the fact that project proponents are not the only ones who are at risk of a take. Permitting and regulatory agencies may also be at risk. This possibility will affect the way agencies issue permits and administer regulations.

State and local governments administer myriad laws that often require permits or other approvals. Examples include permits to engage in logging activities under the Washington Forest Practices Act,⁶⁴ substantial development permits under the Washington Shoreline Management Act of 1971,⁶⁵ hydraulic project approvals under the Washington Fisheries Code,⁶⁶ and grading and building permits under local zoning codes.⁶⁷

In the absence of the ESA, the issuance of these permits is largely guided by state and local laws. Section 9 of the ESA, however, adds an entirely new dimension to government permitting activities. In *Strahan v. Coxe*, for example, the First Circuit indicated that a government agency could violate section 9 merely by issuing permits and licenses or

61. See 926 F.2d 429 (5th Cir. 1991).

62. See *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1300-01 (8th Cir. 1989).

63. See *supra* notes 46-49 and accompanying text.

64. Wash. Rev. Code § 76.09 (1998).

65. Wash. Rev. Code § 90.58 (1998).

66. Wash. Rev. Code § 75.20 (1998).

67. See Wash. Rev. Code § 36.70 (1998).

otherwise authorizing private activities.⁶⁸ In the *Strahan* case, environmental groups alleged that Massachusetts officials violated the ESA by authorizing gillnet and lobster pot fishing.⁶⁹ The trial court found that endangered northern right whales, seasonally present in Massachusetts waters, were becoming entangled in the fixed fishing gears.⁷⁰ It concluded that the mere licensing and permitting of such fishing practices constituted a take under the ESA.⁷¹ Affirming the lower court decision, the First Circuit noted that the ESA prohibits the acts not only of those who take directly, but also “acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place.”⁷² The court held that “a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”⁷³

In *Strahan*, Massachusetts argued that the licensing or permitting of fishing gears is no different than the licensing of cars and drivers; its authorization does not constitute a take any more than the licensing of drivers and cars constitute a crime whenever an automobile is used to break the law.⁷⁴ In response, First Circuit pointed out that, unlike the Department of Licensing, the fishery agency had licensed the use of gillnets and lobster pots in a manner that was likely to result in an ESA violation.⁷⁵ The court viewed Massachusetts’ efforts to minimize entanglements and the fact that other activities exacted potentially greater impacts on the listed species as irrelevant.⁷⁶ *Strahan* illustrates that a “person,” broadly defined to include state and local governments and subdivisions thereof, may violate the ESA by permitting or otherwise authorizing the acts of third parties that exact a taking.

That government activities may constitute prohibited acts under the ESA is not a new concept. In *Defenders of Wildlife v. Environmental*

68. See 127 F.3d 155, 158 (1st Cir. 1997), *cert. denied*, 119 S. Ct. 81 (1998).

69. Massachusetts’ Division of Fisheries, like Washington’s Department of Fish and Wildlife, regulates fishing in that state’s inland and coastal waters. See *id.* at 158.

70. See *Strahan v. Coxe*, 939 F. Supp. 963, 984 (D. Mass. 1996).

71. See *id.* at 984–86.

72. *Strahan*, 127 F.3d at 163.

73. *Id.*

74. See *id.* at 163–64.

75. See *id.* at 164.

76. See *id.* at 164–65.

Protection Agency, Eighth Circuit held that the EPA had taken endangered species by continuing to register pesticides that contained strychnine under the Federal Insecticide, Fungicide, and Rodenticide Act.⁷⁷ The *Strahan* decision goes one step further, however, by applying the ESA to state licensing decisions. The Ninth Circuit has not yet ruled on this issue, but at least one district court in the circuit has addressed a similar one. In *Greater Ecosystem Alliance v. Lydig*, the U.S. District Court for the Western District of Washington confronted the question of whether Washington wildlife officials, by authorizing the hunting of black bears with hounds and bait, had taken listed grizzly bears that inhabit the same region.⁷⁸ The court concluded that they did.⁷⁹

This potential liability may extend even further. Not only would governments be liable for authorizing certain activities, they could also be liable for failing to regulate in areas where they have the authority to do so. Under general principles of tort and criminal law, an omission is actionable if the defendant has a preexisting duty to act.⁸⁰ Consequently, ESA liability for governmental inaction may turn upon the existence of an underlying obligation to act.

The risk that governments may be liable under the ESA for inaction was demonstrated in *Loggerhead Turtle v. County Council*.⁸¹ The issue in that case was whether the county's failure to ban or effectively regulate beach driving and certain artificial light sources constituted a violation of the ESA. The case involved loggerhead and green sea turtles, which were listed as threatened and endangered, respectively.⁸² Female adults of these species come ashore in the spring to deposit their eggs in the sand.⁸³ Months later, the hatchling turtles break out of their shells at night and make their way toward the brightest light on the horizon.⁸⁴ On undeveloped beaches, the brightest light is the moon's reflection off the water.⁸⁵ On developed beaches, however, the brightest light can be inland

77. See 882 F.2d 1294, 1301 (8th Cir. 1989).

78. See No. C94-1536C, op. and order at 16-17 (W.D. Wash. Mar. 5, 1996).

79. See *id.*

80. For an interesting application of these principles to fisheries management, see *Mesiar v. Heckman*, 964 P.2d 445 (Alaska 1998).

81. 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1488 (1999).

82. See *id.* at 1234.

83. See *id.* at 1235.

84. See *id.*

85. See *id.*

artificial lights.⁸⁶ The plaintiffs alleged that the county had violated the ESA by failing to restrict beach driving, which crushed the nests and the young turtles, and by failing to regulate inland artificial lights.⁸⁷

The court in *Loggerhead Turtle* left the ultimate question—whether the county committed a take by failing to regulate these activities—undecided. Nonetheless, it ruled that the plaintiffs had shown enough causal connection to hold the county liable for “harmfully” inadequate regulation of artificial beachfront lighting.⁸⁸ The potential for take violations gives permitting agencies an additional reason to be careful when making regulatory decisions.

The section 9 prohibitions⁸⁹ and the section 7 consultation requirements⁹⁰ will guide state and local officials in the discharge of their permitting and regulatory responsibilities. The Washington Department of Ecology regulates activities that affect water quality and quantity, which are important to salmon survival. The Department issues several kinds of permits under the federal Clean Water Act.⁹¹ Washington Department of Natural Resources authorizes logging activities through forest practices permits,⁹² which can affect salmon by raising the temperature and silt content of streams. Washington’s cities and counties develop comprehensive land use plans under the state Growth Management Act⁹³ and issue building, grading, shoreline, and many other development-related permits.⁹⁴ The list of permitting and regulatory responsibilities is extensive.

The listing of species under the ESA affects permitting and regulatory decisionmaking, which in turn affects our lives. The listing of Puget Sound chinook, for example, affected a highly urbanized area.⁹⁵ We must protect the Puget Sound chinook and other listed species from further

86. *See id.*

87. *See id.*

88. *See id.* at 1249.

89. *See supra* notes 33–42 and accompanying text.

90. *See supra* notes 25–29 and accompanying text.

91. Clean Water Act of 1977, 33 U.S.C. §§ 1251–1387 (1994).

92. *See* Wash. Rev. Code § 76.09 (1998).

93. Wash. Rev. Code § 36.70A (1998).

94. *See* Wash. Rev. Code § 36.70 (1998) (Planning Enabling Act); Wash. Rev. Code § 90.58 (1998) (Shoreline Management Act).

95. *See supra* note 3.

harm and develop effective recovery strategies to meet our obligations as citizens, business leaders, and governmental officials.

Washington is currently developing a salmon recovery strategy that will require the collective efforts of all.⁹⁶ The strategy will likely involve changes to state and local laws and regulations, economic incentives, and grassroots initiatives. We can be assured that our sacrifices and commitments will matter to salmon's survival. We must also be assured, however, that they will matter when the federal government administers the Endangered Species Act with respect to Washington salmon.

II. FEDERAL AGENCIES MUST HAVE THE FLEXIBILITY TO CONSIDER CONSERVATION AND RECOVERY EFFORTS MADE BY STATE, TRIBAL, AND LOCAL GOVERNMENTS

Implementation of the ESA raises significant concerns for state, tribal, and local governments. If administered as Congress had intended, however, the ESA also provides opportunities for governments, industries, tribes, and private citizens to collaborate in the development of effective programs for preserving salmon and other threatened or endangered species. Congress envisioned that the federal agencies administering the ESA would involve state and local governments in their decisionmaking and would consider their protective efforts—including the voluntary and prospective efforts of their citizens.⁹⁷

Pursuant to section 4 of the ESA, the Secretary of the Interior or Commerce must determine whether a species is threatened or endangered based on the following five factors:

- (A) present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;

96. See Washington Governor's Salmon Recovery Office, *Salmon Recovery Home Page* (visited Aug. 1, 1999) <<http://www.governor.wa.gov/lcsci/sro.htm>>.

97. See 16 U.S.C. § 1531(a)(5) (1994) (stating that "encouraging the States . . . to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants"); 16 U.S.C. § 1531(c)(2) (1994) (stating that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species").

(D) inadequacy of existing regulatory mechanisms; or

(E) other natural or man-made factors affecting its continued existence.⁹⁸

In addition, § 1533(b)(1)(A) directs the Secretaries to take into account the conservation efforts of states and their political subdivisions before determining whether a species is endangered or threatened:

The Secretary shall make determinations required by [§ 1533(a)(1)] solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and *after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a state or foreign nation, to protect such species, whether by predator control, protection of habitat, and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.*⁹⁹

Despite congressional intent, however, a recent decision by the U.S. District Court for the District of Oregon makes it unclear whether voluntary and nonregulatory efforts will be considered. In *Oregon Natural Resources Council v. Daley*, the court held that NMFS's decision not to list Oregon coastal coho salmon as threatened was arbitrary and capricious.¹⁰⁰ In reaching that conclusion, the court found that the ESA precluded NMFS from considering, in its listing decision, future or voluntary actions to which commitments had been made by the state.¹⁰¹ According to the court's rationale, listing decisions must stem from current regulatory schemes rather than future or voluntary pledges and commitments.¹⁰²

To understand the significance of this issue and the impact of the court's decision, some background regarding the impetus for, and the development of, the Oregon plan is necessary. In 1995, spurred by petitions to list coho along the Oregon coast, Oregon began working on a conservation plan to recover and protect Oregon coastal coho. In

98. 16 U.S.C. § 1533(a)(1) (1994). The Secretaries use the same criteria when determining whether to delist a species. *See* 50 C.F.R. § 424.11(c) (1998); *see also* Biodiversity Legal Found. v. Babbitt, 900 F. Supp. 526, 530 (D.D.C. 1995).

99. 16 U.S.C. § 1533(b)(1)(A) (1994) (emphasis added).

100. *See* 6 F. Supp. 2d 1139, 1160–61 (D. Or. 1998).

101. *See id.* at 1155.

102. *See id.*

developing its plan, the Oregon Coastal Salmon Restoration Initiative (OCSRI), Oregon drew guidance from NMFS's prior statements regarding the appropriate content of a conservation plan. According to those statements, such a plan should (1) identify the causes of the species' decline; (2) establish priorities for action; (3) establish explicit objectives and timelines; (4) adopt measures necessary to achieve those objectives; (5) provide high levels of certainty that those measures will be implemented (authorization, funding, etc.); (6) establish quantifiable criteria for measuring progress; (7) establish a comprehensive monitoring program; (8) integrate federal, state, tribal, local, corporate, and non-governmental activities and projects; and (9) use an adaptive management approach that will allow the plan to be changed in response to new information and scientific understandings.

Oregon believed that the OCSRI, developed in concert with NMFS, addressed each of these elements. The plan identified the problems that had led to the species' decline, contained a mix of regulatory and programmatic measures calculated to address those problems, and established a set of objectives. It also employed the concept of adaptive management; it was designed to be a dynamic plan that would change as new information arose or existing conditions changed.¹⁰³ Although the OCSRI had a regulatory component, it ultimately contemplated voluntary partnerships between the state, its political subdivisions, and private property owners.

Taking the OCSRI into account, NMFS concluded that Oregon coastal coho should not be listed as threatened. NMFS stated:

The OCSRI contains the tools necessary to ensure that adequate habitat measures are ultimately adopted and implemented: a comprehensive monitoring program, scientific review, and an adaptive management program. Natural escapement has been increasing markedly in recent years and reached 80,000 fish in 1996. On the basis of the harvest and hatchery improvements together with the habitat protections in the [federal Northwest Forest Plan] and given the improving trends in escapement, the Oregon Coast coho is not likely to become endangered in the interval between this decision and the adoption of improved habitat measures by the State of Oregon. Under the April 1997 [Memorandum of Agreement] between NMFS and the governor of

103. *See id.* at 1147.

Oregon... NMFS will propose to Oregon additional forest practices modifications necessary to provide adequate habitat conditions for coho. If these or other comparable protections are not adopted within 2 years, NMFS will act promptly to change the ESA status of this [species] to whatever extent may be warranted.¹⁰⁴

However, the district court in *Oregon Natural Resources Council v. Daley* held that the ESA did not allow NMFS to consider all the steps Oregon planned to take to protect its coastal coho.¹⁰⁵ The court remanded the case to NMFS, which has since listed the fish as threatened.¹⁰⁶ The court recognized its duty to construe all parts of the ESA together, but offered itself only one way to accomplish that task.¹⁰⁷ It read § 1533(a)(1)(D) as restricting the types of state conservation efforts NMFS may consider under § 1533(b)(1)(A).¹⁰⁸ Consequently, the court said that NMFS may consider only current, enforceable state measures; it may not give any weight to voluntary or future conservation efforts made by the states.¹⁰⁹

The ESA can be interpreted in a way that will give effect to congressional intent without restricting the discretion of NMFS or discounting state conservation efforts. Congress intended that NMFS should review and consider any ongoing state conservation efforts NMFS deems relevant before analyzing the listing factors of § 1533(a)(1). The language of § 1533(b)(1)(A) indicates that Congress intended § 1533(b)(1)(A) and § 1533(a)(1) to work together, with neither section limiting the other. For example, § 1533(b)(1)(A) mandates that NMFS “make determinations required by subsection (a)(1) of this section” *after* taking into account state efforts to protect the species in question. Furthermore, § 1533(b)(1)(A) directs NMFS to consider *any* “efforts” made

104. 62 Fed. Reg. 24,588, 24,607–08 (1997).

105. See 6 F. Supp. 2d at 1153–55.

106. See 50 C.F.R. § 227.4(o) (1998).

107. The court stated the question as “whether § 1533(b)(1)(B) should be read merely to clarify what types of ‘existing regulatory mechanisms’ may be considered as the fourth factor in § 1533(a)(1)(D) or whether it should be interpreted to expand upon the five factors by, in effect, adding yet another factor.” *Daley*, 6 F. Supp. 2d at 1153.

108. The court also concluded that § 1533(a)(1)(D) limits the analysis NMFS may perform when NMFS considers the other four factors of § 1533(a)(1). See *id.* at 1152 (“[T]he NMFS must determine, based upon a rational analysis of the factors set forth in the ESA, and in light of current regulatory measures, that the Oregon Coast ESU is not likely to become endangered in the foreseeable future.”) (emphasis added).

109. See *id.* at 1155.

by a state *before* determining whether existing regulatory mechanisms are adequate under § 1533(a)(1)(D).

The “conservation practices” the statute gives as examples of such efforts—predator control and protection of habitat and food supply—are not limited to regulatory programs. Such practices may include nonregulatory efforts such as appropriate management of state-owned lands, disease-control research, purchase of conservation easements, and campaigns to encourage conservation-oriented policies and practices. The ESA should be read in a way that gives NMFS the discretion to accord to such efforts whatever weight it deems appropriate when performing the requisite analysis under § 1533(a)(1).¹¹⁰

The rules implementing section 4 support this second interpretation. They state that, in making a listing decision, NMFS has the discretion to determine what weight it will give to a state’s conclusion as to whether a species is endangered or threatened.¹¹¹ The amount of weight thus accorded by NMFS will depend, in part, on “the degree of protection afforded the species.”¹¹² Such protection may include financial incentives to encourage landowners to set aside streamside buffers or otherwise protect salmon habitat voluntarily.

The language of section 4, taken as a whole, also suggests that NMFS has discretion to weigh voluntary and prospective components of state conservation efforts.¹¹³ The factors NMFS must consider under section 4 are broad. For example, NMFS could hardly make any judgment about “threatened” habitat destruction without taking into account prospective or voluntary components of a state’s efforts. Thus, all “efforts” a state might make to protect a species should be relevant to the analysis.

Federal discretion to consider state conservation efforts should not end when a species is listed. The goal of the ESA is to return species to the point where they no longer need the statute’s protection—in other words, where they can be delisted. State recovery efforts also aim to achieve that goal. NMFS uses the same criteria in listing as well as delisting

110. *Cf.* Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988) (finding that agency is to assess data in record against listing criteria of § 1533(a)(1) “and then to exercise its own expert discretion in reaching its decision”).

111. *See* 50 C.F.R. § 424.11(e) (1998).

112. 50 C.F.R. § 424.11(e).

113. *See supra* note 24 and accompanying text.

decisions.¹¹⁴ Here again, NMFS must be able to consider all state conservation efforts in making such decisions.

III. CONCLUSION

The reach of the Endangered Species Act is expansive and powerful. As a consequence of the ESA and the listing of salmon species that originate or migrate through Washington, we will have to make tough choices in the way we conduct our lives. Washington's salmon strategy, currently being refined, calls for collaboration between local, tribal, state governments, and regulating federal agencies. It will also require the cooperation of businesses and environmentalists, individuals as well as groups. Although we all have different tasks, there is but one common goal for which we will have to make sacrifices.

Our challenge is to preserve our salmon, our environment, our way of life, and our independence. Whether viewed as a carrot or a stick, the ESA calls on us to act and respond creatively. We have demonstrated our ability to respond creatively; there is no doubt that we shall do so in order to meet this challenge. The ESA must be read in a way that fosters and recognizes creative solutions to evolving environmental issues. The federal agencies must, in turn, be allowed the flexibility to consider and appropriately credit all state efforts as they make listing and delisting decisions and administer the ESA.

114. *See supra* note 98 and accompanying text.

