PRELIMINARY INJUNCTIONS AS RELIEF FOR SUBSTANTIAL PROCEDURAL VIOLATIONS OF ENVIRONMENTAL STATUTES: *AMOCO PRODUCTION CO. V. VILLAGE OF GAMBELL*

I. INTRODUCTION

Federal Rule of Civil Procedure 65(a) permits federal courts to issue preliminary injunctions. The rule, however, specifies neither the purpose of nor the conditions necessary for granting such injunctive relief. Instead, the grant or denial of a preliminary injunction is left to the trial court's discretion, which is guided by historic principles of equity.[1] Pursuant to these principles, courts generally do not issue injunctive relief unless a remedy at law is inadequate[2] and an injunction is necessary to preserve or restore the status quo.[3] More specifically, in determining whether to issue injunctive relief, the courts typically invoke the traditional test, which requires the balancing of four factors: (1) whether the petitioner has demonstrated probable success on the merits; (2) whether the petitioner will suffer irreparable harm if injunctive relief is denied; (3) whether such harm will outweigh any injury that the respondent will suffer if injunctive relief is granted; and (4) whether granting injunctive relief will best serve the public interest.[4] Although no standardized formula exists,[5] it is clear that a party

1. *See generally* D. DOBBS, REMEDIES 52 (1973); Plater, *Statutory Violations and Equitable Discretion,* 70 CALIF. L. REV. 524, 533-45 (1982); *Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 1056-59 (1965).

2. D. DOBBS, *supra* note 1, at 108; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2944, at 392 (1973) [hereinafter WRIGHT & MILLER].

3. 7 J. MOORE, W. TAGGART & K. SINCLAIR, MOORE'S FEDERAL PRACTICE, § 65.04[1] (2d ed. 1986); WRIGHT & MILLER, *supra* note 2, § 2947, at 423, § 2948, at 463-64.

4. WRIGHT & MILLER, *supra* note 2, § 2948, at 430-31. Some courts also invoke an alternative test and issue preliminary injunctive relief when the moving party has proven either: (1) a combination of probable success and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships favors injunctive relief. *See, e.g.,* United States v. Akers, 785 F.2d 814, 818 (9th Cir. 1986); City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985); *cf.* Sierra Club v. Hennessy, 695 F.2d 643, 647 (2d Cir. 1982) (similar test but explicitly requires irreparable harm in (2)).

seeking a preliminary injunction in the federal courts must, at a minimum, demonstrate "irreparable injury and the inadequacy of legal remedies."[6]

The federal courts' discretion to grant or deny preliminary injunctive relief is not sacred; Congress can "intervene and guide or control the exercise of the courts' discretion."[7] The degree to which a statute limits or restricts the courts' discretion depends on the intent of Congress and the nature of the statute. Consequently, when federal courts are faced with a question of whether to grant or deny a preliminary injunction for an alleged statutory violation, they must consider Congress' mandate in conjunction with their historical imperative to balance the equities. The weight to be accorded each of these factors is a matter with which federal courts[8] and legal scholars have struggled.[9]

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5. Professor Leubsdorf, in his analysis of the historical development of preliminary injunctive relief, provides an illustrative discussion of the lack of standards upon which injunctive relief is granted and proposes a standardized model that courts should adopt. *See* Leubsdorf, *The Standard for Preliminary Injunctions,* 91 HARV. L. REV. 525, 541-44 (1978).

6. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

7. *Id.* at 313 (citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

8. *See infra* notes 17-68, 126-30, 134-224 and accompanying text.

9. There are several important discussions of the courts' ability to balance the equities when faced with a statutory violation. *See, e.g.,* Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions,* 45 U. PITT. L. REV. 513 (1984); Plater, *supra* note 1; Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions,* 9 ENVTL L. 477, 506-10 (1979).

This note differs from these articles in several important ways. First, unlike Professor Plater's article, this note neither provides an historical analysis of the courts' equitable powers vis-à-vis statutory mandates, *see* Plater, *supra* note 1, at 545-83, nor attempts to find that statutes, regardless of their nature — procedural, substantive, or some variation thereof — similarly affect the courts' ability to balance the equities, *id.* at 526-33. The Court's decision in *Romero-Barcelo,* 456 U.S. 305, does not conform to Professor Plater's model. *See* Plater, *supra* note 1, at 593-94. This note suggests that the nature of the statute determines the restrictions, if any, on the courts' ability to balance the equities, and thus accounts for *Romero-Barcelo.* Second, this note expands upon Professor Farber's assertion that congressional intent is the key determinant of whether and to what extent a statute affects the courts' ability to balance the equities in a case involving a statutory violation. Specifically, this note concerns "ancillary injunctions" (injunctive relief for a violation of a procedural statute) as defined by Professor Farber, *supra,* at 539-40. Professor Farber concludes that courts have discretion to grant or deny ancillary injunctions, *id.* at 540, and this note analyzes the scope of this discretion. Finally, this note expands on Professor Winner's analysis of the courts' role under NEPA and disagrees with his conclusion that NEPA should affect the weighting of the balancing calculus rather than provide a presumption favoring injunctive relief. Winner, *supra,* at 506-10. *See also* Plater, *supra* note 1, at 574-75 (criticizing Professor Winner's conclusion that balancing is appropriate).

Recently the United States Supreme Court granted certiorari in *Amoco Production Co. v. Village of Gambell.*[10] This case once again presents the Court with the question of whether and to what extent a statute—here the Alaska National Interest Lands Conservation Act, Title VIII ("ANILCA")[11]—affects the courts' discretion to grant or deny a preliminary injunction as relief for a statutory violation.[12] ANILCA, however, presents the Court with a novel issue because the statute is procedural, not substantive, in nature.[13] Moreover, the procedures are not merely secondary; rather they are the essence of the statute. Although much of the Court's decision should be based on the language of ANILCA and its legislative history, the Court must also consider the procedural nature of the statute. The impact of the decision, therefore, will not be limited to preliminary-injunction actions under ANILCA, but will influence such actions involving procedural violations of similar statutes, particularly the National Environmental Policy Act of 1970 ("NEPA"), Title I.[14]

This note first discusses several United States Supreme Court decisions concerning whether a particular statute restricts a federal court's ability to invoke its equitable powers to grant or deny a preliminary injunction for a violation of the statute. Second, the note summarizes *Amoco.* Third, it compares and contrasts ANILCA with the Federal Water Pollution Control Act ("FWPCA")[15] and the Endangered Species Act ("ESA")[16] (each considered in earlier Supreme Court cases), and concludes that the courts' discretion to grant or deny injunctive relief for a probable substantial procedural violation of

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10. 106 S. Ct. 2274 (1986).

11. 16 U.S.C. §§ 3111-3126 (1982). "ANILCA" as used in this note only refers to Subchapter II—Subsistence Management and Use, sections 801-16 of the Act.

12. Petition for Writ of Certiorari at (I), Amoco Prod. Co. v. Village of Gambell, *cert. granted,* 106 S. Ct. 2274 (1986) (Federal Petitioners); *see also infra* notes 68-69 and accompanying text.

13. *See infra* notes 72-102 and accompanying text; *see also* Village of Gambell v. Hodel, 774 F.2d 1414, 1421 (9th Cir. 1985), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986); Village of Gambell v. Clark, 746 F.2d 572, 582 (9th Cir. 1984); Kunaknana v. Clark, 742 F.2d 1145, 1150-51 (9th Cir. 1984) (court construed section 810 of ANILCA to provide a "procedural mechanism which insures . . . local input into the administrative decision-making process").

Although this issue has been before the Court in several cases involving the National Environmental Policy Act ("NEPA"), the Court has never reached the issue for, in each instance, it found that the federal action involved did not violate section 102(2)(C) of the Act. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Kleppe v. Sierra Club, 427 U.S. 390 (1976).

14. 42 U.S.C. §§ 4331-35 (1982). For the pertinent language of NEPA and a discussion of NEPA's similarity to ANILCA, see *infra* notes 132-33.

15. 33 U.S.C. §§ 1251-1376 (1982).

16. 16 U.S.C. §§ 1531-1543 (1982).

ANILCA is severely limited. Finally, drawing upon an analysis of preliminary injunction litigation under NEPA, this note concludes that ANILCA and other procedural statutes should be construed to require courts to invoke the following three-factor test rather than the traditional test. First, probable success on the merits should be established by demonstrating the probable substantial violation of the statute's nondiscretionary procedures—procedures that are not merely secondary, but are the essence of the statute. Second, irreparable harm should not depend on a showing that the plaintiff is actually harmed (for example, that subsistence uses (ANILCA) or the environment (NEPA) will be irreparably harmed); instead, irreparable harm should lie in the procedural harm, that is, in the failure to comply with the rural participation requirements of section 810 of ANILCA or the failure to prepare an adequate environmental impact statement ("EIS") under section 102(2)(C) of NEPA. Third, public interest should not be left to the determination of the court, but should be regarded as defined by the statute and, therefore, embodied in its procedural requirements. Thus, upon a showing of a probable substantial violation of a procedural statute, a rebuttable presumption of injunctive relief should arise. This presumption may be defeated by showing that unusual circumstances exist, the violation is technical rather than substantial, or the issuance of injunctive relief is unnecessary to ensure procedural compliance.

II. STATUTORY EFFECT ON THE COURTS' EQUITABLE DISCRETION

Whether to grant or deny a preliminary injunction is historically founded in the courts' equitable discretion.[17] Congress, however, has the authority to "guide or control" the courts in the exercise of their discretion.[18] But, Congress' ability to do so is restricted in two important ways. First, Congress must clearly express its intent to limit the courts' discretion. As the Court stated in *Porter v. Warner Holding Co.*:[19]

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[20]

17. *See supra* note 1 and accompanying text.

18. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (citing Hecht Co. v. Bowles, 321 U.S. 321 (1944)).

19. 328 U.S. 395 (1946).

20. *Id.* at 398 (quoting Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836)).

Second, even where Congress clearly intends to limit the courts' discretion, the Court has held that "a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law."[21] For example, in *Hecht Co. v. Bowles,*[22] despite a past statutory violation by the defendant, the Court denied injunctive relief because the district court concluded that "the issuance of an injunction would have 'no effect by way of insuring better compliance in the future' and would be 'unjust' to [Hecht Co.] and not 'in the public interest.' "[23]

While Congress is constrained in the extent to which it can limit the courts' equitable discretion, the courts too are limited in their ability to narrow the impact of Congress' intent.[24] This inherent limitation is founded in our tripartite governmental system.[25] As the Court in *Hill* explained, "the commitment to the separation of powers is too fundamental for [the courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' "[26] The courts can limit the effect of a statute on their equitable discretion only insofar as their interpretation contradicts neither the language of a statute nor its purpose. To allow otherwise would violate the separation of powers doctrine.[27]

The Supreme Court has applied these conflicting principles in a number of cases presenting the issue of whether it was appropriate for the lower federal courts to balance the equities, notwithstanding a clear statutory violation. The Court's decisions, while varying in result,[28] consistently reveal the paramount importance of the "language,

21. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193 (1978).

22. 321 U.S. 321 (1944).

23. *Id.* at 326 (quoting Hecht Co. v. Bowles, 49 F. Supp. 528, 532 (D. D.C. 1943)). The Court interpreted section 205(a) of the Emergency Price Control Act of 1942 to provide courts with discretion in determining what relief was appropriate for a statutory violation. The Court explained that section 205(a), although requiring that relief "shall" be granted upon a showing of actual or probable violation, explicitly permitted the grant of a "permanent or temporary injunction, restraining order, or other order." *Id.* at 322 (quoting section 205(a)). The Court opined that the inclusion of the words "or other order" coupled with the statute's legislative history did not require courts to issue a mandatory injunction when there was an actual or probable violation. *Id.* at 328.

24. *See infra* notes 38-40, 115, 119-31 and accompanying text.

25. *Hill,* 437 U.S. at 194-95.

26. *Id.* at 195.

27. *See infra* notes 38-40, 115, 119-31 and accompanying text.

28. *See, e.g.,* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (despite statutory violation, balancing of equities required and injunctive relief denied), discussed *infra* notes 41-51 and accompanying text; *Hill,* 437 U.S. 153 (injunctive relief granted without balancing the equities after finding a statutory violation), discussed *infra* notes 33-40 and accompanying text; *Porter,* 328 U.S. 395, 399 (1946) (reversed lower court's decision to grant injunctive relief and deny restitution because section 205(a) of the

history, and structure of the legislation under review."[29] As Professor Plater demonstrates, however, "there have been many statutory equity cases in which judges have exercised discretion, but never [with the one exception being *Romero-Barcelo*] so as to override the specific prohibitions of a statute."[30] Specifically, the Court's decisions reveal that in reviewing the statute involved it makes three inquiries. First, does the statutory scheme, its language, and the legislative history demonstrate that Congress intended the courts to exercise their discretion as to the appropriate remedy for a statutory violation? Second, does the violation undermine the statutory scheme and its underlying purpose? Third, do the circumstances warrant injunctive relief, that is, will injunctive relief redress the harm incurred and ensure future statutory compliance?

The Court's decisions in *Weinberger v. Romero-Barcelo*[31] and *Tennessee Valley Authority v. Hill*[32] illustrate its reasoning process and the scope of its holdings. Furthermore, both are probative as to the resolution of *Amoco*. In *Hill,* the Court was confronted with the question of whether ESA required the lower federal court to enjoin the completion of the Tellico Dam because its operation would eradicate the snail darter, an endangered species.[33] The district court, after balancing the equities, found that the issuance of a permanent injunction would mean abandoning the project, and thus $53 million of the $78 million expended would be wasted.[34] It, therefore, denied the injunctive relief requested. The Sixth Circuit Court of Appeals reversed, finding that the funds congressionally authorized and spent on the project were immaterial because "the only relevant legislation was the Act itself, 'the meaning and spirit' of which was 'clear on its face.' "[35]

Emergency Price Control Act of 1942, 50 U.S.C. App. § 925(a) (1946) (terminated 1947)), permitted the district courts to invoke their equitable discretion in determining whether to issue a "permanent or temporary injunction, restraining order, or other order"); *Hecht Co.,* 321 U.S. 321 (Court denied injunctive relief despite past violation of section 205(a) Emergency Price Control Act of 1942, 50 U.S.C. App. § 925(a) (Supp. II 1942) (terminated 1947)), discussed *supra* note 22 and accompanying text; United States v. City and County of San Francisco, 310 U.S. 16, 30 (1940) (in reinstating injunctive relief issued by the district court, the Supreme Court explained that "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued").

29. *Hill,* 437 U.S. 153, 174 (1978); *accord Romero-Barcelo,* 456 U.S. at 314-19.

30. Plater, *supra* note 1, at 594.

31. 456 U.S. 305 (1982).

32. 437 U.S. 153 (1978).

33. *Id.* at 156.

34. *Id.* at 166 (citing Hill v. Tennessee Valley Auth., 419 F. Supp. 753, 758 (E.D. Tenn. 1976)).

35. *Id.* at 169 (quoting Hill v. Tennessee Valley Auth., 549 F.2d 1064, 1072 (6th Cir. 1977)).

The Supreme Court reviewed the statute and its legislative history and found that "Congress intended endangered species to be afforded the highest of priorities"[36] and "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[37] It, therefore, affirmed the appellate court's decision. Although noting that "the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion,"[38] the Court reasoned that:

> [T]hese principles take a court only so far. Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. . . .
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> . . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution." . . .
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> . . . Once the meaning of an enactment is discerned and its constitutionality is determined, the judicial process comes to an end.[39]

Hence, the Court held that, although it could not mechanically grant injunctive relief under the statute, Congress had already balanced the equities and, therefore, the Court's discretion was severely restricted.[40]

In *Romero-Barcelo,* the Supreme Court's most recent decision concerning the effect of a statute on the courts' equitable discretion, the Court was confronted with the issue of whether the Navy should be enjoined from discharging ordnances into the waters surrounding an island off the coast of Puerto Rico. The Navy's action violated the FWPCA because it had failed to secure a permit from the Environmental Protection Agency ("EPA") as required under the Act. The district court, after balancing the equities, denied injunctive relief. It reasoned that, because the discharges were not harming the environment and because the training that occurred on and around the island was important, "the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant

36. *Id.* at 174.
37. *Id.* at 184.
38. *Id.* at 193 (quoting D. DOBBS, *supra* note 1, at 52).
39. *Id.* at 194 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
40. *Id.* at 194-95.

Navy, but to the general welfare of this Nation."[41] The court, however, ordered the Navy to apply for a National Pollution Discharge Elimination System permit.[42]

The First Circuit Court of Appeals, relying on *Hill,* vacated the district court's order and remanded the case, ordering the court to enjoin the Navy from further discharges until it secured a permit. The court of appeals found that "[w]hether or not the Navy's activities in fact harm the coastal waters, it has an absolute statutory obligation to stop any discharges of pollutants until the permit procedure has been followed and the Administrator of the EPA, upon review of the evidence, has granted a permit."[43]

The Supreme Court reversed and remanded, relying on *Hecht* and distinguishing *Hill.* The Court explained that:

> [A] major departure from the long tradition of equity practice should not lightly be implied. As we did [in *Hecht*], we construe the statute at issue "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." We do not read the FWPCA as foreclosing completely the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.[44]

In so holding, the Court distinguished *Hill* on several grounds. First, in *Hill* "[t]he purpose and language of [ESA] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act,"[45] whereas in the instant case "[a]n injunction [was] not the only means of ensuring compliance. The FWPCA itself, for example, provides for fines and criminal penalties."[46] Second, the statutory violation presented in *Hill* went to the heart of ESA. In contrast, violating the permit process of the FWPCA did not undermine the statute as the Secretary asserted because:

> [t]he integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA. As Congress explained, the

41. Barcelo v. Brown, 478 F. Supp. 646, 707 (D. P.R. 1979), *aff'd in part and vacated in part sub nom.* Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), *rev'd,* 456 U.S. 305 (1982).

42. *Id.* at 708.

43. Romero-Barcelo v. Brown, 643 F.2d 835, 861 (1st Cir. 1981), *rev'd,* 456 U.S. 305 (1982).

44. *Romero-Barcelo,* 456 U.S. at 320 (quoting *Hecht Co.,* 321 U.S. at 330).

45. *Id.* at 314.

46. *Id.* (citing 33 U.S.C. § 1319(c), (d) (1982)).

> objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."
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> This purpose is to be achieved by compliance with the Act, including compliance with the permit requirements. Here, however, the discharge of ordnance had not polluted the waters, and, although the District Court declined to enjoin the discharges, it neither ignored the statutory violation nor undercut the purpose and function of the permit system. The court ordered the Navy to apply for a permit. It temporarily, not permanently, allowed the Navy to continue its activities without a permit.[47]

Third, the Court found that the FWPCA's "statutory scheme contemplates equitable consideration,"[48] and "Congress envisioned, rather than curtailed, the exercise of discretion."[49] It based this finding on the existence of a "scheme of phased compliance,"[50] the nature of the permit process which allowed some discharge of pollutants, and the fact that the FWPCA did not require the EPA Administrator to enjoin immediately all discharges found to be in violation of the Act.[51] For these reasons, the Court concluded that the FWPCA and ESA were dissimilar. Consequently, it was appropriate for the district court to balance the equities and to conclude that the statutory violation did not warrant injunctive relief.

Hill and *Romero-Barcelo* provide guidance for the lower federal courts as they analyze the language, legislative history, and structure of a statute to determine whether the courts can exercise their traditional equitable discretion to grant or deny preliminary injunctions for statutory violations. The courts should forgo balancing the equities and grant injunctive relief if: (1) the statute forecloses the courts' ability to invoke their equitable discretion as to the choice of remedy or the circumstances for which injunctive relief is appropriate, and (2) failure to enjoin the unauthorized activity would undermine the purposes of the statute. The federal courts, however, should invoke their traditional equitable powers and balance the equities if: (1) the alleged conduct violates discretionary elements of the statute, or (2) the activity does not undercut the purposes of the statute but, for example, merely violates secondary procedures as in *Romero-Barcelo.*

The statutes involved in *Hill* and *Romero-Barcelo,* however, were substantive in nature and the procedures violated in *Romero-Barcelo* were secondary. Hence, the question remains whether nondiscretionary, procedural duties that constitute the essence of a statute affect the

47. *Id.* at 314-15 (citations and footnote omitted) (quoting 33 U.S.C. § 1251(a) (1982)).

48. *Id.* at 318.

49. *Id.* at 316 (citing S. REP. No. 414, 92d Cong., 2d Sess. 43, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3709).

50. *Id.* (interpreting 33 U.S.C. § 1311(b) (Supp. IV 1980) (amended 1981)).

51. *Id.* at 316-18.

courts' ability to balance the equities in determining whether to grant or deny a preliminary injunction for a substantial procedural violation. The remainder of this note will attempt to answer this question by analyzing *Amoco,* ANILCA, and the lower courts' struggle with this issue in preliminary-injunction actions involving section 102(2)(C) of NEPA.

III. *AMOCO PRODUCTION CO. V. VILLAGE OF GAMBELL*

Amoco is the product of two appellate decisions arising from the attempts of the Villages of Gambell and Stebbins to enjoin the Secretary of Interior's sale of oil and gas exploration leases located on federally-owned outer continental shelf lands in the Navarin Basin and Norton Sound off the western coast of Alaska.[52] In support of this action, the Villages assert, inter alia, that section 810 of ANILCA applies to the outer continental shelf outside of the territorial boundaries of Alaska, the Secretary failed to comply with the statute's procedural requirements protecting opportunities for subsistence uses, and, therefore, the sales should be enjoined.

The District Court for the District of Alaska, in a series of unreported decisions, refused to issue a preliminary injunction,[53] finding that ANILCA did not extend to the outer continental shelf outside of Alaska's territorial boundaries.[54] The Ninth Circuit Court of Appeals

52. Specifically, the villages initially sought to enjoin Lease Sale 57, which includes 429 tracts—2.4 million acres of land—located in the Norton Sound Basin, twenty-five miles off of the western coast of Alaska. *See* Village of Gambell v. Hodel, 774 F.2d 1414, 1417 (9th Cir. 1985) (*Gambell II*), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986). While the Ninth Circuit Court of Appeals was considering whether injunctive relief was appropriate, *see* Village of Gambell v. Clark, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*), the Secretary engaged in a sale of leases on Lease Sale 83, which includes approximately 37 million acres in the Navarin Basin. *Gambell II,* 774 F.2d at 1418. The Navarin Basin is in the Bering Sea, approximately 250 miles off the coast of Alaska. *Id.* The Village of Gambell filed a separate action to enjoin Lease Sale 83, which the district court consolidated with the injunctive action concerning Lease Sale 57 remanded to it by the court of appeals. *Id.*

53. On March 14, 1983, the district court rejected the villages' argument that ANILCA usurped its power to "consider traditional equitable principles in determining whether an injunction should be issued once a substantial violation by a federal official of a statute . . . has occurred," Village of Gambell v. Watt, 18 Env't Rep. Cas. (BNA) at 2167, and invoked traditional equitable principles to deny the issuance of preliminary injunctive relief. The court, however, believed that the villages had raised a serious question concerning whether ANILCA applied to the outer continental shelf outside of Alaska's territorial boundaries. Therefore, it concluded that the issue should be resolved prior to the issuance of the leases. *Id.* at 2168.

54. On April 4, 1983, the district court found that Congress intended ANILCA to apply only to lands and waters within the territorial boundaries of Alaska and that ANILCA, therefore, did not extend to the outer continental shelf lands. Village of

disagreed. It held that section 810 of ANILCA applies to the outer continental shelf and remanded the matter for determination of the proper remedy.[55]

On remand, the district court found that the Secretary violated ANILCA for two reasons. First, because "the Secretary did not have the mandate of ANILCA clearly in mind . . . , he could not have performed the lease sale evaluations in the manner Congress intended."[56] Second, subsequent to *Gambell I* and prior to the district court's decision, the Minerals Management Service prepared a section 810 significant restriction study for lease sale 57 in which it found, inter alia, that the "development and production 'may significantly restrict subsistence uses in certain areas' if oil is discovered."[57] Therefore, the Secretary had a duty to comply with the procedural requirements of section 810(a)(1)-(3). Nevertheless, the district court denied the request for a preliminary injunction. It found that the case presented unusual circumstances and thus held that it was appropriate to invoke the traditional test and balance the equities. Applying this approach, the court concluded that:

> (1) Movants have established a strong likelihood of success on the merits.
> (2) The balance of irreparable harm does *not* favor the movants.
> (3) The public interest favors continued oil exploration, for the reason that the national interest favors OCS [outer continental shelf] oil exploration and such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent.[58]

In *Gambell II,* the Ninth Circuit Court of Appeals reversed the district court's decision. First, it agreed that the villages would probably succeed on the merits of their claim that the Secretary violated section 810(a)(1)-(3) of ANILCA.[59] It based its reversal on the fact that the law of the Ninth Circuit required it, under the facts found, to grant a preliminary injunction. In the Ninth Circuit, "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action."[60] Thus, "[a]n injunction

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Gambell v. Watt, No. N83-003 CIV, slip op. at 1-2 (D. Alaska Apr. 4, 1983), *aff'd in part and rev'd in part,* 746 F.2d 572 (9th Cir. 1984).

55. *Gambell I,* 746 F.2d at 573.

56. Village of Gambell v. Hodel, No. A85-184 CIV, slip op. at 5 (D. Alaska May 23, 1985), *rev'd,* 774 F.2d 1414 (9th Cir. 1985), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986).

57. *Id.* at 8 (quoting ANILCA section 810 significant restriction study).

58. *Id.* at 10 (emphasis in original).

59. *Gambell II,* 774 F.2d 1414, 1421 (9th Cir. 1985), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986).

60. *Id.* at 1423 (quoting Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984)).

is the appropriate remedy for a substantive [sic] procedural violation of an environmental statute,"[61] unless there exist "rare or unusual circumstances."[62] Such circumstances, the court held, were not present in this case. In fact, the court stated that "the Secretary's lease sale plan poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact section 810(a) of [ANILCA]."[63] Consequently, the court held that "the district court erred in finding that this is the type of rare or unusual case that justifies the denial of a preliminary injunction in the face of its conclusion that there is a strong likelihood of success on the merits."[64] In addition, the court disagreed that the public interest favored continued oil exploration in the area. It explained that such a finding "violates the clearly expressed Congressional intent that lease sales *shall not* be conducted until the Secretary has evaluated the effect of the Oil Companies' activities on the subsistence uses and needs of Native Alaskans."[65] Together, these errors compelled reversal.[66]

In so holding, the appellate court rejected the Secretary's contention that *Romero-Barcelo* required it to affirm the district court's decision. Distinguishing ANILCA from the FWPCA, the court analogized ANILCA to ESA for the violation of which the Supreme Court required issuance of injunctive relief in *Hill.* The court explained:

> Unlike the FWPCA, the injunctive relief we grant is the only means of insuring compliance under section 810.
>
> . . . .
>
> It appears to us that in enacting section 810, Congress has chosen the protection of subsistence life over oil exploration. Thus, only the issuance of a preliminary injunction to compel compliance

61. *Id.* at 1422. The court cites Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), but in *Thomas* the court used the term "substantial" rather than "substantive." *Id.* at 764.

62. *Gambell II,* 774 F.2d at 1423 (citing *Thomas,* 753 F.2d at 764; Alpine Lakes Protection Soc'y v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir. 1975)). The petitioners for certiorari in *Amoco* erroneously characterize the Ninth Circuit's rule as a "per se" rule requiring the mechanical grant of injunctive relief. Brief for Petitioners at 42-46, Amoco Prod. Co. v. Village of Gambell, *cert. granted,* 106 S. Ct. 2274 (1986); *see also* Brief for the Federal Petitioners at 20-21, Amoco Prod. Co. v. Village of Gambell, *cert. granted,* 106 S. Ct. 2274 (1986). Instead, the rule recognizes that a rebuttable presumption for injunctive relief arises upon the showing of, or probable showing of, a substantial procedural violation of a statute of which the procedures are its essence. Hence, if the presumption is defeated, then either balancing the equities is appropriate or injunctive relief should be denied. *See infra* notes 136-51 and accompanying text.

63. *Gambell II,* 774 F.2d at 1424.

64. *Id.* at 1425.

65. *Id.* at 1426 (emphasis in original).

66. *Id.* at 1428.

with the requirements of section 810 can uphold Congressional intent. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."[67]

On June 2, 1986, the Supreme Court granted certiorari. One of the issues before the Court is: "[w]hether the Ninth Circuit's rule that a district Court must enter a preliminary injunction whenever it finds a likely violation of an environmental statute, unless the injunction itself would cause environmental harm, conflicts with [*Romero-Barcelo*] and decisions from other circuits that require balancing of the equities."[68] Oral arguments were heard on January 12, 1987, and a decision is pending. Although it is possible that the case will be decided on other grounds,[69] if the Court decides this issue, it will have to consider ANILCA and its legislative history in light of its earlier decisions.

IV. ANILCA RESTRICTS THE COURTS' EQUITABLE DISCRETION TO GRANT OR DENY A PRELIMINARY INJUNCTION

ANILCA Subchapter II — Subsistence Management and Use,[70] of which section 810 is a part, is a "procedural scheme,"[71] designed to "provide the opportunity for rural residents engaged in a subsistence way of life to do so."[72] Although the question of whether a statute

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67. *Id.* at 1426 n.2 (quoting *Hill,* 437 U.S. at 194).

68. Petition for Writ of Certiorari at (I), Amoco Prod. Co. v. Village of Gambell, *cert. granted,* 106 S. Ct. 2274 (1986) (Federal Petitioners).

69. *Amoco* presents the Court with three additional issues, which may enable it to decide the case on grounds other than the preliminary injunction issue. These include:

> (2) Whether Section 810 of [ANILCA], which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands "the title to which is in the United States" and which are in "Alaska."
>
> (3) Whether the court of appeals' ruling that neither OCS leasing nor exploration may proceed until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production, conflict with Secretary of Interior v. California, 464 U.S. 312 (1984).
>
> (4) Whether the court of appeals' decision applying ANILCA to the OCS should be given retroactive effect, thereby casting a cloud over more than 600 previously-issued OCS leases and $4.2 billion in bonus bids received by the Treasury for those leases.

Petition for Writ of Certiorari at (I), Amoco Prod. Co. v. Village of Gambell, *cert. granted,* 106 S. Ct. 2274 (1986) (Federal Petitioners).

70. 16 U.S.C. § 3120 (1982).

71. Kunaknana v. Clark, 742 F.2d 1145, 1151 (9th Cir. 1984).

72. 16 U.S.C. § 3112 (1982).

affects the courts' discretion in granting or denying a preliminary injunction is a familiar one for the Court, the Court has yet to confront this issue in the context of a statute that is procedural in nature. The Court's decisions in *Hill* and *Romero-Barcelo* reveal how the statute and its legislative history should be construed to determine its impact on the courts' equitable powers to grant or deny preliminary injunctions. A comparison of ANILCA to the FWPCA and ESA demonstrates that Congress intended ANILCA to restrict the courts' ability to invoke their discretion in granting or denying preliminary injunctive relief. Indeed, the federal government's tripartite structure commands this result.

A. ANILCA Compared with the FWPCA and ESA

1. *ANILCA Compared with the FWPCA.* An analysis of ANILCA and its legislative history reveals several factors that distinguish ANILCA from the FWPCA and, thus, *Amoco* from *Romero-Barcelo.* First, the importance of ANILCA's procedural structure vis-à-vis the Act's purpose is significant because, unlike the FWPCA in which the procedural requirements are secondary to achieving pollution free waters,[73] ANILCA's procedural scheme is its essence. The importance of this distinction is explained by the First Circuit Court of Appeals in *Massachusetts v. Watt*[74] — a decision interpreting NEPA. In affirming the district court's issuance of a preliminary injunction for a probable violation of section 102(2)(C), the appellate court reasoned that:

> NEPA is not designed to prevent all possible harm to the environment .... Rather, NEPA is designed to influence the decisionmaking process .... Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. NEPA in this sense differs from substantive environmental statutes, such as the [FWPCA].[75]

Second, the method that Congress chose to implement and to ensure compliance with ANILCA's procedural scheme accentuates the difference between ANILCA and the FWPCA. Unlike the FWPCA,

73. Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982).

74. 716 F.2d 946 (1st Cir. 1983).

75. *Id.* at 952 (citation omitted); *accord* Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974) ("[T]he harm with which the courts must be concerned in NEPA cases is not . . . harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates."); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972).

ANILCA is action demanding,[76] and compliance is mandatory rather than discretionary.[77]

Together, these distinctions are crucial. Congress enacted ANILCA to provide and to protect the rural Alaskans' opportunity to consider the effects of proposed federal action on their subsistence way of life. The Act is structured to force the federal agency involved to consider the views of the affected rural Alaskans prior to taking any action that would "significantly restrict subsistence uses."[78] This was the avowed purpose of ANILCA, unlike the FWPCA for which the procedures merely serve the expressed purpose of cleaning up America's waters. Hence, violations of ANILCA's procedures, contrary to procedural violations of the FWPCA, undermine Congress' expressed intent. Due to the fact that under ANILCA, unlike the FWPCA, no remedy other than a preliminary injunction against a substantial procedural violation[79] will uphold this purpose, the courts, absent unusual circumstances,[80] cannot exercise equitable discretion in deciding whether to grant such a remedy. Congress has clearly spoken and the courts must, because of the tripartite structure of our government, defer to and enforce Congress' mandate.

a. The importance of ANILCA's procedural scheme vis-à-vis its purpose. Subchapter II of ANILCA establishes a procedural structure governing decisions affecting subsistence uses. This scheme, inter alia, provides for the participation of rural residents in subsistence-related decisions. Three features of the Act and its legislative history demonstrate that Congress intended that the participation of rural residents would be essential to ANILCA's success, indeed so essential that the procedures should be considered its very purpose. First, Congress

76. ANILCA's procedural requirements are mandatory, requiring federal agencies to act in the manner prescribed by section 810 prior to approving any action that will significantly affect subsistence uses. *See infra* notes 95-131 and accompanying text. Hence, ANILCA's procedural scheme is similar to section 102(2)(C) of NEPA in that both prescribe nondiscretionary procedures and are, therefore, "action forcing." Andrus v. Sierra Club, 442 U.S. 347, 351 (1979), discussed *infra* at note 133; *accord* Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976), discussed *infra* at note 133.

77. *See infra* notes 94-111, 118-28 and accompanying text.

78. *See* 16 U.S.C. § 3120(a) (1982).

79. Procedural violations that are merely technical do not warrant injunctive relief. *See infra* notes 140, 157-63, 194 and accompanying text.

80. Unusual circumstances exist where a competing public interest warrants that the court balance the traditional equities. This exception is limited to situations where the issuance of injunctive relief will undermine the purposes of the Act in question. For example, the court may deny injunctive relief when such relief will restrict, rather than provide or protect, the opportunity for subsistence uses, or when an injunction would harm a countervailing public interest embodied in a competing Act or activity. For a complete discussion of unusual circumstances that warrant balancing, see *infra* notes 137-39, 164-79, 188-91, 200 and accompanying text.

drafted ANILCA to ensure the meaningful participation of rural Alaskans in subsistence-related decisions. Second, Congress did not intend to protect or preserve all subsistence uses; instead, it intended to protect the "*opportunity for* continued subsistence uses,"[81] rather than subsistence uses themselves. Third, Congress defined subsistence uses in subjective terms.

One of the purposes for ANILCA's enactment was to rectify the failure of the Secretary of the Interior and the State of Alaska adequately to protect subsistence uses as Congress had demanded in the Alaska Native Claims Settlement Act ("ANCSA").[82] Congress chose an administrative structure ensuring rural participation in subsistence-related decisions as the best means to address ANCSA's failure adequately to protect subsistence uses.[83] Congress, however, was not concerned merely with providing rural residents a chance to participate in subsistence-related decisions. Instead, it drafted the subsistence subchapter to ensure that such participation was meaningful. As Congress explained in its declaration of findings:

> the national interest in the . . . continuation of the opportunity for a subsistence way of life by residents of rural Alaska require[s] that an administrative structure be established for the purpose of enabling

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81. *See* 16 U.S.C. § 3111(4) (1982) (emphasis added); *see also infra* notes 89-91 and accompanying text.

82. 43 U.S.C. §§ 1601-1628 (1982).

83. As explained by the committees considering the bill, ANCILA represented "the culmination of Congressional action initiated by Congress by the Alaska Native Claims Settlement Act to protect and provide for continued subsistence uses by Alaska Natives and other rural residents." S. REP. NO. 413, 96th Cong., 2d Sess. 267-68, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5211-12; *accord* H.R. REP. NO. 97, 96th Cong., 1st Sess., pt. 1, at 278-79 (1979).

Congressman Udall, one of the principal authors and supporters of ANILCA, explained why the subsistence subchapter of ANILCA was necessary in light of the fact that Congress had attempted to protect subsistence uses in ANCSA:

> In 1971, the Congress, in the conference report on the Alaska Native Claims Settlement Act, instructed both the Secretary of the Interior and the State of Alaska: ". . . to take any action necessary to protect the subsistence needs of the (Alaska) Natives."
>
> That responsibility was accepted by the Secretary and the State in exchange for the exclusion from that act of a subsistence management title developed by the Senate.
>
> Both the State and the Secretary have been reluctant . . . to provide rural people with a meaningful opportunity to participate in the management and regulation of subsistence resources in their local area.
>
> [W]e promised [Alaska's rural Native people] that we would work to try to achieve legislation which would include a subsistence management process to insure meaningful participation by rural people in decisions of both the State and Federal governments which so effect [sic] their culture and their lives . . . .

125 CONG. REC. 9,904 (1979) (quoting H.R. CONF. REP. NO. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2247, 2250).

> rural residents who have personal knowledge of local conditions and requirements to have a *meaningful role* in the management of . . . subsistence uses on the public lands in Alaska.[84]

The importance of this provision is evident from the fact that the House criticized and rejected two bills that failed to include a commitment to meaningful participation.[85]

Congress considered the right of rural residents to participate meaningfully in decisions concerning the rate of acculturation an "important goal of correct Federal Policy."[86] It, therefore, included section 805 of ANILCA,[87] which establishes and defines the role of regional advisory councils. These councils, combined with the public hearings required by section 810, provide the foundation of the management structure through which Congress chose to ensure meaningful rural participation. The House and Senate committees explained in their reports that this section reflected their determination that:

> [T]he opportunity for rural residents of Alaska with personal knowledge of local conditions and requirements to participate effectively in the management and regulation of subsistence resources on

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84. 16 U.S.C. § 3111(5) (1982) (emphasis added).

85. Congressman Grudger criticized the Breaux-Dingell bill, one of the two bills rejected by the House, because:

> regional boards established pursuant to the Breaux-Dingell bill will be totally advisory in nature, a major compromise in the commitment of this body last year to provide rural people with a meaningful opportunity to participate in the decisionmaking process which is critical to the survival of their culture and subsistence way of life.

125 CONG. REC. 11,428 (1979).

The House adopted the Udall-Anderson substitute bill, *see* 125 CONG. REC. 11,458 (1979), which reflected a commitment to rural participation. It found that:

> (12) [T]he national interest in the . . . continuation of the opportunity for a subsistence way of life by rural residents of Alaska require[s] that an administrative structure be established which enables people who have personal knowledge of local conditions and requirements to have a meaningful role in the . . . management of subsistence uses on the public lands in Alaska.

125 CONG. REC. 11,089 (1979) (Udall-Anderson substitute bill).

86. The House Committee on Interior and Insular Affairs explained that:

> [T]he rate at which subsistence uses and "cultural ties with a subsistence way of life" are replaced with "aspects of the dominant non-Native culture" properly should be determined, as far as possible, by the subsistence-dependent Native and other peoples themselves, and that protection of their option in this regard is, and rightly should be, an important goal of correct Federal policy.

H.R. REP. NO. 1045, 95th Cong., 2d Sess., pt. 1, at 182 (1978). Subsequent House and Senate committee reports adopted this language. *See* H.R. REP. NO. 97, 96th Cong., 1st Sess., pt. 1, at 230 (1979); S. REP. NO. 1300, 95th Cong., 2d Sess. 195 (1978).

87. 16 U.S.C. § 3115 (1982).

> the public [lands] is important in order to assure . . . the ability of rural people engaged in a subsistence lifestyle to continue to do so.[88]

Congress, however, did not intend for ANILCA to preserve all subsistence uses. Instead, it drafted ANILCA "to protect and provide the *opportunity for* continued subsistence uses on the public lands by Native and non-Native rural residents."[89] Although the statute does not define the "opportunity for" qualification of subsistence uses, its meaning is reflected in ANILCA's purpose: "This act does not, however, attempt to perpetuate [subsistence] lifestyle[s]. . . . Rather, the act would merely attempt to allow the Native people to decide for themselves the rate at which acculturation will take place."[90] Representative Udall, one of ANILCA's principal authors, further explained

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88. S. REP. NO. 413, 96th Cong., 2d Sess. 270, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5214; H.R. REP. NO. 97, 96th Cong., 1st Sess., pt. 1, at 281 (1979). Furthermore, Congress feared that the "large urban population centers [might] dominate the regional council system and exercise control over regulation and subsistence resources in rural areas." S. REP. NO. 413, 96th Cong., 2d Sess. 270, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5124; H.R. REP. NO. 97, 96th Cong., 1st Sess., pt. 1, at 281 (1979). Therefore, to ensure further that rural participation would be "meaningful," Congress structured section 805 so that the boundaries of regions reflected and protected "regional differences in subsistence uses." *See* 16 U.S.C. § 3115(a)(1) (1982); *accord* S. REP. NO. 413, 96th Cong., 2d Sess. 270, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5124; H.R. REP. NO. 97, 96th Cong., 1st Sess., pt. 1, at 281 (1979).

89. 16 U.S.C. § 3111(4) (1982) (emphasis added). Congress emphasized ANILCA's focus on the "*opportunity for* subsistence uses" in its declaration of findings:

> The Congress finds and declares that—
>
> (1) the *continuation of the opportunity for subsistence uses* by rural residents of Alaska . . . on the public lands . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;
>
> . . . .
>
> (3) *continuation of the opportunity for subsistence uses* of resources on public and other lands in Alaska is threatened . . . ;
>
> (4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for Congress to . . . *protect and provide the opportunity for continued subsistence uses* on the public lands by Native and non-Native rural residents; and
>
> (5) the national interest in the . . . *continuation of the opportunity for a subsistence way of life* by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management . . . of subsistence uses on the public lands in Alaska.

16 U.S.C. § 3111 (1982) (emphasis added) (citation omitted).

Furthermore, in section 802, Congress declared that "the purpose of this subchapter is to provide the *opportunity for* rural residents engaged in a subsistence way of life to do so." 16 U.S.C. § 3112(1) (1982) (emphasis added).

90. H.R. REP. NO. 1045, 95th Cong., 2d Sess., pt. 2, at 76 (1978).

its scope: "[I]t is the intent of this legislation to . . . leave for Alaska Native people themselves, rather than to Federal and State resource managers, the choice as to the direction and pace, if any, of the evolution of the subsistence way of life and of Alaska Native culture."[91]

Finally, the manner in which Congress defined subsistence uses further supports the view that the procedural scheme is the statute's essence. Congress defines subsistence uses as "customary and traditional uses by rural Alaska residents of renewable resources."[92] Thus, it chose to define subsistence uses subjectively, or, in the words of the committees, "on a case-by-case basis to meet the needs of a particular management situation in a particular area."[93] Hence, to define the subsistence use opportunity to be protected requires rural participation; only rural residents can say what is traditional or customary.

b. Implementation of and compliance with ANILCA section 810. Unlike the FWPCA, ANILCA provides for neither phased compliance[94] nor a penalty scheme dependent on the Secretary's discretion and permitting noncompliance at a price.[95] Instead, section 810 of ANILCA, as reflected in its language and legislative history, is "action forcing,"[96] and compliance is mandatory. Section 810 provides in part that:

> (a) In determining whether to . . . lease . . . , the head of the Federal agency . . . shall evaluate the effect of such use . . . on subsistence uses and needs, the availability of other lands . . . and other alternatives . . . . No such . . . lease . . . of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—
>
> (1) gives notice to the . . . local committees and regional councils . . . ; [and]
>
> (2) gives notice of, and holds, a hearing in the vicinity of the area involved . . . .
>
> (b) If the Secretary is required to prepare an environmental impact statement . . . , he shall provide the notice and hearing and include the findings required by subsection (a) of this section as part of such environmental impact statement.
>
> . . . .

91. 126 CONG. REC. 29,279-80 (1980).

92. 16 U.S.C. § 3113 (1982).

93. S. REP. NO. 413, 96th Cong., 2d Sess. 269, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5213; H.R. REP. NO. 97, 96th Cong., 1st Sess., pt. 1, at 279-80 (1979).

94. Weinberger v. Romero-Barcelo, 456 U.S. 305, 316 (1982).

95. *Id.* at 314 (citing 33 U.S.C. § 1319(c), (d) (1982)).

96. Andrus v. Sierra Club, 442 U.S. 347, 351 (1979), discussed *infra* at note 135; *accord* Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976), discussed *infra* at note 133.

> (d) After compliance with the procedural requirements of this section . . . the head of the appropriate Federal agency may manage or dispose of public lands . . . .[97]

Congress' use of "shall"[98] and "may" in section 810 indicates that it intended the procedural requirements of ANILCA to be nondiscretionary.[99] Congress structured section 810 so that the Secretary "shall" first comply with the procedural scheme of ANILCA, and, having complied with the procedures, the Secretary "may" use his discretion "to manage or dispose of the lands." It contemplated that the Secretary would employ his discretionary powers in subsistence-related decisions[100] only after complying with the procedural scheme Congress emplaced to "protect and provide the opportunity for subsistence uses."[101]

Congress emphasized the importance of adhering to this strict procedure by including section 816,[102] which limits the Secretary's ability to circumvent ANILCA's procedural safeguards and close public lands to subsistence uses. Only in "emergency situation[s]" where "extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population . . . may" the Secretary act without complying with ANILCA's notice and public hearing requirements.[103] Furthermore, the Secretary's unilateral action is only valid for a maximum of sixty days, and the Secretary can extend this period only if, subsequent to notice and public

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97. 16 U.S.C. § 3120 (1982).

98. As explained by the Supreme Court in Escoe v. Zerbst, 295 U.S. 490, 493 (1935), "shall" is "the language of command." Although the Court did not find the inclusion of "shall" to be the end of the inquiry, it did hold that the presence of "shall" is "significant," and that it is, together with the "ends and the aims" of the statute, controlling. *Id.* at 493-94. Congress intended through section 810 of ANILCA to provide the rural Alaskans an opportunity to participate in decisions affecting subsistence uses. Absent section 810, the agencies could have listened to the rural Alaskans had they so chosen, but they had not, as illustrated by the Secretary's and the State's failure under ANCSA. This neglect was a major impetus for the enactment of the subchapter containing section 810. *See supra* notes 82-83 and accompanying text. Thus, it is clear that Congress intended to leave the agencies no discretion when it used "shall" in section 810. It intended to command the agencies to comply with the procedures of section 810 prior to engaging in endeavors affecting subsistence uses on public lands in Alaska.

99. *See, e.g.,* Anderson v. Yungkau, 329 U.S. 482, 485 (1947) (explaining that "when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory").

100. Congress, however, further limited the Secretary's discretion by including an explicit preference for subsistence uses. *See* 16 U.S.C. §§ 3112(2), 3114 (1982); *see also infra* notes 116-18 and accompanying text.

101. 16 U.S.C. § 3111(4) (1982).

102. *Id.* at § 3126(b).

103. *Id.*

hearing, he finds continued closure necessary.[104] Section 816(b) is similar to the exemption section of ESA (section 10(b)-(d))[105] and dissimilar to the section of the FWPCA that permits noncompliance.[106] Therefore, as it did in *Hill*,[107] the Court should apply the maxim *expressio unius est exclusio alterius* to section 816(b) of ANILCA. This construction further supports the conclusion that the procedures included in section 810 are nondiscretionary, because application of this maxim would preclude the courts from exercising their discretion to grant or deny injunctive relief for a procedural violation that is not exempt under section 816(b).

Although ANILCA does not include a remedy or penalty for the Secretary's failure to comply with its procedural requirements,[108] it is

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104. *Id.*

105. *Id.* at § 1539 (1976) (amended 1978, 1979, and 1982), discussed *infra* note 119.

106. Section 1323(a) of title 33 provides, inter alia, that:

> The President may exempt any effluent source of any . . . agency . . . from compliance . . . if he determines it to be in the paramount interest of the United States to do so. . . . Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions . . . granted . . . with his reasons for granting such exemption.

33 U.S.C. § 1323(a) (1982). This exemption clause differs from section 816(b) of ANILCA. Unlike section 816(b) of ANILCA, section 1323(a) of title 33 does not require the President to publish reasons for granting an exemption in the Federal Register or require public notice and participation in the exemption process. Furthermore, exemptions can be routinely renewed under section 1323(a). The Court in *Romero-Barcelo* narrowly construed this section. In so holding, it rejected the court of appeals' determination that "this provision indicate[d] congressional intent to limit the court's discretion." Weinberger v. Romero-Barcelo, 456 U.S. 305, 318 (1982). Instead, because "[the Court] read the FWPCA as permitting the exercise of a court's equitable discretion . . . to order relief that will achieve *compliance* with the Act," *id.* (emphasis in original), it concluded that the FWPCA's "exemption serves a different and complimentary purpose, that of permitting *noncompliance* by federal agencies in extraordinary circumstances." *Id.* (emphasis in original).

Because of its similarity in structure and operation to section 10 of ESA, *see infra* note 119, and dissimilarity to section 1323(a) of title 33, section 816(b) of ANILCA should be construed as exempting compliance rather than permitting noncompliance in rare or emergency circumstances. Although this distinction is subtle, the Court considers it important. As *Hill* and *Romero-Barcelo* demonstrate, a section exempting compliance precludes the use of discretion, *see infra* note 119, whereas one permitting noncompliance allows exercise of discretion.

107. 437 U.S. 153, 188 (1978), discussed *infra* note 119.

108. Section 807 of ANILCA provides the only judicial relief Congress explicitly included in ANILCA. *See* 16 U.S.C. § 3117 (1982). Section 807 applies solely to violations of section 804 of ANILCA, *id.* at § 3114 (1982) (requiring a preference be given to "nonwasteful subsistence uses" over other consumptive uses on public lands), and state law enacted pursuant to section 805(d) of ANILCA, *id.* at § 3115(d) (1982) (permitting the state to enact and implement laws consistent with 16 U.S.C. §§ 3113-

clear from the nature of the procedures that Congress did not intend for compliance to be a matter of the Secretary's discretion.[109] Representative Udall further supports this conclusion in his statement:

> [R]ural residents engaged in subsistence uses . . . are entitled to have the Secretary take appropriate action if the State fails to do so, and, consequently, will be entitled to mandamus such action from the appropriate Secretary if he should fail to fulfill his duty to manage the public lands and the waters of Alaska in a manner consistent with the management standards established by the Congress in this legislation.[110]

In sum, it is clear that the procedural scheme of ANILCA, which provides the opportunity for continued subsistence uses, unlike the permit process of the FWPCA, is the heart of the statute. The primary purpose of ANILCA is to provide rural residents who are pursuing a subsistence lifestyle with the opportunity to continue to do so. Congress sought to do this by providing such persons the opportunity to be heard by those proposing to engage in activity that will "significantly restrict subsistence uses."[111] Furthermore, ANILCA's implementation and compliance provisions protect this opportunity of rural Alaskans to participate. These provisions ensure that neither the federal government nor the state government unilaterally restrict subsistence uses. Unlike the permit process of the FWPCA, compliance with and implementation of ANILCA's procedures that protect the opportunity for subsistence uses are mandatory and immediate. Together, under the rules formulated by *Hill* and *Romero-Barcelo,*[112] these distinctions compel a result different from that reached in *Romero-Barcelo.* Under ANILCA, unlike under the FWPCA, a court, absent unusual circumstances, should not exercise its equitable discretion to grant or deny a preliminary injunction as relief for a substantial procedural violation of ANILCA.

2. *ANILCA Compared with ESA.* ANILCA and ESA share several characteristics that the Court in *Hill* considered crucial[113] in deciding that ESA severely limited the courts' equitable discretion to grant or deny injunctive relief for a violation of that statute. First,

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3115). When the state and Secretary are joined as defendants or when the state is the sole defendant, section 807 grants the courts discretion to enter preliminary injunctive relief. Furthermore, in addition to preliminary injunctive relief, in an action against a state, courts may order the state to draft and submit regulations that comply with section 804 of ANILCA.

109. *See supra* notes 82-106 and accompanying text.

110. 126 CONG. REC. 29,280 (1980).

111. 16 U.S.C. § 3120(a) (1982).

112. *See supra* notes 33-51 and accompanying text.

113. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180-88 (1978).

both statutes are based on a preference that Congress considered worthy of legislative protection. Second, in protecting this preference, Congress drafted ESA and ANILCA so that each requires agencies to comply with the nondiscretionary provisions. Together, these two characteristics — a stated congressional preference and a mandate to the agencies — necessitate that the courts' ability to invoke their traditional equitable discretion be severely restricted. To permit the courts to balance the underlying equities would be to acknowledge their authority to thwart Congress' stated preference and to usurp the agencies' delegated nondiscretionary functions. The separation of powers doctrine forbids such a result.

a. ANILCA's stated preference for subsistence uses. Both ANILCA and ESA contain preferences. ESA expresses a preference for the protection of endangered species over other activities that might affect such species.[114] In deciding to uphold the grant of injunctive relief, the *Hill* Court reasoned that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . . Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."[115]

ANILCA states a preference for subsistence uses over other land and resource uses.[116] Although not explicitly addressing the preference of subsistence uses vis-à-vis nonconsumptive uses of public lands,[117] Congress drafted ANILCA so that any federal agency, prior to taking planned action, must consider the effects of such action on

114. *Id.* at 185 (construing section 7 of ESA, 16 U.S.C. § 1536 (1976) (amended 1978, 1979, and 1982), and its legislative history).

115. *Id.* at 194; *see also infra* notes 126-28 and accompanying text.

116. Sections 802(2) and 804 of ANILCA explicitly provide for preferences favoring subsistence uses over other "consumptive uses" on the public lands. Section 802(2) states that "nonwasteful subsistence uses . . . shall be the priority consumptive uses of all such resources on the public lands of Alaska" and "shall be given preference on the public lands over other consumptive uses." 16 U.S.C. § 3112(2) (1982). Section 804 provides that "[e]xcept as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." *Id.* at § 3114. Congress explained:

> [T]his section envisions that governmental action affecting subsistence resources and uses shall be undertaken in a manner which adequately provides for the preference on an ongoing basis and not only when critical allocation decisions may be necessary because a particular subsistence resource may be threatened with depletion . . . .

S. REP. No. 413, 96th Cong., 2d Sess. 269, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5070, 5213.

117. *See supra* note 116.

subsistence uses. Congress made it clear that the agencies were to accord a high priority to subsistence uses in deciding whether to permit competing consumptive and nonconsumptive uses.[118]

b. ANILCA and ESA are both action demanding. Both ANILCA and ESA contain provisions commanding the agencies to act in a prescribed manner, thereby ensuring that agencies observe the preferences embodied in the statutes.[119] As the Court explained in *Hill:*

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in [section] 7 of [ESA]. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the

118. 16 U.S.C. § 3111(4) (1982).

119. Both statutes provide for limited exemptions. Section 816(b) of ANILCA exempts agencies from having to comply with ANILCA's procedural requirements only in circumstances where "emergency situation[s]" warrant closure of public lands to subsistence uses. 16 U.S.C. § 3126(b) (1982), discussed *supra* notes 102-07 and accompanying text. Furthermore, the Secretary must "publish the reasons justifying the closure in the Federal Register," and the exemption "shall not extend for a period exceeding sixty days, and may not be subsequently extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended." *Id.*

Section 816(b) is similar to section 10 of ESA, 16 U.S.C. § 1539 (1976). First, the exemptions permitted under both Acts are narrow. Section 10(b) of ESA limits exceptions under ESA to "hardship exemptions," which are defined as those situations where a person may suffer "undue economic hardship" because the person entered a contract affecting a fish, wildlife, or plant species that the government subsequently listed as an endangered species. *Id.* Second, each Act limits the duration of exemptions granted. Under ESA, an exemption may extend only for one year. *Id.* Third, notice, publication, and public participation requirements are common to both Acts. Section 10(c) of ESA requires the Secretary to:

> publish notice in the Federal Register of each application for an exemption . . . . Each notice shall invite submission from interested parties, within thirty days after the date of the notice, written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published . . . in the Federal Register within ten days following the issuance of the exemption. . . .

Id. In construing the "hardship exemptions" to be an exclusive list of exemptions from having to comply with ESA, the Court applied the maxim *"expressio unius est exclusio alterius." Hill,* 437 U.S. at 188. The Court therefore concluded that, because the Tellico Dam did not fall within one of the exemption categories, neither the Tennessee Valley Authority ("TVA") nor the Court could permit further construction on the project. Because of the similarities between section 10 of ESA and section 810(b) of ANILCA, the maxim *expressio unius est exclusio alterius* further supports the conclusion that ANILCA severely limits the courts' discretion to grant or deny injunctive relief subsequent to a failure to comply with ANILCA unless the situation is provided for in section 816(b).

> destruction or modification of habitat of such species . . . ." This language admits of no exception.[120]

Hence, the Court in granting injunctive relief concluded that not only did Congress designate a preference for endangered species, but also it commanded the agency to uphold the balance struck in their favor. The courts' role is therefore limited to enforcing the congressional mandate. For the courts to act in any other manner, such as invoking their equitable discretion, would involve ignoring the tripartite nature of our government.[121]

ANILCA also requires the agency to make decisions in a prescribed manner[122] and to observe a preference for a specific result, although the nature of its requirements are procedural rather than substantive.[123] The statute and its legislative history demonstrate that no agency action significantly affecting subsistence uses is to proceed until the Secretary complies with ANILCA's procedures.[124] The only difference between this mandate and that of ESA is that in the latter Congress struck the substantive balance, whereas with ANILCA, Congress did not. It set forth the procedures necessary to implement broad policy goals, thereby permitting the agency to strike the balance between subsistence uses and other uses on public lands.[125] Compliance with these procedures, however, is not discretionary. To the contrary, Congress unequivocally declared the procedure that the agency must follow and the preference for subsistence uses that it must consider. Neither the agency nor the court can ignore Congress' procedural mandate so long as it is constitutional.[126] A court cannot proceed to balance the equities because to do so would require it to "interject itself within the area of discretion of the executive as to the

120. *Hill,* 437 U.S. at 173 (quoting 16 U.S.C. § 1536 (1976)) (emphasis in original).

121. *Id.* at 194-95; *see also supra* notes 24-26 and accompanying text; *infra* notes 126-28 and accompanying text.

122. *See supra* notes 96-104 and accompanying text.

123. *See supra* notes 73-93 and accompanying text.

124. *See supra* notes 94-110 and accompanying text.

125. *See* 16 U.S.C. § 3120 (1982), discussed *supra* notes 97-101 and accompanying text.

126. *See, e.g.,* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984) (In reviewing an agency's construction of a statute, a court must first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *see also* Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2867 (1986) (citing *Chevron,* 467 U.S. 837); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985) ("if Congress has clearly expressed an intent contrary to that of the Agency, [the court's] duty is to enforce the will of Congress") (citing *Chevron,* 467 U.S. 837); Plater, *supra* note 1, at 583-92.

choice of the action to be taken."[127] If a court were to balance the equities, it would usurp the agencies' role under ANILCA, and thereby frustrate the congressional mandate. This would, as one court has explained, "render impotent the procedural requirements"[128] of the statute, and Congress cannot be presumed to enact purposeless legislation.[129] Hence, Congress' mandate in ANILCA is no less compelling than that in ESA.

Although ANILCA and ESA are similar in areas that the Court considered important in *Hill,* ANILCA is procedural whereas ESA is substantive. This distinction, however, should not change the result suggested by the above mentioned similarities. In *Hill,* the majority emphasized ESA's substantive nature to overcome Justice Powell's dissent in which he relied on decisions under NEPA to assert that ESA should not be applied retroactively. The majority reasoned that "it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to *weigh* the benefits of the project versus the detrimental effects on the environment."[130] Thus, it can be inferred from this language that, at least in the early stages of a project, the failure to follow NEPA procedures, or those of a similar statute such as ANILCA, should be considered similar to a violation of ESA and should therefore severely restrict the courts' equitable discretion to grant or deny injunctive relief.[131]

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127. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (quoting Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)); *accord* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 555, 558 (1978).

128. Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972), discussed *infra* notes 209-11 and accompanying text.

129. *See, e.g.,* United States v. Powers, 307 U.S. 214, 217 (1939) ("There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconveniences.") (quoting Bird v. United States, 187 U.S. 118, 124 (1902)); *cf.* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (where statutory language is clear, the courts have "historically assumed that Congress intended what it enacted").

130. *Hill,* 437 U.S. at 188 n.34 (emphasis in original).

131. The Court's decisions concerning NEPA further support this inference. In *Kleppe,* in rejecting the court of appeals' theory that the "contemplation of regional action would permit a court to require preproposal preparation of an impact statement," 427 U.S. at 406-07, the Court explained:

> The procedural duty imposed upon agencies by [NEPA section 102(2)(C)] is quite precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.* Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would

Based on the above analysis, it is evident that ANILCA, unlike the FWPCA and similar to ESA, should be construed to restrict severely the courts' ability to invoke their equitable discretion to grant or deny preliminary injunctions. This, however, only takes the analysis halfway. Unfortunately, *Hill* does not provide guidance as to how the lower federal courts should apply their remaining equitable powers. Hence, the question remains as to what extent the courts' discretion is limited and the traditional equitable test is rejected or modified. Through an analysis of the lower federal courts' struggle with this dilemma in the context of preliminary-injunction litigation under section 102(2)(C) of NEPA, the final section of this note will offer a solution.

V. PRACTICAL EFFECT ON THE COURTS' DISCRETION

The lower federal courts, in their decisions involving violations of section 102(2)(C) of NEPA,[132] have struggled with the impact of a

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invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation.

Id. at 406 (emphasis in original). Although the Court was not addressing the issue of whether it is appropriate for a court to balance the equities in deciding whether to grant or deny injunctive relief, that question is analogous to the issue in *Kleppe*. Both inquiries require the court to determine the scope and nature of the project and its potential environmental impacts, to balance the various interests involved, and to substitute its judgment for that of the agency if the court determines that a preproposal is required or that an injunction should be granted. If a court, after balancing the equities under the traditional four-factor test, determines that an injunction is warranted, it has "substituted its judgment for that of the agency as to the environmental consequences of its actions"—an undertaking the *Kleppe* Court considered impermissible in light of the nature of NEPA. *Id.* at 410 n.21, *quoted in* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 555 (1978).

132. NEPA section 102(2)(C) provides:

> The Congress authorizes and directs that, to the fullest extent possible . . .
> (2) all agencies of the Federal Government shall— . . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and comments and views of the

procedural statute on their discretion to grant or deny injunctive relief.[133] The decisions are far from uniform. In fact, as Professor Rodgers observes, "[p]recedents for just about every point of view can be invoked by courts fashioning equitable relief to correct NEPA violations."[134] Nevertheless, the decisions are useful because, viewed properly, they suggest that when confronted with an alleged violation of a procedural statute, such as section 810 of ANILCA or section 102(2)(C) of NEPA, the federal courts in determining whether to grant or deny a preliminary injunction should employ the following three-factor test. First, probable success on the merits should be established by demonstrating the probable substantial violation of the statute's nondiscretionary procedures — procedures that are not merely secondary, but are the essence of the statute. Second, irreparable harm should not depend on a showing that the plaintiff is actually harmed (for example, that subsistence uses (ANILCA) or the environment (NEPA) will be irreparably harmed); instead, irreparable harm should lie in the procedural harm, that is, in the failure to comply with the rural participation requirements of section 810 of ANILCA or failure to prepare an adequate EIS under section 102(2)(C) of NEPA. Third, public interest should not be left to the determination of the court, but should be regarded as defined by the statute and therefore embodied in its procedural requirements. Hence, upon a showing of a

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> appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

42 U.S.C. § 4332(2)(C) (1982).

133. These decisions, discussed *infra* notes 135-224 and accompanying text, are probative because NEPA is similar to ANILCA in that it imposes on the agencies nondiscretionary, procedural duties that are the essence of the statute. As the Court explained in Kleppe v. Sierra Club, 427 U.S. 390, 409-10 (1976), "[s]ection 102(2)(C) is one of the 'action forcing' provisions intended as a directive to 'all agencies to assure consideration of the environmental impact of their actions in decisionmaking.' " *Id.* at 409 (quoting 115 CONG. REC. 40,416 (1969) (Senator Jackson's remarks concerning S.1075 as passed and H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess., *reprinted in* 1969 U.S. CODE CONG. & ADMIN. NEWS 2767)). In Andrus v. Sierra Club, the Court further elaborated: "[t]he thrust of [section] 102(2)(C) is . . . that environmental concerns be integrated into the very process of agency decision-making. . . . If environmental concerns are not interwoven into the fabric of agency planning, the 'action forcing' characteristics of [section] 102(2)(C) would be lost." 442 U.S. 347, 350-51 (1979); *accord* Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 142-43 (1981); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1977) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural"); Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 319 (1975).

134. W. RODGERS, ENVIRONMENTAL LAW 798 (1977).

probable violation of a procedural statute, a rebuttable presumption of injunctive relief should arise. This presumption may be defeated, and balancing of the traditional equities thereby made appropriate, by showing that unusual circumstances exist. Unusual circumstances are present when there is a strong competing public interest that would be harmed by the issuance of a preliminary injunction. Furthermore, the presumption may be defeated and preliminary injunctive relief thereby denied if the violation is technical rather than substantial, or the issuance of injunctive relief is unnecessary to ensure procedural compliance.

As will be demonstrated, the majority of the circuits, considering those decisions that are based on a review of the language, history, and purpose of the statute involved as *Romero-Barcelo* requires, recognize the existence of a rebuttable presumption of injunctive relief for a substantial procedural violation of NEPA section 102(2)(C).[135] This presumption is founded on the understanding that the irreparable harm associated with a substantial procedural violation of section 102(2)(C)

135. Regarding the relevant decisions of the various circuits, see *infra* notes 136-224 and accompanying text.

A number of circuits, however, appear to embrace the position that NEPA does not alter the courts' ability to invoke the traditional equitable test in determining whether to grant or deny preliminary injunctive relief. The Fifth Circuit Court of Appeals in Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974), concluded that "NEPA, though relevant to the merits of the present case, has not altered the traditional tests for a preliminary injunction." *Id.* at 578. *But see* Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971) (court granted injunction without balancing the equities), *cert. denied,* 406 U.S. 933 (1972). Furthermore, in Environmental Defense Fund v. Marsh, 651 F.2d 983, 1005-06 (5th Cir. 1981), the court acknowledged that an injunction is often appropriate and that the remedy should further the objectives of the statute. Relying on Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978), discussed *infra* notes 170-79 and accompanying text, *vacated in part on other grounds sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978), it explained that "[t]he court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction." *Marsh,* 651 F.2d at 1006. Hence, this case can be interpreted to invoke a rule, which acknowledges a presumption of injunctive relief, similar to that applied by the D.C. Circuit in *Andrus.*

The Tenth and Eleventh Circuits also balance the equities when confronted with a violation or probable violation of NEPA section 102(2)(C). *See* National Wildlife Fed'n v. Marsh, 721 F.2d 767, 770, 786 (11th Cir. 1983); Manatee County v. Gorsuch, 554 F. Supp. 778, 794-96 (M.D. Fla. 1982); Lee v. Resor, 348 F. Supp. 389 (M.D. Fla. 1972); National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan.) (court issued injunctive relief after invoking the traditional balancing test), *aff'd,* 455 F.2d 650 (10th Cir. 1971), *cert. denied,* 416 U.S. 993 (1974).

Finally, the Eighth Circuit also balances equities in deciding whether to grant injunctive relief for a violation or probable violation of NEPA section 102(2)(C). *See, e.g.,* Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1323 (8th Cir. 1974) (affirming district court's decision to issue injunctive relief after balancing the

is the failure to comply with the decisionmaking process mandated, rather than the underlying harm or potential harm to the environment.

A. Ninth Circuit

In deciding whether to grant or deny a preliminary injunction for a procedural violation of a statute, the Ninth Circuit invokes the following rule: upon a showing of a probable "substantial procedural violation,"[136] irreparable harm is presumed. Absent a showing of "unusual circumstances," which have been held to include ongoing, long-term contracts statutorily-mandated,[137] and situations where injunctive relief would endanger the environment,[138] injunctive relief is

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substantive equities). The court, however, in an earlier decision, Environmental Defense Fund, Inc. v. Froehike, 477 F.2d 1033 (8th Cir. 1973), recognized that a NEPA violation "may constitute a sufficient demonstration of irreparable harm to entitle a plaintiff to blanket injunctive relief." *Id.* at 1037. Nevertheless, the court affirmed the district court's decision to deny issuing a blanket injunction because, after balancing the substantive equities, the district court concluded that only limited injunctive relief was appropriate. *Id.* This case can be classified as one involving "unusual circumstances," therefore warranting balancing. It involved both long-term contracts and a project for which significant resources had been committed prior to the passage of NEPA and initiation of the suit. The project found to violate NEPA was authorized 15 years prior to NEPA's enactment, and $75 million had been spent prior to the filing of the action. *Id.* at 1035.

136. Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985), *cited in* Village of Gambell v. Hodel, 774 F.2d 1414, 1422 (9th Cir. 1985) (*Gambell II*), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986).

137. *See* Forelaws on Board v. Johnson, 743 F.2d 677, 685-86 (9th Cir. 1985) ("ongoing 20-year contracts, most of which [were] in the third year of their term," and which were entered into pursuant to a statutory mandate, which reflected an urgency to prevent customer struggle over a finite power supply, constituted an "unusual case"), *cert. denied,* 106 S. Ct. 3293 (1986).

138. The Ninth Circuit has invoked this "unusual circumstances" category on two occasions. First, in Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975), the court found that enjoining the removal of insect-infested trees for the failure of the Forest Service to prepare an adequate EIS prior to granting a timber easement would endanger the surrounding trees and the adjacent national forest lands. The court therefore found that:

> the unusual circumstances of this case call for an individual weighing of the equities according to the traditional three-factor test: (1) Are the moving parties likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of the injunctions? and (3) Does the public interest support granting the injunction?

Id. at 1090. The court, after balancing the equities, denied injunctive relief.

Second, in American Motorcyclist Association v. Watt, 714 F.2d 962 (9th Cir. 1983), the court, despite assuming the existence of a probable NEPA violation, affirmed the district court's refusal to enjoin the implementation of the Bureau of Land Management's Management Plan. The court found that "enjoining the plan would

issued.[139] If unusual circumstances exist, the court decides whether injunctive relief should be issued pursuant to the traditional equitable balancing test. The court denies injunctive relief when the procedural violation is merely technical.[140]

The Ninth Circuit Court of Appeals first confronted the issue of whether and to what extent procedural statutes affect the courts' power to invoke the traditional test for issuance of preliminary injunctions for a probable violation thereof in *Lathan v. Volpe.*[141] In that case, the district court had denied issuance of the preliminary injunction requested as relief for a probable violation of section 102(2)(C) of NEPA, because the plaintiffs had failed to demonstrate that such relief was warranted under the traditional test.[142] The appellate court disagreed with this result. Relying on *United States v. City and County of San Francisco,*[143] it concluded that a failure to comply with NEPA's procedural requirements presented a rare case in which immediate preliminary relief was required. Otherwise, any relief to which the movants might have been entitled would likely have been worthless to them when ultimately obtained.[144] Hence, the court issued a preliminary injunction without balancing the equities. The *Lathan* court

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leave fragile desert resources vulnerable to permanent damage from increased recreational use, a harm which Congress expressly intended to prevent." *Id.* at 966. It therefore determined that "[t]his danger of harm is the kind of unusual circumstance which . . . calls for the 'individualized weighing' of the equities." *Id.* Upon balancing the equities the court found that the public interest warranted denial of a preliminary injunction. *Id.* at 967. In support of its decision, the court clarified the Ninth Circuit's unusual circumstances category exception. It explained that:

> There are . . . cases where public concerns other than failure to comply with NEPA must be weighed in determining whether to grant an injunction. . . .
>
> *Alpine* . . . authorizes the court not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government action allegedly in violation of NEPA might actually jeopardize natural resources.

Id. at 966. In other words, courts will find "unusual circumstances" to involve strong competing public interests that would be harmed if injunctive relief was granted.

139. *See, e.g.,* Village of Gambell v. Hodel, 774 F.2d 1414, 1422-23 (9th Cir. 1985) (*Gambell II*), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986); Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984); *American Motorcyclist Ass'n,* 714 F.2d at 965-66.

140. *See* Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980). In *Gribble,* the court found that the Corps of Engineers failed to obtain written comments from the U.S. Geological Survey ("USGS") and, therefore, violated NEPA. *Id.* at 1022. Nevertheless, the court denied injunctive relief because prior to publishing the supplement to the final EIS, the Corps made a good-faith effort to secure comments, and subsequent to the district court's decision, the Corps corrected the deficiency vis-à-vis the USGS. *Id.* at 1022, 1025.

141. 455 F.2d 1111 (9th Cir. 1971).

142. *Id.* at 1116.

143. 310 U.S. 16 (1940), discussed *supra* note 28.

144. *Lathan,* 455 F.2d at 1116-17.

failed to enunciate a test that courts could employ when confronted with a violation of section 102(2)(C) of NEPA or similar provisions in other acts. The courts, however, quickly adopted as the operative rule the presumption favoring issuance of a preliminary injunction upon the showing of a probable violation except when unusual circumstances exist.[145] The rationale underlying this rule, however, was not explicitly articulated until *California v. Bergland,*[146] wherein the district court stated:

> The rationale for this NEPA injunction rule is clear. NEPA represents a declared Congressional policy requiring assessment of environmental concerns. As such, Congress has weighed the equities and determined that failure to examine environmental issues represents irreparable injury. If having established a violation of NEPA, plaintiffs are not allowed to enjoin further activities until the agency complies with NEPA, then NEPA would be an "exercise in futility."[147]

In *Thomas v. Peterson,*[148] the Ninth Circuit extended its rule to cases arising under one of the procedural provisions of ESA.[149] Upon determining that the procedural requirements of ESA resemble those of NEPA, the court found that "a failure to prepare a biological assessment is comparable to a failure to prepare an [EIS]."[150] In language similar to that of the *Bergland* court, the court stated that "if a project [were] allowed to proceed without substantial compliance with those procedural requirements, there could be no assurance that a violation of the ESA's substantive provisions [would] not result. The latter, of course, is impermissible."[151]

B. District of Columbia Circuit

The District of Columbia Circuit recognizes that "[i]n most cases, . . . it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with the public interest, be enjoined until such compliance is forthcoming."[152] Thus,

145. *See* Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975); Alpine Lakes Protection Soc'y v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975).

146. 483 F. Supp. 465 (E.D. Cal. 1980), *aff'd in part and rev'd in part, both on other grounds,* 690 F.2d 753 (9th Cir. 1982).

147. *Id.* at 498-99 (quoting Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1323 (8th Cir. 1974)) (citations omitted).

148. 753 F.2d 754 (9th Cir. 1985).

149. 16 U.S.C. § 1536(c)(1) (1982).

150. *Thomas,* 753 F.2d at 764.

151. *Id.*

152. Alaska v. Andrus, 580 F.2d 465, 485 (D.C. Cir. 1978) (quoting Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 513 (D.C. Cir. 1974)), *vacated in part on other grounds sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

"there is, in cases of NEPA noncompliance, a 'presumption' in favor of injunctive relief."[153] But, the circuit further acknowledges that:

> [s]uch relief does not follow automatically from every finding of a violation of NEPA. Rather, where courts have enjoined ongoing projects, they have done so primarily to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA. . . . What is called for, in each case, is a "particularized analysis" of the violations that have occurred, of the possibilities for relief, and of any countervailing considerations of public interest.[154]

Although this language suggests that the D.C. Circuit employs a slightly different exception to the presumption of a preliminary injunction than that applied by the Ninth Circuit,[155] the difference is merely semantic. The two circuits have applied their tests similarly. The D.C. Circuit recognizes three general exceptions to the presumption of injunctive relief for a procedural violation. First, as does the Ninth Circuit, the D.C. Circuit recognizes an exception if the violation is merely technical. Second, both circuits deny injunctive relief where strong countervailing public interests are present. Finally, the D.C. Circuit acknowledges an exception where injunctive relief is unnecessary to ensure procedural compliance. This exception, although not presently acknowledged by the Ninth Circuit, does not undermine the rule, and it is easily explained—the Ninth Circuit has not had the opportunity to decide such a case.[156]

First, several decisions by the D.C. Circuit are similar to *Warm Springs Dam Task Force v. Gribble*[157] in that they involved violations that were merely technical; therefore, injunctive relief was not warranted. For example, in *Realty Income Trust v. Eckerd,*[158] failure to file a timely EIS with Congress constituted the NEPA violation. The

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153. *Id.* (quoting Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977) ("Ordinarily, when an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted.").

154. *Id.*

155. The Ninth Circuit Court of Appeals noted this difference:

> [T]he D.C. Circuit apparently does not follow the Ninth Circuit rule that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances. . . . Instead, the D.C. Circuit followed [in *Andrus*] a rule which restricts the availability of an injunction against an ongoing project to cases where it is necessary primarily "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA."

Gambell II, 774 F.2d 1414, 1423-24 (9th Cir. 1985) (quoting *Andrus,* 580 F.2d at 485) (citations omitted), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986).

156. *See infra* notes 170-79 and accompanying text.

157. 621 F.2d 1017 (9th Cir. 1980), discussed *supra* note 140.

158. 564 F.2d 447 (D.C. Cir. 1977).

final EIS, however, was filed prior to beginning construction. Hence, although the congressional committees approved the project prior to the completion of the EIS, they had adequate opportunity to react subsequent to the filing of the EIS and prior to the initiation of construction.[159] In *Concerned About Trident v. Rumsfeld,*[160] the D.C. Circuit Court of Appeals refused to grant a preliminary injunction where the Navy's violation of NEPA was only partial and it had made a good-faith effort to comply.[161] Finally, in *Jones v. District of Columbia Redevelopment Land Agency,*[162] the court denied injunctive relief because the violation was merely one of the "statements' timing;" the "defendants' remedial actions achieved the substance of NEPA's requirements and purposes."[163]

Second, both circuits deny preliminary injunctions when strong countervailing public interests are involved. In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission (NRDC),*[164] the Energy Research and Development Administration violated section 102(2)(C) of NEPA by failing to consider design and safety features that could be built into the planned high-level radioactive waste storage tanks.[165] Nevertheless, the court declined to enjoin construction of the tanks. It reasoned that injunctive relief was unwarranted because such relief would not serve the public interest. The tanks involved were needed to replace existing tanks from which wastes were leaking.[166] *NRDC* is similar to those cases of the Ninth Circuit in which unusual circumstances required balancing of the equities and subsequent denial of injunctive relief, because such relief presented a serious environmental harm.[167] Furthermore, the court explained that "[i]t may still be possible, upon completion of an adequate EIS, for the agency to decide that it is appropriate to modify the tanks."[168] Hence, injunctive relief, as in *Alaska v. Andrus,*[169] was unnecessary to ensure procedural compliance with NEPA section 102(2)(C).

The most troubling case for the argument that the tests employed by the two circuits are analogous is *Andrus,* particularly since the

159. *Id.* at 456-58.
160. 555 F.2d 817 (D.C. Cir. 1977).
161. *Id.* at 830.
162. 499 F.2d 502 (D.C. Cir. 1977).
163. *Id.* at 513-14.
164. 606 F.2d 1261 (D.C. Cir. 1979).
165. *Id.* at 1272.
166. *Id.* at 1272-73.
167. *See* American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983), discussed *supra* note 138; Alpine Lakes Protection Soc'y v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975), discussed *supra* note 138.
168. *NRDC,* 606 F.2d at 1272.
169. 580 F.2d 465, 485 (1978).

Ninth Circuit Court of Appeals declared it to be "contrary to the law of this circuit."[170] Closer analysis, however, reveals that the Ninth Circuit overreacted and that the difference can be attributed to the fact that it has not had the opportunity to decide such a case. In *Andrus,* the court found two violations of NEPA section 102(2)(C). First, the Secretary of Interior failed to consider "the possibility of conducting the lease sale pursuant to different more rigorous operating orders than those promulgated by the USGS."[171] The court denied injunctive relief because this violation was merely partial and a lesser remedy would suffice. It reasoned that because operating orders can be changed subsequent to a lease sale and made retroactive, it was unnecessary to set the lease sales aside.[172] Instead, all that was required was for the Secretary to consider the orders and to change them if he concluded that modification was necessary.[173] Furthermore, the court explained that "[a]ny damage that may have resulted from the exploration that has already been conducted pursuant to the existing orders could not, in any event, be remedied by an injunction."[174] Second, the Secretary failed to include termination clauses in the leases.[175] Again the court denied injunctive relief. Here it did so because the violation was merely partial, countervailing public interests were present, and "[i]f it should eventually develop that the exploration would produce environmental damage that cannot be avoided by modification of the operating orders, or by a suspension of operations, the government would . . . retain the power to institute formal eminent domain proceedings at that time, to take the leasehold interests."[176]

In short, although the *Andrus* court found that the violations of NEPA were not merely technical, injunctive relief was unnecessary. Enjoining the lease sales was not necessary to preserve the Secretary's opportunity to choose among the alternatives in an informed manner, as required by section 102(2)(C) of NEPA.[177] The Ninth Circuit's test does not provide for such an exception,[178] but the Ninth Circuit has not been confronted with a case similar to *Andrus,* and therefore it has not had the occasion to create such an exception. And, as discussed earlier, *Hill* and *Romero-Barcelo* appear to mandate the presence of

170. *Gambell II,* 774 F.2d 1414, 1423 (9th Cir. 1985) (quoting *Andrus,* 580 F.2d at 485) (citations omitted), *cert. granted sub nom.* Amoco Prod. Co. v. Village of Gambell, 106 S. Ct. 2274 (1986).

171. *Andrus,* 580 F.2d at 485.

172. *Id.* at 485-86.

173. *Id.*

174. *Id.* at 486.

175. *Id.* at 485.

176. *Id.* at 486-87.

177. *Id.* at 485.

178. *See supra* notes 136-40 and accompanying text.

such an exception.[179] Consequently, *Andrus* is not contrary to the law of the Ninth Circuit; in fact, its holding constitutes a necessary exception to the presumption of injunctive relief for a violation of section 102(2)(C) of NEPA.

C. First Circuit

The First Circuit's position concerning NEPA's effect on the courts' power to balance the underlying equities is illustrated in *Massachusetts v. Watt.*[180] In affirming the issuance of a preliminary injunction, the Court of Appeals for the First Circuit agreed with the Secretary that the "propriety of a preliminary injunction depends" on the results of balancing under the four-factor test.[181] The court, however, disagreed with the Secretary's assertion that the plaintiffs had failed to demonstrate irreparable harm. In *Watt,* the plaintiffs sought to enjoin certain lease sales by the Secretary for oil exploration. In response the Secretary argued that the lease sales did not entitle the buyers to drill for oil and that several additional steps requiring government approval were necessary before the purchasers could begin drilling. Therefore, the Secretary contended that the court should have allowed the lease sales to proceed while it considered their lawfulness. The Secretary also noted that the court could always set aside the lease sales if it concluded that they were unlawful.[182]

The court, however, found that failure, or probable failure, to comply with NEPA's procedural mandate[183] constituted a showing of both probable success on the merits and irreparable harm.[184] In so holding, the court explained that because "[i]t is far easier to influence an initial choice than to change a mind already made up[,] . . . a plaintiff seeking an injunction cannot be stopped at the *threshold* by [the government's] pointing to additional steps between the governmental decision and [underlying, or substantive,] environmental harm."[185] In affirming the district court's issuance of injunctive relief, the court also found that: (1) the plaintiff's procedural harm, if injunctive relief was denied, outweighed the Secretary's harm if relief was granted; and (2) the public interest would be best served if the injunction was

179. *See supra* pp. 110-14. It is for this reason that such an exception is included in the standard proposed herein for determining when to grant preliminary injunctions for substantial violations of statutes that are procedural in nature. *See supra* p. 126.

180. 716 F.2d 946 (1st Cir. 1983).

181. *Id.* at 951.

182. *Id.* at 951-52.

183. The court distinguished NEPA from the FWPCA — a substantive environmental statute — and therefore distinguished *Romero-Barcelo. Id.* at 952.

184. *Id.* at 951-53.

185. *Id.* at 952 (emphasis in original).

granted.[186] The court based its public interest finding on the district court's analysis in which the district court concluded:

> It is plain that the public interest calls upon the courts to require strict compliance with environmental statutes. Congress has mandated that action . . . proceed . . . in accordance with several regulatory schemes, [such as NEPA and ESA], that require public disclosure of and comment on all factors relevant to a balanced, reasoned, and informed decision . . . . The plaintiffs have demonstrated a likelihood of success on the merits of their claims that this mandate has not been satisfied. The public interest clearly requires that the Congressional mandate be fulfilled.[187]

Hence, by concluding that a demonstration of a probable NEPA violation constituted a showing of probable success on the merits and irreparable harm, and that the public interest required compliance with NEPA's procedural requirements, the court in effect applied a rebuttable presumption favoring injunctive relief.

The First Circuit's decision in *Jones v. Lynn*[188] provides further support that the circuit invokes a test similar to that of the Ninth Circuit and is, therefore, in accord with the test proposed herein. Upon analyzing NEPA and its underlying intent, the court determined that the courts' responsibility is to "protect the integrity of the fact-finding process mandated by Congress."[189] The court therefore remanded the case with instructions that, if the district court determined that the government's activities constituted "major federal action," then NEPA was violated and an injunction should be issued.[190] The court suggested that balancing the underlying equities in the traditional sense would be appropriate only for those portions of the project that were near completion or for which the breach of contractual obligations would "work a substantial injustice or public harm."[191] This decision demonstrates that the First Circuit, although recognizing a rebuttable presumption of injunctive relief, acknowledges that an injunction may be inappropriate when its issuance would cause substantial public harm or when the decision-maker's opportunity to make an informed decision is foreclosed, thereby rendering injunctive relief moot. These exceptions comport with those employed by the Ninth Circuit.

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186. *Id.* at 953.

187. Conservation Law Found. v. Watt, 560 F. Supp. 561, 583 (D. Mass.), *aff'd sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

188. 477 F.2d 885 (1st Cir. 1973).

189. *Id.* at 892.

190. *Id.* at 892-93.

191. *Id.* at 893.

D. Fourth Circuit

Although the Fourth Circuit clearly departs from the traditional four-factor test, it is unclear what, if any, systematic balancing test is used. The courts consider NEPA and its underlying legislative intent, as required by *Hill* and *Romero-Barcelo,*[192] and then, upon finding a violation of NEPA's procedural requirements, issue injunctive relief without invoking the traditional four-factor test.[193] Although these decisions do not directly support the modified injunctive test proposed, they do support the conclusion that a procedural statute affects the courts' ability to employ their equitable powers to grant or deny preliminary injunctions, and that a presumption of injunctive relief exists where there is either an actual or probable substantial violation of NEPA section 102(2)(C). The courts in this circuit, however, deny injunctive relief where noncompliance is merely technical.[194]

E. Second, Sixth, and Seventh Circuits

Finally, the decisions of the Second, Sixth, and Seventh Circuits concerning the impact of section 102(2)(C) of NEPA on the federal courts' equitable powers to grant or deny preliminary injunctions are inconsistent. Generally, however, the cases in which NEPA, its purpose, and its legislative history are analyzed in accord with the factors deemed significant by *Hill* and *Romero-Barcelo*[195] hold that NEPA restricts their discretion in a manner consistent with the modified test proposed herein. Illustrative of the Second Circuit's authority supporting a presumption for injunctive relief is *Sierra Club v. United States Army Corps of Engineers.*[196] After reviewing NEPA and its

192. *See supra* notes 31-51 and accompanying text.

193. *See, e.g.,* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1332 (4th Cir.) (in granting injunctive relief without balancing the substantive equities, the court reasoned that "Section 102(2)(C) is applicable to a project until it has reached the state of completion where the costs of abandonment or altering the proposed route would clearly outweigh the benefits therefrom"), *cert. denied,* 409 U.S. 1000 (1972); *cf.* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Rankin v. Coleman, 394 F. Supp. 647 (E.D. N.C.) ("acknowledging the requirement of strict compliance with NEPA," the court found that defendants violated section 102(2)(C) and therefore, without balancing the equities, issued an injunction), *modified,* 401 F. Supp. 664 (E.D. N.C. 1975).

194. *See* Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va.) (although EIS filed by Corps was partially incomplete, court found that it had considered requisite environmental impacts prior to deciding to proceed), *aff'd,* 484 F.2d 453 (4th Cir. 1973).

195. *See supra* notes 31-51 and accompanying text.

196. 701 F.2d 1011 (2d Cir. 1983); *see also* Action for Rational Transit v. West Side Highway Project, 536 F. Supp. 1225, 1252-54 (S.D. N.Y. 1982), *aff'd,* 699 F.2d 614 (2d Cir. 1983), *aff'd in part and rev'd in part sub nom.* Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011 (2d Cir. 1983). But in Sierra Club v. Hennessey, 695 F.2d 643 (2d Cir. 1982), the court of appeals reversed the district

purpose,[197] the Second Circuit Court of Appeals concluded that "although NEPA established 'significant substantive goals for the Nation,' the balancing of the substantive environmental issues is consigned to the judgment of the executive agencies involved, and the judicially reviewable duties that are imposed on the agencies are 'essentially procedural.' "[198] It therefore, without balancing the equities, affirmed the district court's issuance of injunctive relief.[199] Several of the decisions in which the courts employ the traditional balancing test involve circumstances that arguably fall within the "extraordinary or unusual" category for which balancing the substantive equities is appropriate.[200]

In the Sixth Circuit, *Environmental Defense Fund v. Tennessee Valley Authority*[201] represents the better reasoned authority.[202] After

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court's issuance of a permanent injunction, because it failed to balance the equities, which favored the defendants. The appellate court neither discussed NEPA nor its legislative history. It based the need to balance the equities on Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974), *vacated on other grounds,* 423 U.S. 809 (1975) (a case involving unusual circumstances and thus warranting balancing), which is discussed *infra* note 200. *See also* Steubing v. Brinegar, 511 F.2d 489 (2d Cir. 1975) (in granting injunctive relief, the court balanced the substantive equities).

197. *Sierra Club,* 701 F.2d at 1029-31.

198. *Id.* at 1029 (quoting Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980)).

199. *Id.* at 1034-35. The district court did not employ the traditional balancing test to determine that injunctive relief should be issued. Instead, it held that "since the [Federal Highway Administration ("FHWA")] has failed to comply with NEPA, the FHWA must be enjoined against making any further steps." Sierra Club v. United States Army Corps of Eng'rs, 541 F. Supp. 1367, 1370 (S.D. N.Y.), *appeal dismissed,* 697 F.2d 297 (2d Cir. 1982), *aff'd in part and rev'd in part,* 701 F.2d 1011 (2d Cir. 1983).

200. *See, e.g.,* New York v. Nuclear Regulatory Comm'n, 550 F.2d 745 (2d Cir. 1977) (challenged plutonium transfers ongoing for 25 years), *cited in* American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983) (cited for proposition that the equities should be balanced in cases presenting "unusual circumstances," such as where the public interest would be harmed if injunctive relief was granted); Conservation Soc'y of S. Vermont, Inc., 508 F.2d at 936-38 (court acknowledged general rule that injunctive relief is appropriate for statutory violations but reasoned that the equities involved — project in advanced stage of completion, extensive environmental considerations completed, and injunctive relief would severely harm the defendants and the public — favored denying such relief), *vacated on other grounds,* 423 U.S. 809 (1978).

201. 468 F.2d 1164 (6th Cir. 1972).

202. This author considers the better reasoned cases to be those in which the courts base their authority to grant or deny injunctive relief on a careful analysis of NEPA, its purpose, and its legislative history as required by the Court in *Hill* and *Romero-Barcelo.* For an example of a poorer reasoned authority, by the Sixth Circuit, see Ohio *ex rel.* Brown v. Callaway, 497 F.2d 1235 (6th Cir. 1974) (without analyzing NEPA, its purpose, or its legislative history, the court rejected the contention that it could not exercise discretion and therefore should issue a comprehensive injunction

carefully analyzing NEPA and its legislative history,[203] the court affirmed the district court's issuance of a preliminary injunction, thereby rejecting the appellants' contention that the plaintiffs would not suffer irreparable harm if injunctive relief was denied. The court found, in addition to the balance of the underlying harms favoring injunctive relief,[204] that "the preliminary injunction . . . is the vehicle by which a declared congressional policy can be effectuated. Sufficient irreparable harm . . . can be found in the continuing denial by appellants of appellees' [procedural] right under the NEPA, and this is enough to justify issuing the injunction."[205]

Finally, the law of the Seventh Circuit is unclear. The Seventh Circuit Court of Appeals found in *Scherr v. Volpe*[206] that a substantial violation of section 102(2)(C) of NEPA was enough to warrant injunctive relief and balancing the equities therefore was unnecessary. In *Wisconsin v. Weinberger,*[207] however, the court, in dictum, explained that "NEPA does not foreclose the application of traditional principles of injunctive relief."[208] For the reasons stated below, *Scherr* should be considered the superior authority of the circuit.

In *Scherr,* the court was confronted with an appeal from the issuance of an injunction for failure to comply with section 102(2)(C) of NEPA. The appellants claimed, inter alia, that the injunction was granted improperly because the appellees had "failed to show that the construction of Highway 16 would result in irreparable harm to the environment."[209] After examining section 102(2)(C) and its legislative history, the court concluded that "[t]o accept the [appellees'] argument on this point would thwart the Congressional mandate by rendering impotent the procedural requirements of [NEPA]."[210] The court, therefore, affirmed the district court's issuance of injunctive relief. It explained:

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pursuant to a substantial procedural violation; instead, it applied the traditional equitable test, looking to the underlying substantive harms).

203. *Environmental Defense Fund,* 468 F.2d at 1172-81. The court concluded that section 102(2)(C) of NEPA imposes procedural requirements that are not discretionary; rather, it establishes a "strict standard of compliance." *Id.* at 1174 (quoting Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971)). The court, therefore, found that federal agencies must comply with NEPA's procedural requirements prior to engaging in action covered by the statute, unless a competing statute precludes compliance. *Id.* at 1176.

204. *Id.* at 1183-84.

205. *Id.* at 1184.

206. 466 F.2d 1027 (7th Cir. 1972).

207. 745 F.2d 412 (7th Cir. 1984).

208. *Id.* at 426.

209. *Scherr,* 466 F.2d at 1034.

210. *Id.*

> The kind of "irreparable harm" which must be shown in order to justify the issuance of a preliminary injunction in these cases can be found in the language of the Act itself . . . . "Section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties." Here, if the project were allowed to proceed after the [appellees] had demonstrated a probability of success on the merits, this "careful and informed decision-making process" would be lost forever.[211]

In *Weinberger* the district court had enjoined the Navy from continuing work on Project ELF, because the Navy had failed to prepare a supplemental environmental impact statement. The district court found NEPA to be similar to ESA and therefore, following *Hill* and distinguishing *Romero-Barcelo,* it concluded:

> In much the same way that [Congress] has chosen to preserve endangered species, Congress has chosen to impose a decisionmaking process on federal agencies by enacting [NEPA]. The Act is designed to ensure that environmental concerns are integrated into the process of agency decision-making and that the public is informed of the agency's consideration of the environmental consequences of its decisions.[212]

Thus, because the Navy had failed to "overcome the presumption that an injunction is necessary,"[213] the district court refused to balance the equities and granted injunctive relief. It explained that "[t]his presumption may be overcome if an injunction would not serve the purposes of the Act by preserving the freedom of choice for the agency after it considers possible adverse environmental consequences of its options."[214]

The court of appeals held that the Navy did not violate NEPA, and therefore vacated the injunction.[215] In dictum, however, the court opined that "even if there had been a NEPA violation, the district court abused its discretion in not undertaking a balancing of the relative harms to the parties before entering the injunction."[216] The court based its opinion on several factors. First, it concluded that NEPA and ESA are dissimilar.[217] It reasoned:

> NEPA . . . is procedural in nature, . . . and the statute recognizes that agencies may decide to subordinate environmental values to

211. *Id.* (quoting Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971)).

212. Wisconsin v. Weinberger, 582 F. Supp. 1489, 1494 (W.D. Wis.) (citing Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 142-43 (1981), *rev'd,* 736 F.2d 438 (7th Cir.) (order only), *later opinion,* 745 F.2d 412 (7th Cir. 1984)).

213. *Id.* at 1495.

214. *Id.*

215. *Weinberger,* 745 F.2d at 424.

216. *Id.*

217. *Id.* at 426.

> other social values with which they sometimes compete. Thus, although the judicial role is to insure that this weighing of competing interests takes place, we must fulfill this role in accordance with a consideration of other social costs, as recognized by the statute itself. That, after all, is the traditional way of applying equitable principles.[218]

The court's reasoning is flawed because it confuses the agencies' procedural and substantive responsibilities under NEPA. Under this reasoning the court concludes that, because Congress authorized the agencies to balance environmental and nonenvironmental considerations, the courts retain their ability to balance the equities. The court fails to recognize that, although Congress authorized the agencies to invoke their discretion to approve or deny major federal actions, this discretion does not apply to NEPA's procedural requirements.[219] Hence, the fact that agencies "may subordinate environmental values to other social values"[220] after they comply with the nondiscretionary procedural requirements of section 102(2)(C) does not in turn authorize the courts to balance the equities, unfettered, when an agency violates section 102(2)(C).

Second, the court based its conclusion that balancing the substantive equities was appropriate on its view of "[t]he recent trend of the majority of the courts,"[221] which it believed "is to evaluate competing public interests in fashioning permanent injunctive relief for NEPA violations."[222] The court supports this assertion by citing four decisions from the Second, Fifth, and D.C. Circuits, the most recent of which was decided in 1981.[223] These cases, however, do not stand for the proposition that the courts are free to apply the traditional equitable test, unfettered. Instead, they recognize that a rebuttable presumption for injunctive relief exists for a substantial procedural violation, but that such relief is inappropriate when strong, competing public interests are involved, or when such relief is unnecessary to ensure procedural compliance.

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218. *Id.* (citation omitted).

219. *See supra* note 133.

220. *Weinberger,* 745 F.2d at 426.

221. *Id.*

222. *Id.*

223. *Id.* at 426. The court cites Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981), discussed *supra* note 135; Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 606 F.2d 1261 (D.C. Cir. 1979), discussed *supra* notes 164 and accompanying text; Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), discussed *supra* notes 170-79 and accompanying text, *vacated in part on other grounds sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978); Conservation Soc'y of S. Vermont, Inc. v. Secretary of Transp., (2d Cir. 1974), discussed *supra* note 200, *vacated on other grounds,* 423 U.S. 809 (1975).

Hence, the factors upon which the *Weinberger* court based its conclusion that "NEPA does not foreclose the application of traditional principles of injunctive relief"[224] are not persuasive. Furthermore, the court failed to discuss or distinguish its earlier decision in *Scherr.* Thus, although the Seventh Circuit's position is unclear, *Scherr* should be considered the circuit's better reasoned authority.

The above analysis of the decisions of the federal circuits demonstrates that, although dissimilarities between the circuits exist, they are primarily semantic rather than substantive. In those cases in which the courts base their authority to grant or deny injunctive relief on a careful analysis of NEPA, its purpose, and its legislative history, the majority of the circuits recognize that there is a rebuttable presumption of injunctive relief for a substantial procedural violation. The presumption may be defeated and balancing of the substantive equities appropriate, when strong, countervailing public interests are involved. Furthermore, the presumption may be overcome and injunctive relief denied if the violation is merely technical or the issuance of injunctive relief is unnecessary to ensure procedural compliance.

VI. CONCLUSION

Amoco presents the United States Supreme Court with the opportunity to decide whether and to what extent section 810 of ANILCA limits the federal courts' ability to invoke their equitable discretion to grant or deny a preliminary injunction as relief for a probable substantial procedural violation. If the Court decides this issue, its decision will not be limited to preliminary-injunction actions under ANILCA section 810. Instead, the Court's decision will also affect actions involving alleged violations of section 102(2)(C) of NEPA and other similar procedural statutes.

As this note demonstrates, section 810 of ANILCA imposes on the federal agencies nondiscretionary, procedural duties that protect Congress' preference for subsistence uses. Congress' mandate prevents the courts from balancing the substantive equities to determine whether to grant or deny a preliminary injunction for a probable substantial procedural violation. If the courts were to ignore Congress' mandate and balance the equities, they would usurp the federal agencies' role and violate the separation of powers doctrine. The tripartite nature of our federal government forbids such a result.

The existence of a statute such as section 810 of ANILCA, however, does not require the federal courts mechanically to grant a preliminary injunction for every probable substantial procedural

224. *Weinberger,* 745 F.2d at 426.

violation. Instead, the courts must recognize the existence of a rebuttable presumption favoring preliminary injunctions. Such relief is warranted because, if a probable substantial violation is demonstrated, irreparable harm is established and the public interest, as embodied in the statute's procedures, will be protected by granting injunctive relief. Absent unusual circumstances in which a strong competing public interest is involved, the courts should forgo balancing the underlying merits and grant injunctive relief. Furthermore, they should deny injunctive relief when the violation is merely technical and when such relief is unnecessary to ensure procedural compliance.

A majority of the circuits, in their better reasoned decisions, invoke this approach. Although the circuits' use of different language in the formulation of their rules causes some confusion, it is evident from their application that these tests are fundamentally similar and support the modified test proposed herein. The *Amoco* Court should follow their lead, harmonize the preliminary-injunction test, and bring the minority into line.

Don J. Frost, Jr.

AUTHOR'S POSTSCRIPT

While this note was at the printer, the Supreme Court decided *Amoco Production Co. v. Village of Gambell.*[225] Contrary to this author's conclusion, the Court found that the procedural requirements of section 810(a) are subordinate to its underlying substantive policy.[226] The Court reasoned that "nothing . . . distinguishes *Romero-Barcelo* from the instant case."[227] Therefore, as the Court construed the FWPCA in *Romero-Barcelo,*[228] the Court found that ANILCA does not restrict the courts' ability to invoke the traditional balancing test when determining whether to issue injunctive relief for a substantial

225. 55 U.S.L.W. 4355 (U.S. Mar. 24, 1987).

226. *Id.* at 4359. The Court explained that "[l]ike the First Circuit in *Romero-Barcelo,* the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources." *Id.*

227. *Id.* at 4359.

228. *See supra* notes 41-51 and accompanying text.

procedural violation of section 810(a).[229] The Court held that the balance of the substantive harms and the public interest favored the Secretary and the oil company petitioners; it, therefore, reversed the Ninth Circuit's issuance of injunctive relief.[230]

The Court's conclusion that the underlying substantive policy, rather than the procedural requirements, of section 810(a) of ANILCA is determinative and, thus, does not restrict the courts' equitable powers to grant or deny injunctive relief for a violation is peculiar for two reasons. First, it is unnecessary in light of the Court's decision that ANILCA does not apply to the OCS.[231] Second, the Court neither cited nor discussed those sections of ANILCA upon which it relied in reaching this conclusion. This failure is curious, given the importance of the "language, history, and structure of the legislation under review"[232] in determining whether the statute affects the courts' ability to invoke the traditional balancing test for injunctive relief, and the Court's extensive discussions of the FWPCA and ESA and their respective legislative histories in *Romero-Barcelo*[233] and *Hill*.[234] Moreover, in another part of the opinion where the Court decides that ANILCA does not apply to the OCS, the Court carefully analyzed ANILCA and its legislative history.[235] In its analysis, the Court emphasized the need to give meaning to the words used by Congress, particularly "[w]hen statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning."[236] Yet, without explanation, the Court, by its conclusion that section 810 of ANILCA is designed to "protect Alaskan subsistence resources from unnecessary destruction,"[237] read out of the statute the words "opportunity for"[238] and failed to consider the

229. *Amoco,* 55 U.S.L.W. at 4359. The Court explained that the Ninth Circuit's presumption favoring injunctive relief "is contrary to traditional equitable principles and has no basis in ANILCA." *Id.*

230. *Id.* at 4359. The Court also went on to hold that ANILCA does not apply to the OCS. *Id.*

231. Justices Stevens and Scalia criticize the majority opinion because the finding that ANILCA does not apply to the OCS rendered a decision concerning the proper standard of injunctive relief unnecessary. *Id.* at 4362 (Stevens, J., concurring in part).

232. *Hill,* 437 U.S. 153, 174 (1978); *accord Romero-Barcelo,* 456 U.S. 305, 314-19 (1982); *see also supra* note 29 and accompanying text.

233. 456 U.S. at 314-20, discussed *supra* notes 41-50, 73-112 and accompanying text.

234. 437 U.S. at 171-89, discussed *supra* notes 33-40, 113-129 and accompanying text.

235. *Amoco,* 55 U.S.L.W. at 4360-62.

236. *Id.* at 4361.

237. *Id.* at 4359.

238. *See supra* notes 89-91 and accompanying text for a discussion of the relevance of the phrase "opportunity for" and its use in ANILCA.

importance of the procedural structure of ANILCA, as analyzed in this note.[239]

The Court's determination that the Ninth Circuit erred in "focus[ing] on the statutory procedure rather than on the underlying substantive policy the process was designed to effect"[240] and recognizing a presumption of irreparable harm for the Secretary's failure to comply with section 810's procedural requirements may have extensive implications. First, because of the structure and importance of ANILCA's procedural mandate,[241] it is difficult to imagine a statute for which the nondiscretionary procedures can be construed to be the statute's essence. Nevertheless, the Court's analysis of NEPA in *Hill*[242] and *Kleppe v. Sierra Club*[243] may provide a means to distinguish section 102(2)(C) of NEPA from section 810(a) of ANILCA and thereby to support an argument that NEPA's procedural mandate is not subordinate to its underlying substantive policy. Second, by determining that the courts must balance the substantive harms when faced with a substantial procedural violation of section 810(a), the Court rejected the position that a substantial procedural violation, absent a harm to the underlying substantive policy, can cause harm for which injunctive relief is appropriate.[244] If applied to injunction actions for failure to comply with section 102(2)(C) of NEPA, this aspect of the decision is significant since the majority of the circuits currently recognize that the harm associated with such a violation is not the harm or potential harm to the environment, but rather the harm inherent in the failure to comply with NEPA's procedural mandate.[245] Third,

239. *See supra* notes 81-111, 122-29, and accompanying text.

240. *Amoco,* 55 U.S.L.W. at 4359.

241. As analyzed by this author, ANILCA and its legislative history demonstrate that Congress intended ANILCA's procedural requirements to be mandatory and its essence. See *supra* notes 81-111, 122-29, and accompanying text.

242. 437 U.S. 153, 188 n.34 (1978), discussed *supra* note 130 and accompanying text.

243. 427 U.S. 390, 406-07, 410 n.21 (1976), discussed *supra* notes 127, 131, and accompanying text.

244. In addition to affecting the federal courts' approach to granting or denying preliminary injunctions for substantial procedural violations of other statutes, such as NEPA, this facet of the Court's holding may also create a standing hurdle. By finding that the procedural harm could neither warrant injunctive relief nor even constitute a factor to be considered in the traditional balancing test, arguably, the Court considered the harm inherent in a substantial procedural violation of section 810(a), or similar statute, not to be judicially cognizable. Hence, absent a showing of probable harm to the underlying substantive policy—subsistence (ANILCA), environment (NEPA)—a plaintiff lacks standing to challenge an agency's failure to comply with congressionally mandated, nondiscretionary procedures. *See, e.g.,* Allen v. Wright, 468 U.S. 737, 750-53 (1984) (finding that constitutional, core component of standing is plaintiff must allege a "judicially cognizable injury").

245. *See supra* Part V.

notwithstanding the Secretary's committing a substantial procedural violation of section 810(a) of ANILCA, the Court held that compliance was unnecessary because the substantive equities favored continued oil exploration. Despite recognizing that "[h]ere as in *Romero-Barcelo,* compliance could be obtained through the simple means of an order to the responsible federal official to comply,"[246] the Court did not order the Secretary to comply with section 810(a)'s nondiscretionary procedures. The Court asserted that such a holding did not "undermine"[247] the underlying substantive policy of the statute. Its holding, however, did undermine and render impotent ANILCA's mandatory procedures. This result permits the courts to ignore Congress' mandate and usurp the federal agencies' role, and, therefore, it appears to abridge the separation of powers doctrine.[248]

246. *Amoco,* 55 U.S.L.W. at 4359 n.8.

247. *Id.* at 4359.

248. This holding permits the courts to ignore Congress' procedural mandate to the agencies engaged in actions affecting subsistence uses and to usurp the agencies' role under the statute, as defined and mandated by Congress. *See supra* Part IV. The Court explained that:

> [T]he record before the District Court was complete enough to allow it to decide that exploration activities would not significantly restrict subsistence resources. The fact that, on another record, such a conclusion could not be made with any degree of confidence is a factor to be considered under the traditional equitable balancing of interests but hardly suggests that the balancing test itself must be abandoned.

Amoco, 55 U.S.L.W. at 4359 n.12. The implications of this dicta, if read broadly, are that balancing the substantive equities is required when the effects of exploration activities on subsistence uses are unknown or even when it is known that exploration activities will significantly restrict subsistence. Hence, in light of this dicta and the Court's holding, it would seem that, despite a finding that exploration activities will significantly restrict subsistence resources, the court must deny injunctive relief if it determines that the balance of the equities favors exploration. Furthermore, it need not order the agency involved to comply with section 810(a)'s procedures. Regardless of the Court's determination that such a result does not undermine ANILCA's substantive policy, such a result undermines the statutory scheme Congress enacted and violates the separation of powers doctrine.