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ARTICLE

Reexamining What We Stand to Lose: A Look at Reinitiated Consultation Under the Endangered Species Act

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Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans.

–Richard Nixon[1]

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For more than three decades, the Endangered Species Act has successfully protected our nation's most threatened wildlife, and we should be looking for ways to improve it—not weaken it.

–Barack Obama[2]

I. INTRODUCTION

Catastrophic. That is the claim from both sides in Endangered Species Act (ESA) litigation. On the one hand, interests as critical as national defense can be imperiled by vigorous application of the ESA.[3] On the other hand, an entire species could become extinct if the law is not strictly applied.[4] There is little room for error in either scenario.[5] So who wins? Who loses? And at what point are an agency's duties under the ESA over?

Most Federal agencies ensure ESA compliance through consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively the Service), as required by section 7 of the ESA.[6] Given the high

1. *374 - Statement on Signing the Endangered Species Act of 1973, December 28, 1973*, AMERICAN PRESIDENCY PROJECT (Nov. 10, 2014, 6:30 PM), http://www.presidency.ucsb.edu/ws/index.php?pid=4090.

2. *Remarks by the President to Commemorate the 160 Anniversary of the Department of the Interior*, WHITEHOUSE.GOV (Nov. 10, 2014, 6:38 PM), http://www.whitehouse.gov/the-press-office/remarks-president-commemorate-160th-anniversary-department-interior.

3. *See* Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. 2d 1129, 1138 (N.D. Cal. 2003) (discussing the Navy's need to conduct sonar training and testing for national security purposes).

4. *See id.* at 1188-89 (discussing gray whales and some populations of endangered sea turtles).

5. *See* Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1443 (9th Cir. 1992) ("This is a case about difficult choices. In 1988, Congress was asked to choose between ensuring that our nation remains a world leader in astrophysical research or protecting from almost certain demise an endangered species on the brink of extinction.").

6. Endangered Species Act of 1973, 16 U.S.C. § 1536 (2012) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary [elsewhere defined as NMFS and FWS], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any

stakes of complying with the ESA, it is not surprising that ESA consultation is the subject of considerable litigation and commentary.[7] However, reinitiated consultation, renewed consultation required when circumstances underlying the initial consultation materially change, has similar consequences.[8] But, there is little case law or academic research examining when an agency must reinitiate consultation and the consequences if the agency improperly fails to reinitiate.[9] Moreover, unlike the National Environmental Policy Act (NEPA), where the procedural requirements to prepare an environmental impact statement end when the agency takes its federal action,[10] the ESA's implementing regulations[11] contemplate reinitiated consultation even years after an agency acts.[12] Thus, under the ESA's terms and implementing regulations, once a species is listed as endangered or threatened, it is protected now and into the future, even if that protection comes at a high cost to society.

Additionally, the listing of a new species can trigger an entirely new set of reinitiated consultations for an otherwise-complete federal action.[13] Currently, the Service is considering

endangered species or threatened species . . . ."); *see also* 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(b) (2014).

7. *See, e.g.*, Jeremy Brian Root, *Limiting the Scope of Reinitiation: Reforming Section 7 of the Endangered Species Act*, 10 GEO. MASON L. REV. 1035 (2002) (describing the ESA's consultation process as complex, lengthy, and highly litigated).

8. 50 C.F.R. § 402.16.

9. The following articles primarily constitute the existing literature: *see* Deborah Freeman, *Reinitiation of ESA Section 7 Consultation over Existing Projects, in* THE ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES 115 (Donald C. Baur & William Robert Irvin eds., 2002); Root, *supra* note 7, at 1035.

10. *See, e.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989) (noting that the requirement to supplement environmental impact statements exists when an agency has yet to act and discovers new and significant information).

11. *See* 50 C.F.R. §§ 401-53.

12. § 402.16(d). For example, the regulations require reinitiation of formal consultation when the agency retains some discretionary involvement or control over an action and a new species is listed that may be affected by the action. The Act also provides extensive protection to all listed species regardless of whether a consultation occurs under section 7. *See* 16 U.S.C. § 1538.

13. 50 C.F.R. § 402.16(d).

whether to list many more species.[14] Thus, more and more requests to reinitiate consultations appear likely. As a result, understanding the legal basis, power, limits, and consequences of reinitiated consultation is more critical than ever.

This article first examines the role reinitiated consultation plays within Congress's statutory framework and concludes that in many ways, reinitiated consultation is the glue that holds the ESA's protective scheme together.[15] While the ESA generally prohibits any injury to an endangered species, Congress has authorized the Service to permit such injuries under certain circumstances.[16] But these authorizations must be accompanied by a limit that will trigger reinitiated consultation if exceeded. Thus, without reinitiated consultation, these preauthorized injuries or "takes" would prove gaping leaks in Congress's "Ark,"[17] leaving little or no safety for endangered species. Moreover, reinitiated consultation has significant real world consequences for federal agencies and private parties.[18] Failure to reinitiate consultation when legally required can subject the agency and its employees, as well as private parties, to civil and even criminal liability.

Next, this article explores the legal basis for reinitiated consultation.[19] Despite its central role, Congress never provided

14. Endangered and Threatened Wildlife and Plants; Review of Native Species that are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 78 Fed. Reg. 70,104 (Nov. 22, 2013) (to be codified at 50 C.F.R. pt.17) (noting that "the current number of species that are candidates for listing is 146"). Some of these species are very prevalent at or near power plants or other major industrial installations operated by private entities under federal licenses and permits.

15. *See infra* Part III.A. (discussing protective elements of the ESA and the role of reinitiated consultation).

16. 16 U.S.C. § 1536(b)(4) (empowering the Service to provide an "Incidental Take Statement" authorizing a limited number of takes for a federal project). An "Incidental Take," or "take that results from a Federal action but is not the purpose of the action" may be allowed if the Service "finds that an action may adversely affect a species, but not jeopardize its continued existence" and then prepares and approves the "Incidental Take Statement." *Section 7 Consultation: A Brief Explanation*, U.S. FISH AND WILDLIFE SERV. (last updated June 30, 2014), *available at* http://www.fws.gov/midwest/endangered/section7/section7.html.

17. *See* § 1536(b)(4).

18. *See infra* Part III.B.

19. *See infra* Part IV.

for reinitiated consultation within the Act itself.[20] While the Service has acknowledged this silence,[21] the courts generally do not raise this question of statutory authority.[22] In light of the ambiguities within the ESA and Congress's clear direction in the legislative history of the Act that it intended for agencies to reinitiate consultation, this article concludes that the practice is legally supportable.

Finally, given the significance of reinitiated consultation, and the likelihood that it is here to stay, this article then explores how courts have reviewed suits concerning reinitiated consultation.[23] This discussion highlights potential challenges and best practices for federal agencies and permittees. This article concludes that, with few exceptions, courts have taken a surprisingly deferential approach to reviewing agency decisions to reinitiate, or more commonly not reinitiate, consultation. For example, courts have allowed agencies to expand a project's scope, duration, or impact on listed species or to recalculate how to measure the impacts altogether without requiring reinitiated consultation.[24] Nonetheless, courts have taken a much stricter approach when considering the triggers for reinitiated consultation and have frequently insisted that those triggers be as meaningful and as exact as possible.[25]

However, before discussing reinitiated consultation in detail, this article provides some additional background on the ESA in general and reinitiated consultation in particular. To understand the purpose and effect of reinitiated consultation, one must first understand several key ESA provisions – namely, the ESA's listing, liability, and consultation provisions.

20. *See* 16 U.S.C. § 1536 (entirely omitting the word "reinitiate").

21. Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,956 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402).

22. Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir. 1994) (assuming that the ESA requires reinitiated as well as initial consultation).

23. *See infra* Part V.

24. *See infra* Part V.B.

25. *See infra* Part V.A.3.

II. BACKGROUND ON THE ESA'S KEY PROVISIONS RELATED TO CONSULTATION AND REINITIATED CONSULTATION

If you read the preamble to the ESA[26] and believe the Supreme Court,[27] you would conclude that the ESA protects endangered species at any cost.[28] There is certainly evidence of this: just ask the Tennessee Valley Authority (TVA)[29] or loggers in the Pacific Northwest.[30] The ESA is called the "pit bull of environmental laws"[31] for good reason. Unlike NEPA, the ESA has substantive requirements in addition to procedural requirements.[32] These requirements are extensive[33] and

26. *See* 16 U.S.C. § 1531 (2012).

27. Tenn. Valley Auth. v. Hill (*TVA*), 437 U.S. 153, 184 (1978) (noting that the plain intent of Congress in enacting the ESA was to halt and reverse the trend toward species extinction, whatever the cost).

28. *See* 16 U.S.C. § 1531(b) (emphasis added); Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, 275-83 (1969) (prohibiting transportation of endangered species). In contrast, the ESA "provide[s] a means whereby *the ecosystems* upon which endangered species and threatened species depend may be conserved." *Id.* (emphasis added); Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, 926-29 (1966) (authorizing the Secretary of the Interior to purchase lands for purposes of preserving endangered species); *TVA*, 437 U.S. at 180 (The Supreme Court has observed, "[a]s it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."). Previous laws protecting endangered species were far more limited; for example they empowered the executive to create sanctuaries for endangered species or restricted transportation of those species.

29. *See TVA*, 437 U.S. 153. The ESA famously led to the Supreme Court's *TVA* decision that halted construction of a nearly complete, multi-million-dollar Federal dam.

30. Candee Wilde, *Evaluating the Endangered Species Act: Trends in Mega-Petitions, Judicial Review, and Budget Constraints Reveal a Costly Dilemma for Species Conservation*, 25 VILL. ENVTL. L.J. 307, 324-35 (2014). Since the Service named the Northern Spotted Owl as a listed species pursuant to the ESA, "over two hundred logging mills in the Pacific Northwest have closed and thousands of logging employees have lost their jobs." *Id.* at 324.

31. *Id.* at 310. It has also been called the "*Magna Carta* of the environmental movement." WATER ON THE EDGE (Water Education Foundation 2005) (interview with Kevin Starr at 29:12).

32. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989). "NEPA itself does not mandate particular results." *Id.* at 350. Instead, NEPA imposes only procedural requirements to "ensure[] that the agency . . .

compliance with them can cost agencies and individuals delay (with corresponding costs) or even stop projects in their tracks if a protected species would be jeopardized. Moreover, violations of ESA requirements can result in large civil or criminal penalties.[34]

But the real story is not that simple. By the plain terms of the ESA, endangered species sometimes lose because "takes"[35] are permitted by the statute.[36] Further, the ESA's procedural and substantive requirements do not guarantee that a species will flourish.[37] In fact, the Service has only de-listed thirty-two species for reasons of recovery out of the hundreds of species listed in the Act's nearly thirty-year history.[38] And, unlike many environmental laws, which tend to have a decreasing impact on the American economy as industry conforms to new environmental standards, the ESA's impact increases each year

carefully consider[ed], detailed information concerning significant environmental impacts." *Id*. at 359.

33. Root, *supra* note 7, at 1036 (noting commenters have described completing the consultation process as a "bottomless bureaucratic morass").

34. *See* 16 U.S.C. § 1540.

35. 16 U.S.C. § 1532(19) (2012) (defining take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" regarding protected species). "Harm," in this context, is "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or. (*Sweet Home*), 515 U.S. 687, 691 (1995) citing 50 C.F.R. § 17.3.

36. 16 U.S.C. § 1536(b)(4).

37. Wilde, *supra* note 30, at 324-25 (noting that the Northern Spotted Owl population has remained stagnant, even after listing). Though the Supreme Court's decision in *TVA* halted the Tellico dam project, the dam was later built after an act of Congress. Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 486 (1999) ("Ironically, however, soon after the dam's completion, FWS discovered healthy populations of snail darters in other Tennessee rivers and down-listed the species from endangered to threatened.").

38. *See Delisting Report*, U.S. FISH AND WILDLIFE SERV., http://ecos.fws.gov/tess_public/reports/delisting-report (last visited Jan. 12, 2015); *see also* Steven P. Quarles & Thomas R. Lundquist, *The Pronounced Presence and Insistent Issues of the Endangered Species Act*, SP036 ALI-ABA 447, 454 (2009) (noting that, as of 2009, the Service had only de-listed twenty five of the hundreds of species listed in the Act's nearly thirty year history).

as sprawling development pushes construction into new habitats.[39]

A. Listing a Species Under the ESA

The ESA's primary purpose is to protect and recover imperiled species and the ecosystems upon which they depend.[40] The ESA's protections include section 7 conservation and consultation requirements and section 9 protections against takes. But before a species can receive the protection provided by the ESA, the species must be listed as an endangered or threatened species.[41] Thus, how the ESA defines endangered and threatened species and how species are listed have critical ramifications.[42]

Section 3 of the ESA provides definitions for species, endangered species, and threatened species. Under section 3, "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[43] Thus, a species for ESA purposes can be a true taxonomic species, a subspecies, or in the case of vertebrates, a distinct population segment.

An endangered species is defined as "any species which is in danger of extinction throughout all or a significant portion of its range."[44] A threatened species is defined as "any species which is

39. *See generally* Quarles & Lundquist, *supra* note 38.

40. 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."). *See also Listing and Critical Habitat: Overview*, U.S. FISH AND WILDLIFE SERV. (last updated Jul. 31, 2014), https://www.fws.gov/endangered/what-we-do/listing-overview.html.

41. 16 U.S.C. § 1531(b).

42. This article does not extensively discuss the delisting of species. For more information on that topic, *see* Kurtis A. Kemper, *Delisting of Species Protected Under Endangered Species Act*, 54 A.L.R. FED. 2D 607 (2011).

43. 16 U.S.C. § 1532(16).

44. *Id*. § 1532(6). The statute provides an exception to this; specifically, "a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an

likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[45]

Section 4 provides for the listing of endangered and threatened species.[46] As noted above, the FWS and NMFS share responsibilities for administering the ESA.[47] The FWS has jurisdiction over land and freshwater species.[48] NMFS has jurisdiction over marine species and anadromous species (fish that swim up river to spawn).[49]

Species can be listed in one of two ways: the Service can list a species by rule, using a candidate assessment process[50] or an individual can petition for a species to be listed.[51] To be considered for listing, the species must meet one of five factors in ESA section 4(a)(1):

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) [declining population due to] disease or predation;

overwhelming and overriding risk to man" is not considered an endangered species. 16 U.S.C. § 1532(6).

45. 16 U.S.C. § 1532(20).

46. *See id.* § 1533. Section 4 also provides for the designation of critical habitat. *Id.*; *see also* Ann K. Wooster, *Designation of "Critical Habitat" Under Endangered Species Act*, 176 A.L.R. FED. 405 (2002).

47. 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(b) (2014).

48. 50 C.F.R. § 402.01(b); *see also Endangered Species Act*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.nmfs.noaa.gov/pr/laws/esa/ (last visited Nov. 5, 2014) ("Generally, [NMFS] manage[s] marine species, while []FWS manages land and freshwater species."). These species are listed at 50 C.F.R. § 17.11(h) and 50 C.F.R. § 17.12(h). The critical habitats are found in 50 C.F.R. § 17.95, 50 C.F.R. § 17.96, and 50 C.F.R. Part 226.

49. *See* 50 C.F.R. § 402.01(b); *Endangered and Threatened Marine Species under NMFS' Jurisdiction*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#fish (last updated Jan. 15, 2015); *see also Endangered Species Act*, *supra* note 48 (noting that NMFS has jurisdiction over 102 listed species).

50. *See* 50 C.F.R. § 424.15(b) (2014). Under section 4, the Secretaries of the Department of the Interior and Commerce, whose departments include FWS and NMFS respectively, work together to list threatened and endangered species. *Id.*; *see also* 50 C.F.R. § 402.01(b).

51. 16 U.S.C. § 1533(b)(3)(A) (2012); 50 C.F.R. § 424.14(a). The procedures are the same for both types of listing except that there is a 90-day screening period for petitions. 16 U.S.C. § 1533(b)(3)(A).

> (D) the inadequacy of existing regulatory mechanisms [for preservation]; or
> (E) other natural or manmade factors affecting its continued existence.[52]

If the current condition of a species meets one or more of these factors, it is considered a candidate for listing. Under the ESA's implementing regulations on listing, a "candidate" species is "any species being considered by the Secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule."[53] Importantly, "[u]nlisted species, species petitioned by citizens for listing, species which the Federal government has termed 'candidates'[54] for listing, or even species which the federal government has proposed to list, do not receive any of the substantive protections of the Act."[55] Therefore, the Service's listing decisions are highly scrutinized[56] and controversial.[57]

52. 16 U.S.C. § 1533 (a)(1).

53. 50 C.F.R § 424.02(b).

54. *See id*. There is a conference requirement imposed on agencies related to candidate species. *See* Ala. Power Co. v. FERC, 979 F.2d 1561, 1564 (D.C. Cir. 1992).

55. Jay Tutchton, *Listing and Critical Habitat Decisions and Related Issues Under Section 4 of the Endangered Species Act*, 2012 ROCKY MTN. MIN. L. INST. 7B, 7B-1.

56. 16 U.S.C. § 1533. Under the ESA, the public may participate in the informal rulemaking for listing decisions and designation of critical habitat. Additionally, courts have allowed organizations to enforce the ESA on behalf of a species. *E.g*,. N. Spotted Owl v. Hodel, 716 F. Supp. 479, 480 (W.D. Wash. 1988) (Sierra Club could represent interests of Northern Spotted Owl in challenging failure of FWS to list the owl)*; see* Constance E. Brooks, *Challenging Agency Action and Inaction: the Problem of Leading a Horse to Water*, 2004 ROCKY MTN. MIN. L. INST. 12A. Thus, petitioners can and do sue under the Administrative Procedure Act to compel action on the listing of candidate species. *But see* Bennett v. Spear, 520 U.S. 154, 177 (1997) (right to sue is limited to litigants seeking to protect the species).

57. *Spear*, 520 U.S. 154. This article does not discuss these controversies. For some examples of listing controversies: *see Hodel*, 716 F. Supp. at 479; *see also* Forest Guardians v. Babbitt, 174 F.3d 1178, 1186 (10th Cir. 1999) (finding unreasonable delay in listing decision, given statutory requirement to make a listing decision within one year after a petition is filed); Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995); Biodiversity Legal Found. v. Babbitt, 63 F. Supp. 2d 31, 35 (D.D.C. 1999).

The only consideration in the listing process is the biological status of the species, based on the best scientific and commercial data available.[58] Economic factors cannot be considered during the listing process.[59] Potential candidate species are then prioritized, with any potential "emergency listing" given the highest priority, including species that face a "significant risk to the well-being of any species."[60]

The Service's current list of candidate species is published in the *Federal Register*[61] and on the FWS' and NMFS's websites.[62] Several of these candidate species live at or near existing major industrial facilities.[63] Thus, listing these species could have a substantial impact on American infrastructure. Moreover, the Service has entered into settlement agreements with petitioners that have already resulted in the listing of dozens of new species.[64] As discussed in more detail below, if a new candidate

58. *See* 16 U.S.C. § 1536(a)(2) (2012); 50 C.F.R. § 402.14(g)(8) (2014); *see* Endangered and Threatened Wildlife; Final Listing Priority Guidance for Fiscal Year 2000, 64 Fed. Reg. 57,114 (Oct. 22, 1999). Congress amended the ESA in 1982 by adding the word "solely" to prevent any consideration other than the biological status of the species. *See infra* Part IV. In doing so, Congress rejected President Ronald Reagan's Executive Order 12291, which required economic analysis of all government agency actions. *See generally* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

59. 50 C.F.R. § 424.11(b). Previously, the ESA allowed for consideration of economic impact when designating critical habitat, but the ESA was subsequently amended. *See* 16 U.S.C. § 1533(b)(2).

60. 16 U.S.C. § 1533(b)(7); *see also* Endangered and Listed Species; Listing and Recovery Priority Guidelines, 55 Fed. Reg. 24,296 (June 15, 1990).

61. Annual Description of Progress on Listing Actions, 78 Fed. Reg. 70,104, 70,106 (Nov. 22, 2013) (to be codified at 50 C.F.R. pt.17).

62. *Candidate Species Report*, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/tess_public/pub/candidateSpecies.jsp (last visited Oct. 8, 2014); *Proactive Conservation Program: Species of Concern*, NAT'L MARINE FISHERIES SERV., http://www.nmfs.noaa.gov/pr/species/concern/ (last updated Dec. 23, 2014).

63. *See* Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Eriogonum kelloggi (Red Mountain buckwheat) and Sedum eastwoodiae (Red Mountain stonecrop) as Endangered or Threatened Species, 79 Fed. Reg. 56,029, 56,038 (Sep. 18, 2014) (noting that mining activities were evaluated, but found not to disturb species); *see, e.g.*, Endangered and Threatened Wildlife and Plants; Endangered Species Act Listing Determination for Alewife and Blueback Herring, 78 Fed. Reg. 48,944, 48,956-57 (Aug. 12, 2013) (noting that herring occur within the vicinity of power plants).

64. *See generally* Federico Cheever, *Greater Sage-Grouse, Lesser Prairie-Chickens, and Dunes Sagebrush Lizards: Developments in the Courts, Federal*

species is listed,[65] the species receives many protections under the ESA, and a Federal agency taking action is required to consult and may be required to reinitiate formal consultation with the Service.[66] Moreover, interested members of the public may seek to enjoin activities based on an agency's failure to initiate formal consultation or to adequately reinitiate consultation.

B. Sections 9 and 11: No Takes . . . or Else

Once listed, a species enjoys substantial protection from human encroachment under section 9 of the ESA.[67] Section 9 of the ESA declares that "with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States."[68] The ESA defines a "take" as a "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" and person to be any "individual, corporation, partnership, trust, association, or any other private entity."[69] Based on these expansive definitions, section 9 prohibits almost any entity, including both private entities and government agencies, from undertaking nearly any activity that could hurt an endangered species in any way.

Moreover, the ESA does not just prohibit taking endangered species on paper. Section 11 provides for civil and criminal

Agencies, and the States Regarding Imperiled But Not (Yet?) Listed Species, 58 ROCKY MTN. MIN. L. INST. § 23.01 (2012) (discussing two settlement agreements entered into by the Service and petitioners). Importantly, "the court settlements themselves do not generally require listing. Rather, they require . . . FWS to make decisions that species listing is either warranted or not warranted and to follow through on those decisions." *Id.* § 23.06, at 23-18.

65. *See Endangered Species Act (ESA)*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.nmfs.noaa.gov/pr/laws/esa/ (last updated Oct. 10, 2014) (noting that currently there are approximately 2,195 species listed under the ESA).

66. *See infra* Parts II.C-D.

67. *See generally* 16 U.S.C. § 1538(a)(1)(B) (2012).

68. *Id.*

69. *Id.* § 1532(13), (19).

penalties for violations of the ESA, including section 9; the penalties include fines of up to $50,000 and up to one year imprisonment.[70] Moreover, section 9(g) of the ESA permits citizen suits to enjoin activities that violate the Act's provisions.[71] Thus, federal agencies, as well as everyone else, have a strong incentive to avoid ESA violations.

C. Listing Triggers Initial Consultation Under ESA Section 7

Once listed, a species is also protected by the ESA's section 7 consultation requirement.[72] The ESA's consultation requirements apply only to federal agencies, not private individuals or states.[73] These consultation requirements allow an agency to avail itself of the Service's expertise in assessing the impact of the proposed project and the feasibility of adopting reasonable alternatives.[74]

Section 7(a)(2) of the ESA requires that each federal agency consult with the Secretary of Commerce or the Interior to "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."[75]

70. 16 U.S.C. § 1540.

71. *Id.* § 1540(g).

72. *Id.* § 1536(b)(4). As discussed in more detail below, section 7 is also the mechanism agencies use to acquire authorization for take of listed species. *See* Peg Romanik & John C. Martin, *Take Under the Endangered Species Act*, 2012 ROCKY MTN. MIN. L. INST. 8A. Section 7 also provides agencies a procedure to apply to the Endangered Species Committee to exempt a project from the ESA. *See* 16 U.S.C. § 1536(e)-(p); *see generally* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) (discussing Committee's role).

73. *See* Devon Lea Damiano, *Licensed to Kill: A Defense of Vicarious Liability Under the Endangered Species Act*, 63 DUKE L.J. 1543, 1558 (2014).

74. *See* Ky. Heartwood, Inc. v. Worthington, 20 F. Supp. 2d 1076, 1084 n.8 (E.D. Ky. 1998); *see also* 16 U.S.C. § 1536; 50 C.F.R. §§ 402.13, 402.14, 402.16 (2014).

75. 16 U.S.C. § 1536(a)(2). *See also* 50 C.F.R. § 402.01(a), (b) ("If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS."); 50 C.F.R. § 402.02 ("Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed

As the FWS has explained, the ESA contains several provisions designed to facilitate and expedite consultation:

> First, Section 7(c) provides that each federal agency shall . . . request information from the Secretary of the Interior or Commerce whether any listed species is present in the area of the proposed action. If the Secretary advises that such species may be present, the agency undertaking the action shall conduct a biological assessment for the purpose of identifying any listed species "which is likely to be affected by such action." . . . [A]fter the conclusion of consultation, the Secretary shall provide the federal agency with an opinion [biological opinion or (BiOp)] "detailing how the agency action affects the species or its critical habitat[;]" if the Secretary finds jeopardy to the species or adverse modification of critical habitat, the Secretary shall suggest reasonable and prudent alternatives that he believes would not violate Section 7(a)(2).[76]

If there is a finding of jeopardy, the agency must modify or abandon its proposal.[77] If there's a finding of no jeopardy, but the project is likely to result in incidental takings of listed species, the Service issues an Incidental Take Statement (ITS) with the BiOp.[78] The ITS provides terms and conditions that, if complied with, will shield the agency and any applicant from section 9 liability.[79] Additionally, private entities may apply for an Incidental Take Permit (ITP) under section 10 of the ESA, which has a similar, but more limited, effect.[80] While parties are not

species in the wild by reducing the reproduction, numbers, or distribution of that species.").

76. Petition for Writ of Certiorari at 5, Thomas v. Pac. Rivers Council, 514 U.S. 1082 (1995) (No. 94-1332) (internal citations omitted).

77. *See* 16 U.S.C. § 1536(b)(3)(A).

78. *See* 16 U.S.C. § 1536(b)(4)-(c); 50 C.F.R. § 402.14(i). Service must issue an ITS if its biological opinion concludes no jeopardy to listed species or adverse modification of critical habitat will result from the proposed action, but the action is likely to result in incidental takings. 16 U.S.C. § 1536(b)(4)-(c); 50 C.F.R. § 402.14(i). As long as any takings comply with the terms and conditions of the ITS, the action agency is exempt from penalties for such takings. 16 U.S.C. § 1536(o)(2).

79. *See* 16 U.S.C. § 1536(o)(2).

80. *See* 16 U.S.C. § 1539(a)(1)(A) (noting that the otherwise prohibited act must be for scientific purposes or to enhance the propagation or survival of the affected species).

required to follow the terms of an ITS or ITP, they frequently choose to do so in light of section 9's stringent liability provisions.[81]

The ESA's implementing regulations provide a structure for section 7 consultation, which is highly complex, lengthy and often the subject of litigation.[82] Nonetheless, the FWS and NMFS have guidance on this process.[83] Agencies have also developed guidance to work through the consultation process.[84]

D. ESA's Implementing Regulations for Reinitiated Consultation

In contrast to the complex initial consultation regulations and process, the Service has promulgated a single and specific regulation governing reinitiated consultation. Specifically, 50 C.F.R. § 402.16 provides:

> Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

81. Bennett v. Spear, 520 U.S. 154, 170-71 (1997) (noting that agencies disregard the terms of an ITS at their peril).

82. *See* 50 C.F.R. §§ 402.10-402.16; *see* Root, *supra* note 7, at 1036 (describing the section 7 consultation process as complex, lengthy, and highly litigated).

83. *See* U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT (1998) [hereinafter CONSULTATION HANDBOOK]; *see also Endangered Species Act Policies, Guidance, and Regulations*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.nmfs.noaa.gov/pr/laws/esa/policies.htm (last updated Oct. 10, 2014) (providing links to guidance documents and policies on section 7 Consultation, among other things). The section 7 Consultation Handbook provides additional guidance on reinitiated consultation. *See infra* Part II.D.

84. *See, e.g.*, Paul Weiland, *Corps of Engineers Issues Guidance Regarding Section 7(a)(2) Consultation*, ENDANGERED SPECIES L. & POL'Y (July 23, 2013), http://www.endangeredspecieslawandpolicy.com/2013/07/articles/consultation-2/corps-of-engineers-issues-guidance-regarding-section-7a2-consultation/ (discussing June 11, 2013 U.S. Army Corps of Engineers ESA Guidance memorandum); *see also* OFFICE OF ENERGY PROJECTS, FED. ENERGY REGULATORY COMM'N, HYDROPOWER LICENSING AND ENDANGERED SPECIES: A GUIDE FOR APPLICANTS, CONTRACTORS, AND STAFF (2001), *available at* http://www.ferc.gov/industries/hydropower/gen-info/guidelines/esa_guide.pdf (FERC's guidance).

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.[85]

Thus, although reinitiated consultation is a powerful concept—even after the agency acts, it still has requirements[86] to consult potentially years or decades later—this power is limited. The text of 50 C.F.R. § 402.16 clarifies that the requirement to reinitiate consultation is only triggered when several precursors are met. Specifically, reinitiated consultation under 50 C.F.R. § 402.16 presumes the following: (1) there has been an agency action; (2) the agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law; and (3) a triggering event under 50 C.F.R. § 402.16 has occurred.[87]

1. An Agency Action Prompting Initial Consultation

Reinitiation of formal consultation presumes that there has been an agency action. The ESA states that section 7 applies to "any action authorized, funded, or carried out" by a federal agency.[88] The ESA's implementing regulations give examples of what constitutes such agency action. Specifically, 50 C.F.R. § 402.02 notes that agency action includes: "(a) actions intended to

85. 50 C.F.R. § 402.16(a)-(d) (2014).

86. Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,956 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402) (acknowledging that NMFS and FWS cannot require Federal agencies to reinitiate consultation).

87. *See* 50 C.F.R. § 402.16. One might assume that another presumption would be a previous formal consultation, since the text of the regulation is *re*initiation of *formal* consultation (emphasis added). However, as discussed *infra* in note 99, courts have reasoned that reinitiation of consultation may be required even where there was only previously informal consultation.

88. 16 U.S.C. § 1536(a)(2) (2012).

conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."[89] But the ESA's implementing regulations then go on to expressly limit the scope of what constitutes agency action, and therefore what types of agency actions trigger section 7's consultation requirement, to those actions "in which there is *discretionary Federal involvement or control*."[90] Therefore, initial consultation is required when an agency has taken an affirmative, discretionary action.[91]

2. Discretionary Involvement or Control

In considering whether an agency has taken such an action, courts first analyze whether a federal agency affirmatively authorized, funded, or carried out the underlying activity. If so, courts then determine whether the agency had some discretion to influence or change the activity for the benefit of a protected species.[92] If the agency lacks the discretion to influence actions that affect listed species, then section 7 is not triggered. For example, in *National Ass'n of Home Builders v. Defenders of Wildlife*[93] the Supreme Court held that in light of the its implementing regulations, the ESA is not triggered where an agency is *required* by statute to undertake an action once certain specified triggering events have occurred.[94] The Court found the Service reasonably determined that the ESA is not an affirmative

89. 50 C.F.R. § 402.02. This list is only illustrative, not exhaustive; "[e]xamples include, but are not limited to" the listed actions in 402.02(a) – (d). *Id.* Thus, the definition of "agency action" under the ESA differs from the definition under the Administrative Procedure Act, which defines action to include a failure to act. Administrative Procedure Act, 5 U.S.C. § 551(13) (2012).

90. 50 C.F.R. § 402.03 (emphasis added); *see also* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007).

91. *See* Karuk Tribe v. U.S. Forest Serv., 681 F.3d 1006, 1020-21 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 1579 (2013); *see also* W. Watershed Projects v. Matejko, 468 F.3d 1099 (9th Cir. 2006).

92. *See Karuk*, 681 F.3d at 102; Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995).

93. *Nat'l Ass'n of Home Builders*, 551 U.S. at 673.

94. *Id.*

grant of authority to effectively add another "entirely separate prerequisite" to agency action, such as a requirement to consult on the impact to listed species.[95] In deciding whether an agency has retained discretionary involvement or control over the action to reinitiate consultation based on the listing of a new species, courts have also held that the agency's control must inure to the benefit of the newly listed species.[96]

3. Agency Retains Discretion or Control and A Triggering Event Under § 402.16 Occurs

Once the Federal action is completed, reinitiated consultation can only occur if the agency retains discretionary involvement or control over the action and a triggering event under 50 C.F.R. § 402.16 occurs. These triggering events are: "(a) if the incidental take is exceeded, (b) if new information reveals unanticipated impacts on listed species or habitat, (c) if the action is subsequently modified in a way that now impacts listed species or habitat, or (d) if a new species or habitat is listed that may be affected by the action."[97] If reinitiation of consultation is triggered, then the Service must issue a new BiOp before a project may go forward.[98] Notably, each of the events in 50

95. *Id*. at 671.

96. Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1080 (9th Cir. 2001) (reaffirming test laid out in Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995)).

97. Root, *supra* note 7, at 1039, n.41 (citing 50 C.F.R. § 402.16 (2014)).

98. Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1451 (9th Cir. 1992). Another interesting question concerns whether the agency must have initially completed formal consultation for § 402.16 to apply. The Tenth Circuit indirectly addressed this question in *Center for Native Ecosystems v. Cables*. Ctr. for Native Ecosystems v. Cables, 509 F.2d 1310 (2d Cir. 2007). The concurring opinion found that because the FWS and Forest Service never entered formal consultation, by virtue of a "not likely to adversely affect" finding, there was no consultation to reinitiate under § 402.16. *Id.* at 1334 (Briscoe, J., concurring). While the majority ostensibly took no position on this argument, the majority's reasoning clearly suggests that they would require agencies to revisit informal consultations, at least those concluding in a not likely to adversely affect finding. *Cables*, 509 F.3d at 1324-25, n.2 (noting that reinitiated consultation would be required if a not likely to adversely affect finding "required utilization levels to be met to remain valid" and new information showed that the levels were not met). The District Court for the Virgin Islands has also opined that the Service could reinitiate informal consultation. Hawksbill Sea Turtle v. FEMA,

C.F.R. § 402.16 would trigger formal consultation initially, as each may adversely affect a listed species or habitat. Thus, each of these events logically trigger reinitiated consultation because the previously issued biological opinion is no longer consistent with the current circumstances.[99]

III. REINITIATED CONSULTATION'S SIGNIFICANCE

From a conservation standpoint, reinitiated consultation serves a pivotal role within the ESA. In passing the ESA, Congress plainly intended to provide the highest level of protection to listed species. But, Congress also provided for ITSs, which authorize taking listed species in some limited circumstances.[100] However, without reinitiated consultation, ITSs could become blank checks, potentially authorizing takes that would jeopardize protected species and imperiling Congress's goal of saving species on the brink of extinction. Moreover, reinitiated consultation has important legal consequences. Failure to reinitiate consultation can invalidate ITSs, exposing agencies and third parties to section 9 liability.[101] The below discussion helps explain where reinitiated consultation fits in to the ESA process and how it helps serve the ESA's purpose.

A. Reinitiated Consultation Serves as the Essential Constraint on Incidental Take

1. Congress Placed the Highest Priority On Protecting Threatened and Endangered Species

The legislative history underlying the ESA consistently emphasizes the importance of protecting threatened and endangered species to preserve genetic heritage. The House

11 F. Supp. 2d 529, 550 n.31 (D.V.I. 1998). Thus, the stronger view is that formal consultation is not a prerequisite to reinitiated consultation, at least when the Service previously determined that formal consultation was not needed because the action was not likely to adversely affect listed species.

99. Root, *supra* note 7, at 1040.

100. 16 U.S.C. § 1536(b)(4).

101. 16 U.S.C. § 1538.

Report accompanying the legislation memorably illustrated the high stakes:

> The value of this genetic heritage is, quite literally, incalculable. The blue whale evolved over a long period of time and the combination of factors in its background has produced a certain code, found it its genes, which enables it to reproduce itself, rather than producing sperm whales, dolphins, or goldfish. If the blue whale, the largest animal in the history of the world, were to disappear, it would not be possible to replace it – it would simply be gone. Irretrievably. Forever.[102]

Congress extolled the value of what humanity stood to lose through the accelerating disappearance of species from Earth:

> 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, 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.[103]

These quotes demonstrate that, in passing the ESA, Congress placed a tremendous value on guarding endangered species, a benefit of "incalculable" value to society.[104]

2. Reinitiated Consultation as a Needed Check on ITSs

The ESA clearly furthers these considerations through its prohibition on taking listed species. But as noted above, the Act contains an important exception to this prohibition—the ITS, which under certain conditions authorizes takes that would

102. H.R. REP. NO. 93-412, at 143 (1973).
103. *Id*. at 144.
104. *See id.* at 143.

otherwise violate section 9.[105] Nonetheless, in allowing for ITSs, the House Merchant Marine and Fisheries Committee cautioned, "[t]he Committee intends that such incidental takings be allowed provided that the terms and conditions specified by the Secretary . . . are complied with."[106] Thus, Congress did not intend to abandon the rigorous scheme of protection for endangered species when it provided for ITSs. Rather, it envisioned that these statements would act as limited exceptions to the ESA's stringent protections. Reinitiated consultation ensures that ITSs do not metastasize past these limits.

The Ninth Circuit has explained, "[t]he terms of an [ITS] do not operate in a vacuum. To the contrary, they are integral parts of the statutory scheme, determining, among other things, *when consultation must be reinitiated*."[107] In addition, "[e]ven a cursory review of the regulations governing formal consultation demonstrates that [ITSs] supplement [biological opinions], and were not meant to stand alone."[108] "Without the 'no jeopardy' determination contained in the underlying [biological opinion], the [ITS] potentially pre-authorizes take for an action that could subsequently be determined to jeopardize the existence of an endangered species. Such a result would be contrary to the ESA's fundamental purpose."[109] Consequently, if the action results in greater takings than those envisioned by the ITS, the action

105. *See supra* Part II.

106. H.R. REP. NO. 97-567, at 26 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2826, 1982 WL 25083.

107. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1251 (9th Cir. 2001) (emphasis added).

108. Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007). As described above, the Service will only issue an ITS for actions that will "not be likely to jeopardize the continued existence of listed species." CONSULTATION HANDBOOK, *supra* note 83, at 4-45. Typically, the ITS will contain an estimate of the amount of takings "*anticipated* from the action." *Id.* at 4-47. By definition, these takings take will not "reach the level of *jeopardy* or *adverse modification*." *Id.* at 4-49. Additionally, the ITS must contain terms and conditions that include sufficient monitoring requirements to ensure that the Service and action agency will know if the project results in takings that exceed the anticipated levels of take in the document. *Id.* at 4-54.

109. *Allen*, 476 F.3d at 1036.

agency must immediately stop the action causing the taking and reinitiate formal consultation.[110]

Thus, the Ninth Circuit has reasonably rejected attempts to unhook the ITS from the duty to reinitiate formal consultation. In *Allen*, the FWS argued, "[ITSs] need not allow for reinitiation of consultation."[111] Instead, the FWS contended that ITSs "serve only to lift [section] 9's bar on take."[112] But, the Ninth Circuit concluded that authorizing a take of a listed species without any additional limit, "is inadequate because it prevents the action agencies from fulfilling the monitoring function the ESA and its implementing regulations clearly contemplate."[113] Such a reading would effectively "expand the [ITS's] liability exemptions beyond the scope that has been established by Congress and by the ESA's implementing regulations."[114]

3. Reinitiated Consultation Protects the Service's Careful Balance in the Jeopardy Determination

Moreover, reinitiated consultation protects the jeopardy finding itself, which rests on a complex scientific analysis conducted by Service's experts in the biological opinion. In deciding whether a federal action will jeopardize any listed species, the Service must carefully describe the action and the action area;[115] the life history, population dynamics, and status and distribution of listed species in the area;[116] the environmental baseline for these species, which is to say the current health of these species without regard to the federal action;[117] the direct and indirect effects of the action;[118] and the cumulative effects of development on the action area.[119] The

110. *Id.* at 1034-35. The action agency is the agency proposing an action that may affect listed species.
111. *Id.* at 1040.
112. *Id.*
113. *Id.* at 1040-41.
114. *Id.* at 1041.
115. CONSULTATION HANDBOOK, *supra* note 83, at 4-15.
116. *Id.* at 4-19 to 4-22.
117. *Id.* at 4-22 to 4-23.
118. *Id.* at 4-23 to 4-30.
119. *Id.* at 4-31 to 4-32.

Service must then weigh the effects of the action and cumulative effects against the current status of the species to determine whether the action is likely to jeopardize that species' continued existence.[120]

Thus, the Ninth Circuit has noted, "[w]hen reinitiation of consultation is *required*, the original biological opinion loses its validity."[121] The regulations require reinitiated consultation when the project exceeds the stated level of take in the ITS or when new information arises concerning the project or listed species in the area.[122] Plainly, these are the types of occurrences that would call into question the validity of the underlying "no jeopardy" finding.

Therefore, reinitiated consultation acts as an essential limit on an ITS, which is the primary exception to the Act's prohibition against harming listed species. Without reinitiated consultation, ITSs could effectively be blank checks because they would authorize takings of unknown impact, potentially even jeopardizing species already facing extinction.[123]

B. The Consequences of Failing to Reinitiate Consultation

While reinitiated consultation is important from a conservation standpoint, failure to reinitiate consultation can also lead to serious legal consequences for federal agencies and third

120. *Id.* at 4-35.

121. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1108 (9th Cir. 2012) (emphasis added) (citing Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1037 (9th Cir. 2007)). However, the Eleventh Circuit has noted, "[t]here is no precedent in our circuit to support Petitioners' argument that [the agency's] *choice* to reinitiate consultation with NMFS and FWS automatically renders the former biological opinions invalid." Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., 684 F.3d 1242, 1252 (11th Cir. 2012) (emphasis added). Because this opinion focused on the agency's choice to reinitiate consultation, as opposed to changed circumstances requiring the reinitiation, it does not directly relate to whether an ITS remains valid when 50 C.F.R. § 402.16 requires consultations. 50 C.F.R. § 402.16 (2014).

122. 50 C.F.R. § 402.16(a)-(b).

123. *See* Sierra Club v. Marsh, 816 F.2d 1376, 1381 (9th Cir. 1987) (noting that when the action agency failed to undertake mitigation measures relied on by the BiOp, the Service found that the action could jeopardize listed species and requested reinitiated consultation).

parties. An ESA violation is hardly academic—section 9 violations can lead to significant civil and criminal penalties, including fines and imprisonment. According to the Ninth Circuit, an ITS loses its validity when circumstances require reinitiated consultation, and the action agency is exposed to potential section 9 liability until reinitiated consultation leads to a new ITS.[124] Because the ITS represents the primary bulwark against section 9 liability, federal agencies and licensees have a powerful incentive to reinitiate consultation to ensure that the protection remains effective.[125]

If the federal action is ongoing, either because the federal agency is undertaking the action or still deciding whether to authorize another's actions, then the potential for section 9 liability and the duty to reinitiate consultation is clear.[126] But, for licensing and permitting actions, the exposure to liability under section 9 may remain, even after the licensing action is over. Section 9 of the ESA defines "taking" to include actions that cause another to take a listed species.[127] A number of Circuit Courts have interpreted these provisions to include government licensing and permitting activities within the definition of a "take" under the Act, because the license or permit is a proximate cause of the underlying take.[128]

124. *Ctr. for Biological Diversity*, 698 F.3d at 1108 (emphasis added) (citing *Allen*, 476 F.3d at 1037).

125. *See* 16 U.S.C. § 1536(o) (2012).

126. *See* Cal. Sportfishing Prot. Alliance v. FERC, 472 F.3d 593, 596-99 (9th Cir. 2006).

127. 16 U.S.C. § 1538(a)(1), (g).

128. Although this proposition is perhaps counterintuitive, it is the recognized law in many circuits, and no circuit has ever held otherwise. *See* Loggerhead Turtle v. Cnty. Council of Volusia, 148 F.3d 1231, 1251-53 (11th Cir. 1998) (recognizing the potential for a locality to be held liable under the ESA because "a genuine issue of fact exists in this case that the lighting activities of landowners along Volusia County's beaches—as authorized through local ordinance—violate the ESA."); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (finding that the EPA could be liable under the ESA for takings caused by pesticides manufactured by a third party because "the EPA's decision to register pesticides containing strychnine or to continue these registrations was critical to the resulting poisonings of endangered species"); Damiano, *supra* note 73, at 1570; *cf.* Aransas Project v. Shaw, 756 F.3d 801, 819 (5th Cir. 2014) (demonstrating that while the Fifth Circuit has not found that certain licensing actions will trigger section 9 liability, it has clearly acknowledged the possibility).

In the leading case of *Strahan v. Coxe*, the First Circuit directly addressed the question of whether a permitting agency could be civilly and criminally liable under section 9 of the ESA for takings committed by its licensees.[129] In that case, an environmental group sought an injunction under the ESA against two Massachusetts agencies on the grounds that the state regulation of commercial fishing directly led to the take of northern right whales.[130] Specifically, the group claimed that the use of lobster pots and gillnets as licensed by Massachusetts entangled the whales causing distress and death.[131]

The First Circuit found, "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA."[132] The court rejected Massachusetts's argument that regulating commercial fishing was no different than licensing automobiles or drivers, which plainly does not cause a taking under the ESA.[133] The First Circuit noted that in such licensing actions, the driver's use of the automobile to violate federal law constitutes an intervening cause, breaking classic notions of proximate causation.[134] In contrast, lobster pot and gillnet fishing are so "likely to result in a violation of federal law," that "it is not possible for a licensed commercial fishing operation to use gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking."[135] Several other circuits have also considered this question and adhere to this view.[136]

129. Strahan v. Coxe, 127 F.3d 155, 164 (1st Cir. 1997).

130. *Id.* at 158-59. The name "right whale" itself is a sad reminder of the past – the term gained currency because that species was the "right" one to harpoon. *Right Whale Fact Sheet*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/animals/9364.html (last visited Nov. 9, 2014).

131. *Strahan*, 127 F.3d at 158-59.

132. *Id.* at 163.

133. *Id.* at 163-64.

134. *Id.* at 164.

135. *Strahan*, 127 F.3d at 164. The First Circuit reaffirmed this view. Strahan v. Linnon, No. 97-1787, 1998 WL 1085817 (1st Cir. July 16, 1998).

136. *See, e.g.*, Aransas Project v. Shaw, 756 F.3d 801, 819 (5th Cir. 2014); Loggerhead Turtle v. Cnty. Council of Volusia, 148 F.3d 1231, 1251-53 (11th Cir. 1998).

Consequently, for federal permitting and licensing agencies, the duty to reinitiate consultation may remain an important consideration years after the federal action is complete. As noted, the Ninth Circuit has indicated that any circumstances requiring reinitiated consultation under 50 C.F.R. § 402.16 will invalidate the existing ITS.[137] But the protections afforded by the ITS can be crucial to the agency or its employees for the duration of any license or permit issued. Without them, the agency may find itself unable to successfully defend against section 9 liability arising from the actions of the licensees or permittees. Even for non-licensing agencies, the ITS can be an important bulwark during the duration of the direct federal action, which can take years. Therefore, federal agencies face potentially significant consequences if they incorrectly evaluate whether circumstances warrant reinitiated consultation, as do private parties who are also protected by the terms of an ITS.

C. Conclusions

When viewed in context, reinitiated consultation is one of the most important components of the ESA. Without it, the ESA's entire scheme of protection could collapse through unlimited ITSs, which would shield agencies and industries from liability long after the species they were meant to protect expired. Moreover, failure to properly reinitiate consultation can yield dramatic impacts for agencies and third parties. When circumstances require reinitiated consultation, ITSs become invalid.[138] As a result, agencies and licensees lose their protections against section 9 liability. Therefore, given the important stakes surrounding reinitiated consultation, for people and protected animals, it is critical that agencies understand when they must reinitiate consultation and the consequences of not doing so. Unfortunately, as described below, Congress hardly provided a clear roadmap in the ESA for navigating the jungle of reinitiated consultation.

137. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1108 (9th Cir. 2012).

138. *See supra* Part III.B.

IV. LEGISLATIVE HISTORY BEHIND REINITIATED CONSULTATION

Despite the importance of reinitiated consultation, Congress never explicitly provided for it in statute.[139] Thus, the Service's regulation requiring reinitiated consultation[140] lacks an overt statutory basis.[141] Indeed, the Service acknowledged as much in the Federal Register notice accompanying the current version of the regulation.[142] Despite this lack of a statutory basis, no court appears to have explicitly addressed the legal basis for reinitiated consultation.

Although the statutory language itself is silent on reinitiated consultation, it also does not contain language limiting an agency's ESA obligations to one consultation or restricting consultation to the pendency of the federal action. Rather, it only states, "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species."[143] This ambiguity over the scope and frequency of consultation could justify resorting to the legislative history to determine whether the Service's interpretation of reinitiated consultation in 15 C.F.R. § 402.16 is reasonable.[144] On balance, that legislative history suggests that Congress understood reinitiated

139. *See* 16 U.S.C. § 1536 (2012) (extensively discussing consultation but never mentioning reinitiated consultation).

140. 50 C.F.R. § 402.16 (2014).

141. 16 U.S.C. § 1536.

142. In response to a comment on the proposed reinitiated consultation regulation, 50 C.F.R. § 402.16, the Service acknowledged "its lack of authority to require Federal agencies to reinitiate consultation if they choose not to." Interagency Cooperation—Endangered Species Act of 1973, as Amended, 51 Fed. Reg. 19,926, 19,956 (June 3, 1986) (to be codified at 50 C.F.R. pt. 402). In contrast, the Service generally has power to bring enforcement actions against any entity, including other agencies, for noncompliance with any provision of the ESA itself. 16 U.S.C. § 1538.

143. 16 U.S.C. § 1536(a)(2). In fact, the ESA does not further define the terms "action," "authorized," "funded," or "carried out." 16 U.S.C. § 1532.

144. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (noting that when the meaning of a statute is unclear, a court will defer to the interpretation of the expert agency charged with administering that statute).

consultation to be a part of the section 7 process. Consequently, if courts were to consider the legal basis for reinitiated consultation, the legislative history would provide significant support for reinitiated consultation.

A. The Legislative History Assumes Reinitiated Consultation Will Occur

In a House Report accompanying the 1982 amendments to the ESA, which added the provisions regarding ITSs, the Committee on Merchant Marine and Fisheries explicitly addressed reinitiated consultation. It stated, "[i]f the specified impact on the species is exceeded, the Committee expects that the Federal agency or permittee or licensee will immediately reinitiate consultation since the level of taking exceeds the impact specified in the initial Section 7(b)(4) statement."[145] The report continued, "[i]n the interim period between the initiation and completion of the new consultation, the Committee would not expect the Federal agency or permittee or licensee to cease all operations unless it was clear that the impact of the additional taking would cause an irreversible and adverse impact on the species."[146]

This statement contains a number of notable assumptions. Most obviously, this portion of the legislative history establishes that the Committee undeniably envisioned reinitiated consultation as part of the ESA. Moreover, it confirms that the duty to reinitiate consultation is closely linked to the terms of the ITS, as noted by the Ninth Circuit.[147] On the other hand, it does not mention reinitiating consultation when new information shows a greater impact on already-listed species or the Service lists a new species in the action area, which indicates that the last three components of the reinitiation standard in 50 C.F.R. § 402.16 may go beyond the Committee's intent.[148] Additionally

145. H.R. REP. NO. 97-567, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 1982 WL 25083.

146. *Id.*

147. Or. Natural Res. Council v. Allen, 476 F.3d 1031, 1039 (9th Cir. 2007).

148. 50 C.F.R. § 402.16(b)-(d) (requiring reinitiated consultation when a new listed species is discovered within the vicinity of the federal action, the federal

the description in House Report 567 states that the Committee would not ordinarily expect the federal action to cease after reinitiating consultation, which suggests that section 7(d)'s bar on making an "irreversible or irretrievable commitment of resources with respect to the agency action" should perhaps not apply during reinitiated consultation.[149] Last, because the language notes that this expectation would also apply to licensees' or permittees' "operations," it appears that the Committee envisioned reinitiated consultation occurring after licensing actions as well as direct federal actions.[150]

In 1999 and 2001, two unsuccessful bills aimed at reauthorizing the ESA attempted to reform the process for reinitiated consultation. In 1999, Representative Young of Alaska introduced H.R. 3160, a bill entitled "Common Sense Protections for Endangered Species Act."[151] The bill, which had 41 cosponsors, provided,

> Whenever a determination to list a species as an endangered species or a threatened species or a designation of critical habitat requires reinitiation of consultation on an already approved action, the consultation shall commence promptly, but not later than 90 days after the date of the determination or designation, and shall be completed not later than 1 year after the date on which the consultation is commenced."[152]

In 2001, Senator Smith of Oregon introduced a bill with identical language regarding reinitiated consultation.[153]

While neither bill was successful, the inclusion of a discussion on reinitiated consultation indicates that at least some members of Congress accepted it as an established feature of the

action changes, or subsequent information shows a new impact of the action on listed species); H.R. REP. NO. 97-567, at 27.

149. 16 U.S.C. § 1536(d) (2012). *See also* H.R. REP. NO. 97-567, at 27; *but see infra* note 170 (presents a view to the contrary).

150. H.R. REP. NO. 97-567, at 27.

151. Common Sense Protections for Endangered Species Act, H.R. 3160, 106th Cong. (1999). The accompanying House Report contained little additional information regarding the portion of the legislation related to reinitiated consultation. H.R. REP. NO. 106-1013, at 13 (2000), 2000 WL 1623050.

152. H.R. REP NO. 106-1013, at 46.

153. S. 911, 107th Cong., at 55 (2001).

section 7 consultation process by 2000. Importantly, while both bills represented an attempt to reform reinitiated consultation, neither bill questioned its legal basis or sought to provide a specific authorization for reinitiated section 7 consultation. In addition, both bills expressly mentioned reinitiated consultation arising from the listing of a new species or designation of a critical habitat, providing additional support for the practice.[154]

B. The Scarcity of References to Reinitiated Consultation Is Unremarkable

On the other hand, Congress has considered the ESA on numerous occasions and often deliberated extensively on the law.[155] While this consideration generated hundreds of pages of discussion, the only references to reinitiated consultation in the Congressional record are the ones discussed above. The paucity of references to reinitiated consultation may appear to suggest that most members of Congress either did not believe that the ESA required it or never considered the question.

Yet, the dearth of references to reinitiated consultation in the legislative history to the ESA may have more to do with how the section 7 consultation process evolved than anything else. First, reinitiated consultation is integrally tied to ITSs.[156] However, Congress did not amend the ESA to provide for ITSs until 1982.[157] Thus, for most of the Act's legislative history, Congress would have had little reason to discuss reinitiated consultation.

154. *See* H.R. 3160 § 7(a)(8)(B); S. 911 § 4(e)(5)(B).

155. *See, e.g.*, Endangered Species Act of 1973, Appropriation Authorization, Pub. L. No. 96-246, 94 Stat. 348 (1980); Tellico Dam Rider to the 1980 Energy and Water Development Appropriations Act, Pub. L. No. 96-69, 93 Stat. 437 (1980); Endangered Species Act of 1973, Appropriation Authorization, Pub. L. No. 96-159, 93 Stat. 1225 (1979); Endangered Species Act Amendments of 1978, Public L. No. 95-632, 92 Stat. 3751 (1978); Endangered Species Act, Extension of Appropriation Authorization, Pub. L. No. 95-212, 91 Stat. 1493 (1977); Endangered Species Act, Appropriation Authorization Extension, Pub. L. No. 94-325, 90 Stat. 724 (1976); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).

156. *See supra* Part II.A.2.

157. An Act to authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes, Pub. L. No. 97-304, § 4(b)(4), 96 Stat. 1411 (1982).

Second, the entire section 7 consultation process came to occupy an increasingly prominent role as the Act developed. In 1979, the Committee on Merchant Marine and Fisheries extensively discussed the history and current state of section 7 consultation.[158] The Committee noted, "[t]his one small section has developed into one of the most significant portions of the entire statute."[159] "Although section 7 has been in effect since 1973, this consultation procedure was not formally instituted until January of [1979]."[160] The Report noted that from the time Congress enacted the ESA in 1973 to 1979, the Service conducted approximately 4,500 consultations, which largely consisted of informal discussions between the Service and Federal agencies.[161] Many of these discussions may have consisted of only a simple telephone call.[162] However, by 1979, with formal consultation procedures in place, the Committee expected that the Service could engage in 20,000 consultations in one year.[163]

Moreover, the Report indicates that the Committee came to see section 7 consultation as a pragmatic way to balance the strict conservation goals of the Act with economic development. The Committee noted that "the celebrated snail darter case," *TVA v. Hill*, had interpreted section 7 to prohibit completing any federal project that could jeopardize a listed species.[164] But, the Committee found that the "popular press has grossly exaggerated the potential for conflict under the Act" between conservation goals and development.[165] Rather, the Committee concluded that "in many instances good faith consultation between the acting agency and the [Service] can resolve many endangered species conflicts."[166] Thus, the legislative history underlying the Act indicates that section 7 in general, and the consultation process in particular, came to assume a more prominent place in the

158. *See* H.R. REP. NO. 95-1625, at 4-13 (1979), *reprinted in* 1978 U.S.C.C.A.N. 9453, 1978 WL 8486.
159. *Id.* at 7.
160. *Id.* at 11.
161. *Id.*
162. *Id.* at 12.
163. *Id.* at 11.
164. H.R. REP. NO. 95-1625, at 10.
165. *Id.* at 13.
166. *Id.* at 12.

protective scheme as time went on. Therefore, the limited number of references to reinitiated consultation in the legislative history is, perhaps, not as telling as it may initially seem about Congress's views on the topic. Rather, the rarity of discussions regarding reinitiation may be expected given the time it took to recognize the importance of section 7 consultation.

C. Congress Has Generally Advanced Conservation Over Economic Development

Additionally, the rest of the legislative history of the ESA suggests that reinitiated consultation is consistent with Congress's overall approach to protecting listed species. Doubtlessly, reinitiated consultation protects listed species at the cost of an economic hardship to federal licensees and permittees as well as those who benefit from direct federal action.[167] But in the 1982 amendments, which established the ITS process, the Congress voiced a clear preference for conservation over economic development. Specifically, Congress amended the Act to provide that the Service shall make listing determinations under section 4 "solely on the basis of the best scientific and commercial data available."[168] The Committee explained that it "strongly believe[d] that economic considerations have no relevance to determinations regarding the status of species and intends that the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act not apply."[169]

Therefore, on balance, the legislative history supports reinitiated consultation. While it only contains a few direct references to reinitiated consultation, the existing references indicate that Congress understood reinitiated consultation to act as an important limit on ITSs. Additionally, given the relatively late introduction of ITSs into the act, the scarcity of these

167. For a vivid description of the potential economic hardships flowing from reinitiated consultation, see Root, *supra* note 7, at 1055-59.

168. An Act to authorize appropriations to carry out the provisions of the Endangered Species Act of 1973 for fiscal years 1983, 1984, and 1985, and for other purposes, Pub. L. No. 97-304, § 2(b), 96 Stat. 1411 (1982).

169. H.R. REP. NO. 97-567, at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 1982 WL 25083.

references to reinitiated consultation, which is fundamentally connected to ITSs, appears natural. Finally, in the decades-long legislative history of the ESA, Congress almost always chose to value protecting endangered species over economic development, particularly in the 1982 amendments, which introduced the ITS and saw the most significant reference to reinitiated consultation in the Congressional record. In sum, the legislative history supports reinitiated consultation.

V. WHAT THE COURTS HAVE TO SAY ABOUT REINITIATED CONSULTATION CLAIMS

As the legislative history and case law makes clear, reinitiated consultation serves a similar function to the initial consultation requirement in section 7. Namely, it protects species and avoids the irreversible or irretrievable commitment of resources until consultation is reinitiated and a new biological opinion prepared[170] or the agency, license or permit applicant applies for an exemption, if needed.[171] Like initial consultation, reinitiated consultation can have a drastic impact on the parties involved[172] and raises environmental issues that are "rarely black or white, usually complex, frequently difficult to delineate, and often troubling to resolve."[173]

170. *See* 50 C.F.R. § 402.09 (stating that after initiation or reinitiation of consultation required under section 7(a)(2) of the Act, the Federal agency and any applicant shall make no 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 alternatives which would avoid violating section 7(a)(2)); Vill. of False Pass v. Watt, 565 F. Supp. 1123, 1155 (D. Alaska 1983).

171. N. Slope Borough v. Andrus, 486 F. Supp. 332, 354 (D.D.C. 1980) (finding that if after the start of agency action, new information suggests that the action may imperil an endangered species, resources may not be granted in violation of this chapter, and consultation must begin again).

172. *See* Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 J. ENVTL. L. & LITIG. 247, 252-54 (1996) (discussing the *Pacific Rivers* case and noting that the Snake River National Forests are populated only by rural communities that depend on logging, mining, and ranching on Federal lands).

173. Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1459 (9th Cir. 1992) (discussing what constitutes a new, unforeseen, or unanticipated development).

Currently, there is not a considerable amount of case law on reinitiated consultation.[174] The case law that exists is mostly in the Ninth Circuit,[175] and only a few other circuit courts directly address 50 C.F.R. § 402.16.[176] Not surprisingly, other circuits rely heavily on the Ninth Circuit case law.[177] However, the volume of 50 C.F.R. § 402.16 litigation is likely to increase given the number of species the Service is considering listing.[178]

A careful examination of the case law reveals that despite the ESA's well-founded reputation as the "pit bull" of environmental laws,[179] courts will normally take a surprisingly deferential approach to reinitiated consultation. While courts will carefully scrutinize ITSs to ensure that they provide clear criteria for triggering reinitiated consultation, when it comes to determining if those criteria are met, courts generally defer to an agency's interpretation.[180] In particular, courts have declined to require reinitiated consultation, even when agency decisions expand the scope, size, or duration of the project or substantially alter the methodology for calculating when take levels are exceeded.[181]

A. You Should Have Done Better: ESA Violations

In a handful of older proceedings, courts found ESA violations based on a failure to properly reinitiate consultation. The case summaries below offer action agencies and applicants perspective on what they should and should not do to avoid a challenge of inadequate reinitiation of consultation.

174. In contrast, there is a considerable body of case law on listing, initial consultation, takes, and other areas of the ESA. *See* 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUB. NAT. RESOURCES L. § 29:32 (2d ed. 2014).

175. *See, e.g.*, Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).

176. *See* Waterkeeper Alliance v. Dep't of Def., 271 F.3d 21 (1st Cir. 2001); Defenders of Wildlife v. Hodel, 851 F.2d 1035 (8th Cir. 1988).

177. *See, e.g.*, *Hodel*, 851 F.2d at 1035; *see also* Hawksbill Sea Turtle v. FEMA, 11 F. Supp. 2d 529, 549-51 (D.V.I. 1998).

178. To see a "live" list of candidate species, go to FWS' species reports. *Environmental Conservation Online System*, U.S. FISH & WILDLIFE SERV. (last visited Oct. 29, 2014), http://ecos.fws.gov/tess_public/.

179. *See* Wilde, *supra* note 30, at 310.

180. *See, e.g.*, *Marsh*, 816 F.2d at 1388.

181. *See infra* Part V.A.

1. *Pacific Rivers*: FWS' Programmatics Trigger Reinitiation of Consultation

In *Pacific Rivers Council v. Thomas*, the Ninth Circuit considered whether the U.S. Forest Service's programmatics (forest plans used to evaluate and authorize specific permit applications, also called "land resource management plans") constituted agency actions triggering section 7 reinitiated consultation.[182] The Forest Service issued the programmatics in 1990, and NMFS later listed the Snake River chinook salmon as threatened.[183] Petitioners brought suit and argued that the Forest Service must reinitiate consultation on the programmatics with the NMFS in light of chinook-salmon-listing.[184] The Forest Service replied that it was not required to reinitiate consultation because the programmatics "are not ongoing agency action throughout their duration, but only when they were adopted in 1990 or if they are revised or amended in the future."[185]

The Ninth Circuit disagreed and reasoned that the programmatics themselves "represent ongoing agency action throughout their duration" because:

> [land resource management plans] are comprehensive management plans governing a multitude of individual projects. Indeed, every individual project planned in both national forests involved in this case is implemented according to the LRMPs. Thus, because the LRMPs have an ongoing and long-lasting effect even after adoption, we hold that the LRMPs represent ongoing agency action.[186]

Importantly, the court ruled that both the site-specific actions and programmatics triggered the reinitiation of consultation, as both had the potential of injuring a newly listed species.[187] On remand, the district court granted a preliminary injunction of all projects on Forest Service land in Idaho "until all

182. Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994).
183. *Id.* at 1051.
184. *Id.*
185. *Id.* at 1053.
186. *Id.*
187. *Id.* at 1057.

questions surrounding [Forest Service] compliance with the ESA have been resolved."[188] This injunction affected 342 activities in six national forests, including thirty-seven mines with more than 800 workers.[189]

Pacific Rivers is considered a landmark case for several reasons.[190] First, *Pacific Rivers* took a broad view of what constitutes agency action triggering reinitiated consultation. Second, the remedy in *Pacific Rivers* has been called striking because it appears the court ordered the injunctions without considering the harm to local communities despite the fact that NMFS found that the challenged activities did not threaten salmon.[191] *Pacific Rivers* is also illustrative of the high stakes of ESA litigation. As in *Pacific Rivers*, the health of a listed species is often balanced with agencies trying to fulfill their statutory duties and communities relying on permitted activities for their livelihood. Who wins and who loses is not always clear. For example, after the protracted litigation in *Pacific Rivers*, which clearly constituted a major victory for the environmental movement, the environmental group agreed to stay the injunction due to political pressure.[192] Given this backdrop, much of the reinitiation case law following *Pacific Rivers* represents an effort to limit the scope of reinitiated consultation.[193] This withdrawal from the high-water mark of *Pacific Rivers* may explain later courts' surprisingly deferential approach to reviewing agency decisions to reinitiate consultation under 50 C.F.R. § 402.16.[194]

188. Pac. Rivers Council v. Thomas, 873 F. Supp. 365, 371 (D. Idaho 1995).

189. Smith, *supra* note 172, at 290 n.204.

190. Root, *supra* note 7, at 1035.

191. Smith, *supra* note 172, at 251 ("Pending reconsultation on plans, the courts ordered across-the-board injunctions against thousands of ongoing forest activities—despite [Forest Service] or NMFS findings that these activities did not threaten salmon and without regard to the harm such injunctions would cause to local communities.").

192. *Id.* at 290.

193. *See* Root, *supra* note 7, at 1036 ("The real attraction of section 7 reinitiation is not necessarily the protection of endangered species, but a powerful incentive to enjoin hundreds of site-specific projects through a single programmatic injunction."). Congress has also proposed bills specifically limiting the amount of time available to conduct reinitiation of consultation. *See* S. 911, 107th Cong. (2011); H.R. 3160, 106th Cong. (1999); Root, *supra* note 7, at 1062-1064 (discussing H.R. 3160 and S. 911).

194. *See infra* Part V.B.

2. Refusing to Reinitiate Can Get You In Trouble

While the most interesting part of *Pacific Rivers* is the broad definition of agency action that triggers reinitiated consultation, at its bottom it is a case where the court found an ESA violation because the action agency refused to reinitiate consultation. Similarly, in *Sierra Club v. Marsh*, the court found an ESA violation because the action agency refused to reinitiate consultation when it failed to successfully undertake mitigation measures the Service relied on in issuing the BiOp.[195] In *Marsh*, the Army Corps of Engineers (Corps) and the Federal Highway Administration were funding the construction of a flood control channel and roads in the flood plain of the Sweetwater River.[196] The construction affected the endangered California least tern and the light-footed clapper rail.[197] The Service's BiOp identified the preservation of 188 acres of nearby wetlands as one measure for mitigating the project's effects.[198] When the Corps did not acquire these lands,[199] the Service determined that the agency action was now likely to jeopardize the continued existence of the endangered rail and tern.[200] The Service requested that the Corps reinitiate consultation, but the Corps refused.[201] The Sierra Club and League for Coastal Protection sued and claimed that the Corps violated the ESA by failing to reinitiate consultation.[202]

The court agreed and held that the Corps' failure to acquire the mitigation lands triggered reinitiation of consultation.[203] The court reasoned that while the ESA does not give the Service "the power to order other agencies to comply with its requests or to veto their decisions,"[204] ESA section 7 does impose a duty on all

195. Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).
196. *Id*. at 1378.
197. *Id*.
198. *Id*. at 1379.
199. *Id*. at 1380.
200. *Id*. at 1381.
201. *Marsh,* 816 F.2d at 1381.
202. *Id.* at 1381.
203. *Id.* at 1388.
204. *Id.* at 1386 (citing Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 371-72 (5th Cir. 1976); *see also* Interagency Cooperation—Endangered Species Act of

federal agencies to consult.[205] The court found that reinitiation of formal consultation was triggered in this instance because discretionary federal involvement or control over the action had been retained and new information revealed that the action could affect listed species to an extent not previously considered.[206] Thus, in a handful of instances, courts have found that agencies improperly failed to reinitiate consultation – typically when new information undermined the validity of the previous consultation, such as when a new species is listed or when a planned mitigation measure does not occur.

3. An Inadequate ITS Is Asking for Trouble

While courts infrequently find ESA violations based on a failure to reinitiate consultation, courts are far more likely to find ESA violations based on an inadequate ITS. Though these cases do not directly pertain to reinitiated consultation, they have a close nexus to the topic because the ITSs govern when reinitiated consultation is required.

a. An ITS Not Predicated on a Take Violates the ESA

Several courts have found an ESA violation when an ITS was not predicated on an incidental take.[207] In *Arizona Cattle Growers' Association v. U.S. Fish & Wildlife Service*,[208] the Ninth Circuit considered ITSs related to the Arizona Cattle Growers' Association's (ACGA) application for cattle grazing permits in Southeastern Arizona.[209] The FWS issued a BiOp that analyzed twenty species of plants and animals on land within an area supervised by the Bureau of Land Management's (BLM) Saffold

1973, as Amended, 51 Fed. Reg. 19,926, 19,956 (June 3, 1986) (codified at 50 C.F.R. pt. 402)).

205. *Id.* at 1385 (citing 16 U.S.C. § 1536(a)(2)).

206. *Id.* at 1387 (citing 50 C.F.R. § 402.16).

207. *See* 16 U.S.C. § 1536(a)(2), (o) (2012) (noting that the Service may provide an ITS when an action will lead to incidental takes).

208. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001).

209. *Id.* at 1233.

and Tucson, Arizona, field offices.[210] While the BiOp concluded that the livestock grazing program "was not likely to jeopardize the continued existence of the species affected nor was likely to result in destruction or adverse modification of the designated or proposed critical habitat,"[211] the FWS nonetheless issued an ITS for several species of fish and wildlife listed or proposed to be listed.[212] ACGA and a rancher seeking a grazing permit on the lands challenged the ITS on the grounds that it was arbitrary and capricious because there was insufficient evidence of an actual take to support the ITS.[213]

In arguing that the ITSs were appropriate, the FWS claimed that the word "taking" in section 7(b)(4) "should be interpreted more broadly than in the context of Section 9" given the different purposes of the sections (protective vs. punitive, respectively).[214] The Ninth Circuit, like the district court below, rejected this argument and stated that the "definition of 'taking' in Sections 7 and 9 of the ESA are identical in meaning and application."[215]

The Ninth Circuit explained that the ESA was amended to "resolve the conflict between Sections 7 and 9" and that Congress made clear that:

> [the] purpose of Section 7(b)(4) and the amendment to Section 7(o) is to resolve the situation in which a Federal agency or a permit or license applicant has been advised that the proposed action will not violate Section 7(a)(2) of the Act but the proposed action will result in the taking of some species incidental to that action—a clear violation of Section 9 of the Act which prohibits any taking of a species.[216]

210. *Id.* ("The Bureau of Land Management's livestock grazing program for this area affects 288 separate grazing allotments that in total comprise nearly 1.6 million acres of land.").

211. *Id.*

212. *Id.*

213. *Id.*; *see* Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 63 F. Supp. 2d 1034 (D. Ariz. 1998).

214. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1237. The district court had already rejected this argument. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 63 F. Supp. 2d 1034, 1044-45 (D. Ariz. 1998).

215. *Ariz. Cattle Growers' Ass'n,* 273 F.3d at 1237.

216. *Id.* at 1239-40 (citing H.R. REP. NO. 97-567, at 26 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2826, 1982 WL 25083).

Thus, the Ninth Circuit pointed out that "[a]bsent an actual or prospective taking under Section 9, there is no 'situation' that requires a Section 7 safe harbor provision."[217] In fact, the Ninth Circuit went so far as to say that the FWS' interpretation of "taking" "would turn the purpose of the 1982 Amendment on its head"[218] and "would allow the [FWS] to engage in widespread land regulation even where no Section 9 liability could be imposed."[219] Therefore, the Ninth Circuit, like the district court below, held that the FWS acted arbitrarily and capriciously because the ESA did not provide the FWS with authority to impose conditions on the land when a taking was not present.[220]

The *Arizona Cattle Growers' Ass'n* court also pointed out the FWS' argument that it "should be able to issue an [ITS] based upon prospective harm" was flawed because the ESA's regulations require a separate procedure, *i.e.*, the reinitiation of consultation, if different evidence is later developed.[221] The court stated that "[a]bsent this procedure, however, there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species."[222] Thus, while the ESA does provide considerable protection to listed species, potentially at the expense of private landowners and others, it does not provide the Service unfettered authority to impose conditions on the use of land.[223]

217. *Id.* at 1240.

218. *Id.*

219. *Id.* The court also stated that the FWS' "handbook instruction to issue an [ITS] when no take will occur as a result of permitted activity is contrary to the plain meaning of the statute as well as the agency's own regulations." *Id.* at 1242.

220. *Id.* at 1242.

221. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1244.

222. *Id.* at 1244.

223. While this limit is logically satisfying, it can lead to inconsistent results in practice, in light of the dynamic ecosystems in which Federal agencies act. As one commenter has noted, for actions that result in an ITS during the section 7 consultation process, most licensing agencies will simply include a license condition implementing the terms of the ITS, which will require reinitiated consultation when the circumstances described in 50 C.F.R. § 402.16 are met. Root, *supra* note 7, at 1060; CONSULTATION HANDBOOK, *supra* note 83, at 6-64. As a result, agencies can easily reinitiate consultation on those projects that previously received an ITS. But, the Service does not issue a BiOp or ITS for all

b. ESA Violation Because ITS Did Not Adequately Trigger Reinitiated Consultation

Even when an ITS is based on a "take," courts have held that the ITS violated the ESA if it did not adequately provide a requirement for reinitiated consultation. These findings are logical because as explained above and by the Ninth Circuit, the purpose of an ITS is to "set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation."[224] When the ITS does not fulfill this purpose, the purposes of the ESA will not be served. Below are some examples of when courts have held that an ITS did not properly provide a trigger for the reinitiation of consultation.

i. The Taking of All is Not a Reasonable Trigger

In *Oregon Natural Resources Council v. Allen*, the Ninth Circuit considered an ITS which allowed taking "all" northern spotted owls.[225] The court held that ITSs are arbitrary and capricious when they allow a take level that is "coextensive with the scope of the project" because such statements could never trigger the reinitiation of consultation.[226] The court explained that:

projects, and under the holding in *Arizona Cattle Growers' Ass'n*, the action agency would logically have no ITS to implement into the terms of the license. *See Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1251; 50 C.F.R. § 402.14 (2014). But, due to changing ecosystems, new species can move into the environment of any project or the Service can later decide to list existing species within a project's vicinity. Although this could happen anywhere, *Arizona Cattle Growers' Ass'n* effectively restricts agencies to only reinitiating consultation at those facilities with BiOps, because only those facilities will have ITSs giving rise to license conditions. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1244-45. While section 9 liability continues to apply to these facilities, without a license condition requiring monitoring and reporting that liability provides greatly reduced protection to listed species at facilities without BiOps because the Service's limited resources will likely restrict it from ever learning of these violations. *See generally* Quarles & Lundquist, *supra* note 38.

224. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1249.

225. Or. Natural Res. Council v. Allen, 476 F.3d 1031 (9th Cir. 2007).

226. *Id*. at 1041.

> [t]he regulations governing Incidental Take Statements also provide for ongoing monitoring of incidental take by the action agency and the FWS. 50 C.F.R. § 402.14(i)(3) instructs the action agency or applicant to monitor the impacts of incidental take by reporting on the project's impact on the species as specified in the incidental take statement. The regulation further instructs the action agency to reinitiate consultation immediately if the amount or extent of specified take is exceeded in the course of the action. The FWS' own Consultation Handbook terms this point "reinitiation level." Thus, the terms of an Incidental Take Statement do not operate in a vacuum. To the contrary, they are integral parts of the statutory scheme, determining, among other things, when consultation must be reinitiated.[227]

The *Allen* court also noted that Congress clearly intended for ITSs to allow for reinitiation of consultation.[228] In particular, the court noted the House Report which provided the Committee's expectation that if the specified impact on the species is exceeded, "the Federal agency or permittee or licensee will immediately reinitiate consultation since the level of taking exceeds the impact specified in the initial Section 7(b)(4) statement."[229] Thus, the court held that an ITS that authorized the take of "all spotted owls," without any additional limit, was inadequate "because it prevents the action agencies from fulfilling the monitoring function the ESA and its implementing regulations clearly contemplate."[230]

ii. Take What? An Unclear ITS Standard Is Not a Sufficient Reinitiation Trigger

Given the ESA's monitoring function, it is not surprising that courts have also held that reinitiation of formal consultation is not adequately triggered by an ITS that does not set a clear standard for determining when the authorized level of take has

227. *Id.* at 1040 (internal citations and quotations omitted).

228. *Id.*

229. *Or. Natural Res. Council*, 476 F.3d 1040 (quoting H.R. REP. NO. 97-567, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2827, 1982 WL 25083).

230. *Id.* at 1040-41. The court went so far as to say that such an ITS "reads out of the statute" the idea of reinitiation. *Id.* at 1041. But, as discussed, the idea of reinitiation is not in the statute itself. *See supra* Part IV.

been exceeded.[231] For example, in *Arizona Cattle Growers' Ass'n*, the Ninth Circuit considered whether an ITS related to cattle grazing on a cow flat allotment under FWS' control properly specified the amount of anticipated take of loach minnow.[232] The ITS at issue did not provide a specific number of loach minnow; instead, it defined the incidental take in terms of habitat characteristics. The ITS specified that take would be exceeded if several conditions are not met,[233] including if "ecological conditions do not improve under the proposed livestock management plan."[234] ACGA challenged the terms and conditions of the ITS, in particular the "ecological conditions not improving" condition.[235] ACGA asserted that the ITS "fail[ed] to

231. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1251 (9th Cir. 2001).

232. *Id.* at 1249. The Ninth Circuit "agree[d] with the district court that the issuance of the Cow Flat Incidental Take Statement was not arbitrary and capricious" because the FWS "provided evidence that the listed species exist on the land in question and that the cattle have access to the endangered species' habitat. Accordingly, the [FWS] could reasonably conclude that the loach minnow could be harmed when the livestock entered the river." *Id.* at 1248. However, the Ninth Circuit was considering whether the anticipated take provisions were appropriate. The district court had ruled that "neither the specificity of the anticipated take provision nor the 'reasonable and prudent measures' condition was arbitrary and capricious." *Id.* at 1235.

233. *Id.* at 1248-1249.

234. *Id*. at 1249 (quotations omitted).

235. The relevant portion of the ITS stated:

> The service concludes that incidental take of loach minnow from the proposed action will be considered to be exceeded if any of the following conditions are met:
>
> [Condition 1] Ecological conditions do not improve under the proposed livestock management. Improving conditions can be defined through improvements in watershed, soil condition, trend and condition of rangelands (e.g., vegetative litter, plant vigor, and native species diversity), riparian conditions (e.g., vegetative and geomorphologic: bank, terrace, and flood plain conditions), and stream channel conditions (e.g., channel profile, embeddedness, water temperature, and base flow) within the natural capabilities of the landscape in all pastures on the allotment within the Blue River watershed.

Ariz. Cattle Growers' Ass'n, 273 F.3d at 1249.

specify the amount or extent of authorized take with the required degree of exactness."[236]

In considering the take "trigger" in the ITS, the court noted that, ideally, the "trigger" should be a specific number.[237] However, the court noted that while preferred, a specific number was not required.[238] The court pointed to examples where ITSs were upheld that used a combination of numbers and estimates as a "trigger"[239] and cited to legislative reports showing that Congress anticipated that a precise number would not always be possible.[240] The court adopted the reasoning of the district court in concluding that "'the use of ecological conditions as a surrogate for defining the amount or extent of incidental take is reasonable so long as these conditions are linked to the take of the protected species.'"[241] In adopting this approach, the Ninth Circuit noted that it is consistent with the ESA section 7 Consultation

236. *Id.* at 1249-50 ("ACGA argues that it is entitled to more certainty than vague and undetectable criteria such as changes in a 22,000 acre allotment's "ecological condition.") (internal quotations omitted).

237. *Id.* at 1249 (citing Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) (snowmobiling activity may take no more than two wolves)); Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996) (municipal landfill may take fifty-two snakes during construction and an additional two snakes per year thereafter); Mount Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992) (telescope construction may take six red squirrels per year); Ctr. for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996) (shrimping operation may take four hawksbill turtles, four leatherback turtles, ten Kemp's ridley turtles, ten green turtles, or 370 loggerhead turtles)).

238. *Ariz. Cattle Growers Ass'n*, 273 F.3d at 1249. However, the court noted that "[i]n the absence of a specific numerical value . . . the [FWS] must establish that no such numerical value could be practically obtained." *Id.* at 1250.

239. *Id.* at 1249–50 (citing Ramsey v. Kantor, 96 F.3d 434, 441 n.12 (9th Cir. 1996) (utilizing both harvesting rates and estimated numbers of fish to reach a permitted take)); Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 6 F. Supp. 2d 1119 (D. Ariz. 1997) (concluding that an ITS that indexes the permissible take to successful completion of the reasonable and prudent measures as well as the terms and conditions is valid); Pac. Nw. Generating Coop. v. Brown, 822 F. Supp. 1479, 1510 (D. Or. 1993) (ruling that an ITS that defines the allotted take in percentage terms is valid)).

240. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1250 (citing H.R. REP. NO. 97–567, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2827, 1982 WL 25083) ("The Committee does not intend that the Secretary will, in every instance, interpret the word impact to be a precise number. Where possible, the impact should be specified in terms of a numerical limitation.").

241. *Id.*

Handbook, which states that for purposes of an ITS, take can be expressed as:

> a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such changes to the take of the listed species.
> In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. . . . [I]f a sufficient causal link is demonstrated (i.e. the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation.[242]

The court clarified that by "causal link" it meant that the FWS must "establish a link between the activity and the taking of species before setting forth specific conditions."[243] The court rejected the FWS' argument that the ITS "'provides for those studies necessary to provide the quantification of impacts which the [ACGA] claim is lacking.'"[244] Instead, the court found that the ITS's analysis that "if 'ecological conditions do not improve,' takings will occur" was too vague to establish a causal link between the condition and the take.[245] Additionally, the court noted that the vague condition left the Service with "unfettered discretion" to determine whether there was compliance with the condition, "leaving no method by which the applicant or the action agency can gauge their performance."[246] Further, the court found that the vague condition imposed a duty on ACGA to ensure the "general ecological improvement" of the 22,000-acre cow flat allotment.[247] Thus, the court held that the implementation of the ITS was arbitrary and capricious because of the "the lack of an articulated, rational connection between

242. CONSULTATION HANDBOOK, *supra* note 83, at 4-50; *see also Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1250.
243. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1250.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 1251.

Condition 1 and the taking of species, as well as the vagueness of the condition itself."[248]

Similarly, in *Wild Fish Conservancy v. Salazar*, the Ninth Circuit held that an ITS that lacked adequate monitoring and reporting requirements violated the ESA.[249] The ITS at issue concerned the effects of the Leavenworth National Fish Hatchery's ("Hatchery") operation and maintenance from 2006–2011 on the Icicle Creek bull trout, a threatened species.[250] While the ITS set a clear numerical cap on the annual take of the bull trout,[251] petitioners claimed that the ITS had inadequate monitoring and reporting requirements.[252] The ITS anticipated that

> up to twenty migratory bull trout will be injured each year, because Hatchery operations will significantly disrupt their breeding behavior by preventing or delaying their spawning migration. Yet, the Statement does not require the Hatchery to monitor and report the actual number of bull trout so harmed.[253]

In considering whether the ITS was adequate, the court looked no further than the ESA's implementing regulations. Specifically, the court quoted 50 C.F.R. § 402.14(i)(3)[254] and

248. *Id.*

249. Wild Fish Conservancy v. Salazar, 628 F.3d 513, 532 (9th Cir. 2010). In this case, the Service was both the action agency and the consulting agency. *Id.* at 518 ("Formal section 7 consultation begins when the 'action agency' (here, the Service in its capacity as the operator of the Hatchery) transmits a written request to the 'consulting agency' (here, the Service in its consulting capacity)."); *see* Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1223 (9th Cir. 2008); 50 C.F.R. § 402.14(c) (2014).

250. The Hatchery was established to replace salmon "spawning grounds in the upper Columbia River made inaccessible by the completion of the Grand Coulee Dam, which blocks fish migration." *Salazar*, 628 F.3d at 517. "Unfortunately, and somewhat ironically, the Hatchery itself blocks fish passage in Icicle Creek." *Id.*

251. Specifically, the ITS set the "the following annual limits on incidental take: (1) one bull trout killed and one harmed by the water intake system; and (2) twenty migratory bull trout injured because their access to historically accessible spawning habitat is impaired, significantly disrupting their breeding behavior." *Id.* at 530.

252. *Salazar*, 628 F.3d at 531.

253. *Id.*

254. *Id.* This regulation provides that "[i]n order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of

stated that this regulation "makes clear that the Service is responsible for specifying in the [ITS] how the action agency is to monitor and report the effects of the action on listed species."[255] To meet this requirement, the court reasoned that the Service's ITS must either "specify monitoring and reporting requirements with respect to the twenty-bull trout limit or, if appropriate, select a surrogate trigger that *can* be monitored."[256] Because the ITS did neither, the court held that it did not establish a meaningful trigger for reinitiation of consultation.[257]

Likewise, in *Natural Resources Defense Council, Inc. v. Evans*,[258] the district court rejected an ITS that purported to set the impermissible level of take at "any individual."[259] The court explained that it was extremely unlikely that the taking of a single marine animal would actually be detected.[260] Therefore, the court found that the terms in the ITS did not provide a reasonable trigger for reinitiation of consultation.[261]

In summary, courts will carefully scrutinize an underlying ITS to ensure that it lays a reasonable framework for reinitiating consultation. These courts have held that the Service can only issue an ITS when the underlying action will actually lead to takes. Moreover, these courts have held that while an ITS should ideally provide a specific number of takings that will trigger reinitiated consultation, the ITS must, at a minimum, provide sufficiently clear criteria for reinitiating consultation. But, if the ITS provides sufficiently clear criteria for reasonable

the action and its impact on the species to the Service *as specified in the incidental take statement*." *Id.* (quoting 50 C.F.R. § 402.14(i)(3)) (emphasis in original).

255. *Id.* at 532.

256. *Id.* at 532 (emphasis in original).

257. *Id.* Judge Fisher dissented in part, but concurred in the majority's ruling on the ITS. *Id.* at 533, 537 (Judge Fisher "dissent[ed] from Parts II.A, II.B, II.E and III. of the majority opinion, but otherwise concur[red].").

258. Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129 (N.D. Cal. 2003).

259. *Id.* at 1187.

260. *Evans*, 279 F. Supp. 2d at 1187 ("It is arbitrary and capricious to set the trigger at one animal unless defendants can adequately detect the taking of a single animal.").

261. *Id.* at 1184.

consultations, courts will seldom second-guess agencies' decisions regarding whether those criteria are met, as described below.

B. You Did Good! No ESA Violation

As discussed above in Part V.A, there are multiple precursors before reinitiation of consultation is required. As a result, courts have frequently found that circumstances did not require reinitiated consultation under 50 C.F.R. § 402.16. For example, there is no ESA violation if the Service or a private party requests an agency to reinitiate consultation, but the agency: (1) lacks discretionary authority or control over the project, or (2) the circumstances alleged to require reinitiated consultation do not meet the four criteria in 50 C.F.R. § 402.16. Further, there is no duty to reinitiate consultation if Congress has provided for a waiver of ESA requirements for the agency action.

1. No Discretionary Authority or Control

a. *Sierra Club*

While not formally a reinitiation case, *Sierra Club v. Babbitt*,[262] laid the conceptual groundwork for the Ninth Circuit's more limited approach to reviewing 50 C.F.R. § 402.16 in the wake of *Pacific Rivers*.[263] In *Babbitt*, the BLM entered a reciprocal right-of-way agreement with a timber company, under which the BLM and the timber company could access existing roads and build new roads over each other's land.[264] That agreement required the timber company to submit a plan for any

262. Sierra Club v. Babbitt, 65 F.3d 1502 (1995).

263. *See* Root, *supra* note 7, at 1048-49 (noting that unlike *Pacific Rivers*, *Babbitt* stressed agency discretion that could benefit a listed species as the key element in deciding whether the agency had a duty to consult and also describing how this holding would be influential in later reinitiated consultation cases). *See also* Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994).

264. *Babbitt*, 65 F.3d at 1505. Congress authorized these agreements to allow the government and private land owners easier access to their own lands in light of the "checkerboard pattern of alternating public and private forestland ownership." *Id.*; *see also* 43 C.F.R. § 2812.0-3, 2812.0-6 (2014) (explaining the current status of the authorization). Originally, the timber company was Woolley Logging Company, which subsequently assigned its rights to the Seneca Timber Company. *Babbitt*, 65 F.3d at 1505, 1506.

proposed road over BLM land to the agency for approval.[265] BLM could object if (1) another route was more direct, (2) the proposed route "would substantially interfere with existing or planned facilities," or (3) the plan would cause excessive soil erosion.[266] In addition, the timber company agreed to follow all applicable environmental laws and also agreed that the BLM could withdraw any approvals if the timber company violated those laws.[267]

Pursuant to this agreement, the timber company submitted a plan to build an 810-foot road over BLM land. Before approving the road, the BLM prepared an Environmental Assessment (EA) and concluded that the road would lead to logging activities that may affect the spotted owl, a listed species.[268] But the BLM declined to pursue section 7 consultation with the FWS because it lacked discretionary authority under the reciprocal agreement to modify the proposal for the owl's benefit.[269] The Sierra Club sought to enjoin construction of the road on the grounds that BLM should have consulted with the FWS on the project.[270]

The court considered whether the BLM's approval would trigger initial consultation, as opposed to reinitiated consultation, because the BLM entered the reciprocal agreement before Congress passed the ESA.[271] Nevertheless, because the court evaluated when an agency could require further consultation on an ongoing Federal project, the case addresses factual circumstances identical to most reinitiated consultation questions, and the court actually looked to 50 C.F.R. § 402.16 for the applicable standard—whether the agency retains "'*discretionary* Federal involvement or control.'"[272] Given the BLM's limited ability to object to a proposed road under the reciprocal agreement, the court found that the agency lacked

265. *Babbitt*, 65 F.3d at 1505-06.

266. *Id.* at 1505.

267. *See id.* at 1506. Seneca Timber Company agreed to these additional environmental conditions when it assumed rights under the reciprocal agreement. *Id.*

268. *Id.*

269. *Id.*

270. *Babbitt*, 65 F.3d at 1507.

271. *See id.* at 1505.

272. *Id.* at 1509 (quoting 50 C.F.R. § 402.03) (emphasis in original).

discretionary involvement or control under the ESA because it could not "implement measures that inure to the benefit of the protected species."[273] Moreover, the court found that the environmental provisions did not provide authority to enter consultation because they only allowed the BLM to act if the timber company violated the ESA or other environmental law; they did not provide the BLM with prospective authority to condition the authorization.[274] Thus, the Ninth Circuit declined to require the BLM to enter consultation with the service on the proposed road.[275] The court noted that these limits on the agency's authority to condition the authorization distinguished the case from *Pacific Rivers*.[276]

b. *Environmental Protection Information Center v. Simpson Timber Co.*

In *Environmental Protection Information Center v. Simpson Timber Co.* (*EPIC*), the Ninth Circuit squarely applied the *Sierra Club* framework to reinitiated consultation under 50 C.F.R. § 402.16.[277] In that case, the FWS had previously issued an ITP to the Simpson Timber Co. (Simpson) under section 10 of the ESA for the northern spotted owl.[278] Subsequently, the FWS listed the marbled murrelet and the coho salmon as threatened species, both of which were potentially affected by Simpson's logging operations.[279] The plaintiff, the Environmental Protection Information Center (EPIC), sought to enjoin Simpson's ongoing

273. *Id.*; *see also* Root, *supra* note 7, at 1049 (noting that the requirement that the discretion inure to the benefit of a listed species acts as a further limit on reinitiated consultation beyond the text of 50 C.F.R. § 402.16, which only requires some discretion or control, regardless of whether it could benefit a listed species).

274. *Babbitt*, 65 F.3d at 1510-11.

275. *Id.* at 1509. The dissent found that the ability to object on the grounds of whether the route was the most direct could potentially benefit the spotted owl. *Id.* at 1514.

276. *Id.* at 1509 (citing Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054-56 (9th Cir. 1994)).

277. Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1079 (9th Cir. 2001).

278. *Id.* at 1074-76. For a discussion of ITPs, see *infra* Part II.C.

279. *Envtl. Prot. Info. Ctr.*, 255 F.3d at 1074-76.

operations because the subsequent listings required the FWS to reinitiate consultation with itself on the ITP.[280]

EPIC argued that under *Pacific River*'s expansive test for reinitiated consultation, which required reinitiated consultation for any agency action that had an ongoing and lasting effect, plainly required the FWS to reinitiate consultation.[281] The court disagreed with EPIC's assumption that *Pacific Rivers* governed the outcome. Rather, the Ninth Circuit determined that the ITP was closer to the right-of-way agreement in *Sierra Club* than the resource management plan in *Pacific Rivers*.[282] While the plans in *Pacific Rivers* were "comprehensive management plans which govern agency action in forest planning decisions," the ITP, like the right-of-way agreement, represented an "agency authorization of a private action and a more limited role for the" action agency.[283] Therefore, the court applied the test from *Sierra Club* and examined whether the FWS retained discretionary control over the ITP that could accrue to the benefit of the listed species.[284]

In applying the *Sierra Club* test, the Ninth Circuit took a surprisingly limited view of the FWS' discretionary authority under the ITP. For example, the ITP provided that "[i]n addition to addressing the needs of the spotted owl, Simpson's [plans will modify] silvicultural systems as appropriate to ensure compatibility with the habitat requirements of other species."[285] On its face, this provision appeared to give the FWS authority to modify the ITP to benefit the salmon and murrelet, which are logically different species than the spotted owl. But, with little analysis, the court declared that the language only applied to species listed at the time of the ITP, not species subsequently

280. *Id.* at 1075. While the request for FWS to consult with itself may appear overly technical, the parties agreed that issuing an ITP constituted an agency action for purposes of section 7(a)(2). *Id.* Indeed, the FWS conducted an internal consultation process with itself before issuing the initial ITP. *Id.* at 1077 n.5.

281. *Id.* at 1079 (citing *Pac. Rivers*, 30 F.3d at 1053).

282. *Id.* at 1080.

283. *Id* (citing Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995)).

284. *Envtl. Prot. Info. Ctr.,* 255 F.3d at 1080. *But see* Root*, supra* note 7, at 1060-61 (noting that this holding does not place a meaningful limit on reinitiated consultation because agencies can always choose to include a license or permit condition that requires reinitiated consultation).

285. *Envtl. Prot. Info. Ctr.,* 255 F.3d at 1080.

listed.[286] Further, the court found that although the terms of the FWS' biological opinion read, "[r]einitiation of formal consultation is required if . . . a new species is listed," the biological opinion did not give the FWS additional authority to reinitiate consultation, but only restated the language in § 402.16.[287] Particularly, the court indicated that for an agency to rely on a license or permit condition to reinitiate consultation upon the listing of a new species, the condition must specifically reserve the agency's discretion to reinitiate consultation upon a new species' listing.[288]

c. Later Cases

More recently, in *San Bernardino Valley Audubon Society v. FERC*,[289] the Ninth Circuit has also indicated that reinitiated consultation only applies to an ongoing "action" as defined in 50 C.F.R. § 402.02.[290] Thus, the court determined that FERC need not reinitiate consultation on operation of a relicensed hydroelectric dam because operation of the dam under the Federal permit did not constitute an agency action.[291] But this result appears contrary to the plain text of 50 C.F.R. § 402.16, which requires reinitiation whenever "discretionary Federal involvement or control over the action has been *retained* or is

286. *Id.* at 1081 n.6.

287. *Id.* (alteration in original) (similar statements successfully preserve discretion for the acting agency when contained in the license or permit). This feature of the opinion drew a sharp dissent, which argued that the court's analysis artificially constricted the terms of the ITP to only cover listed species. *Id.* at 1084.

288. *See id.* The Eastern District of California reached this conclusion in *Natural Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1249 (E.D. Cal. 2005). There, the court noted that *EPIC* suggested that "only very specific language in permits or contracts explicitly retaining discretionary control to benefit protected species" could form the basis for reinitiated consultation. *Id.* Thus, in that case the court found that an agency could not reinitiate consultation under 50 C.F.R. § 402.16 when the underlying contract did not contain such language. *Id.*

289. San Bernardino Valley Audubon Soc'y v. FERC, No. 05–77186, 242 Fed. App'x 462 (9th Cir. July 12, 2007).

290. *Id.* at 469; *see* 50 C.F.R. § 402.02 (2014) (actions are "activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies").

291. *San Bernardino Valley Audubon Soc'y,* 242 Fed. App'x at 469.

authorized by law."[292] The word "retained" appears to contemplate activities beyond simple ongoing agency action, including instances where an action occurs that the Federal agency continues to authorize or permit and retains discretionary control over.[293]

Moreover, *San Bernardino Valley Audubon Society* relies heavily on *California Sportfishing Protection Alliance* for its interpretation of 50 C.F.R. § 402.02.[294] However, *California Sportfishing Protection Alliance* did not explicitly address reinitiated consultation or 50 C.F.R. § 402.16 and appears to rely on a dramatic misreading of 50 C.F.R. § 402.02.[295] In *California Sportfishing Protection Alliance*, without any explanation or analysis, the Ninth Circuit ignored the definition of agency action in 50 C.F.R. § 402.02, and instead found that the four examples in the regulation constituted the entire definition of agency action: (1) actions to conserve listed species, (2) promulgating regulations, (3) granting licenses or contracts, and (4) modifying the land, water, or air.[296]

Given this reading of 50 C.F.R. § 402.02, the *Sportfishing* court found that operation of a facility under a Federal permit or license was not a Federal action.[297] But the list in 50 C.F.R. § 402.02 is explicitly not exclusive, and the regulation states that action "means all activities or programs of any kind *authorized*, funded, or carried out, in whole or in part, by Federal agencies."[298] Since operation of a hydroelectric dam under a FERC license certainly appears to be an action authorized by a Federal agency, the Ninth Circuit likely misinterpreted the regulation. Consequently, *San Bernardino Audubon Society*

292. 50 C.F.R. § 402.16 (2014) (emphasis added).

293. *See Envtl. Prot. Info. Ctr.*, 255 F.3d at 1074-76 (considering the Service's obligation to reinitiate consultation on a completed, ongoing ITP).

294. *San Bernardino Valley Audubon Soc'y*, 242 Fed. App'x at 469 (citing Cal. Sportfishing Prot. Alliance v. FERC, 472 F.3d 593, 597 (9th Cir. 2006)).

295. *See generally* Cal. Sportfishing Prot. Alliance v. FERC, 472 F.3d 593 (9th Cir. 2006).

296. *Sportfishing Prot. Alliance*, 472 F.3d 593 at 598-99 (quoting 50 C.F.R. § 402.02).

297. *Id.* at 599.

298. 50 C.F.R. § 402.02 (2014) (emphasis added). Indeed, the regulation includes the phrase, "[e]xamples include, but are not limited to." *Id.*

appears to rest on questionable logic, is not an officially published case, and no court has relied on its holding in further interpreting 50 C.F.R. § 402.16. Thus, it is best considered as an outlier.[299]

2. No Changed Circumstances

Beyond questions of discretionary control over the Federal project, courts have frequently upheld agency determinations that the triggers in 50 C.F.R § 402.16 are not met. For example, in *Center for Native Ecosystems v. Cables*,[300] the Tenth Circuit considered whether new information regarding the impact of a Federal project, issuing grazing permits, on the Preble's mouse, a listed species, required reinitiated consultation under 50 C.F.R. § 402.16.[301] During the initial informal consultation, the Forest Service and FWS concurred that the grazing permits would not be likely to adversely affect the mouse.[302] As part of that concurrence, the agencies agreed to several mitigation measures, one of which was a 60.5% limit on forage-utilization.[303] During a separate-but-related consultation, the FWS and Forest Service revisited the mitigation measures and found that grazing activities under the permits had exceeded the forage-utilization levels in some key areas.[304] Nevertheless, the agencies concluded

299. *See* Freeman, *supra* note 9, at 121. Nevertheless, Freeman argues that reinitiated consultation should only be triggered by some additional Federal action because new species and data on the condition of the species are inevitable and will continuously arise. *Id.* But not all new information is significant. For a complete discussion of how courts evaluate new information's significance in the NEPA context, see Maxwell C. Smith and Catherine E. Kanatas, *Acting with No Regret: A Twenty-Five Year Retrospective of* Marsh v. Oregon Natural Resources Defense Council, 32 UCLA J. ENVTL. L. & POL'Y 329 (2014). Possibly, the Ninth Circuit's interest in further limiting the reach of 50 C.F.R. § 402.16 rests on recognition of the regulation's uncertain legal basis. *See supra* Part III.

300. Ctr. for Native Ecosystems v. Cables, 509 F.3d 1310 (10th Cir. 2007).

301. *Id.* at 1313-14. The Forest Service explicitly retained ongoing control over the grazing permits; the permits stated that they could "be cancelled, in whole or in part, or otherwise modified, at any time . . . to conform with needed changes brought about by law, regulation," or other circumstances. *Id.* at 1313.

302. *Id.* at 1315.

303. *Id.* (stating the agencies initially agreed to a 40-45% level but later agreed to the increase).

304. *Id.* at 1317.

that overall, the average utilization rate was below the 60.5% limit.[305]

The Center for Native Ecosystems (CNE) alleged that the Forest Service should have reinitiated consultation under 50 C.F.R. § 402.16(b) and (c) because the exceeded forage-utilization showed a previously unconsidered effect on the mouse and a modification to the project that impacted the mouse.[306] CNE acknowledged that the Forest Service had found the average forage-utilization within limits in all allotments, but CNE argued that this measurement rested on an arbitrary policy change.[307] CNE argued that previously, the Forest Service had measured each key area separately and only recently switched to an averaging method.[308]

The court responded that the biological assessment did not specify that the Forest Service would use data from key areas, as opposed to data averaged over an entire allotment, to evaluate whether authorized activities exceeded the forage utilization standards.[309] In any event, the court noted that agencies always retain discretion to change methodology on a reasoned basis.[310] In this case, the court found that the agency's preference of averages over an entire allotment was reasonable given the potential for measures of isolated key areas to prove misleading.[311] Thus, *Cables* illustrates the substantial discretion agencies have in determining whether a mitigation measure, or potentially a term of an ITS, has been exceeded. Not only will courts defer to an agency's method of calculating the impact on a listed species, but courts may also give agencies considerable flexibility in altering those methods.

Several district courts have also taken a deferential approach to reviewing an agency's determination on the reinitiation criteria

305. *Id.* at 1315, 1318.

306. *Ctr. for Native Ecosystems*, 509 F.3d at 1324-25.

307. *Id.*

308. *Id.* at 1325-26.

309. *Id.* at 1326.

310. *Id.* at 1327 (citing Exxon Corp. v. Lujan, 970 F.2d 757, 762 n.4 (10th Cir. 1992)) ("Changes in policy can be upheld when such change is explained with a reasoned analysis.").

311. *Id.*

in 50 C.F.R. § 402.16.[312] For example, the Eastern District of California found that even though the Service listed a new species, the red-legged frog, in a project's vicinity, the agency's reasonable determination that the project would have no effect on the frog relieved the agency from any further duty to consult.[313] Similarly, the District Court for the Virgin Islands concluded that 50 C.F.R. § 402.16 did not require FEMA to reinitiate consultation on an emergency housing project when the agency extended the duration of the project from six to eighteen months.[314] There, the petitioner did not show that the extension would harm listed species and the duration of the project was not instrumental to the Service's previous finding.[315]

Likewise, one District Court found that the impacts of white-noise syndrome on the Indiana Bat did not require the Forest Service to reinitiate consultation on a forest management plan when the available evidence showed that the bat had not been negatively impacted and the population had, in fact, grown by ten percent.[316] In addition, the District Court for the District of Columbia found that the Forest Service did not need to reinitiate

312. In these cases, the plaintiff bears the burden of producing evidence to show that the 50 C.F.R. § 402.16 criteria require reinitiated consultation. *See* Oceana, Inc. v. Byson, 940 F. Supp. 2d 1029, 1061-62 (N.D. Cal. 2013).

313. Protect Our Water v. Flowers, 377 F. Supp. 2d 844, 877 (E.D. Cal. 2004) (quotations omitted). In that case, the Army Corps of Engineers preserved discretion and control over an ongoing residential development product through a clause in a dredge and fill permit that allowed the Corps to "reevaluate its decision on this permit at any time the circumstances warrant." *Id.* at 855 (internal citations omitted). Strikingly, despite several requests from the Service to reinitiate consultation, the Court disagreed with the Service's claims that new information, changes to the project, and violations of the limits in the ITS required reinitiated consultation under 50 C.F.R. § 402.16. *Id.* at 856-57, 873-76. Specifically, the court concluded that sightings of listed species within the project area did not constitute new information when the biological opinion noted the presence of the species in the vicinity, that an appreciably greater spatial impact on the habitat of a listed species than initially thought was only a minor modification to the project, and that speculation from the Service that the project exceeded the incidental take levels did not suffice to trigger reinitiated consultation. *Id.* at 874-76.

314. Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 11 F. Supp. 2d 529, 550 (D.V.I. 1998).

315. *Id.* at 550.

316. Heartwood, Inc. v. Agpaoa, 611 F. Supp. 2d 675, 692-93 (E.D. Ky. 2009), *rev'd on other grounds,* 628 F.3d 261 (6th Cir. 2009).

consultation on oil and gas leases to account for new information showing the leases would affect more grizzly bears than originally thought.[317] The court noted that the underlying biological opinion explicitly recognized the importance of the area to grizzly bears and the uncertainty of the number of grizzly bears in the area.[318] Thus, courts have upheld agencies' determinations not to reinitiate consultation even when the agency changes the methodology for determining impacts on species, triples the duration of a project, or learns that the project may impact many more members of the species than initially thought. Overall, these cases suggest that when new circumstance do not significantly change the underlying reasoning in the biological opinion or the ITS, courts will not likely find a duty to reinitiate consultation.

3. Congress Intervention Establishing That Reinitiation Is Not Required

Congress can also step in and create laws that remove any requirement to reinitiate consultation. Such was the case in *Mt. Graham Red Squirrel v. Madigan*.[319] As the Ninth Circuit stated, *Red Squirrel* is a case about the "conflict between those who would build bigger and better telescopes and those who would shelter the endangered Mount Graham red squirrel from the destruction of its habitat."[320]

This conflict involved the Sierra Club, a number of Federal agencies, and Congress. In this case, there was considerable delay in getting telescopes built on Mt. Graham, the critical habitat of the endangered red squirrel.[321] Given the delay and the desire to build the telescopes, Congress interceded and enacted the Arizona–Idaho Conservation Act.[322] The Act provided for a two-phase building project and appeared to state that the ESA was deemed satisfied as to the first phase.[323]

317. Wyo. Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 95 (2003).
318. *Id.*
319. Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992).
320. *Madigan*, 954 F.2d at 1443.
321. *Id.*
322. *Id.*
323. *Id.* at 1446.

Environmental groups raised multiple challenges, including a challenge that the first phase of construction triggered the need to reinitiate consultation.[324] To determine if reinitiated consultation was required, or if the ESA was deemed satisfied, the court looked first to the Arizona–Idaho Conservation Act, which it determined was ambiguous on the point.[325] Given this, the court looked to legislative history to determine if Congress had in fact meant to waive ESA requirements with respect to the first phase of construction.[326] The court found that the legislative history, although limited, clearly suggested "Congress intended that the first three telescopes be built immediately, without being subject to the possibility of delay inherent in any reinitiation of consultation."[327] Thus, the court stated "the requirements of Section 7 of the Endangered Species Act are deemed satisfied as to the entire first phase of construction."[328] The court made clear

324. *Id.* at 1447.

325. *Id.* at 1452.

326. *Madigan*, 954 F.2d at 1456-57. Notably, the court did not defer to the Service's interpretation of the statute, because the Service's position on whether the statute contemplated reinitiated consultation changed. Specifically, the court stated:

> Prior to the initiation of the present litigation, the Forest Service indicated its belief that the Arizona–Idaho Conservation Act permitted the reinitiation of consultation regarding the first phase of construction. Subsequent to the filing of this lawsuit, the agency's position changed. Given this fluctuation over the course of two years, we decline to rely on the Forest Service's "expertise."

Id. at 1457.

327. *Id.* at 1453. The court also included excerpts of statements made on the floor of the Senate. "Three telescopes will be built immediately. They can no longer be stalled by process, by litigation, or by whim. Four telescopes can be built in the future after a timely conclusion to the [Environmental Impact Statement] and consultation between Fish and Wildlife, Forest Service, and the University of Arizona." *Id.* at 1454 (citing 134 CONG. REC. 15,741 (daily ed. Oct. 13, 1988) (statement of Sen. McCain)). Interestingly enough, two years after the statute was enacted, the same speaker said "[w]e have always believed that the Arizona–Idaho Conservation Act contemplated the possibility of reinitiation of consultation where new information has been found." *Id.* at 1456. These statements lend further support to the conclusion in section IV that despite the ESA's silence on reinitiated consultation, Congress has long understood reinitiated consultation to be an established and important part of the ESA's statutory scheme.

328. *Id.* at 1456.

that this waiver did not apply to the second phase of construction (i.e., the final four telescopes):

> The fact that Congress made authorization of the final four telescopes contingent on an evaluation of the impact on the red squirrel of construction of the first three telescopes also indicates that the legislators sought to achieve a workable and practical compromise between the needs of the scientific community on the one hand and the legitimate concerns of the environmentalists on the other.[329]

Given this reading of the Act, the court affirmed the district court's summary judgment on Sierra Club's reinitiation claims. In particular, the court held that Sierra Club's claims that reinitiation was required given new information were irrelevant due to the waiver.[330]

In *Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. U.S. Department of Energy*,[331] the Ninth Circuit also found that the Department of Energy (DOE) need not reinitiate consultation when a statute required the agency to sell a specific oil field and explicitly provided that the existing BiOp and ITS would transfer to the purchaser.[332] The court found that by specifying that the ITS would accompany title to the oil field, Congress explicitly intended to excuse the DOE from its duty to reinitiate consultation on the action.[333] Moreover, the court agreed with the DOE that requiring reinitiated consultation under these circumstances would serve no purpose because, by law, the transferee would still operate the oil field in accordance with the ITS and would therefore not generate any new impacts on listed species.[334] Thus, the Ninth Circuit has also declined to

329. *Id.* at 1458.

330. *Id.* at 1448-49, 1460, 1461 (discussing "reconsultation claims" associated with the "Summary Judgment Appeal" and the "Jurisdictional Appeal").

331. Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy, 232 F.3d 1300 (9th Cir. 2000).

332. *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians*, 232 F.3d at 1302, 1303, 1308-09 (citing National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 3412(a), 110 Stat. 186, 631)).

333. *Id.* at 1309.

334. *Id.*

require consultation when legislation clearly overrides agency discretion to implement the terms of an ITS.

C. Conclusions

While reinitiated consultation poses important considerations for action agencies and practitioners, courts have seldom found that agencies improperly refused to reinitiate consultation. Recently, courts have typically taken a deferential view toward agency interpretations of 50 C.F.R. § 402.16. Nevertheless, courts will carefully scrutinize ITSs to ensure that they contain reasonable triggers for reinitiated consultation. As a result, practitioners and agencies would be well advised to ensure that ITSs are adequate at the time the agency undertakes a proposed action.

VI. CONCLUSION

A request for reinitiated consultation need not end in a catastrophe for either a listed species or an agency or permittee. While courts have readily assumed firm legal ground for reinitiated consultation, the statute is actually silent on this count. Fortunately the legislative history and clear policy ends of the ESA support the practice. As described above, courts will typically require reinitiated consultation when it is within the action agency's discretionary authority and one of the reinitiated criteria in 50 C.F.R. § 402.16 are clearly met. While courts will carefully scrutinize underlying ITSs to ensure that they provide meaningful criteria for reinitiating consultation, courts normally adopt a deferential approach to agency determinations of whether the 50 C.F.R. § 402.16 criteria are met. In these circumstances, reinitiated consultation may actually further the ends of the agency and applicant, in that it will ensure that the protections of any ITS remain valid or that any needed ITS is adopted.