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## NOTES

# The Exemption Process under the Endangered Species Act: How the "God Squad" Works and Why

### INTRODUCTION

Suppose the long-snouted ferret, native to the state of Jefferson, is nearing extinction. This species of ferret lives in the high plains region and can only survive in this environment. Only 1,000 breeding adults survive. Suppose further that the high plains of Jefferson are owned by the federal government and are the source of one half of the oil and natural gas for the country. With these resources in ever increasing demand, the need to exploit them is growing fast.

Suppose, also, that to remove the oil and gas from the ground will destroy the ferret's habitat. The drilling, pumping and shipping of the oil and gas will drive the ferret to extinction. Jefferson's economy, however, is based on the production of oil and gas. Oil companies, relying on mineral leases for the oil and gas bought from the government, employ thousands of people and pour millions of dollars into Jefferson's economy.

The interests in protecting the ferret from extinction are in direct conflict with those of producing the oil and gas. Either the ferret is saved or thousands lose their jobs and Jefferson's economy suffers, along with the economy of the entire country.<sup>1</sup>

This conflict is more serious if Jefferson is within the United States. Under the Endangered Species Act of 1973 (ESA),<sup>2</sup> the federal government mandates that if a species is listed as either endangered or threatened,<sup>3</sup> all government departments and

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1 See *Portland Audobon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989) (stating the actual facts from the spotted owl case upon which the long-snouted ferret hypothetical is based), *cert. denied*, 110 S. Ct. 1470 (1990); Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361, 379 (1984) (describing another hypothetical conflict between species preservation and economic development).

2 16 U.S.C. §§ 1531-43 (1988).

3 16 U.S.C. § 1533 (1988).

agencies must protect it.<sup>4</sup> In fact, under section 7 of the ESA, "[e]ach federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."<sup>5</sup>

These provisions would foreclose the government from selling leases to the oil companies, as the sale would likely jeopardize the continued existence of the ferret. This would stop the production of oil, leading to harsh results for the workers of the oil companies, and both the regional and national economy. Is there any way around the requirements of the Act? Can the oil companies or Jefferson seek an exemption from the strictures of the Act? Yes, they can, and that is the focus of this Note.

Section 1536 of the ESA provides a procedure by which a federal agency or the state may obtain an exemption from the mandates of the ESA.<sup>6</sup> The original ESA, as formulated in 1973, did not include this exemption process, but a subsequent United States Supreme Court decision in *TVA v. Hill*<sup>7</sup> prompted Congress to add the process in 1978 and 1979 amendments to section 7.<sup>8</sup> The amendments, now codified in section 1536, delineate a complex procedure for seeking an exemption.<sup>9</sup> Central to the procedure is the formation of the Endangered Species Committee, a cabinet level group, that has final decision-making power over exemptions.<sup>10</sup> The Joint Regulations on Endangered Species provide the application procedure and consideration measures.<sup>11</sup>

This Note explores the exemption process. Part I looks at the historical development of the ESA and the policy judgments behind this development. Part I first considers the arguments made for the preservation of species, tracing these arguments through the laws preceding the ESA and through the drafting of the origi-

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4 16 U.S.C. § 1536 (1988).

5 *Id.*

6 *Id.*

7 437 U.S. 153 (1978).

8 See Coggins & Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433, 1476-77 (1982); see also *TVA v. Hill*, 437 U.S. 153, 210 (1978) (Powell, J., dissenting) ("I have little doubt that Congress will amend the Endangered Species Act to prevent the grave consequences made possible by today's decision.").

9 16 U.S.C. § 1536 (1988).

10 *Id.*

11 Endangered Species Exemption Process, 50 C.F.R. §§ 450-53 (1989).

nal ESA. It then follows the ESA through its analysis in the courts that led to the creation of the exemption process.

Part II discusses the drafting of the exemption process and its subsequent use in the cases of the snail darter and the whooping crane. The analysis focuses on why the process was needed and on the rationality given for it at its inception.

Part III explains the process in depth. It examines the application process, the role of the Secretaries of the Interior and Commerce, and the Endangered Species Committee's formation and duties.

Part IV analyzes the status of the exemption process today in the context of the spotted owl case. Much attention is focused on the exemption process thirteen years after its inception. Calls have been made to weaken the requirements of the process<sup>12</sup> or to broaden the mandate of the Committee.<sup>13</sup> Part V argues that these measures will undercut the intent behind the ESA as a whole, that the exemption process needs to be rigorous to achieve the ESA's purpose, and that no changes should be made in the process.

## I. THE HISTORY AND POLICY OF THE ENDANGERED SPECIES ACT

An understanding of the arguments for species preservation is needed before any meaningful analysis can be made of the ESA and, more specifically, the exemption process.

### A. *Why do we want to preserve species?*

Four general arguments for preserving species can be categorized as direct benefits, indirect benefits, aesthetic considerations, and moral or ethical considerations.<sup>14</sup> This Note looks at each

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12 See S. 3112, 101st Cong., 2d Sess., 136 CONG. REC. S16,775-76 (daily ed. Oct. 23, 1990) and 136 CONG. REC. S16,771-819 (daily ed. Oct. 23, 1990) (discussing the Packwood Amendment proposed by Sen. Packwood (R-Ore.) to immediately convene the Endangered Species Committee to resolve the spotted owl case); see also *infra* note 209.

13 See Press Conference of Secretary of Agriculture Clayton Veutter and Secretary of Interior Manuel Lujan (June 26, 1990) ("[W]e believe that it would be most appropriate for the Endangered Species Committee to have a broader mandate than presently exists in the law. In other words, our intent would be to propose changes—legislative changes—that will broaden the mandate of the committee in dealing with situations such as [the spotted owl case] in the future.").

14 See P. EHRLICH & A. EHRLICH, *EXTINCTION* (1981) [hereinafter EHRLICH]; B. NORTON, *WHY PRESERVE NATURAL VARIETY?* (1987); see generally Linder, *New Directions for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49 (1990).

argument individually.

### 1. Direct Benefits

The first argument for species preservation is that diverse species provide direct benefits and potential benefits to humankind and thus should be maintained.<sup>15</sup> Both animal and plant species<sup>16</sup> provide food and medicines for the world's population.<sup>17</sup> They also are of fundamental importance to scientific research and industrial development.<sup>18</sup>

Preserving genetic diversity underlies all the direct benefits related to preserving species. Each species' genetic code is unique; even among members of a species, genetic differences exist.<sup>19</sup> These differences between species and individuals are the driving force for evolution, according to Charles Darwin.<sup>20</sup> As environments change over time, species and individuals better adapted to the new environment are more likely to survive and reproduce and thus pass on their genetic information.<sup>21</sup>

Preserving diversity within a species maintains the entire genetic library of unique combinations of genetic codes. Protecting the genetic library greatly enhances the likelihood of survival and adaptation of a species in the face of a catastrophic destruction of an environment or environments.<sup>22</sup>

15 See EHRlich, *supra* note 14, at 53-76; Campbell, *Federal Protection of Endangered Species: A Policy of Overkill?*, 3 UCLA L. REV. 247, 267-70 (1983).

16 See Coggins & Harris, *The Greening of American Laws?\*\*\*The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247, 253-57 (1987).

17 See EHRlich, *supra* note 14, at 53-76.

18 See Coggins & Harris, *supra* note 16, at 256-58; S. YAFFEE, PROHIBITIVE POLICY 22-24 (1982).

19 See EHRlich, *supra* note 14, at 18-32; see e.g., Goodman, *Preserving Genetic Diversity of Salmonid Stocks: A Call for Federal Regulation of Hatchery Programs*, 20 ENVTL. L. 111 (1990).

20 *Id.*

21 *Id.* (Darwin termed this process "selective adaptation.")

22 H.R. REP. NO. 412, 93d Cong., 1st Sess. 4-5 (1973). Debate in Congress shows its concern for preserving genetic variability.

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply, we threaten their—and or our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable . . . .

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 which we cannot solve, and may provide answers to questions which we have not yet learned to ask . . . .

Who knows, or can say, what potential cures for cancer or other scourges,

The crops that compose the world's food supply exemplify the importance of preserving genetic variability.<sup>23</sup> "Fewer than twenty crops supply more than ninety percent of the world's food supply, and three crops—maize, rice, and wheat—provide more than half."<sup>24</sup> Mass starvation could result if an environmental catastrophe or a parasite were to arise and attack one or more of the world's staples. "By maintaining the genetic variability necessary for these harvested species to survive the constant onslaught of new parasites and diseases, the wild progenitors of these crop species provide a critical resource for the protection of the world's food supplies."<sup>25</sup> Moreover, other wild species not now relied upon could become direct sources of food or could contribute through hybridization to harvests of new crops.<sup>26</sup> Preserving fish species is similarly important, as marine fish provide an abundant food supply.<sup>27</sup>

Besides the value of diverse animal and plant species in regard to the food supply, "the potential for the discovery of new medicines from the study of seemingly obscure and unimportant species" also warrants species preservation.<sup>28</sup> Many important new drugs are the result of research on the genetic strengths of rare plants.<sup>29</sup> Preserving a diverse genetic library is essential in order to help find cures for many diseases such as cancer.<sup>30</sup> Many animal species have also been vital to modern medicine both as a source of new drugs and in research and experimentation.<sup>31</sup>

Finally, the importance of diverse species in science and industry argues for the preservation of species. Both plant and ani-

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present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.

*Id.*

23 See EHRlich, *supra* note 14, at 67.

24 Coggins & Harris, *supra* note 16, at 67.

25 Smith, *supra* note 1, at 374.

26 *Id.*

27 EHRlich, *supra* note 14, at 67.

28 Smith, *supra* note 1, at 375.

29 EHRlich, *supra* note 14, at 54.

30 See EHRlich, *supra* note 14, at 57; Environmental Quality - 1980: The Eleventh Annual Report of the Council on Environmental Quality 37-38 (1980) (species of plants and animals may provide new sources of cancer-curing medicines); see also N. MYERS, A WEALTH OF WILD SPECIES 89-141 (1983) (discussing the potential importance of plants, animals, and marine life in medicine).

31 EHRlich, *supra* note 14, at 59.

mal species have played, and will continue to play, significant roles in scientific research. Many important products that are essential to our society, such as rubber, oil, and wood, come directly from plant species or were at least derived from them.<sup>32</sup> Wide species preservation is needed so that future advances in science and industry to be derived from plant and animal species, like those of the past, are possible. "Shortsighted exploitation could deprive future generations of benefits that cannot now be imagined."<sup>33</sup>

## 2. Indirect Benefits

Besides the direct benefits that presently derive or potentially could derive from diverse species, humankind also receives many indirect benefits from species preservation.

The most important example of an indirect benefit is ecosystem stability.<sup>34</sup> "Ecosystems are the fundamental operating units of the biota."<sup>35</sup> Within an ecosystem, the individual organisms and the physical parts of the surrounding environment are related by an infinite maze of interactions. "The maze is so complex that it is not altogether unreasonable simply to say that every living thing potentially affects every other living thing and the physical environment" of the ecosystem, if not of the planet.<sup>36</sup> Removing a number of species from a system could throw all other organisms and the system into a state of flux. Because everything is interrelated and all the interactions are not known, the removal of one species may lead to unknown and possibly calamitous results.<sup>37</sup>

Another indirect benefit of species preservation is the maintenance of the environment, including the atmosphere, the climate, the fresh water supplies and the soil.<sup>38</sup> Plant and animal species clean the air and water that humans need. Diverse ecosystems ameliorate the climate, notably by modifying the carbon dioxide concentrations in the atmosphere.<sup>39</sup> Many organisms, both plant and animal, such as the earthworm, generate and preserve the

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32 *Id.* at 71.

33 Coggins & Harris, *supra* note 16, at 257.

34 EHRlich, *supra* note 14, at 77-100; Coggins & Harris, *supra* note 16, at 251-53.

35 S. YAFFEE, *supra* note 18, at 23.

36 ERHLICH, *supra* note 14, at 78.

37 *Id.*

38 *Id.* at 86-95.

39 *Id.* at 89.

soil.<sup>40</sup> Any disruption of an ecosystem or a particular species may drastically affect one or more of these essential processes. Removing one species could trigger a change in an ecosystem that could then result in an unhealthy change in the environment.<sup>41</sup>

The direct and indirect benefits arguments are not entirely foolproof. Detractors assert that science may be able to determine with certitude that the direct and indirect values of an individual species are negligible and therefore extinction would be no loss to the world. For example, the extinction of the malaria-carrying mosquito may benefit the world.<sup>42</sup>

To proponents of species preservation, these attacks are shortsighted, however, as there is greater value in preserving species than just the direct or indirect benefits they bring to humankind. Diverse species have aesthetic value incalculable to humans, and humanity is under an ethical or moral duty to preserve other species.<sup>43</sup>

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40 *Id.* at 91.

41 *See supra* notes 35-38 and accompanying text.

42 EHRLICH, *supra* note 14, at 11-12. Even this argument may be shortsighted:

If, for example, some magic way were found to exterminate just the *Anopheles* mosquito that transmit the most important of human diseases, malaria, it would be a tempting thing to do. But ecologists would caution that doing so would entail some small chance that the inevitable consequent changes in Earth's ecosystems would make the world less hospitable for humanity, causing worse suffering than that previously inflicted by malaria. And some demographers might warn that the sudden decline in human death rates in some developing countries could cause an acceleration in population growth that would exacerbate their serious social and economic problems.

*Id.*

43 *But see* Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1329-32 (1974). Tribe discusses the dangers of justifying the preservation of the environment in the terminology of human self-interest. He argues that translating the obligation of preserving the environment into a utilitarian rationale is incongruent with the ethical argument for preserving nature.

Despite impassioned efforts to suggest the contrary, the best interests of individual persons (and even of future human generations) are not demonstrably congruent with those of the natural order as a whole, even if such a congruence can be established as between individuals and the human communities in which they live. Indeed, individually or communally defined human interests may often be at odds with the primal ethical impulse—the sense of duty beyond self—that gives passion and conviction to many who see elements of the inviolable in nature.

*Id.*



### 3. Aesthetic Considerations

The aesthetic benefits derived from both plant and animal species and communities also justify their preservation.<sup>44</sup> Plant and animal species have innate beauty that needs to be protected. Humanity can find this beauty both in physical beauty, such as in butterflies or flowers, and in the sight or study of particular species in their environment.

Both plant and animal species provide recreation for humans. By gardening, bird watching, hunting, or by visiting national parks or nature estuaries, people derive much pleasure from diverse species in their environment.<sup>45</sup>

Detractors of this argument say that, yes, a soaring eagle is beautiful, but what aesthetic beauty or value can be found in a biting insect or a dangerous lizard? The statement shortchanges nature's beauty, defining it simply as what the majority finds appealing. To some, that insect may hold infinite beauty. To all, it should be a source of potential beauty and should not be destroyed before its value is found.<sup>46</sup> The lizard may seem valueless and even detrimental to humanity, but it may be vital to the desert in which it lives.<sup>47</sup> Furthermore, that desert may be the focus of much interest, for example, sightseeing and research. Without the lizard, the tourist attraction may wane.

Even if the insect and the lizard were valueless as the detractors may say, they should be saved by humanity's moral or ethical duty to preserve them.

### 4. Ethical or Moral Considerations

Many proponents of species preservation argue that humanity has a moral or ethical duty to preserve all species of life. The arguments shift the focus away from the anthropocentric goals measured in the previous utilitarian arguments.<sup>48</sup> The arguments fall along three lines.

The first ethical argument involves the present generation's moral obligation to leave resources and opportunities to future

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44 See EHRLICH, *supra* note 14, at 38-48; Coggins & Harris, *supra* note 16, at 257; Sagoff, *On the Preservation of Species*, 7 COLUM. J. ENVTL. L. 33, 50 (1980).

45 Coggins & Harris, *supra* note 16, at 258.

46 EHRLICH, *supra* note 14, at 39-47.

47 See *supra* notes 35-38 and accompanying text.

48 Smith, *supra* note 1, at 376.

generations.<sup>49</sup> Inherent in this argument is the idea that diverse species are potentially direct and indirect resources for humanity.<sup>50</sup> Because of this potential, it would be immoral if mankind destroyed species now for short-term utilitarian needs before the full extent of the species value is determined. To do so is to rob our descendants of potential cures for cancer, or future food supplies, or hospitable climates.

The second line of argument for preservation centers on the "inadequate appreciation of the value of life and (the) callous insensitivity to the causing of pain in other living entities."<sup>51</sup> Legal sanctions against cruelty towards animals are quite common; they reflect a determination that such behavior is immoral. This argument has merit to stop the direct exploitation and killing of a particular species such as the bison, but the scope of the legal sanctions afforded may limit its applicability.

Humanity only protects certain species such as dogs or horses. These limitations are probably the result of an aesthetic value choice; dogs and horses are beautiful, friendly, and valuable (as protection or transportation), thus they are protected. Snakes and wild boars, neither one being "man's best friend", are neither valued nor protected.<sup>52</sup>

The third ethical argument is the most fundamental and probably the strongest. Professors Paul Ehrlich and Ann Ehrlich argue that all species have a right to exist.<sup>53</sup> They rely on David Ehrenfeld's view that species and communities should be conserved "because they exist and because this existence is itself but the present expression of a continuing historical process of immense antiquity and majesty. Long-standing existence in Nature is deemed to carry with it the unimpeachable right to continued existence."<sup>54</sup> With every species having a right to exist, humanity should not play God by eliminating other species.<sup>55</sup> Species protection, Laurence Tribe argues, is driven by an innately perceived

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49 *Id.*; Coggins & Harris, *supra* note 16, at 258.

50 *See supra* notes 23-44 and accompanying text.

51 Smith, *supra* note 1, at 377.

52 *Id.*

53 EHRlich, *supra* note 14, at 48-52.

54 D. EHRENFELD, THE ARROGANCE OF HUMANISM (1978).

55 EHRlich, *supra* note 14, at 48; Campbell, *supra* note 15, at 266. Interestingly enough, the idea of humans playing God by determining which species survive and which are destroyed is exemplified in the Endangered Species Committee's nickname, the "God Squad".

obligation in man to protect the environment and other forms of life.<sup>56</sup>

All four arguments add weight to the overall case for the preservation of species. The first two and, to some extent, the third call for a utilitarian balancing of values of an individual species in the ecosystem, while the fourth calls for an absolute protection of every species. These arguments in some form or another have driven the evolution of endangered species protection. The next section of this Note traces the history of the exemption process through the forerunners of the ESA, the enactment of the ESA, and the judicial interpretation of the ESA. The arguments for preservation have affected this development in different ways.

### B. *Historical Development of the Endangered Species Act*

The exemption process of the Endangered Species Act of 1973 was a late, after-hours addition. Prior to 1978 the ESA did not include the process. To properly see why Congress felt the process was needed and why it turned out as it did, it is necessary to trace endangered species legislation from its inception. Without this historical backdrop, the significance and the legislative intent behind the exemption process may not be apparent.

#### 1. Forerunners of the Endangered Species Act of 1973

Federal legislation for the protection of wildlife has existed since the beginning of the twentieth century.<sup>57</sup> The focus of the earliest legislation was not on broad protection of rare species as a class but on problems with specific species.<sup>58</sup> An example of an early act is the Lacey Act of 1900,<sup>59</sup> which partially prohibit-

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<sup>56</sup> See Tribe, *supra* note 43, at 1330-31.

<sup>57</sup> See Coggins, *Federal Wildlife Law Achieves Adolescence: Development in the 1970's*, 1978 DUKE L.J. 753 (1978) (discussing the origins of federal wildlife law and tracing the development of several specific acts including the Migratory Bird Treaty Act and the Endangered Species Act); Dickens, *The Law and Endangered Species of Wildlife*, 9 GONZ. L. REV. 57 (1973) (discussing the development of international treaties, early federal laws, and state laws concerning endangered wildlife); Rosenberg, *Federal Protection of Uniquely Environmental Interests: Endangered and Threatened Species*, 12 LAND USE & ENVTL. L. REV. 469, 474-86 (1981); Note, *Environmental Law—The Endangered Species Act Amendments of 1978: Congress Responds to Tennessee Valley Authority v. Hill*, 25 WAYNE L. REV. 1327, 1327-30 (1979).

<sup>58</sup> Rosenberg, *supra* note 57, at 475.

<sup>59</sup> Act of May 25, 1900 ch. 553, §§ 1-5, 31 Stat. 187 (current version at 16 U.S.C. § 667(e) (1988), 18 U.S.C. §§ 42-44 (1988)).

ed the transportation of game animals or birds taken in violation of state law.<sup>60</sup> Congress' earliest attempts at wildlife legislation were not comprehensive; the federal government took no action to inventory and protect either animal or plant species as a whole.<sup>61</sup> Commentators argue that "the reluctance of Congress to enact federal legislation regarding endangered species can be attributed to an uncertainty as to whether or not Congress had the authority to act in this area."<sup>62</sup> This may not be correct, however, as Congress' reluctance "is probably best explained by a lack of social awareness and interest in the entire subject."<sup>63</sup>

Modern endangered species legislation began in earnest in 1966 with the enactment of the Endangered Species Protection Act of 1966.<sup>64</sup> The 1966 Act was the first federal law to directly address the issue of species extinction. The 1966 Act was modest in scope; it authorized the Secretary of the Interior to review this agency's existing programs to protect endangered species and to implement those programs only "to the extent practicable, . . . in furtherance of the purpose of this [1966] Act."<sup>65</sup> The 1966 Act also required the Secretary to consult and assist other federal agencies to implement the policies of the act "where practicable."<sup>66</sup>

Even though this "practicability" requirement and the lack of an order to protect species except when "consistent with the primary purposes" of the agency fatally weakened the 1966 Act,<sup>67</sup> the 1966 statute was a good foothold for the growing interest in species preservation. Through its enactment, Congress expressed its growing concern for threatened and endangered species. Faced with data that showed species were becoming extinct at an alarm-

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60 *Id.*

61 Rosenberg, *supra* note 57, at 476.

62 Dickens, *supra* note 57, at 66. Congress' uncertainty in the wildlife area stemmed from the Supreme Court's decision in *Geer v. Connecticut*, 161 U.S. 519 (1896). The Court held that wild animals in a state belonged to that state and, therefore, only the state, could regulate wild animals under its police power. The Court upheld the Migratory Bird Treaties, in *Missouri v. Holland*, 252 U.S. 416 (1920), as constitutional under the supremacy power to enact legislation to carry-out valid treaties. Despite *Geer*, it has been argued that Congress can enact such laws by relying, not on the treaty power but, on the interstate commerce power. See Comment, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289 (1970).

63 Rosenberg, *supra* note 57, at 477.

64 Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973) [hereinafter 1966 Act].

65 1966 Act § 2(d) (repealed 1973).

66 *Id.*

67 1966 Act § 1(b) (repealed 1973).

ing rate,<sup>68</sup> Congress stated that the purpose of the 1966 Act was to conserve, protect, and restore species threatened with extinction.

Congress then enacted the Endangered Species Conservation Act of 1969.<sup>69</sup> The 1969 Act expanded the protection of the 1966 Act to other types of species,<sup>70</sup> and authorized the purchase of private lands to further the protection of endangered species.<sup>71</sup> Most notably, the 1969 Act also prohibited the importation of endangered species of fish and wildlife into the United States; this had a substantial impact on the international trade in these animals, as the United States was the largest consumer of endangered species.<sup>72</sup> Though the 1969 Act did not remove the "practicability" requirements,<sup>73</sup> the legislative record shows Congress' growing interest in species preservation.<sup>74</sup>

68 S. REP. No. 1463, 89th Cong., 2d. Sess.(1966), *reprinted in* 1966 U. S. CODE CONG. & ADMIN. NEWS 3342, 3342-43.

69 Pub. L. No. 91-135 § 1-5, 83 Stat. 275 (1969) (repealed 1973) [hereinafter 1969 Act]. For a discussion of the 1969 Act see Rosenberg *supra* note 57, at 479-80. According to Rosenberg,

[t]he 1969 Act made minor modifications in the system of preserving native fish and wildlife that had been established by the prior law. A new definition of "fish and wildlife" extended protection to invertebrates as well as vertebrates. In addition the [1969] Act enhanced the Department of Interior's protection program by authorizing the acquisition of privately owned property "for the purpose of conserving, protecting, restoring, or propagating any selected species of native fish and wildlife that are threatened with extinction." Finally the 1969 legislation amended the Lacey Act to expand its prohibition against commerce in illegally taken wildlife specifically to include the classification of "amphibian, reptile, mollusk, and crustacean."

*Id.*

70 1969 Act § 1 (repealed 1973). Section 1 extended the definition of wildlife to include invertebrates as well as vertebrates.

71 1969 Act § 12(c) (repealed 1973).

72 See Note, *supra* note 57, at 1328.

73 See *supra* notes 66-68 and accompanying text.

74 The Senate Report on the 1969 Act relied on two arguments that were akin to the direct benefit and ethical approaches, for increased protection of endangered species.

First, by preserving species, future reproduction is sustained at levels that allow for the "controlled exploitation" of the species. Furthermore, the extinction of species removes unique genetic materials from the world's supply. This genetic material may prove useful in the future.

Second, [o]n a more philosophical plane, the gradual elimination of different forms of life reduces the richness and variety of our environment and may restrict our understanding and appreciation of natural processes. Moreover, in hastening the destruction of different forms of life merely because they cannot compete in our common environment upon man's terms, mankind, which has inadvertently arrogated to itself the determination of which species shall live and which shall die, is assuming an immense ethical burden.

Congress' interest reached a focal point in 1973. Spurred by the Convention on International Trade in Endangered Species of Wild Fauna and Flora,<sup>75</sup> increased public sentiment,<sup>76</sup> and President Nixon,<sup>77</sup> Congress enacted the Endangered Species Act of 1973.

## 2. The Endangered Species Act of 1973

Congress in 1973 enacted the Endangered Species Act.<sup>78</sup> Described by Chief Justice Burger as "the most comprehensive legislation for the preservation of endangered species enacted by any nation,"<sup>79</sup> the ESA "heralded a new era in species conservation," a time when "all species [are] to be protected at any cost."<sup>80</sup> Congress, finding that endangered and threatened species "are of [a]esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,"<sup>81</sup> drafted the 1973 Act to strengthen and broaden the earlier two statutes.

Through the ESA, Congress increased federal regulation across the entire spectrum of species conservation because it found the problem of species depletion and extinction to be increasingly serious.<sup>82</sup> The ESA, with its specific language, expand-

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S. REP. No. 526, 91st Cong., 1st Sess. 3 (1969), reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 1413, 1415.

75 *International Conference Concludes Convention on Trade in Endangered Species of Wildlife*, 68 DEP'T ST. BULL. 608-29 (May 14, 1973) (The Convention, held in February 1973, concluded that plant species as well as animal species needed to be protected and that other species not faced with imminent extinction also needed to be protected. The United States on September 13, 1973 was the first nation to ratify it.)

76 See Cambell, *supra* note 15, at 252 ("During the early 1970's, public interest in saving species from extinction grew with increasing awareness of the problem's magnitude and complexity. The plight of the magnificent whooping crane, its habitat rapidly disappearing in the wake of rural expansion, caught the public attention. No longer a concern of a mere handful of ecologists, extinction became a public concern.") (citations omitted).

77 *The President's 1972 Environmental Program*, 8 WEEKLY COMP. PRES. DOC. 218, 223-24 (Feb. 8 1972) (President Nixon stated that the existing legislation "simply [did] not provide the kind of management tools needed to act early enough to save a vanishing species.")

78 16 U.S.C. §§ 1531-43 (1982).

79 *TVA v. Hill*, 437 U.S. 153, 180 (1978).

80 Campbell, *supra* note 15, at 263.

81 16 U.S.C. § 1531(a)(3) (1988).

82 See Rosenberg, *supra* note 57, at 481; see generally Batchelor, *The Preservation of Wildlife Habitat in Ecosystems: Towards a New Direction Under International Law to Prevent Species Distinction*, 3 FLA. INT'L L.J. 307 (1988) (discussing the need for international treaties for global ecosystem preservation as the best way to preserve wildlife).

ed protection to virtually all species.<sup>83</sup> It also removed the "practicability" requirement that had weakened the prior statutes.<sup>84</sup>

Acting with the overall purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species,"<sup>85</sup> Congress ordered that all federal agencies shall "seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act]."<sup>86</sup>

The first step in achieving the ESA's purposes is the labeling of species as threatened or endangered. The Act gives the Secretaries of the Interior and Commerce the power to make this determination based on stated guidelines.<sup>87</sup> The ESA also goes beyond just species preservation; it sets forth guidelines to establish whether any habitat of such species should be designated as "critical."<sup>88</sup> The Secretaries are then under a duty to "issue such regulations as [they] deem[] necessary and advisable to provide for the conservation of such species and such [critical] habitats,"<sup>89</sup> and to conform their programs to the purposes of the ESA.<sup>90</sup>

All other federal agencies are bound to conform their actions to the purposes of the ESA.<sup>91</sup> They must consult with the Secretaries to determine if their project "jeopardizes" an endangered or threatened species or might result in the destruction of a "critical

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83 See 16 U.S.C. § 1532(5),(9) (1976) (codified at 16 U.S.C. § 1532(16) (1988)).

84 See *supra* notes 64-74 and accompanying text. Section 7 codified as 16 U.S.C. § 1536(a)(2) (1988), instead of requiring federal agencies to comply with species preservation as "practicable," mandated that each agency insure species preservation. No practicability test remained. See also France & Tuholske, *Stay the Hand: New Directions for the Endangered Species Act*, 7 PUB. LAND L. REV. 1 (1986) (discussing the affirmative duty under § 7 and the importance of changes from the earlier Acts).

85 16 U.S.C. § 1531(b) (1988).

86 16 U.S.C. § 1531(c) (1988); see *supra* note 83.

87 16 U.S.C. § 1533 (1988).

88 16 U.S.C. § 1532(5)(A) (1988). The term "critical habitat" for a threatened or endangered species means:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with . . . this title on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with . . . this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

89 16 U.S.C. § 1533(d) (1988).

90 16 U.S.C. § 1536(a)(1) (1988).

91 16 U.S.C. § 1536(a)(1) (1988).

habitat.<sup>92</sup> If their program will, in fact, cause damage to a habitat or a species, the agency is mandated to seek less detrimental alternatives or to abandon the project.<sup>93</sup>

The intent of Congress for the ESA was clear.

The dominant theme pervading all Congressional discussion of the proposed [ESA] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources. Much of the testimony at the hearings and much debate was devoted to the biological problem of extinction. Senators and Congressmen uniformly deplored the irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear.<sup>94</sup>

Congress' strict mandate showed its strong distaste for the continued extinction of species. It removed the hedged duties found in the "practicability" requirement<sup>95</sup> of the earlier acts with an affirmative duty on the part of all federal agencies to uphold the ESA's purpose of protecting endangered species.<sup>96</sup>

Absent in the language of the text was any mention of a balancing test between the ESA's purpose and the federal agency's original purpose for its project.<sup>97</sup> The ESA also made no mention of an exemption process to evade the requirements. The language of the ESA indicates that Congress intended that species

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92 16 U.S.C. § 1536(a)(2) (1988).

93 19 U.S.C. § 1536 (1988). The mandate in this section removes the "practicability" requirement of the old statutes. The agencies under the 1973 ESA have no choice; they must conform. This strict interpretation was not clear at the time of drafting, however, and this section was the subject of much litigation. Not until the Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), was the issue resolved. For a discussion of the judicial interpretation that led to this interpretation, see *infra* notes 98-122 and accompanying text.

94 Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. REV. 315, 321 (1974) (citing the legislative record, H.R. REP. NO. 93-412, 93d Cong., 1st Sess. (1973); S. REP. NO. 93-307, 93d Cong., 1st Sess. (1973)).

95 See *supra* note 84 and accompanying text.

96 See *supra* notes 91-93 and accompanying text.

97 Chief Justice Burger in *Hill* stated:

In addition, the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The printed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies. *TVA v. Hill*, 437 U.S. 153, 186 (1978).



protection was vitally important and no countervailing interest could override this purpose.

This rigidity and clear intent of pro-species conservation on the part of Congress became a source of litigation. The next section considers how the courts interpreted the Act to reach this "no balancing test" interpretation and how this interpretation led to Congress' creation of the exemption process.

### 3. Judicial Interpretation of the ESA

At the ESA's inception, the strength of Congress' mandate to all federal agencies was not clear. In three subsequent cases, the federal circuit courts differed as to whether section 7 permitted a balancing test.<sup>98</sup> These differences led the Supreme Court in *TVA v. Hill* to declare that Congress, through its clear language, intended the ESA to impose a strict duty on federal agencies to preserve endangered or threatened species and their critical habitats. As we will see later, this ruling prompted Congress to create the exemption process.

(a) *Early Federal Circuit Court Interpretations.*—In *Sierra Club v. Froehlke*,<sup>99</sup> the Sierra Club sought to enjoin construction of the Meramac Park Lake Dam, alleging that the continued existence of the Indiana Bat, an endangered species, would be jeopardized by the project. It also alleged that the critical habitat of the bat, caves in the area, would be destroyed by the reservoir.<sup>100</sup>

The Court of Appeals for the Eighth Circuit affirmed the lower court's decision for the defendants and stated that the consultation requirement under section 7 does not require acquiescence on the part of the challenged federal agency. "Should a difference of opinion arise as to a given project, the responsibility for the decision after consultation is not vested in the Secretary but in the agency involved."<sup>101</sup>

The court went on to state that the ESA must be given a reasonable construction,<sup>102</sup> and that the agency's and the lower court's balancing of the benefits in the project against the impor-

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98 See *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977); *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976); *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir.), cert denied, 429 U.S. 979 (1976).

99 534 F.2d 1289 (8th Cir. 1976).

100 *Id.* at 1296.

101 *Id.* at 1303.

102 *Id.* at 1304.

tance of an unspoiled environment was proper.<sup>103</sup> The court held that this balancing test was not "arbitrary or capricious, or an abuse of discretion therein."<sup>104</sup>

Earlier in 1976, the Court of Appeals for the Fifth Circuit reached a contrary decision in *National Wildlife Federation v. Coleman*.<sup>105</sup> In *Coleman*, a few conservationist groups sought to enjoin construction of a section of interstate highway across Mississippi, alleging the construction would cross the habitat of the Mississippi sandhill crane, an endangered species.<sup>106</sup> The lower court dismissed the complaint based on testimony that the construction would have a minimal effect on the crane and its habitat.<sup>107</sup>

The Fifth Circuit reversed this decision because of the failure on the part of the Department of Transportation and the lower court to consider the impact of private development along the highway on the crane's habitat.<sup>108</sup> The court went on to state that although section 7 did not give the Secretary of the Interior veto power over other agencies, it did require each federal agency to take "all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species."<sup>109</sup>

The court, by requiring this broad mandatory duty, rejected any balancing of competing interests. The Fifth Circuit's holding required that an agency must consider both the direct and indirect effects of its proposed action on an endangered or threatened species and must do everything possible to protect the endangered or threatened species in each of its decisions.

The United States Court of Appeals for the Sixth Circuit, in *Hill v. TVA*,<sup>110</sup> agreed with the Fifth Circuit and rejected a balancing test under section 7.<sup>111</sup> In *Hill*, some environmental groups sought to enjoin the completion and operation of the Tellico

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103 *Id.* at 1305.

104 *Id.*

105 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

106 *Id.* at 362.

107 *Id.* at 372.

108 *Id.* at 365.

109 *Id.* at 371.

110 549 F.2d 1064 (6th Cir. 1977). For an indepth discussion of the Tellico Dam, its history, and its problems, see Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REF. 805, 806-18 (1986).

111 *Hill*, 549 F.2d at 1071.

Dam on the Little Tennessee River because the operation of the dam would cause the extinction of the snail darter, an endangered species.<sup>112</sup> The district court refused to enjoin the operation of the dam.<sup>113</sup> The Sixth Circuit reversed, holding that the operation of the dam by the Tennessee Valley Authority (TVA) would violate the ESA.<sup>114</sup> The court went on to say that the lower court could not "rewrite the statute no matter how desirable the purpose or result might be."<sup>115</sup> The lower court abused its discretion by balancing the economic exigencies and by not enjoining the dam, even though it was in violation of the Act.

(b) *The Supreme Court's Response in TVA v. Hill.*—The United States Supreme Court granted certiorari in *TVA v. Hill*,<sup>116</sup> to resolve the inconsistencies between the Eighth Circuit and the Fifth and Sixth Circuits. In a notable example of judicial adherence to the supremacy principle,<sup>117</sup> Chief Justice Burger, writing for the Court, affirmed the Sixth Circuit's decision, holding that the meaning of the ESA was clear on its face.<sup>118</sup> Relying on legislative history to establish Congress' intent behind the ESA, the Chief Justice held that the protection of species is of the highest priority.<sup>119</sup> He also found that the duty of an agency to insure that its actions do not "jeopardize the continued existence" of an endangered or threatened species or its critical habitat was absolute.<sup>120</sup> The Supreme Court's interpretation of section 7 was strict; it refused to allow a balancing of the interests between the dam and the snail darter.

The Court's decision illustrates the strength of the ESA and of Congress' desire to protect endangered species. Chief Justice Burger found in the legislative history of the ESA many occasions when Congress could have softened the language of the Act but did not.<sup>121</sup> He also found many references to "the mandatory

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112 *Id.* at 1068.

113 *Id.* at 1069.

114 *Id.* at 1070.

115 *Id.* at 1074 (citing *West Virginia Div. of Isaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir.1975)).

116 437 U.S. 153 (1978).

117 See Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 294-98 (1989) (discussing Chief Justice Burger's opinion as the paradigmatic case of the Supreme Court adhering to the supremacy principle).

118 *Hill*, 437 U.S. at 184-86.

119 *Id.* at 173-74.

120 *Id.* at 173.

121 *Id.* at 181-83. In fact, the history of the ESA shows that Congress stiffened the

nature and critical importance of the agency's duty to protect endangered species."<sup>122</sup> Finally, the fact that the Supreme Court enjoined the Tellico Dam based on the wording and congressional intent of the ESA, even after millions of dollars had been spent on the dam, shows the strength of the ESA. The Court upheld the ESA despite the fact that the project had been started before the ESA's enactment and despite Congress' continual appropriation of money to the project after the violation had been found.

## II. THE 1978 AND 1979 AMENDMENTS TO THE ESA: THE EXEMPTION PROCESS

### A. Congress' response to *TVA v. Hill*: the 1978 Amendments

After the Supreme Court's rigid interpretation of the ESA in *TVA v. Hill*, Congress responded by amending the ESA.<sup>123</sup> With the Dam project halted after an investment of millions of dollars, both the House and the Senate proposed bills to continue the project even after the Supreme Court's ruling.<sup>124</sup> The proposed amendments included calls for the exemption of the Tellico Dam from the strictures of the ESA and for the elimination of section 7.<sup>125</sup> Following the Senate's lead,<sup>126</sup> Congress chose not to gut

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language from the "practicability" requirements in the 1966 and 1969 Acts to the affirmative mandate of the 1973 Act. See *supra* notes 65-84 and accompanying text.

122 *Hill*, 437 U.S. at 177-78, 182-84.

123 Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 1, 92 Stat. 3751 (1978) CONFERENCE REPORT, ENDANGERED SPECIES ACT AMENDMENTS OF 1978, H.R. REP. NO. 1804, 95th Cong., 2d. Sess. (1978) (now codified at 16 U.S.C. §§ 1531-43 (1988)).

124 See Rosenberg, *supra* note 57, at 494-97. Both the House and the Senate proposed amendments to the 1973 Act even before the decision in *TVA v. Hill*; see also Note, *Endangered Species Act Amendments of 1978: A Congressional Response to Tennessee Valley Authority v. Hill*, 5 COLUM. J. ENVTL. L. 283 (1979).

125 E.g., Senator Stennis (D-Miss) introduced an amendment that would have reinserted "insofar as practicable" into § 7. 124 CONG. REC. 21,285 (July 18, 1978). The amendment received one-quarter of the Senate votes and was defeated. *Id.* at 21,335. See Note, *supra* note 124, at 298-304 ("All of these proposals shared the problem of totally defeating the purpose of the Act with respect to the particular endangered or threatened species found on the site of an exempted project. None of the proposals required the acting agency to weigh the competing values of the project and the concerned species or to mitigate the damage to such species.")

126 In S. 2899, S. REP. NO. 874, 95th Cong., 2d Sess. (1978), the Senate proposed a general procedure for exempting federal actions from the strict requirements of § 7. The bill did not call for a direct exemption of the Tellico Dam. *Id.* at 2. The compromise bill was drafted by Senators Baker (R-Tenn.) and Culver (D-Iowa). It passed the Senate by a vote of 94-3. Comment, *Supreme Court Protects Snail Darter from TVA; Congress Poised to Weaken Endangered Species Act*, 8 ENVTL. L. REP. 10,154 & 10,158 n.45

the ESA or to directly exempt the Tellico Dam; instead it introduced flexibility into the Act by way of an exemption process.<sup>127</sup>

"The overall purpose of the amendments was to create a comprehensive administrative scheme to promote interagency cooperation and to avoid conflict between the interests of particular projects and the protection of endangered species."<sup>128</sup> Congress sought to avoid future conflicts like the Tellico Dam case by adding a "balancing test" to section 7,<sup>129</sup> to be used only when there is an "irresolvable conflict."<sup>130</sup>

The Endangered Species Committee is empowered to implement the "balancing test."<sup>131</sup> Congress created the Committee and gave it the power to exempt a project from the ESA where, by a majority vote of not less than five of its members, it determines that: (1) no reasonable alternatives to the agency action exist; (2) the benefits of the action clearly outweigh the benefits of any alternative course of action consistent with the conservation of species or its critical habitat; (3) the action is in the public interest and of regional or national significance; and (4) neither the agency involved nor the exemption applicant has made an irreversible or irretrievable commitment of resources.<sup>132</sup> The Committee also is required to formulate reasonable mitigation and enhancement measures where appropriate "to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."<sup>133</sup> Part III discusses the current exemption process and the duties of the Com-

(1978). See also Note, *supra* note 124, at 304-08.

127 See *supra* note 123.

128 Note, *supra* note 57, at 1335.

129 In *TVA v. Hill*, the Supreme Court had previously held that the 1973 Act did not allow for a balancing test. 437 U.S. at 194-95 (1978).

130 The Amendments state:

The term "irresolvable conflict" means, with respect to any action authorized, funded, or carried out by a Federal agency, a set of circumstances under which, after consultation as required in section 7(a) of this Act, completion of such action would (A) jeopardize the continued existence of an endangered or threatened species, or (B) result in the adverse modification or destruction of a critical habitat.

Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(4), 92 Stat. 3751 (1978) (amending 16 U.S.C. § 1532 (1976)).

131 Endangered Species Act Amendments of 1978 § 7(e) (now codified at 16 U.S.C. § 1536(e) (1988)).

132 Endangered Species Act Amendments of 1978 (now codified at 16 U.S.C. § 1536(h) (1988)).

133 16 U.S.C. § 1536(h) (1988).

mittee in more detail.

The 1978 Amendments, by adding the exemption process, lessened the strict mandate of the 1973 Act, but they did not diminish Congress' strong desire to protect endangered and threatened species. Instead of weakening the language of the ESA,<sup>134</sup> which was the backbone of the Supreme Court's interpretation in *TVA v. Hill*, Congress added a limited exemption process to be used only after the normal consultation process failed.<sup>135</sup> Congress sought to maintain the consultation process<sup>136</sup> and the mandatory duty of compliance of all federal agencies.<sup>137</sup> By requiring an exemption applicant to follow all of the consultation procedures and to avoid any conflicts between species preservation and the proposed agency project, Congress showed that it only wanted the exemption process used as a last ditch solution in the most difficult cases.<sup>138</sup>

Shortly after it was adopted, the exemption process resolved two cases.

### *B. Application of the 1978 Exemption Process*

Although Congress did not directly exempt the Tellico Dam from the ESA, it ordered the Endangered Species Committee to meet within thirty days after the enactment of the amendment to rule on the Tellico Dam project and the Gray Rocks Dam project.<sup>139</sup> The courts enjoined both projects because they jeopardized

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134 The language of § 7 was amended in 1979. In the 1979 amendments to the Endangered Species Act, Congress changed the language of § 7 upon which the Supreme Court had relied in its decision. Before the amendment, an agency was required to insure its actions "do not jeopardize the continued existence" of an endangered or threatened species. After the 1979 amendment, an agency now must ensure its actions are "not likely to jeopardize" the existence or habitat of the endangered or threatened species. 16 U.S.C. § 1536(a)(2) (1982). This change and the 1979 Amendments will be discussed later, *see infra* notes 151-56 and accompanying text. *See also* Rosenberg, *supra* note 57, at 534-37.

135 Congress maintained the mandate of § 7 as drafted in the 1973 Act but added the language "unless such agency has been granted an exemption for such actions by the [Endangered Species] Committee pursuant to subsection (h) of [16 U.S.C. § 1536]." 16 U.S.C. § 1536(a)(2) (1988).

136 16 U.S.C. § 1536(a)(b)(c) (1988).

137 16 U.S.C. § 1536(a)(2) (1988).

138 *See supra* note 130 and accompanying text.

139 16 U.S.C. § 1539(i)(1) (Supp. III 1979). Congress removed the requirement that the project be of regional or national significance pursuant to § 1536(h)(i)(A)(iii) (1988). Congress stated that the Committee could grant an exemption in these cases without this finding. 16 U.S.C. § 1539(i)(1) (1988).

dized the existence and the critical habitat of two endangered species, the snail darter and the whooping crane, respectively. Congress, by ordering the Committee to meet and decide quickly, sidestepped some of the exemption procedures outlined in the amendment, but the decisions in these cases were made using the general exemption criteria established in section 7 for all future conflicts.<sup>140</sup> The Committee met on January 23, 1979 to decide on both projects.<sup>141</sup> It granted an exemption for the Gray Rocks Dam<sup>142</sup> and denied an exemption for the Tellico Dam.<sup>143</sup>

By granting the exemption in the Gray Rocks case, the Committee allowed the completion of a dam on the Laramie River in Wyoming.<sup>144</sup> The Committee voted unanimously to grant the exemption. The Committee found that there were no reasonable alternatives to the project, that its benefits clearly outweighed any alternate courses of action, and that the project was in the public interest.<sup>145</sup> The Committee also ordered that certain mitigation and enhancement provisions designed to alleviate the threat to the whooping cranes must be taken before the exemption would

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140 16 U.S.C. § 1536(h) (1988).

141 Transcript of Endangered Species Comm. Mtg., Dep't of the Interior, (Jan. 23, 1979).

142 Endangered Species Comm. Decision on Grayrocks Dam and Reservoir Application for Exemption, (Feb. 7, 1979).

143 Endangered Species Comm. Decision on Tellico Dam and Reservoir Application for Exemption, (Feb. 7, 1979).

144 See Note, *supra* note 57, at 1339 n.74 (citing Transcript, *supra* note 141). The Note states:

The Grayrocks project is part of the Missouri Basin Power Project located on the Laramie River ten miles from the confluence of the Laramie and North Platte Rivers. Grayrocks is intended to be the principle source of cooling water for the Laramie Power Station, which will provide power to customers in eight states. The Army Corps of Engineers, responsible for granting a dredge and fill permit for the Grayrocks Dam, requested a report from the Fish and Wildlife Service regarding the effect of the project on endangered species. The Service reported that the project would adversely affect the habitat of the whooping crane, located 330 miles downstream on the Platte River, because it would reduce the annual stream flow of the river. The habitat is used by the cranes as a resting area during their migration from Texas to Canada, and it is unique because it contains sandbars and shallow water sites away from tall vegetation. However, there was a disagreement whether the estimate by the Fish and Wildlife Service of the reduction in annual stream flow was accurate . . . . The reduction attributed to the Grayrocks project was approximately two percent of the annual river flow.

See Note, *supra* note 57, at 1339 n.74 (citing Transcript *supra* note 141).

145 Endangered Species Comm. Decision on Grayrocks Dam and Reservoir, *supra* note 142.

be granted. These provisions required the project to establish an irrevocable trust fund for the maintenance of the whooping crane's critical habitat and to control water withdrawals and releases from the dam throughout the year.<sup>146</sup> The fate of the snail darter was better, however, than that of the whooping crane, as the Committee denied the exemption for the Tellico Dam,<sup>147</sup> thus blocking the completion and operation of the dam. By a unanimous vote, the Committee denied the exemption. The Committee found that the project's benefits did not clearly outweigh an alternative course of action that would conserve the snail darter and its critical habitat. At the Tellico Dam hearing, the Committee staff testified that the TVA, the responsible federal agency, had developed an alternative, the "River Development" project.<sup>148</sup> "River Development" would entail removing part of the Dam and developing the Little Tennessee River Valley surrounding the free-flowing river. The potential developments were in the areas of agriculture, recreation, industry, and other developments. The Committee found the benefits from "River Development" greater than those of operating the Tellico Dam. Even though the benefits of the Tellico Dam were higher in terms of actual dollars, "River Development" produced immeasurable benefits to culture, archaeology, history, and fish and wildlife preservation.<sup>149</sup>

By creating the exemption process in the 1978 amendments, Congress decreased the rigid protection of endangered and threatened species found in the 1973 Act, but the protection was not diminished much, as illustrated by the Committee's decision in the Tellico Dam case. In the middle of a political boondoggle, the Committee could have rubberstamped the exemption application, but it did not. It weighed the project against the listed criteria,<sup>150</sup> and it decided against the project. This decision indicated that the Committee had the power and the courage to implement the ESA and the 1978 amendments to their letter. Congress may have created an exemption process, but an exemption after the Tellico Dam decision is not an easy or sure thing.

The story of the snail darter and the Tellico Dam did not

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146 *Id.*

147 Endangered Species Comm. Decision on the Tellico Dam, *supra* note 143.

148 *Id.*

149 *Id.*

150 16 U.S.C. § 1536(h)(1)(A) (1988).



end, however, with the Committee's decision. Congress, as part of further amendments to the ESA, overturned the Committee's decision by exempting the Tellico Dam from the ESA.

C. *1979 Amendments to the Endangered Species Act*

As a result of the Committee's decision against the Tellico Dam, Senator Howard Baker introduced two bills. The first sought to abolish the Endangered Species Committee,<sup>151</sup> and the second sought to exempt the Tellico Dam project from the ESA.<sup>152</sup> Senator Baker later withdrew the first bill and the second lost on the Senate floor by a vote of 52-43.<sup>153</sup>

The Tellico Dam finally won out, though, when, as part of the Energy and Water Development Appropriations Act of 1980<sup>154</sup> for the carrying out of the ESA, Congress exempted the Tellico Dam from the ESA. The 1979 Amendments<sup>155</sup> also modified some of the language in section 7. The Supreme Court, in *TVA v. Hill*, relied upon this language for its decision.<sup>156</sup>

The current exemption process was the result of a long political and judicial battle among many factions over the Tellico Dam. Congress' strong intent to preserve species behind the ESA collided directly with another equally strong federal government project, the Tellico Dam. By creating the exemption process as it did, with such rigorous procedures, Congress found the best possible solution both to uphold its desires in species preservation and to resolve the conflict. The exemption process, as drafted in 1978, showed Congress remained serious about the preservation issue. Congress did not want the ESA to be a balancing test in 1973,<sup>157</sup> and by outlining the exemption process so narrowly in

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151 S. 242, 96th Cong., 1st Sess. (1979).

152 S. 243, 96th Cong., 1st Sess. (1979).

153 125 CONG. REC. 14,576 (1979).

154 Pub. L. No. 96-367, 94 Stat. 1331 (1980). The Act sought to increase the funding for the Departments of Interior and Commerce for their efforts in carrying out the ESA. The Act contained a rider that appropriated money for the completion of the Tellico Dam and exempted the project from the ESA requirements.

155 Endangered Species Act Amendments, Pub. L. No. 96-159, 93 Stat. 1225 (1979). The 1979 amendments signed into law on December 28, 1979, 15 WEEKLY COMP. OF PRES. DOCS. 2288 (Dec. 31, 1979), served both as a funding measure and as "technical amendments" to the ESA. The 1978 amendments only provided funding until March 31, 1979. See 16 U.S.C. § 1542(1)(2) (1979). The 1979 amendments authorized funding for the ESA for three additional years. The 1979 amendments also changed some of the language of the ESA. See *supra* note 134. The amendments were approved without substantial discussion.

156 See *supra* note 134.

157 The Endangered Species Act of 1973 removed the "practicability" requirements

1978, Congress showed it still did not want the ESA to be a balancing test. The limited nature of the exemption process only allows "balancing" to settle very difficult cases that cannot be resolved using all of the regular means of the ESA. Congress did not want the exemption process to be a rubber stamp escape route for any federal project to sidestep the ESA requirements.<sup>158</sup> Through the ESA, Congress wanted to protect endangered and threatened species from governmental action. It wanted any potential conflicts resolved before the projects began.<sup>159</sup> Once discovered, alternative plans to avoid the problem can be formulated. The fact that only two projects, the Tellico Dam and the Gray Rocks Dam,<sup>160</sup> have needed to go through the process, shows the success of the exemption process.<sup>161</sup>

Part III considers in more detail how the process works and why it is so difficult. It explains the application process, the role of the Secretary, and the formation and duties of the Endangered Species Committee.

### III. THE EXEMPTION PROCESS

The exemption process, which originated in the 1978 amendments to the Endangered Species Act,<sup>162</sup> is a detailed procedure for obtaining relief from the requirements of section 7 of the ESA. The procedure has been amended twice, in the 1979 and 1982 amendments to the ESA.<sup>163</sup> This Section focuses on the

that had plagued the earlier Acts. See *supra* notes 66-74 and accompanying text.

158 See Plater, *supra* note 110, at 828. Plater notes:

Because preventing extinction was the purpose of the original Act, this amendment can be viewed as a diminution in the protection accorded endangered species. Conversely, however, it can also be argued that the 'God Committee' procedure has actually strengthened the Act. It introduces a note of flexibility, but that flexibility is secured by a tough, high-level review process.

*Id.*

159 See Rosenberg, *supra* note 57, at 519. According to Rosenberg, "[t]he underlying assumption of the exemption procedure, however, is that most potential conflicts can be avoided through consultations and project modification early in the federal agency planning process." *Id.* (citing H.R. REP. No. 1625, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN NEWS 9453, 9463; S. REP. No. 874, 95th Cong., 2d Sess. 5-6 (1978)).

160 See *supra* notes 139-49 and accompanying text.

161 See Plater, *supra* note 110, at 829. The "God Committee procedure secures section 7's protection, subject only to a review process so rigorous that no agencies have subsequently been willing to undertake the difficulties of advocating and obtaining an extinction exemption." *Id.*

162 Endangered Species Act Amendments, Pub. L. No. 95-632, 92 Stat. 3751 (1978).

163 For the 1979 amendments, see *supra* notes 151-55 and accompanying text. The

amended procedures as codified in 16 U.S.C. § 1536 and 50 C.F.R. §§ 450-53 (1989).

### A. *Applications for Exemptions*

Under section 7 all federal agencies are required to insure, in consultation with the Secretary of the Interior or Commerce, "that their actions are not likely to jeopardize the continued existence of endangered or threatened species" or destroy or adversely modify critical habitats.<sup>164</sup> The federal agency involved, the Governor of the state in which an agency action<sup>165</sup> will occur, or a permit or license applicant<sup>166</sup> may apply for an exemption from these requirements.<sup>167</sup> The application for permit or license applicants must be submitted to the Secretary within ninety days after the date of a formal denial of a permit or license.<sup>168</sup> In all other cases, the application must be submitted to the Secretary within ninety days following the termination of the consultation process.<sup>169</sup>

The contents of the application depend on the status of the

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1982 amendments, Pub. L. No. 97-304 (1982), made a few significant changes to the exemption process. In its original form, the threshold review was conducted by a review board consisting of one member appointed by the Secretary of Interior, one member appointed by the President, and an administrative law judge. This review board had sixty days to determine if the application met four criteria, whether the federal agency, and/or permit or license applicant: (1) have carried out consultation responsibilities in good faith; (2) have made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed action; (3) have refrained from making any irreversible or irretrievable commitment of resources; and (4) whether an irresolvable conflict exists.

The 1982 amendments changed this threshold review in a number of ways. The review boards were eliminated and the Secretary was given responsibility over the threshold determination. The time period was shortened from sixty days to twenty days for a determination to be made. And, most importantly, the fourth criterion was eliminated. The purpose behind these amendments was to speed-up the entire process. The final rules implementing the 1982 amendments were released Feb. 28, 1985 with an effective date of April 1, 1985. See 50 Fed. Reg. 8,122 (1985).

164 16 U.S.C. § 1536(a)(2) (1982).

165 50 C.F.R. § 450.01 (1989). "Agency action" means all action of any kind authorized, funded, or carried out, in whole or in part by Federal agencies, including, in the instance of an application for a permit or license, the underlying activity for which the permit or license is sought.

166 50 C.F.R. § 450.01 (1989). "Permit or license applicant" means any person whose application to an agency for a permit or license has been denied primarily because of the application of § 7(a)(2) of the Act, 16 U.S.C. § 1536(a)(2) (1988).

167 16 U.S.C. § 1536(g) (1988); 50 C.F.R. § 451.02(c) (1989).

168 16 U.S.C. § 1536(g)(2)(A) (1988); 50 C.F.R. § 451.02(d)(2) (1989).

169 16 U.S.C. § 1536(g)(2)(A) (1988); 50 C.F.R. § 451.02(d)(1) (1989).

applicant. Nevertheless, every application must contain the name, address, and phone number of the applicant.<sup>170</sup> It also must contain a statement of the benefits of the proposed action, a discussion of why the benefits clearly outweigh the benefits of each alternative, a discussion of why none of the alternatives are reasonable and prudent, a statement as to why the proposed action is in the public interest, an explanation of why the action is of regional or national significance, and a discussion of mitigation and enhancement measures to be implemented if the exemption is granted.<sup>171</sup>

Furthermore, if the applicant is a federal agency, the application must contain a comprehensive description of the proposed action, a description of the consultation process carried out, copies of the biological assessment and opinion, descriptions of alternative actions considered by the agency, a statement of why the proposed action cannot be changed, and a description of resources committed to the proposed action.<sup>172</sup>

If the applicant is a Governor of the state in which the action is proposed, the application must contain the same information as that of the federal agency applicant to the extent that such information is available to the Governor.<sup>173</sup>

If the applicant is a permit or license applicant, the application must contain a comprehensive description of the proposed action, a description of the permit or license sought and the grounds for denial, a description of all permits or licenses obtained or still to be obtained for the action, a copy of the permit or license denial, copies of the biological assessment and opinion, a description of the consultation carried out, a description of alternatives, a description of why the proposed action cannot be changed, and a description of resources committed to the proposed action.<sup>174</sup>

### *B. The Role of the Secretary*

“Upon receipt of an application for exemption for an agency action, . . . the Secretary”<sup>175</sup> has numerous duties.<sup>176</sup> First, the

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170 50 C.F.R. § 451.02(e)(1) (1989).

171 50 C.F.R. § 451.02(e)(5) (1989).

172 50 C.F.R. § 451.02(e)(2) (1989).

173 50 C.F.R. § 451.02(e)(4) (1989).

174 50 C.F.R. § 451.02(e)(3) (1989).

175 50 C.F.R. § 450.01 (1989). “Secretary” means the Secretary of the Interior or the

Secretary has ten days to consider whether the application contains all the required information. If the application is missing some information, the Secretary must reject the application and the applicant may resubmit it, with the required information, within ninety days.<sup>177</sup> If the application is sufficient, the Secretary must notify the Secretary of State,<sup>178</sup> the public,<sup>179</sup> and the Governor of the affected state.<sup>180</sup>

The Secretary must then conduct a threshold review of the application and make threshold determinations. "Within twenty days after receiving the exemption application" the Secretary must conclude his review.<sup>181</sup> In the review, the Secretary must determine (1) whether any required biological assessment was conducted,<sup>182</sup> (2) to what extent the applicant has refrained from making any irreversible or irretrievable commitment of resources,<sup>183</sup> and (3) whether the applicant has carried out its consultation responsibilities in good faith, and has made reasonable and prudent alternatives to the proposed action.<sup>184</sup>

If the Secretary makes a negative finding for any of these threshold determinations, the application is denied. The applicant is notified and can seek judicial review.<sup>185</sup> If the Secretary finds that the application meets all of the requirements, the Secretary must prepare a report to be submitted within 140 days to the Endangered Species Committee.<sup>186</sup> The Secretary of State can

Secretary of Commerce, or the Secretary's delegate, depending upon which Secretary has responsibility for the affected species.

176 16 U.S.C. § 1536(g)(2)(B) (1988).

177 50 C.F.R. § 451.02(f) (1989).

178 50 C.F.R. § 451.02(g) (1989).

179 50 C.F.R. § 451.02(h) (1989).

180 16 U.S.C. § 1536(g)(2)(B) (1988).

181 16 U.S.C. § 1536(g)(B) (1988); 50 C.F.R. § 452.03(a) (1989). The Secretary may have a longer time if agreed upon by the applicant and the Secretary.

182 A "biological assessment" is a study of the proposed action to identify the presence of any species that the action may affect. Once the Fish and Wildlife Service determines that the proposed action may have an effect on a listed species or on a species proposed for listing, the biological assessment becomes a mandatory responsibility of the project agency, 16 U.S.C. § 1536(c) (1988). "[A]ny person who may wish to apply for an exemption" may conduct the biological assessment. *Id.*

183 The statute provides: "[T]he [exemption] applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. § 1536(d) (1988). This may be viewed as a strict standard, even prohibiting preliminary construction activities.

184 16 U.S.C. § 1536(g)(3) (1988); 50 C.F.R. § 452.03(a) (1989).

185 16 U.S.C. § 1536(g)(3) (1988); 50 C.F.R. § 452.03(c) (1989).

186 16 U.S.C. § 1536(g)(4) (1988); 50 C.F.R. § 452.03(d) (1989).

terminate the exemption process at any time if the Secretary determines that "granting the exemption and carrying out the proposed action would violate an international treaty obligation or other international obligation of the United States."<sup>187</sup>

For any application that passes the threshold review, the Secretary must prepare a report for the Endangered Species Committee. The report must discuss the availability of alternatives and the nature and extent of both the proposed action and alternative actions. It must summarize the evidence on whether the action is of national or regional importance and on whether the action is in the public interest. It also must discuss any appropriate and reasonable mitigation and enhancement measures that the Committee should consider and whether the applicant has refrained from making any irreversible or irretrievable commitments of resources.<sup>188</sup> "To develop the record for the report . . . the Secretary . . . shall hold a hearing."<sup>189</sup> The hearing is conducted by an administrative law judge appointed by the Secretary.<sup>190</sup> After the hearing is conducted, the Administrative Law Judge shall close and certify the record and transmit it to the Secretary. The Secretary then prepares a report from the record.<sup>191</sup>

### C. *The Formation and Duties of the Endangered Species Committee*

The Secretary, after compiling a report, has 140 days to submit it to the Endangered Species Committee. The Committee consists of seven members; namely the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one other member from the affected state, to be appointed by the President.<sup>192</sup> The Secretary of the Interior serves as the Chair.

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187 16 U.S.C. § 1536(i) (1988); 50 C.F.R. § 452.03(e) (1989).

188 16 U.S.C. § 1536(g)(5) (1988); 50 C.F.R. § 452.04(a) (1989).

189 50 C.F.R. § 452.05(a)(1) (1989).

190 50 C.F.R. § 452.05(a)(2) (1989). The hearings are held in accordance with 5 U.S.C. §§ 554-56 (1988). For the complete procedures for the hearings, see 50 C.F.R. § 452.05(4) (1989).

191 50 C.F.R. § 425.08(a) (1989).

192 16 U.S.C. § 1536(e)(3) (1988). See Note, *supra* note 124, at 305 (discussing the composition of the ESC). "Senator Culver, one of the sponsors of the [1978 Amendments], noted that the composition of the ESC was so weighted that 'the presumption in favor of protection of the species is overwhelming.'" *Id.* (citing 124 CONG. REC. S10,974

Within thirty days after receiving the Secretary's report, the Committee must make its decision whether to grant or deny the exemption. "By a vote in which at least five of its members concur,"<sup>193</sup> the Committee may grant an exemption if, based on the report, it finds that (1) there are no reasonable and prudent alternatives to the proposed action, (2) the benefits of the action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat and that the action is in the public interest, (3) the action is of regional or national significance, and (4) neither the federal agency nor the applicant made any irreversible or irretrievable commitment of resources prohibited by the ESA.<sup>194</sup> If the Committee grants an exemption it also must establish "reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the proposed action upon the endangered species, threatened species or critical habitat concerned."<sup>195</sup> The applicant must then carry out and pay for these measures and must also report annually to the Council on Environmental Quality until the measures are completed.<sup>196</sup>

All exemptions granted by the Committee are permanent unless the Secretary finds that the action will cause the extinction of another species not subject to the consultation or biological assessment, and within sixty days after the Secretary's discovery the Committee finds, as a result, that the exemption should not be permanent.<sup>197</sup>

Exemptions may also be granted or denied in rare cases by the President, Secretary of Defense, or Secretary of State. The President may determine that an exemption is needed for a project that will repair or replace a public facility destroyed by a major disaster. The President must find the action is necessary to prevent the recurrence of such a disaster or to reduce the potential loss of life.<sup>198</sup> The Secretary of Defense can grant an exemption upon finding "that such exemption is necessary for reasons

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(daily ed. July 18, 1978)).

193 50 C.F.R. § 453.03(a) (1989).

194 16 U.S.C. § 1536(h)(1) (1988); 50 C.F.R. § 453.03(a)(1) (1989).

195 50 C.F.R. § 453.03(a)(2) (1989).

196 16 U.S.C. § 1536(l)(2) (1988). *See, e.g.*, Annual Report on Endangered Species Act Exemption submitted by Basin Electric Power Cooperative in the matter of an exemption granted from the requirements of the Endangered Species Act to Grayrocks Dam. (Jan. 19, 1988), 50 Fed. Reg. 7,960 (1988).

197 16 U.S.C. § 1536(h)(2)(B) (1988).

198 16 U.S.C. § 1536(k) (1988).

of national security."<sup>199</sup> As mentioned earlier, the Secretary of State can deny an exemption if it would violate a treaty.<sup>200</sup>

Finally, any Committee decision is subject to appeal in the United States Court of Appeals for the circuit where the proposed action will be carried out or in the District of Columbia. The applicant must file an appeal with the appropriate court's clerk within ninety days after the date of the Committee's decision.<sup>201</sup>

The requirements for obtaining an exemption are rigorous. Any application must be complete and must pass two tests—the threshold determination of the Secretary and the final determination by the Committee. Because of the difficulty of the process, it has been rarely used,<sup>202</sup> and calls have been made to relax on the requirements.<sup>203</sup>

Part IV argues that the requirements should not be diminished, as the exemption process serves its purpose in its current form. Because the process is strict, it secures the protections of section 7 and the entire ESA.<sup>204</sup>

#### IV. THE EXEMPTION PROCESS TODAY

The exemption process is again the focus of much attention. In a conflict very similar to the long-snouted ferret hypothetical, the northern spotted owl faces extinction at the hands of the Pacific Northwest loggers.<sup>205</sup> The spotted owl lives and depends on the old-growth forests of Oregon, Washington, and Northern California. These forests are mostly federally owned; they are managed by the Forest Service and the Bureau of Land Manage-

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199 16 U.S.C. § 1536(j) (1988).

200 16 U.S.C. § 1536(i) (1988); see *supra* note 185 and accompanying text.

201 16 U.S.C. § 1536(n) (1988).

202 See *supra* note 161 and accompanying text. "After exhausting surveys of Department of the Interior files . . . the Carter Administration was able to determine that of more than 4,500 potential conflicts, only three had been administratively irreconcilable and these (including Tellico) each represented cases in which the agency refused to discuss project adjustments to alleviate the conflict." *Id.* at 828 n.82 (citing *Endangered Species Act Oversight Hearings Before the Subcomm. on Resources Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. 291 (1977)). See Hemmer, *The Pittston Case*, 4 HARV. ENVTL. L. REV. 415 (1980) (discussing the proposed Pittston refinery project and showing the difficulty of pursuing an exemption).

203 See *supra* note 13 and accompanying text.

204 See Plater, *supra* note 110, at 828-29.

205 See *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert denied*, 110 S.Ct 1470 (1990).



ment (BLM). The BLM is in charge of planning forest harvests and then selling the rights to harvest according to the plan. During the late 1970s and 1980s, harvests of these forests accelerated, precipitating a sharp decrease in the number of spotted owl breeding pairs. This decline led the Department of the Interior's Fish and Wildlife Service to list the spotted owl as a threatened species on June 23, 1990.<sup>206</sup>

As a threatened species, the spotted owl is protected by section 7. Section 7 requires the forest service and the BLM to avoid taking any action that will jeopardize the continued existence of the spotted owl or its critical habitat, the old-growth forests. This mandate has raised a potentially devastating conflict. If the Secretary's opinion states that continued harvests of the forests will jeopardize the owl, the forest service and the BLM cannot allow these harvests to continue. If the harvests are halted, thousands will lose their jobs in the Pacific Northwest<sup>207</sup> and the cost of lumber will increase.

Faced with potential economic hardship if the Endangered Species Act is enforced against the Forest Service and the BLM, many groups have called for the Endangered Species Committee to convene and decide the issue. Among these groups, the Bush Administration, through Secretary of Agriculture Veutter and Secretary of the Interior Lujan, has not only sought the convening of the Committee but also has called for the Committee's mandate to be broadened. The broader mandate would entail the easing of the requirements for convening the Committee and would give "a greater breadth of opportunities and greater flexibility" to the Committee in deciding cases.<sup>208</sup> Senator Bob Packwood proposed an amendment to immediately convene the Committee to decide the spotted owl issue.<sup>209</sup> Still others have called for the

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206 See 55 Fed. Reg. 26,114 (1990).

207 See Siegal, *Will the Winners be Owls or Jobs*, Wash. Times, Sept. 4, 1990, at C4, col. 3. "Production from federal lands on owl country would drop more than 30 percent, idling 28,000 workers by the year 2000, the Forest Service estimates. An industry sponsored study says 44,500 jobs would be lost directly and nearly 60,000 more indirectly." *Id.*

208 See *supra* note 13.

209 Sen. Packwood (R-Ore.) proposed S. 3112, 101st Cong., 2d Sess. (1990), as an amendment to the ESA to call for the immediate convening of the ESC. Citing the difficulty in meeting the requirements of the exemption process for each individual sale of timber rights, Sen. Packwood called for a relaxation of the definition of agency action to include the sales of timber in aggregate.

Sen. Albert Gore (D-Tenn.) led the opposition to the amendment. Stating "that the exemption process was intended to be a matter of last resort," Sen. Gore argued for the

repeal of the ESA.<sup>210</sup>

Changes should not be made to the ESA as a whole or to the exemption process. The exemption process, if it is needed in the spotted owl case, should be used as Congress drafted it.<sup>211</sup> The exemption process, as it now stands, properly values species preservation. Any changes made to it, to reduce its standards or broaden its scope, will defeat Congress' purpose behind the ESA as a whole.

*A. The Exemption Process Furthers the Purpose Behind the ESA*

By rigorously enforcing the ESA, the exemption process upholds Congress' strong desire to preserve species.<sup>212</sup> Congress developed the ESA as a comprehensive pro-species plan to protect and preserve endangered and threatened species. Congress, alarmed by the findings that extinction rates were growing fast, toughened its previous attempts at species preservation,<sup>213</sup> and the result was the 1973 ESA. From the ESA's beginning, Congress realized the incalculable value of species,<sup>214</sup> and sought to protect species absolutely.<sup>215</sup>

The exemption process, when it was added in 1978, did not change Congress' view of species preservation. Instead of weakening the ESA, Congress added the exemption process as a further burden on any applicant seeking to circumvent the ESA's man-

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ESA to be used as drafted. The proposed amendment calls on Congress to "make the exemption process a matter not of last resort but a matter of first resort." Before an exemption should be sought, the consultation process should be followed, which has not been done in the spotted owl case.

The Senate rejected the amendment by a vote of 62-34. 136 CONG. REC. S16,771 (daily ed. Oct. 23, 1990) (statement of Sen. Gore).

210 Schaefer, *Endangered Species: A Hard Act to Follow*, Seattle Times, June 3, 1990, at B1, col. 1. "Sen. Slade Gorton (R-Wash.), is pushing for making certain forest areas exempt from the Endangered Species Act. Reps. Denny Smith (D-Ore.), and Ron Marleenee (R-Mont.), want the Act repealed." *Id.*

211 The exemption process may not be needed to resolve the spotted owl case as on February 5, 1991, Secretary of the Interior Manuel Lujan announced the formation of a 16-member panel to write a permanent recovery plan for the spotted owl. Consisting of federal officials, timber experts, biologists, and representatives from the affected states, California, Oregon, and Washington, the panel is to draft a plan in compliance with the ESA by the end of 1991. The plan will then be open to public comment prior to its adoption in July 1992.

212 See *supra* notes 157-61 and accompanying text.

213 See *supra* notes 78-97 and accompanying text.

214 See *supra* note 81 and accompanying text.

215 See *supra* notes 119-22 and accompanying text.

date. Before an exemption will be granted, the applicant must first follow all of the requirements of the ESA, including consultation<sup>216</sup> and biological assessment.<sup>217</sup> By forcing any federal agency, or other applicant, to go through these procedures and to not spend much money on the project,<sup>218</sup> the overall purpose of the ESA is met. When forced to look for ways to avoid any conflict between the proposed project and the endangered or threatened species and its habitat, federal agencies nearly always have found an alternative plan.<sup>219</sup> Because it is so burdensome, the exemption process works; it maintains the ESA's purpose of species preservation.

Congress, through the ESA, gave species preservation the highest priority.<sup>220</sup> The exemption process as it now stands maintains this priority, although it allows exemptions from preservation in very rare cases. The purpose of the exemption process is not to avoid the ESA and to benefit development; it is to further species preservation as part of the comprehensive ESA.<sup>221</sup> If the exemption process were eased, the whole ESA would be affected. Unless Congress wants to change its entire evaluation of species preservation, it should not change the exemption process.

### *B. Congress Should Maintain its Choice of Preservation Over Development*

Choosing species preservation over development may have been a "tragic choice"<sup>222</sup> for Congress but it was the correct one. Congress, in 1973, saw that something had to be done to preserve endangered species. Congress needed to draw a line across which Congress and the United States would not be willing to go for the sake of economic development.<sup>223</sup> The ESA was

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216 16 U.S.C. § 1536(a)(b) (1988).

217 16 U.S.C. § 1536(c) (1988).

218 16 U.S.C. § 1536(h) (1988).

219 See *supra* notes 158-59 and accompanying text.

220 See *supra* note 119 and accompanying text.

221 See *supra* note 158 and accompanying text.

222 See G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 17-28 (1978) (discussing the concept of tragic choices, i.e., kidney machines or crime prevention, and giving some insight into how they should be resolved).

223 See Sagoff, *supra* note 44, at 53. Sagoff notes:

[M]any Americans are concerned that we must, as a nation, 'dig in our heels' somewhere. We suspect that, for most endangered species and most of the projects which threaten them, it will be arguable that the particular project is 'worth more' than the particular species. Yet each species contributes more to

that line. Congress valued species preservation very highly. It did not include balancing of interests in the original ESA because it wanted species preservation to be absolute.<sup>224</sup>

Although the exemption process introduced a balancing test to the ESA, it did not move Congress' line.<sup>225</sup> Congress instituted the exemption process to maintain the strength of the ESA in the face of the political dilemma of the Tellico Dam. The flexibility added with the exemption process appeased some members of Congress, while its rigidity maintained Congress' strong line in favor of species preservation. The strong line has been reinforced by the courts as they have strictly interpreted the ESA since 1979.<sup>226</sup>

Any change in the exemption process would precipitate a change in the line. The Bush Administration may advocate this change,<sup>227</sup> but Congress must not move its line. "The Bush administration proposal would be the Tiananmen Square for American wildlife."<sup>228</sup> The reasons that led Congress to enact the ESA

the ecosystem as a whole, than each highway contributes to the highway system as a whole, or each dam contributes to an irrigation network. Some members of Congress may have reasoned that we have to stop destroying species altogether in order to 'save' nature as we know it.

*Id.*

224. See *supra* notes 116-20 and accompanying text.

225. See *supra* notes 212-20 and accompanying text.

226. See Plater, *supra* note 110, at 830. Plater notes:

The courts since 1979 have been far more attentive to the Act's requirements, . . . . In case after case, courts have strictly interpreted the Endangered Species Act to the detriment of powerful market forces . . . . How strong would the courts have been in these opinions had not the Supreme Court held such a strong line in a highly publicized case poisoning an "insignificant" species against a purported multi-million dollar project? Judicial experience to date thus offers indications that future cases will be held to a high level of species protection. The snail darter may be subject to continued disparagement, but its precedential position seems to have secured protection to its comrades throughout the natural world.

*Id.*

227. See Fein & Meese, *Endangering A Species Our Own: The Act Should be Amended So Human Welfare Comes First*, L.A. Times, July 30, 1990, at 7, col. 5. "The Act propagates a pestiferous imbalance between the earthbound benefits of economic growth and human well-being, and the protection of endangered or threatened fish, wildlife, and plants. Wholesale amendments are required to stand the public interest upright, as President Bush and Secretary of the Interior Manuel Lujan Jr. have suggested." *Id.* See also *supra* note 13.

228. See Wolf, *Endangered Species Act in Danger of Losing Clout*, Reuters, BC Cycle, June 27, 1990 (quoting Andy Kerr, Conservation Director of the Oregon Natural Resources Council).

still exist today, and are probably even greater. The need to save species from extinction is increasing rapidly with the growing threat to the world's rain forests. With the advent of AIDS and the threat of global warming, the potential direct<sup>229</sup> and indirect benefits<sup>230</sup> of both plant and animal species has never been more important and apparent. The value of species has not diminished, nor should the protection. The line that Congress drew in 1973 should not be crossed.

C. *The Value of Species Preservation is Greater Than Any Project*

The value of a particular species may not, on balance, seem greater than the value of the project halted because of that species. But the value of species preservation as a whole is greater than any single project.<sup>231</sup> The snail darter may seem inconsequential compared to the Tellico Dam, and the spotted owl may seem of little importance as compared to the logging industry, but the concept of species preservation is greater than both the dam and the industry.

The focus behind the ESA is not preserving any single species, it is preserving all species. The arguments for species preservation value all species. All species have a right to exist.<sup>232</sup> All species are potential sources of direct and indirect benefits.<sup>233</sup> All species are beautiful.<sup>234</sup> Shifting the focus to a single species, and away from species preservation in general, contorts the purpose of the ESA.

Changing the exemption process to compare the economic value of an individual species, like the spotted owl, against a large federal project would doom the ESA. A strong argument could be made in almost every case that the value of the project is greater

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229 See *supra* notes 15-33 and accompanying text.

230 See *supra* notes 34-43 and accompanying text.

231 See Campbell, *supra* note 15, at 271.

[A] case-by-case exemption is fatally flawed: a built-in imbalance of interests stacks the deck against any single species when the value of its continued existence is compared with the far-reaching benefits of a major federal project . . . . Therefore, species preservation should be determined by a comprehensive protection policy before conflict arises and before this balancing procedure comes into play to doom a single endangered species pitted against a federal project.

*Id.* (citations omitted).

232 See *supra* notes 48-56 and accompanying text.

233 See *supra* notes 15-43 and accompanying text.

234 See *supra* notes 44-47 and accompanying text.

than the value of the individual species. This, of course, assumes that humanity possesses the ability to value an individual species correctly.

Humanity, however, may not yet be able to value species correctly. Calculating the potential benefits of each individual species would be very difficult. Determining the precise role of a species in its ecosystem and then calculating the change on the ecosystem without the species is very difficult. These valuations also must include the aesthetic value of a species.

Because of these difficulties in valuing individual species, the focus should be on species preservation as a whole. Without the ability to evaluate the worth of each species, humanity must preserve all species. The ESA mandates this view.<sup>235</sup> The ESA does not distinguish which species should be saved and which should not. All species are protected.

The exemption process, as it now stands, furthers this view instead of balancing the "value of the project against the value of the species at risk. Congress intended the review to balance the net benefits of the project against the net benefits of alternative causes of action."<sup>236</sup> Broadening the mandate of the Endangered Species Committee<sup>237</sup> to include economic considerations regarding the particular species, would change the focus of the ESA as a whole. "Under current law, 'we do not let economic considerations dictate the continued existence of species' . . . 'A move towards balancing would be a move towards changing that philosophy.'"<sup>238</sup>

The exemption process must not be changed. As it stands now, it achieves the purpose of the ESA in preserving all species. To change it, by removing some of its strictness or by broadening its mandate, would move the line that Congress drew with the ESA. All Species are to be preserved for the "[a]esthetic, ecological, educational, historical, recreational, and scientific value [that they bring] to the Nation and its people."<sup>239</sup> No single project of any federal department or agency is more important than species preservation.

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235 16 U.S.C. § 1531 (1988).

236 See Plater, *supra* note 110, at 828 n.81.

237 See *supra* note 13.

238 See Wolf, *supra* note 228 (quoting Robert Fischman of the Environmental Law Institute).

239 See *supra* note 81.

## CONCLUSION

Whether or not the oil companies or the state of Jefferson receive an exemption from the ESA for the long-snouted ferret is not the question of this Note. What matters is the exemption process through which they have to go. If they do seek an exemption, they should seek it from the exemption process as it now stands.

Congress, through the Endangered Species Act of 1973, developed the United States' plan to protect endangered and threatened species and their habitats. Congress gave species preservation its highest priority. It did not allow utilitarian balancing of the value of a species against the value of a proposed project. Congress values species preservation so much that it made its mandate absolute.

When confronted with an irresolvable conflict between this mandate and another important project, Congress responded with the present exemption process. Instead of softening the ESA, Congress drafted the exemption process to force compliance with the ESA. By making exemptions very hard to come by, Congress furthered its purpose of preserving species by causing federal agencies to use alternative projects that do not adversely affect the endangered or threatened species.

Now confronted with a major challenge to the ESA in the form of the spotted owl controversy, Congress should not knuckle under political pressure and change the exemption process. Congress should not follow the axiom and let a "hard case make bad law." The ESA is a good law. To change the exemption process under the pressure from the spotted owl controversy would be a mistake.

The exemption process as it stands now furthers the purpose of the entire ESA. A change in the exemption process would reflect a change in Congress' overall evaluation of species preservation. This evaluation should not be changed; however, because species preservation is as vitally important today as it was in 1973.

Unfortunately, the United States and its government do not have enough resources to both preserve species and continue unbridled economic development. Today, we cannot afford both. In 1973, Congress chose to preserve endangered and threatened species and that was the correct choice. Humanity cannot afford to exterminate any more species. The exemption process, therefore, must not be changed.

*Jared des Rosiers*