

10-1-1983

## Federal Conservation of Threatened Species: By Administrative Discretion or Legislative Standard?

Janice Goldman-Carter

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>



Part of the [Animal Law Commons](#), and the [Environmental Law Commons](#)

---

### Recommended Citation

Janice Goldman-Carter, *Federal Conservation of Threatened Species: By Administrative Discretion or Legislative Standard?*, 11 B.C. Env'tl. Aff. L. Rev. 63 (1983), <http://lawdigitalcommons.bc.edu/ealr/vol11/iss1/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# FEDERAL CONSERVATION OF THREATENED SPECIES: BY ADMINISTRATIVE DISCRETION OR BY LEGISLATIVE STANDARD?

*Janice Goldman-Carter\**

## I. INTRODUCTION

The Endangered Species Act of 1973<sup>1</sup> declares that threatened and endangered species of fish, wildlife, and plants, "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."<sup>2</sup> One of the purposes of the Act is "to provide a program for the conservation of such endangered and threatened species."<sup>3</sup> Congress was so committed to the conservation of "endangered" wildlife species that it enacted specific legislative prohibitions to protect them.<sup>4</sup> Thus, the Act gives only limited discretion to the Departments of the Interior and Commerce in regulating the management of these species.<sup>5</sup>

---

\* Student, University of Minnesota Law School (J.D. anticipated May, 1984). B.A. Williams College; M.S., University of Michigan School of Natural Resources. The author wishes to thank Brian O'Neill, attorney, Faegre & Benson, Minneapolis, Minnesota, for his assistance and encouragement.

1. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1982).

2. 16 U.S.C. § 1531(a)(3) (1982).

3. 16 U.S.C. § 1531(b) (1982). The Act defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(4) (1982).

A "threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(15) (1982). Examples of threatened species include the Grizzly Bear, the Eastern Timber Wolf, and the American Bald Eagle.

4. *See, e.g.*, 16 U.S.C. § 1538(a)(1) (1982), which makes it unlawful for any person to engage in any of a list of activities which would adversely affect an endangered species.

5. Responsibility for administering the Act is given to the Secretaries of Interior, Commerce, or Agriculture, depending upon whether the species is plant or animal; terrestrial and fresh water or marine. *See* 16 U.S.C. § 1532(15) (1982). The bulk of management responsibility

In contrast to the treatment of "endangered" species, Congress did not promulgate specific legislative prohibitions to protect "threatened" species. Instead, Congress mandated that the Secretary of the Interior "shall issue such regulations as he deems necessary and advisable to provide for the *conservation* of such species."<sup>6</sup> The Act further requires the Secretary to "cooperate to the maximum extent practicable with the states," and authorizes the Secretary to enter into cooperative agreements with any state which "establishes and maintains an adequate and active program for the *conservation* of endangered species and threatened species."<sup>7</sup> Therefore, in contrast to the management of endangered species, where the Secretary's responsibilities are specifically circumscribed by statute, the degree of protection provided for "threatened" species depends upon how the Secretary of Interior and the courts construe: (1) the scope of the Secretary's duty to issue regulations; and (2) the meaning of the terms "conserve," "conserving," and "conservation" as used in the Act.

The Endangered Species Act defines the term "conserve," "conserving," and "conservation" as,

the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management . . . and, *in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.*<sup>8</sup>

In each case, the Secretary must decide what measures should be taken to conserve a particular threatened species. Regulations to protect a threatened species may result in stopping a dam,<sup>9</sup> closing a hunting or trapping season,<sup>10</sup> or restricting the sale of offshore oil and gas leases.<sup>11</sup> Thus, political, social, and economic pressures constantly influence the Secretary's interpretation of his responsibilities to preserve endangered and threatened species.

---

falls on the Secretary of Interior, and specifically, the United States Fish and Wildlife Service [hereinafter, FWS].

6. 16 U.S.C. § 1533(d) (1982) (emphasis added).

7. 16 U.S.C. § 1535(c)(1) (1982) (emphasis added).

8. 16 U.S.C. § 1532(3) (1982) (emphasis added).

9. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

10. *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977).

11. *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979).

One issue that has been particularly subject to controversy since passage of the Endangered Species Act is the extent to which the Secretary can allow the taking<sup>12</sup> of resident threatened species<sup>13</sup> in light of his mandate to "conserve." One view, based upon the Act's definition of "conservation," is that the Secretary has *an explicit congressional mandate to increase* the population of a threatened species, and that taking is permissible only in the extreme circumstance where population pressures within a given ecosystem cannot be otherwise relieved.<sup>14</sup> Under this view, the Secretary's discretion to permit takings of threatened species is restricted by the terms of Congress' legislation.

An opposing interpretation based upon the Secretary's alleged discretion to promulgate regulations regarding threatened species, takes the view that the Secretary has considerable authority to permit the taking of threatened species. According to this view, Congress recognized the necessity of state management and enforcement resources for full implementation of the Act,<sup>15</sup> and therefore specifically directed the Secretary to cooperate with the states.<sup>16</sup> The management of resident wildlife has traditionally been the province of *state* wildlife agencies, and many states have opposed feder-

---

12. The term "take" is defined in the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1531(14) (1982).

13. The term "resident species" as used in the Act refers to those species naturally residing in one of the fifty states. A resident species is one which has not been introduced to an area through artificial means, and which is generally not migratory. See 16 U.S.C. § 1535(c)(1), (f) (1982).

14. 16 U.S.C. § 1532(3) (1982). See *supra* text and note at note 8. See also *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977).

15. CONF. REP. NO. 740, 93rd Cong., 1st Sess. 26 (1973); H.R. REP. NO. 412, 93rd Cong., 1st Sess. 6 (1973); S. REP. NO. 307, 93rd Cong., 1st Sess. 3 (1973); 119 CONG. REC. H30,163 (daily ed. Sept. 18, 1973) (statement of Rep. Dingell); 119 CONG. REC. S25,669 (daily ed. July 24, 1973) (statement of Senator Tunney); *Endangered Species: Hearings on H.R. 37, H.R. 2169, and H.R. 4859 before the Subcommittee on Fisheries, Wildlife Conservation and the Environment of the House Committee on Merchant Marines and Fisheries*, 93rd Cong., 1st Sess., 204-05 (1973) (testimony of Nathaniel Reed) [hereinafter cited as 1973 *House Hearings*].

16. See, e.g., 16 U.S.C. § 1535 (1982). Section 1535(a) states that the Secretary "shall cooperate to the maximum extent practicable with the states" in carrying out the Act. Section 1535(b) authorizes the Secretary to "enter into agreements with any state for the administration and management of any area established for the conservation of endangered species or threatened species." Section 1535(c) authorizes the Secretary to enter into a cooperative agreement with any state which establishes and maintains an "adequate and active program for the conservation of endangered species and threatened species." That section further declares that when the Secretary receives a copy of a proposed state program, he must enter into a cooperative program with the state to assist in implementing that program, "unless he determines . . . that the state program is not in accordance with this chapter."

ally-imposed limitations on the taking of resident threatened species.<sup>17</sup> Thus, under this more lenient approach, the Secretary has discretion to acquiesce to state demands for takings of threatened species; he need only restrict taking when he deems it "necessary and advisable" for the "conservation" of a given threatened species.<sup>18</sup> This conflict in interpretation of the Secretary's role in implementing the Endangered Species Act is critical to the conservation of threatened species.

This article will discuss the Agency's role in implementing the Act by focusing on one particular controversy for case study; the management of the eastern timber wolf (*Canis lupus lycaon*) in Northern Minnesota. The article will first trace the Department of the Interior's interpretation of the Secretary's duty to "conserve" under the Act from the time of its enactment in 1973 to the present. It will then explore the legislative history of the Act's definition of "conservation," and the intended effect of this statutory definition on the protection of threatened species. The article will also examine the scant federal case law that has construed the scope of the Secretary's mandate under the Act to authorize takings of threatened species. After concluding that Congress did, in fact, intend to limit the Secretary's discretion to allow the taking of threatened species, the final section of the article will examine the wisdom of adopting a rigid legislatively-imposed rule versus a highly discretionary mandate in an area of public policy fraught with political, social, and economic pressures.

## II. A BRIEF HISTORY OF THE TIMBER WOLF CONTROVERSY

Numerous environmental groups have recently brought suit against James Watt and the Department of the Interior,<sup>19</sup> challenging United States Fish and Wildlife Service ("FWS") regulations permitting a sport season on the eastern timber wolf in Minnesota.<sup>20</sup> Current pressures on the FWS to permit taking of the timber wolf stem from a long history of state predation control. This section

---

17. See M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 18-34 (1977).

18. See 16 U.S.C. § 1533(d) (1982), which provides that "whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species."

19. *Sierra Club v. James Watt*, No. 5-83-254 (D. Minn. filed August 15, 1983); *Fund for Animals v. James Watt*, No. 5-78-66 (D. Minn. Supplemental Complaint filed August 15, 1983).

20. Final Regulations, 48 Fed. Reg. 36,256 (1983); Proposed Regulations, 47 Fed. Reg. 30,528-31 (1982).

briefly describes the history of state control measures, the onset of federal endangered species protection, and the current federal timber wolf conservation program. This section will also discuss the present status of the wolf population and the state of Minnesota's opposition to federal timber wolf protection.

*A. History of State Predation Control*

From 1849 to 1965, the state of Minnesota administered a bounty program on wolves within the state.<sup>21</sup> This program was frequently justified as an effort to control predation on livestock.<sup>22</sup> During its 116-year tenure, the bounty was renewed biennially by the state legislature and administered by the Minnesota Department of Conservation (now the Minnesota Department of Natural Resources ("DNR")). This program ended in 1965 when Governor Carl Rolvaag vetoed the bounty appropriation, despite considerable pressure and criticism.<sup>23</sup>

In addition to administering the bounty program, the Minnesota Department of Conservation conducted wolf control until 1965. Department personnel used aerial hunting, snaring, and trapping to kill 140-150 wolves annually from 1949 to 1954. The aerial hunting was terminated in 1954, and from 1954 to 1956, the annual take dropped to an estimated seventy to ninety wolves. From 1965 to 1969, there was no official state wolf control program, although the public was allowed to take wolves.<sup>24</sup>

In 1969 the Minnesota state legislature funded a new "Directed Predator Control Program."<sup>25</sup> This program was implemented primarily because of predation on sheep in the northwestern counties by coyote, not because of predation by wolves. The state designated registered local trappers to remove coyotes, bears, bobcats, lynx, and wolves (until September 1974) that were reported to be damaging domestic animals or wildlife. Controllers were paid fifty dollars for each wolf taken and thirty-five dollars for each coyote. No limit was set on the number of wolves that could be taken.<sup>26</sup>

---

21. A bounty program encourages the extermination of predatory animals by offering a set monetary reward for each carcass presented to state authorities.

22. S. FRITTS, WOLF DEPREDATION ON LIVESTOCK IN MINNESOTA 2 (U.S. Fish and Wildlife Service Resource Publication 145, 1982).

23. *Id.*

24. *Id.* at 3.

25. *Id.*

26. *Id.*

*B. Federal Control of the Wolf Population Under The  
Endangered Species Act*

1. Introduction of Federal Statutory and Regulatory Control

The Endangered Species Act<sup>27</sup> was enacted in December of 1973. The Act provided complete legal protection for wolves,<sup>28</sup> a statutory mandate which the State of Minnesota opposed from the outset. The state initially disregarded the Act and promulgated an administrative order that allowed the taking of endangered species under certain circumstances.<sup>29</sup> On September 5, 1974, the FWS informed the State that it was violating the Act and the taking of wolves under the State's Directed Predator Control Program was subsequently terminated.<sup>30</sup> Only a month later, however, Commissioner Herbst of the Minnesota DNR petitioned the FWS to exclude the State from the endangered range of the eastern timber wolf,<sup>31</sup> thereby removing all restrictions imposed by the Act on the taking of timber wolves in Minnesota. Although eventually accepted, a decision on the petition by the FWS was postponed pending a report by the Eastern Timber Wolf Recovery Team.<sup>32</sup>

In the meantime, wolf predation control became the responsibility of the federal government. The FWS initiated a wolf predation control program in early 1975. In 1978, the Secretary of Interior, acting upon the Recovery Plan recommendations<sup>33</sup> of the Eastern Timber Wolf Recovery Team, changed the classification of the wolf in Min-

---

27. 16 U.S.C. §§ 1531-43 (1982).

28. 16 U.S.C. § 1533(c)(3) (1982). This provision directed that species designated as threatened with extinction pursuant to the 1966 and 1969 Endangered Species Acts (P.L. No. 89-669, §§ 1-3, 80 Stat. 926; P.L. No. 91-135, 83 Stat. 275) at the time of the 1973 enactment would be deemed endangered species under the 1973 Act, pending any republication to conform with the new Act. The Eastern Timber Wolf was listed pursuant to these earlier acts through the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, Appendices I-III, 12 I.L.M. 1085 (1973), and a related Pan-American Treaty.

29. Minnesota Department of Natural Resources, Commissioner's Order No. 1899 (May 17, 1974).

30. Letter from Director, FWS to Commissioner, DNR (September 5, 1974).

31. Letter from Commissioner, DNR to Director, FWS (October 4, 1974). The endangered range refers to the geographical area which a particular species naturally inhabits, but in which it is now threatened with extinction.

32. The Eastern Timber Wolf Recovery Team is a group of experts brought together by FWS to develop a strategy for conservation of the timber wolf. The creation of such recovery teams for each threatened or endangered species is mandated by 16 U.S.C. § 1533 (1982).

33. 16 U.S.C. § 1533 (1982) requires the Secretary to develop and implement the "recovery plans" for the conservation and survival of specific listed endangered and threatened species.

nesota from "endangered" to "threatened."<sup>34</sup> This new federal rule-making allowed authorized state or federal personnel to kill wolves that had committed "significant depredations on lawfully present domestic animals."<sup>35</sup> These changes in classification and the predation control regulation were intended to provide greater protection for farmers and reduce local opposition to wolves while providing ample protection for wolves as required by section 4(d) of the Endangered Species Act.<sup>36</sup> The predator control provision was designed to limit killing to individual targeted wolves,<sup>37</sup> and was consistent with general Interior Department policy.<sup>38</sup>

During the summer of 1978, several environmental groups claimed that the FWS was not following its own regulations, and brought suit against the Agency to challenge the use of certain trapping procedures. Environmentalists specifically objected to the FWS's policy of permitting the trapping of wolves as far as five miles from affected farms, arguing that such wolves probably were not responsible for killing cattle on those farms.<sup>39</sup> In *Fund For Animals v. Andrus*,<sup>40</sup> U.S. Federal District Judge Miles Lord, clarifying what had already been implied in the federal regulations, ordered that control trapping and killing of wolves could be done only after a significant predation had occurred, and must, as nearly as possible, be directed toward the capture of the wolf or wolves responsible for the killing.<sup>41</sup> The Service's trapping program was subsequently adjusted to comply with Judge Lord's court order.<sup>42</sup>

## 2. The Current FWS Conservation Program

A 1982 FWS publication by Dr. Steven Fritts concluded that current wolf predation on livestock in Minnesota is only a minor problem. Approximately one-tenth of one percent of all livestock living within the range are affected, and only one third of one percent of northern Minnesota farms suffered livestock losses in 1981.<sup>43</sup> In addition, Dr. Fritts found that wolf predation on livestock is closely

---

34. Proposed Regulation, 43 Fed. Reg. 9607 (1978) (codified in 50 C.F.R. Part 17 (1982)).

35. *Id.*

36. 16 U.S.C. § 1353(d) (1982).

37. *Id.*

38. See Department of Interior Statement on Animal Damage Control Policy (Nov. 8, 1979).

39. S. FRITTS, *supra* note 22, at 4.

40. 11 E.R.C. 2189 (D. Minn. 1978).

41. *Id.*

42. S. FRITTS, *supra* note 22, at 4.

43. *Id.* at 4.



related to poor animal husbandry practices, such as permitting livestock to calve in the woods or disposing of livestock carcasses in or near pastures.<sup>44</sup> The 1982 study showed that the Service's finely-tuned trapping program has successfully reduced livestock losses at most farms and, along with improved livestock management techniques, has effectively relieved isolated instances of livestock predation by wolves.<sup>45</sup>

### *C. The Current Status of the Wolf Population*

The Secretary of the Interior has listed the timber wolf as a threatened species in Minnesota and an endangered species throughout the rest of its range.<sup>46</sup> Approximately 1,000 to 1,200 wolves remain in northern Minnesota.<sup>47</sup> This population is the only significant remnant of the eastern timber wolf population that once ranged throughout most of the eastern United States.<sup>48</sup> The population is now restricted to about one percent of its former range.<sup>49</sup> Reduction of the eastern timber wolf population in the U.S. was largely the result of the following factors: (1) intensive human settlement of the land; (2) direct conflict with domestic livestock; (3) a lack of understanding about the animal's ecology and habits; (4) fears and superstitions about the animal; and (5) overzealous control programs designed to exterminate it.<sup>50</sup>

In 1981, the Eastern Timber Wolf Recovery Team set forth the conditions it believed necessary to ensure the survival of the timber wolf in the continental United States. The Recovery Team recommended that the following conditions be met before the Secretary remove the wolf from the threatened species list:

- (1) survival of the wolf in Minnesota must be assured by protecting its critical habitat and implementing the Recovery Plan; and
- (2) at least one viable population of wolves must be reestablished outside of Minnesota and Isle Royale, Michigan in the contiguous 48 states.<sup>51</sup>

---

44. *Id.*

45. *Id.* at 4-5.

46. 43 Fed. Reg. 9607 (March 9, 1978).

47. See EASTERN TIMBER WOLF RECOVERY TEAM, EASTERN TIMBER WOLF RECOVERY PLAN 4 (1976).

48. *Id.*

49. S. FRITTS AND L.D. MECH, DYNAMICS, MOVEMENTS, AND FEEDING ECOLOGY OF A NEWLY PROTECTED WOLF POPULATION IN NORTHWESTERN MINNESOTA 6 (Wildlife Monograph No. 80 October, 1981).

50. EASTERN TIMBER WOLF RECOVERY PLAN, *supra* note 47, at 2.

51. Recovery Team Letter to Regional Director, FWS (September 15, 1981). Pursuant to 16

In recent years, wolves have begun to migrate east into northern Wisconsin, where an estimated population of twenty-five to thirty wolves has now been reestablished.<sup>52</sup> If a viable population of wolves can be secured there, delisting of the wolf may be possible.

*D. The Current Position of the Minnesota DNR*

The Minnesota DNR has persistently rejected the notion that the timber wolf is, or ever has been, threatened in Minnesota.<sup>53</sup> DNR officials perceive their mandate from the state legislature to include not only predator control for livestock protection, but also the management of the deer herd as top priority.<sup>54</sup> The DNR intends to reduce wolf populations to benefit the deer to the maximum extent permissible.<sup>55</sup>

Most importantly, the DNR feels that it is better able to manage the eastern timber wolf than is the federal government, and has repeatedly pressured the FWS to return management responsibility for the wolf to the State and to permit the DNR to resume both its wolf harvest and its wolf predation control program.<sup>56</sup> The State has refused to accept any management responsibility for the wolf or assist the FWS in carrying out its mandate under the Endangered Species Act unless it is given the authority to permit a regulated sport season on the species.<sup>57</sup>

The FWS regulations published in August, 1983<sup>58</sup> give the DNR just what it wanted: management responsibility over the timber wolf, and the authority to permit regulated taking of the species. The

---

U.S.C. § 1533(g) (1982), the Secretary must implement the recommendations of the Recovery Team, unless he finds that they will not promote the *conservation* of the species in question.

52. Letter from Ronald E. Nicotera, Recovery Team member, Wisconsin DNR, to Defenders of Wildlife (November 4, 1981).

53. See *supra* text and notes at notes 29-31.

54. P. Karns, paper presented at Symposium on Mammalian Ecology and Habitat Management in Minnesota (March 7-9, 1980).

55. MINNESOTA DNR, MINNESOTA TIMBER WOLF MANAGEMENT PLAN 11 (February, 1980). The DNR intends to reduce wolf populations in order to increase deer numbers despite the fact that severe winters and maturing forest habitat are the major causes of reduced deer numbers. See, e.g., VERME AND OZOGA, INFLUENCE OF WINTER WEATHER ON WHITE-TAILED DEER IN UPPER MICHIGAN, MICHIGAN DEPT. NATL. RESOURCES REPORT No. 237 (1971); Verme and Ullrey, *Feeding and Nutrition of Deer*, in 3 THE DIGESTIVE PHYSIOLOGY AND NUTRITION OF RUMINANTS 275-282 (1972). In addition to reducing wolf numbers for deer, the DNR Management Plan states a firm policy of encouraging the harvest of wolves as a furbearer resource.

56. DNR Wolf Management Policy (1972, 1974, and 1977) (DNR files); MINNESOTA DNR, MINNESOTA TIMBER WOLF MANAGEMENT PLAN (February, 1980).

57. Proposed Regulations, 47 Fed. Reg. 305-28, 305-31 (1981).

58. See *supra* note 20.

legality of the Department of the Interior's recent decision to return wolf conservation authority to the State depends in large part on interpretation of the Secretary's authority to permit the taking of wolves under the Endangered Species Act. The next section of this article examines the limits of the Secretary's authority in light of the legislative history and judicial construction of the Act.

### III. THE DEPARTMENT OF THE INTERIOR'S AUTHORITY TO PERMIT TAKING OF THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT

#### *A. Introduction: Two Views of the Secretary's Mandate to "Conserve"*

In the nine-year history of the Endangered Species Act, the Department of the Interior has juggled two different interpretations of its responsibility to conserve threatened species. One interpretation is that the Secretary must pursue all conservation measures to *increase* populations of threatened species. This interpretation of the Act dictates that conservation measures do *not* permit allowing a regulated taking of threatened species except "in the extraordinary circumstance where population pressures . . . cannot be otherwise relieved."<sup>59</sup> The second interpretation asserts that the Secretary has discretion under the Act to publish regulations which allow or encourage the taking of a threatened species, and would require him to restrict the regulated taking of threatened species only when he determines that such action is "necessary and advisable" for species conservation.<sup>60</sup> Despite the availability of this broad discretionary interpretation of its responsibility, the Department of the Interior has consistently chosen not to test the validity of this interpretation, either in the courts or in Congress. Instead, it has attempted to justify its taking regulations under the strict interpretation by arguing that there existed "extraordinary circumstances where population pressures cannot be otherwise relieved."<sup>61</sup>

The interpretation of the Secretary's statutory mandate substantially affects the nature of the implementation of the Act and the degree of protection it affords to all threatened species. Did Congress intend to give the Secretary broad discretion to determine when the taking of a threatened species was in its own best interest?

---

59. 16 U.S.C. § 1532(3) (1982); *see supra* text and notes at notes 8 and 14.

60. 16 U.S.C. § 1533(d) (1982); *see supra* text and notes at notes 15-18.

61. *See infra* text and notes at notes 113-30.

Or did the lawmakers, perceiving the enormous pressure from states to permit such taking, purposely restrict that discretion to cases where species population pressures required limited taking? Did Congress intend conservation of a threatened species to mean increasing and restoring its populations, or merely taking actions which will not hurt the species or which will maintain the status quo? These are the questions which must ultimately be answered by the courts in assessing the validity of these two conflicting views of the mandate to conserve threatened species outlined in the Endangered Species Act.

In an effort to shed some light on this conflict in statutory interpretation, this section will examine the wording of the Act itself, the evolution of the statutory scheme as it progressed through legislative committees and floor debates, and the consensus ultimately reached in the House-Senate Conference Committee. Finally, this section will discuss federal case law construing the Act, and will show that the Act represents a clear congressional directive to limit the taking of threatened species.

### *B. Construing the Secretary's Mandate to Conserve*

Whether Congress intended to give the Secretary of the Interior broad discretion to permit the regulated taking of threatened species specifically depends upon the construction of sections 4(d) and 3(3) of the Endangered Species Act.<sup>62</sup> Analysis of these sections and their corresponding legislative history<sup>63</sup> indicates that the Secretary may not promulgate regulations permitting the regulated taking of a resident threatened species in the absence of "population pressures within a given ecosystem [which] cannot be otherwise relieved."<sup>64</sup>

#### 1. The Statutory Construct

Section 4(d) of the Act requires that the Secretary "shall issue such regulations as he deems necessary and advisable to provide for the *conservation* of [threatened] species."<sup>65</sup> It authorizes, but does not

---

62. 16 U.S.C. §§ 1533(d), 1532(3) (1982), respectively.

63. The legislative history includes House, Senate, and Conference Reports, House and Senate floor debates, and House and Senate subcommittee hearings. See COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979 AND 1980 (Comm. Print 1982) (Includes House, Senate, and Conference Committee Reports and House and Senate floor debates).

64. 16 U.S.C. § 1532(3) (1982).

65. 16 U.S.C. § 1533(d) (1982) (emphasis added). This section states that, "except that with

require, the Secretary to extend by regulation any of the statutory prohibitions protecting endangered species enumerated in section 9(a)(1) to threatened species as well.<sup>66</sup> The section 9(a)(1) prohibitions most relevant to the issue here are: the taking of an endangered species within the United States;<sup>67</sup> the possession, sale, delivery or transportation of an endangered species;<sup>68</sup> and the violation of any regulation pertaining to a threatened or endangered species and promulgated under the authority of the Act.<sup>69</sup>

Since section 4(d) requires the Secretary to issue regulations necessary for the "conservation" of threatened species, the definition of "conservation" in section 3(3) of the Endangered Species Act dictates the nature of the protective regulations that the Secretary can promulgate. "Conservation" is defined in section 3(3) as,

the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management . . . and, *in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.*<sup>70</sup>

Thus, although the language of section 4(d) suggests that the Secretary has some discretion in determining the necessity for conservation regulations, the definition of conservation itself imposes a strict standard which precludes the taking of protected species in all but extreme circumstances. The statute, therefore, is not the last word on this issue.

## 2. The Conference Report

The wording of the Conference Report accompanying the Act is more emphatic than the language of section 3(3) in limiting the conditions for permissible taking of threatened or endangered species. Its intent to restrict the taking of threatened and endangered species to the most extreme circumstances is evident in the following passage:

---

respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to Section 1535(a) [§ 6 of the Act] of this title only to the extent that such regulations have also been adopted by such State."

66. *Id.*

67. Section 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B) (1982).

68. Section 9(a)(1)(C), 16 U.S.C. § 1538(a)(1)(C) (1982).

69. Section 9(a)(1)(G), 16 U.S.C. § 1538(a)(1)(G) (1982).

70. 16 U.S.C. § 1532(3) (1982) (emphasis added).

In view of the varying responsibilities assigned to the administering agencies in the bill, the term (conservation and management) was redefined to include generally the kinds of activities that might be engaged in to improve the status of endangered and threatened species so that they would no longer require special treatment. The concept of conservation covers the full spectrum of such activities: from total "hands-off" policies involving protection from harassment to a careful and intensive program of control. *In extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, this 'conservation' might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur — it is just to say that the authority exists in the unlikely event that it ever becomes needed.*<sup>71</sup>

Since the Conference Committee Report reflects the final agreement between the houses upon which the Act was passed, it provides the most accurate index of congressional intent with respect to the taking of threatened species.<sup>72</sup> In light of the possible ambiguity that may result from reading sections 4(d) and 3(3) together, this express limitation on taking can best be understood by examining the evolution through the legislative process of the protection scheme for threatened species. The next subsection discusses that evolution.

### 3. The Evolution of a Congressional Scheme to Protect Threatened Species

#### a. Early Congressional Views

The types of protection to be afforded to "threatened" species was a major issue during the House and Senate subcommittee hearings on the Endangered Species Act. The underlying rationale for the "threatened" species classification, provided by the Interior Department itself, was that "it is far more sound to take the steps necessary to keep a species or subspecies from becoming endangered than to attempt to save it after it has reached the critical point."<sup>73</sup> In addi-

---

71. CONF. REP. NO. 740, 93rd Cong., 1st Sess. 23 (1973) (emphasis added).

72. C. D. SANDS, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48.08 (4th ed. 1973); C. D. SANDS, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48.06 (4th ed. 1973 & Supp. 1982).

73. EXEC. COMM. NO. 442, accompanying the Administration's bill, H.R. 4758, reprinted in H.R. REP. NO. 412, 93rd Cong., 1st Sess. 20 (1973) [hereinafter cited as H.R. REP. NO. 412]; *Endangered Species: Hearings on H.R. 37, H.R. 2169, and H.R. 4859 Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 93rd Cong., 1st Sess. 186 (1973) [hereinafter cited as 1973 House

tion, Assistant Secretary for Fish and Wildlife and Parks, Nathaniel Reed, testified before the Senate that the Secretary's authority to issue threatened species regulations was intended, "to provide a 'halfway house' for those animals which have been restored to the point that they are no longer 'threatened with extinction,' but have not yet responded to the point at which they are ready to be completely removed from the protective umbrella of the Endangered Species Conservation Act of 1972."<sup>74</sup> Moving a species from the endangered to the threatened category, Reed testified could be likened to "a hospital where the patient is transferred from the intensive care unit to the general ward until he is ready to be discharged."<sup>75</sup>

The Interior Department and Congress reasoned that the establishment of two classes of species, along with two separate degrees of protection, would facilitate the protection of threatened species by increasing the Secretary's regulatory flexibility.<sup>76</sup> While the taking of endangered species, with some exceptions, would be absolutely prohibited, the Secretary would have discretionary authority to regulate the taking of a threatened species in a manner "tailored to the needs of the animal."<sup>77</sup>

Initially, Congress and the Department of the Interior intended to vest the Secretary with broad discretion to establish protective measures for the threatened species.<sup>78</sup> In a letter responding to Congressional inquiries about the Administration's 1972 bill,<sup>79</sup> the Acting Assistant Secretary of the Interior stated that once a species was reclassified as threatened, the Secretary could permit a limited harvest if it was shown to be "in the best interest of the species."<sup>80</sup> Testifying at House Hearings in 1973, Assistant Secretary Reed explained: "[T]he type and degree of control exercised over this class of

---

*Hearings*]. See also, testimony of Asst. Secretary for Fish and Wildlife and Parks, Nathaniel Reed, 1973 House Hearings, at 204; *Endangered Species Conservation Act of 1972: Hearings on S. 249, S. 2199 and S. 3818 before the Subcommittee on the Environment of the Senate Committee on Commerce*, 92nd Cong., 2d Sess. 68 (1972) [hereinafter cited as *1972 Senate Hearings*].

74. 1972 Senate Hearings, *supra* note 73, at 69-70.

75. *Id.*

76. 1972 Senate Hearings, *supra* note 73, at 68; 1973 House Hearings, *supra* note 73, at 195, 204; 119 CONG. REC. S25,669 (daily ed. July 24, 1973) (statement of Sen. Tunney); 119 CONG. REC. H30,164 (daily ed. September 18, 1973) (statement of Rep. Goodling).

77. *Id.*

78. It was not until the House and Senate bills reached the Conference Committee that the Secretary's discretion to permit takings was narrowed. See *infra* text and notes at notes 93-95.

79. 1972 Senate Hearings, *supra* note 73, at 68.

80. Letter from the Acting Assistant Secretary of Interior to Senator Spring (September 2, 1972).

animal would depend on the circumstances of each species. It could include a complete or partial ban on taking if deemed appropriate.”<sup>81</sup> The House Report adopted this approach, noting:

Once an animal is on the threatened list, the Secretary has *an almost infinite number of options available to him* with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species.<sup>82</sup>

Thus, Congress initially intended to give the Secretary broad discretion and flexibility in conserving threatened species. This broad discretion included authority to regulate their taking.

b. Addition to the Act of the Terms “Conservation” and “Management”

A definition of “conservation” and “management” was first introduced into the Act in the course of the 1973 Senate hearings. The suggested amendment was intended to foster federal-state cooperative agreements and to minimize federal preemption of state authority to regulate the taking of resident wildlife.<sup>83</sup> This legislative change was endorsed by the Department of the Interior, the National Oceanic and Atmospheric Administration, the International Association of Game and Fish Conservation Commissioners, the Wildlife Management Institute, the National Wildlife Federation, and the National Rifle Association. According to the proposed definition, “conservation” and “management” practices were measures taken “for the purposes of increasing and maintaining the number of animals within species and populations of endangered and threatened species at the optimum carrying capacity of their habitat.”<sup>84</sup> In addition, the proposed amendment stipulated that the terms “conservation” and “management” included “the protection, propagation, conservation and restoration of such species, including regulation and taking necessary to these ends.”<sup>85</sup>

81. *1973 House Hearings*, *supra* note 73, at 204. Reed’s testimony refers to the delegation of authority to the Secretary to make protective regulations for threatened species (Section 5(c) of H.R. 4758). Similar provisions were included in S. 1983, Section 4(d) as reported to Senate floor and H.R. 37, Section 4(d), as reported to the House floor.

82. H.R. REP. NO. 412, *supra* note 73, at 11. (emphasis added).

83. *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcommittee on the Environment of the Senate Committee on Commerce*, 93rd Cong., 1st Sess. 82-83, 91 (testimony of Mr. John Gottschalk, IAGFCC) (1973) [hereinafter cited as *1973 Senate Hearings*].

84. *Id.*

85. *Id.* at 91.



The Senate adopted the proposed definition and incorporated it into the Senate Bill<sup>86</sup> during the floor debate.<sup>87</sup> The House bill<sup>88</sup> did not include any comparable language. At the time the amendment was presented, the manager of the bill, Senator Tunney, stated that the amendment was intended to “strengthen the purposes of this act, which is, namely, to protect, conserve, propagate and restore endangered species,” and to “articulate the type of protections the committee intended when it reported the bill from the committee to the floor of the Senate.”<sup>89</sup>

The extent to which the taking of threatened species was intended to be included among the “type of protections” considered by the Senate subcommittee is reflected in the Senate Report and the comments of Senator Tunney in introducing the bill. The Senate clearly saw the purpose of the Act as *restoring* populations already threatened or on the decline — not merely sustaining populations at a depleted level.<sup>90</sup> This legislative history is evidence of Congress’ desire that taking of threatened species should, at a minimum, be aimed at improving the status of its population. The subcommittee also believed, however, that the conservation of threatened species should be promoted by leaving the states with great latitude in regulating the taking of resident species.<sup>91</sup> In introducing the bill to the Senate floor Senator Tunney explained that “States with active endangered species program are given full discretion to manage threatened species which reside within their boundaries.”<sup>92</sup> He added that “the States would have *full authority* to use their management skills to insure the proper conservation of the species.”<sup>93</sup>

Although the House did not attempt to define “conservation,” it did address the issue of threatened species protection. Like the Senate, the House initially intended that the Act lead to *restoration* of healthy populations.<sup>94</sup> The House Report stated that “threatened species” should include not only species on the decline, but also “those which have achieved a stabilized position, or even were on the

---

86. S. 1983, 93rd Cong., 1st Sess. (1973).

87. 119 CONG. REC. S25,681 (daily ed. July 24, 1973).

88. H.R. 37, 93rd Cong., 1st Sess. (1973).

89. 119 CONG. REC. S25,682 (daily ed. July 24, 1973).

90. S. Rep. No. 307, 93rd Cong., 1st Sess. 6 (1973) [hereinafter cited as S. REP. NO. 307].

91. *Id.* at 3; 119 CONG. REC. S25,668-69 (daily ed. July 24, 1973).

92. 119 CONG. REC. S25,669 (daily ed. July 24, 1973).

93. *Id.*

94. H.R. REP. NO. 412, *supra* note 73, at 20. The House Report specifically states an intent to “halt and, if possible, to reverse this decline.” *Id.* at 8.

increase, so long as the Secretary was satisfied that a measurable risk to those species could be said to exist.”<sup>95</sup>

c. Narrowing the Secretary’s Discretion to Permit Taking Under the Act

When the House and Senate bills reached the Conference Committee, the Senate’s definitions of “conservation” and “management” were overhauled, apparently to reflect the Committee’s intent to prevent the taking of threatened species from being left to the unfettered discretion of state or federal wildlife agencies.<sup>96</sup> The term “management” was eliminated from the Senate provision. In addition, the Committee changed the definition of the purpose of conservation from “increasing and maintaining the number of animals at the optimum carrying capacity of their habitat,” to “bring[ing] any endangered or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” These changes emphasized that the goal of conservation measures was to protect threatened species by *removing the species from all risk of extinction*, and not merely by achieving some nebulous “optimum carrying capacity.” Finally, the Committee limited the Agency’s discretion to permit takings to “the extraordinary case when population pressures cannot be otherwise relieved,” rather than whenever taking was deemed “necessary to [the] ends [of conservation and management].” The Committee Report left little room for doubt as to the Committee’s intent:

In extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, . . . “conservation” might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur — it is just to say that the authority exists in the unlikely event that it ever becomes needed.<sup>97</sup>

Hence, while Congress granted broad discretion to the Secretary generally, it apparently reached an ultimate decision to restrict his discretion with respect to the taking of threatened species. The Conference Committee Report contains the clear directive that threat-

---

95. H.R. REP. NO. 412, *supra* note 73, at 10.

96. CONF. REP. NO. 740, 93rd Cong., 1st Sess. 23 (1973).

97. *Id.*

ened species are to be taken only in the most extreme of circumstances.<sup>98</sup>

*C. The Federal Courts' Interpretation of the Secretary's Authority to Permit Taking of Threatened Species*

No court has expressly addressed the extent of the Secretary's authority to permit the taking of resident threatened species. Limited judicial guidance, however, does exist. In *Tennessee Valley Authority v. Hill*,<sup>99</sup> the United States Supreme Court addressed the issue of whether to enjoin the T.V.A. from constructing the Tellico Dam in order to preserve the habitat of the endangered snail darter. Referring to the Endangered Species Act as an "institutionalization of caution,"<sup>100</sup> the Court held that Congress intended to give the highest of priorities to protection of endangered species and stated that all effort and resources necessary to halt and reverse the trend toward species extinction should be employed.<sup>101</sup>

In *Defenders of Wildlife v. Andrus*,<sup>102</sup> the federal district court considered whether Department of the Interior regulations governing the permissible hours for migratory bird hunting violated the Endangered Species Act, the Migratory Bird Treaty Act<sup>103</sup> or the Administrative Procedure Act.<sup>104</sup> The district court held that regulations permitting twilight hunting were arbitrary because the rule-making process did not adequately focus on the FWS's obligation to conserve and increase the population of protected species.<sup>105</sup> In construing sections 4(d) and 3(3) of the Act and the Secretary's mandate to conserve threatened species, Judge Gesell stated:

It is clear from the face of the statute that the Fish and Wildlife Service, as part of the Interior, must do far more than merely avoid the elimination of a protected species. It must bring these species back from the brink so they may be removed from the protected class, and it must use all methods necessary to do so. The Service cannot limit its focus to what it considers the most important management tool available to it to accomplish this end. . . . [T]he agency has an affirmative duty to increase the population of protected species.<sup>106</sup>

---

98. *Id.*

99. 437 U.S. 153 (1978).

100. *Id.* at 187.

101. *Id.* at 177, 179-80.

102. 428 F. Supp. 167 (D.D.C. 1977).

103. 16 U.S.C. § 704 (1982).

104. 5 U.S.C. § 706 (1982).

105. 428 F. Supp. at 170.

106. *Id.*

This interpretation of the Agency's mandate was qualified, however, by the district court's opinion in *Connor v. Andrus*.<sup>107</sup> In that case, the court addressed the issue of whether FWS regulations prohibiting all duck hunting in designated areas in order to protect the endangered Mexican Duck were arbitrary and capricious. The court held that since the federal rulemaking was not supported by findings that the hunting ban would increase or even tend to increase the Mexican Duck population, the FWS rules were not adequately focused on affirmative means of restoring the protected species and were therefore arbitrary and capricious.<sup>108</sup> The court determined that the Secretary's affirmative duty to increase protected species populations "is not met by promulgating regulations which do not attack the cause or causes of population depletion of a species."<sup>109</sup> Thus, according to the court in *Connor*, the Act may not require the Interior Secretary to prohibit the taking of a threatened species if such a taking is not related to the causes of its population depletion.

In short, the little case law on the issue generally supports the view that the Secretary must employ all measures and resources available to bring threatened species populations to the point at which they are beyond risk and can be removed from the list of "threatened" species. This obligation would, of course, limit the Secretary's authority to permit taking of a threatened species.

*D. Summary: A Clear Congressional Directive to Limit the Taking of Threatened Species*

The question of how much discretion should be granted the Secretary of the Interior to permit the taking of threatened species was ardently and thoroughly debated in Congress.<sup>110</sup> Congress never seriously questioned the fact that the Secretary should be granted broad discretion in implementing conservation strategies for threatened species. In addition, it was clear to the lawmakers that the states wanted to retain their traditional control over the taking of resident wildlife species, and that they could best encourage the states to assume a cooperative role in conserving endangered and threatened species by assuring the states of such discretion.<sup>111</sup> It was made equally clear in congressional debate, however, that the

---

107. 453 F. Supp. 1037 (D. Tex. 1978).

108. *Id.* at 1041-42.

109. *Id.* at 1041.

110. *See supra* text and notes at notes 70-109; *infra* text and notes at notes 111-132.

111. *See supra* text and notes at notes 83-93.

federal regulations would act as a minimum standard for taking, and therefore, no state could permit taking of a species under a cooperative agreement unless the Secretary permitted such a taking in the applicable federal regulations.<sup>112</sup>

The Conference Report and the bill enacted represent the Congress's final position on the issue. Both the statute and the Conference Report limit the Secretary's discretion to permit the taking of threatened species. Although the Secretary has broad discretion in dictating protective measures for a threatened species, his discretion is bridled by his mandate to promote its "conservation." It is clear from the legislative history that Congress intended this mandate to impose upon the Secretary the duty to restore the species to a condition where it is beyond any risk of extinction, and permit the taking of the species only under the most extreme circumstances.

At times, the Interior Department has recognized this legislative limitation on its discretion to permit taking. At other times, however, it has interpreted its authority much more broadly. The next section traces the Department's interpretation of its authority to permit the taking of threatened species other than the eastern timber wolf.

#### IV. THE INTERIOR DEPARTMENT'S INTERPRETATION OF ITS AUTHORITY TO PERMIT TAKING

From the outset of its administration of the Endangered Species Act, the Department of the Interior has been pressured to permit the taking of threatened species. When the Department has permitted such takings, it has often considered adopting a broad interpretation of its discretion in promoting conservation in order to accommodate its decisions. This section discusses the Department's responses to pressures for threatened species taking.

##### A. *Early Pressures for Increased Discretion*

The Act's definition of "conservation"<sup>113</sup> came into question in January, 1975, when the Department of the Interior proposed to list the grizzly bear (*Ursa actor horribilis*) as a threatened species,<sup>114</sup> and to

---

112. H.R. REP. NO. 412, *supra* note 73, at 13; *See also* CONF. REP. NO. 740, 93rd Cong., 1st Sess., 26 (1973); *1973 House Hearings*, *supra* note 15, at 204-05 (testimony of Nathaniel Reed).

113. *See supra* text and note at note 8.

114. Proposed Regulations, 40 Fed. Reg. 5-7 (1975). The grizzly bear had not previously been listed. Fund for Animals, Inc. had petitioned the Department to list the grizzly bear as "endangered" in 1974 pursuant to the Act. These regulations were proposed in response to that petition. 40 Fed. Reg. 5 (1975).

permit a sport season on that species.<sup>115</sup> Environmental groups threatened litigation if the proposal was finalized.<sup>116</sup> The issue of taking threatened species was also raised by adopted regulations permitting the importation, under some circumstances, of three threatened species of kangaroo.<sup>117</sup>

In April of 1975, the Department of the Interior Solicitor's Office advised the Assistant Interior Secretary of his options with regard to "the annoying final phrase concerning 'taking' in the Act's definition of 'conservation,'" <sup>118</sup> and offered some possible arguments to support controversial rulemaking permitting taking. One argument suggested that the Secretary's discretion to issue regulations that "he *deems necessary and advisable* . . . to provide for the conservation of [protected] species" <sup>119</sup> was not restricted by the language of section 3(3), which limits the taking of protected species to "the extraordinary case . . . where population pressures . . . cannot be otherwise relieved."<sup>120</sup> The Solicitor's Office reasoned that the Secretary of the Interior need not promulgate a regulation restricting taking if he deemed that such a regulation was neither necessary nor desirable for the conservation of a species.<sup>121</sup>

A second option, already under consideration by the Department to broaden its discretion to permit taking, was to amend the Act itself. Specifically, the Department considered seeking an amendment of the restrictive "extraordinary case" language, emphasizing to Congress that the amendment would not be a *new* grant of power but only a *clarification* of the Secretary's existing discretion consistent with the legal interpretation discussed above.<sup>122</sup> The Solicitor's Office cautioned that if the amendment failed,

Congress could be seen as having considered a ratification of our allowing taking of threatened species, and having rejected such a ratification, thereby weakening our arguments on section 4(d) in the eyes of any court that is called upon to consider the question.<sup>123</sup>

---

115. 40 Fed. Reg. 5 (1975).

116. Memorandum from Associate Solicitor, Conservation and Wildlife, Department of Interior to Assistant Secretary for Fish and Wildlife and Parks (April 11, 1975) [hereinafter cited as Memorandum].

117. *Id.*; Final Regulations, 38 Fed. Reg. 44,991 (1974), *codified at* C.F.R. § 17,40(a)(i)(B) (1980).

118. Memorandum, *supra* note 116.

119. 16 U.S.C. § 1533(d) (1982).

120. 16 U.S.C. § 1532(3) (1982).

121. Memorandum, *supra* note 116. *See also* Draft letter from the Secretary of the Interior to the Chairman, Council on Environmental Quality (attached to Memorandum, *supra* note 116).

122. Memorandum, *supra* note 116.

123. *Id.*

The opinion concluded that the choice between litigating the grizzly bear and kangaroo cases under the new legal interpretation of section 4(d) and pursuing an amendment to the Act immediately, should be decided upon the likelihood of an amendment's passage in Congress.<sup>124</sup>

Neither of these strategies were adopted. Instead, the interpretation of the Act was side-stepped, a decision which likely reflected the Department's lack of confidence in its new legal interpretation. The legislative history of the 1976 Endangered Species Act Amendments reflects no effort by the Department to amend the taking restrictions in section 4(d).<sup>125</sup> Similarly, when the Interior Department promulgated regulations in July, 1975 permitting the taking of grizzly bears, it did not attempt to base its decision upon its broad discretion to permit taking of threatened species. Rather, the Department carefully justified its decision to permit taking by asserting that pressures on the grizzly bear population could not "be otherwise relieved," and thus fell within the precise wording of section 3(3) of the Act permitting taking in extraordinary cases.<sup>126</sup> Thus, the Department was able to sustain its regulations permitting the taking of grizzly bears without arguing for a new interpretation or amendment of the statute.

During this same period, the FWS reclassified the Lahontan cutthroat trout (*Salmo clarki henshawi*) from endangered to threatened and allowed a sport fishing season on the species.<sup>127</sup> The primary environmental factors affecting the cutthroat trout were loss of habitat and competition from introduced non-native trout.<sup>128</sup> Since state and federal managers were successfully re-establishing the species through transplantation, propagation, and removal of introduced species, the FWS reasoned that "sport fishing [was] an acceptable method of preventing overpopulation which could injure a species by taxing the species' habitat," and was therefore a permissible conservation measure under the Act.<sup>129</sup>

Hence, the FWS permitted the taking of the cutthroat on the same basis that it permitted the taking of the grizzly bear. Its regulations

---

124. *Id.*

125. H.R. REP. NO. 887, 94th Cong., 2d Sess. 6-9 (1976) (departmental reports); H.R. REP. NO. 823, 94th Cong., 2d Sess. 1-12 (1976) (text and departmental reports); S. REP. NO. 63, 94th Cong., 1st Sess. 1-9 (1975) (text and agency comments).

126. Final Regulations, 40 Fed. Reg. 31,734-35 (1975).

127. Final Regulations, 40 Fed. Reg. 29,863-64 (1975) (codified at 50 C.F.R. § 17.44(a) (1982)).

128. *Id.* at 29,864.

129. *Id.* at 29,863-64. See also Proposed Regulations, 40 Fed. Reg. 17,347 (1975).

make an implicit finding that trout populations constituted an extraordinary case where population pressures could not be otherwise relieved. The Service received no opposition to the sport harvest of the trout as a conservation measure, and its discretion to permit a taking of threatened species in that case was not contested.<sup>130</sup>

*B. Reemergence of the Department's "Broad Discretion" Interpretation*

In 1980, the "broad discretion" interpretation of the Secretary's mandate to protect threatened species resurfaced on another front. At that time, the FWS promulgated regulations permitting the importation of three threatened species of kangaroos from Australia.<sup>131</sup> Environmental groups argued that lifting the import ban was the equivalent of permitting the taking of a threatened species in violation of the Act.<sup>132</sup> The FWS, as it had in 1975, responded by letter in the following manner:

[T]he Act does not automatically prescribe any taking prohibitions for threatened species but leaves that action up to the Secretary's discretion. . . . The existence of population pressure is not a prerequisite to allowing the taking of threatened species under specific factual situations. The test under section 4(d) of the Act is the necessity and advisability of such regulations considering the overall status and foreseeable future of the species.<sup>133</sup>

When the "Kangaroo Case"<sup>134</sup> was litigated in May, 1981, the federal government, in its Memorandum of Law, modified its broad interpretation somewhat. It argued that the validity of regulations issued under section 4(d) must be judged on the basis of whether they seek to remedy the problems which led to the species' threatened status.<sup>135</sup> In the case of the kangaroo, the government argued, the problem to be remedied was the inadequacy of existing regulatory mechanisms, not reduced population levels. The Secretary used his leverage first to impose, and then to lift, the import ban on the kangaroos as a means of encouraging the Australian States to imple-

---

130. *Id.* at 29,864.

131. Final Regulation, 46 Fed. Reg. 23,929 (1981).

132. Letter from the Associate Director of FWS for Federal Assistance to Jeffrey H. Howard, Attorney, Davis, Graham and Stubbs, Washington, D.C. (September 30, 1980).

133. *Id.* The letter reveals coordination with the Solicitor's Office in its drafting.

134. *Defenders of Wildlife, Inc. v. James G. Watt*, No. 81-1048 (D.D.C. 1981).

135. *Defendants' Memorandum of Law* at 16, *Defenders of Wildlife, Inc. v. James G. Watt*, No. 81-1048 (D.D.C. 1981).



ment effective regulatory mechanisms to protect these species.<sup>136</sup> The government concluded that since the Australian States did enact these conservation regulations, the Secretary acted within his statutory mandate to “conserve” by lifting the import ban in accordance with his negotiations with Australian authorities.<sup>137</sup>

The district court adopted this line of reasoning and upheld the Agency’s regulations. The court’s opinion, however, drew a clear distinction between the Secretary’s conservation mandate in a domestic context and an international context.<sup>138</sup> Judge Aubrey Robinson explained:

Defendants have no control over the species or its natural habitat. Their ability to protect the kangaroo is limited to encouraging the Australian States to implement programs designed to ensure the species’ well-being . . . . Because lifting the ban was essential in order to encourage the Australian States to implement measures deemed necessary by Defendants . . . the lifting of the ban fulfilled the conservation objective of the ESA.<sup>139</sup>

Consequently, the Secretary’s authority to permit the taking of *resident* threatened species was never addressed.<sup>140</sup>

The Department’s responses to pressures for taking in the grizzly bear, Lahontan cutthroat trout, and kangaroo controversies provide a backdrop for evaluating its actions in the timber wolf controversy. That issue is discussed in the section below.

#### V. CONSERVATION OF THE EASTERN TIMBER WOLF: A CASE STUDY OF THE DEPARTMENT’S INTERPRETATION OF ITS MANDATE

The Department of the Interior’s treatment of the timber wolf controversy reveals its vulnerability to pressure regarding threatened species protection. Persistent pressure from the State of Minnesota to permit taking of the timber wolf resulted in the reclassification of the wolf from “endangered” to “threatened” status, and the FWS’s reluctant acceptance of Minnesota’s plan, pursuant to a cooperative agreement, to permit taking of the wolf. The Interior Department has justified these changes in timber wolf protection policy under a broad construction of its discretion to permit taking of threatened species under the Endangered Species Act.

---

136. *Id.* at 15.

137. *Id.* at 17.

138. *Defenders of Wildlife, Inc. v. James G. Watt*, No. 81-1048, at 7 (D.D.C. 1981).

139. *Id.* at 8.

140. *Id.*

A. *Reclassification of the Wolf From "Endangered" to "Threatened"*

From October, 1974, when the state of Minnesota petitioned the Department of the Interior for exclusion from the "endangered" range of timber wolf, until June, 1977, when the Recovery Team issued its recommendations, efforts to remove legal protections on the timber wolf were halted.<sup>141</sup> During this period, state politicians and the Minnesota Department of Natural Resources sought Interior's legal interpretation as to the extent and nature of federal power to control the taking of a species listed as "threatened" in a state where a Cooperative Agreement was signed pursuant to section 6(c) of the Act.<sup>142</sup> Specifically, state authorities posed the following question to the Department of the Interior: "if the timber wolf were reclassified from 'endangered' to 'threatened,' and if the state entered into a cooperative agreement to manage the species, would the state have the authority to permit a sport season on the animal?" The response of the Department was "no." The Department stated that "[t]he Secretary could not sign a Cooperative Agreement with a state if the State would permit takings of a threatened species that the Secretary has otherwise prohibited by regulation."<sup>143</sup>

On June 9, 1977, the FWS received the Recovery Team's recommendations and published their proposed regulations regarding the timber wolf.<sup>144</sup> The regulations proposed to reclassify the wolf from an "endangered" to a "threatened" species.<sup>145</sup> Although the Recovery Plan recommended some regulated taking of the wolf in its peripheral range as one part of an overall wolf recovery plan, the FWS rejected this recommendation.<sup>146</sup> The FWS determined instead that,

[f]or the time being, the Service sees no justification for allowing the taking of non-depredating wolves. The Service could,

---

141. See *supra* text and notes at notes 30-38. The timber wolf was automatically classified as "endangered" upon enactment of the 1973 Act because it had been previously categorized as such under the 1969 Act. See *supra* note 28.

142. Letter from Regional Director, U.S. Fish and Wildlife Service to State Representative Irwin N. Anderson (April 8, 1977); Meeting Minutes, Office of Endangered Species, U.S. Fish and Wildlife Service briefing of Minnesota DNR and Regional FWS personnel (June 3, 1974).

143. Letter from Regional Director, U.S. Fish and Wildlife Service, to State Representative Irwin N. Anderson, *supra* note 63. See also Memorandum from Associate Solicitor, Fish and Wildlife, Department of Interior, to Associate Director, Federal Assistance, Fish and Wildlife Service (April 28, 1977).

144. Proposed Regulations, 42 Fed. Reg. 19,527 (1977).

145. *Id.*

146. *Id.* at 19,528.

however, continue to monitor the situation as recommended by the team, and would propose new regulations whenever warranted.<sup>147</sup>

The Service's final rulemaking in 1978 reclassified the timber wolf and retained this prohibition on taking of non-depredating wolves. It also set forth procedures for wolf predation control.<sup>148</sup>

### *B. Initial Rejection of a Plan for Taking Timber Wolves*

In December, 1979, the Minnesota DNR and the FWS, pursuant to section 6(c) of the Act,<sup>149</sup> signed a Cooperative Agreement for the management of threatened and endangered species within the State. In February, 1980, the DNR submitted to FWS a Timber Wolf Management Plan<sup>150</sup> which, if approved by the FWS and Department of the Interior, would have provided the basis for delegation of the timber wolf conservation program to the state. The plan contained two controversial provisions, both of which permitted the taking of timber wolves beyond the exceptions condoned by the Department of the Interior as consistent with the Act's definition of "conservation" and the Secretary's mandate to conserve threatened species.<sup>151</sup> First, the State proposal expanded the predation control program in a manner which permitted the taking of non-depredating wolves.<sup>152</sup> Second, the proposal recommended a sport season on the wolf.<sup>153</sup>

The Office of the Field Solicitor<sup>154</sup> advised the FWS Regional Director in March, 1980, that the state's management plan was unacceptable and inconsistent with the Agency's existing regulations.<sup>155</sup> The Field Solicitor informed the FWS that in order to amend the regulations to accommodate the taking proposed by the state, "it would be necessary for the Service to establish that such control would occur only 'in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved.'"<sup>156</sup> Hence, the Field Solicitor recognized that the definition of "conservation" in Section 3(3) prohibited any federal regulation that permitted taking except in the most extreme circumstances.

---

147. *Id.*

148. Final Regulations 43 Fed. Reg. 9607 (1978) (*codified at* 50 C.F.R. § 17.40(d) (1982).

149. 16 U.S.C. § 1535(c) (1982).

150. MINNESOTA DNR, MINNESOTA TIMBER WOLF MANAGEMENT PLAN (February, 1980).

151. *Id.*

152. *Id.*

153. *Id.*

154. The field office of the Office of the Solicitor, Department of the Interior.

155. Letter from Field Solicitor, Department of the Interior, to the Regional Director, FWS (March 7, 1980).

156. *Id.*

The Director of the FWS confirmed the Field Solicitor's strict interpretation of the Act in a memorandum to the Service's Regional Director regarding the Minnesota Timber Wolf Plan.<sup>157</sup> The Director of the Service concluded that the Department had no basis for changing the regulations to accommodate the state's predation control and sport season provisions. He suggested that the Regional Office meet with the Minnesota DNR to propose modification of the predation control program and *elimination* of the sport season in order to "proceed with a legally acceptable depredation control and management program."<sup>158</sup> Subsequent meetings between the two agencies in August, 1980 resulted in an impasse: the DNR would not cooperate in a wolf conservation program without permission to place a sport season on the animal.<sup>159</sup>

*C. Final Acceptance of a Plan for Taking Timber Wolves*

Several months after the FWS rejected Minnesota's proposed plan to allow taking of the timber wolf, the Minnesota DNR resubmitted its same timber wolf management plan to the Department of the Interior.<sup>160</sup> Three months later, in July, 1981, the FWS again refused to accept the plan, explaining:

The implementation of any harvest season is not legally feasible. The Endangered Species Act allows regulated taking of a threatened species only in "the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved." According to available biological data, the wolf in Minnesota is not now in such a situation.<sup>161</sup>

Roughly four months after rejecting Minnesota's proposal for the second time, the FWS expressed a willingness to reconsider the DNR's proposed 1980 Wolf Management Plan.<sup>162</sup> The same plan that had been submitted by the state in February, 1981, and rejected by FWS on both occasions, was resubmitted by the DNR on October 27, 1981.<sup>163</sup> Pressure from Minnesota's congressional delegation had become particularly intense by March, 1981.<sup>164</sup> Not inconsequential-

---

157. Memorandum from Director, FWS to the Regional Director, FWS (June 27, 1980).

158. *Id.*

159. Letter from Regional Director, U.S. Fish and Wildlife Service to Commissioner, Minnesota DNR (August 15, 1980).

160. Letter from Commissioner, DNR to Assistant Secretary for Fish and Wildlife and Parks (March 26, 1981).

161. Letter from Associate Director, FWS to Commissioner, DNR (July 1, 1981).

162. Letter from Commissioner, DNR to Associate Director, FWS (October 27, 1981).

163. *Id.*

164. *See, e.g.*, letter of Rep. Arlan Stangeland to Secretary of Interior Watt (March 2, 1981); letters of State Senator Lessard to Assistant Secretary Arnett and Secretary Watt (March 24,

ly, several Reagan Administration appointees in the Department of the Interior were firmly established in their positions by this time.

On November 3, 1981, the Associate Director of the Fish and Wildlife Service wrote a memorandum to the Regional Director in the Twin Cities and the Washington, D.C. Offices of Endangered Species and Research requesting comments on the resubmitted plan.<sup>165</sup> The memorandum made reference to the tough legal standard permitting regulated taking only "in the extraordinary case," but noted a recent change with regard to the applicability of that legal standard. The memo stated: "I discussed this matter with the Solicitor's Office and found that they recently have taken the position in the kangaroo litigation that this standard . . . is inapplicable to threatened species."<sup>166</sup> With the endorsement from this memo and the Solicitor's Office, the Regional Director then modified his position on the state plan. Relying also upon data supplied by the state purporting to indicate wolf population increases amounting to "population pressures . . . [which could not] be otherwise relieved," the Regional Director indicated his acceptance of the concept of a sport harvest:

Concerns associated with Service acceptance of a regulated taking have presented what seemed to be an insurmountable problem. Data supplied by the State [on October 27] and the position recently taken by the Solicitor as outlined in your memorandum of November 3, 1981 solve these problems and it appears the concerns raised on this issue are now moot.<sup>167</sup>

Both of the Agency's reasons for changing its position are troublesome. First, the Service's own expert wolf researcher and member of the Recovery Team discounted the state's proffered population data as reflecting no significant change in the wolf

---

1981, and April 6, 1981, respectively); letter from Rep. Anderson to Rep. Martin Sabo (September 28, 1981); letter of Rep. Martin Sabo to Director, FWS (October 14, 1981); letters of Sen. Rudy Boschwitz to FWS and Assistant Secretary of Interior (November 4, 1981 and December 14, 1981, respectively); letters of Sen. James Oberstar to Director, FWS and Commissioner, DNR (January 19, 1982).

165. Memorandum from Associate Director, FWS to Regional Director, OEA, and Research (November 3, 1981).

166. *Id.*

167. Memorandum from Regional Director, FWS to Associate Director, FWS (November 16, 1981). The purported basis for this change in position—new data submitted by the State and a new legal interpretation of the Act—was confirmed by agency responses to Congressional inquiries by Minnesota Rep. James Oberstar and Sen. Rudy Boschwitz. The letters noted that these two new developments "might permit us to accept the plan and return management of the wolf to Minnesota." See Letters from Director, FWS to Sen. Oberstar (February 5, 1982); Letter from Assistant Secretary for Fish and Wildlife and Parks to Sen. Boschwitz (January 8, 1982).

population since 1975.<sup>168</sup> Second, as noted previously, the Department of the Interior did not go so far as to assert in the kangaroo litigation that the restrictive language on taking was "inapplicable to threatened species,"<sup>169</sup> nor did the district court reach this question in that case.<sup>170</sup>

Nevertheless, the Regional Office of the FWS proceeded immediately to draft new regulations which would permit a sport season on the timber wolf, and which would otherwise facilitate federal acceptance of the State Management Plan. By December 22, 1981, the Regional Office had prepared a preliminary draft of its new regulations for presentation at a public hearing.<sup>171</sup> At that hearing, the Field Solicitor's Office articulated the "broad discretion" interpretation<sup>172</sup> of the Endangered Species Act as the legal basis for permitting a sport season on the threatened eastern timber wolf:

[B]ased on the data accumulated . . . the harvest contemplated is such as to have no effect on viable conservation for the wolf and therefore there is no particular reason not to have it. . . .

The question thus turns on, what is necessary to conserve the gray wolf? And if a particular regulation or a particular level of regulation is not necessary then it would be the contention of the Interior Department that it is not required by section 4. . . .

[P]resumably that is the, if you will, legal basis for the regulation were this preliminary draft to be proposed.<sup>173</sup>

It is precisely this legal interpretation of the Act that was offered as the legal basis for the FWS final regulations permitting taking of the timber wolf which were ultimately published in the Federal Register on August 10, 1983.<sup>174</sup>

---

168. Memorandum from Dr. L. David Mech to Dr. H. Randolph Perry, Jr., Leader, Ecology Section, Endangered Species Research, Patuxent Wildlife Research Center (December 14, 1981).

169. *See supra* text and notes at notes 133-40.

170. *Id.*

171. FWS Scoping Meeting, Court Reporter Transcript (December 22, 1981).

172. *See supra* text and notes at notes 119-21.

173. FWS Scoping Meeting, *supra* note 171, at 43-44.

174. Final Regulations, 48 Fed. Reg. 36,256-66 (1983). Proposed Regulations, 47 Fed. Reg. 30,528-31 (1982). The new regulations considerably liberalize the federal wolf depredation control program and permit the State of Minnesota to administer the program. 48 Fed. Reg. 36,265 (to be codified at 50 C.F.R. § 17.40(d)(2)(i)(B)(4)). They permit trapping of wolves throughout most of the state, as outlined in the Minnesota management plan. 48 Fed. Reg. 36,265 (to be codified at 50 C.F.R. § 17.40(d)(2)(i)(c)(3)). The regulations also authorize federal and state employees or agents to trap the remaining quota of wolves permitted to be trapped as part of the State season that are not otherwise trapped. 48 Fed. Reg. 36,265 (to be codified at 50 C.F.R. § 17.40(d)(2)(i)(d)). The overall objective of these taking provisions is to reduce conflicts between man and wolf. 47 Fed. Reg. 30,531 (1982), 48 Fed. Reg. 36,259-60 (1983).

The new regulations can not be supported on the basis of increased wolf population pressures. Wildlife experts, including those of the FWS, observed that the biological and ecological condition of the wolf population in Northern Minnesota had not changed since 1975 and did not, in and of itself, support a change in federal regulation.<sup>175</sup> The population continues to be stable and within its biological carrying capacity, and therefore does not present an "extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved."<sup>176</sup> The primary rationale thus proffered by the FWS for its new position was more nebulous: according to the FWS, the trapping of wolves is necessary to make wolves more "wary" of humans in areas of human habitation and to reduce public antagonism toward the species.<sup>177</sup> The Service reasoned that by reducing public antagonism toward the wolf, illegal killing of the species will be reduced and the species will be better protected.<sup>178</sup> This sociological rationale for taking is a significant departure from the rationale which supported the taking regulations for the grizzly bear<sup>179</sup> and the Lahotan cutthroat trout.<sup>180</sup> In both those instances, the Department of the Interior justified the public taking on the basis of existing or anticipated population pressures, in accordance with the strict interpretation of the "conservation" definition in Section 3(3) of the Act.

Clearly, a dramatic change occurred in federal policy toward wolf conservation in Minnesota between July and October, 1981. By the end of the year, new preliminary regulations were already publicized and their legal rationale established. The change in taking regulations was justified not on the basis of any change in the wolf population itself, but on the basis of long-standing sociological considerations. In fact, the only significant change in the Minnesota Wolf Controversy since 1975 has been the change in Interior Department administrative policies and in its interpretation of the Secretary's role in conserving threatened and endangered species. The propriety of permitting the Secretary to exercise such leeway in interpreting its statutory authority will now be considered.

---

175. Proposed Regulations, 47 Fed. Reg. 30,528-31 (1982).

176. See Memorandum, *supra* note 165.

177. Proposed Regulations, 47 Fed. Reg. 30,528-31 (1982).

178. *Id.*

179. See *supra* text and note at note 126.

180. See *supra* text and notes at notes 128-29.

VI. OPTIMIZING THREATENED SPECIES CONSERVATION:  
BROAD ADMINISTRATIVE DISCRETION OR  
LEGISLATIVELY IMPOSED GUIDELINES?

Given that Congress did intend to limit the discretion of wildlife managers to permit the taking of threatened species by enacting the Endangered Species Act, the question arises as to the wisdom of that approach. This question is not merely academic since the law may be subject to change. Indeed, Interior Department personnel have made it clear that if the recent timber wolf rulemaking is thwarted, the FWS may seek a congressional amendment to section 4(d) of the Act to broaden the agency's discretion to permit the taking of threatened species.<sup>181</sup>

The purpose of threatened species conservation is to identify species and subspecies in need of special protection and to take steps to prevent that species or subspecies from ever becoming in danger of extinction.<sup>182</sup> The threatened species protective regulations authorized by section 4(d) of the Endangered Species Act were intended to provide a "halfway house" for species which were no longer in imminent danger of extinction, but which still required special care in order to insure full recovery.<sup>183</sup> In the following sections, it will be argued that the rigid legislative standard imposed by sections 3(3) and 4(d) of the Act restricting the taking of threatened species is essential to the achievement of the purpose of the Endangered Species Act, and should not be diluted by Congress or the courts.

*A. Factors Affecting the Optimal Approach to Threatened  
Species Conservation*

The optimal amount of managerial discretion to be granted to the Secretary of the Interior under sections 3(3) and 4(d) of the Endangered Species Act must be assessed in light of several considerations. A number of factors, some of which lead to conflicting conclusions, should enter into any assessment of the Secretary's proper discretion in this area. Among the factors central to this assessment are: (1) the importance of the Act's objective to maintain natural diversity;<sup>184</sup> (2) the pervasiveness of a traditional consumptive ethic in society;<sup>185</sup> (3) the consumption-oriented training of fish

---

181. Personal Communication, Field Solicitor's Office (July, 1982).

182. See *supra* text and notes at notes 73-75, 90-95.

183. See *supra* text and notes at notes 73-75.

184. See *infra* text and notes at notes 191-95.

185. See *infra* text and note at note 196.



and wildlife managers, and their loyalties to a consumption-oriented constituency;<sup>186</sup> (4) public attitudes toward threatened predator species;<sup>187</sup> (5) the practical need for broad administrative discretion in managing threatened species;<sup>188</sup> (6) the disadvantages of centralizing management discretion in Washington, D.C.;<sup>189</sup> and (7) the advantages of removing decision-making from the influence of local pressures.<sup>190</sup>

### 1. The Importance of Biological Diversity

Harvard University biologist Edward O. Wilson recently proclaimed that the "loss of genetic and species diversity by the destruction of natural habitats . . . is the folly our descendants are least likely to forgive us."<sup>191</sup> It is just this folly which the Endangered Species Act is intended to prevent.<sup>192</sup> Every plant and animal species driven to extinction reduces the genetic and species diversity of the planet. Reductions in species diversity weaken entire natural systems, removing built-in safeguards against stress and catastrophe.<sup>193</sup> Genetic diversity increases humanity's chances of overcoming its own problems of survival.<sup>194</sup> Agricultural and pharmaceutical discoveries of the future depend upon the continued existence of diverse biological types. Natural diversity is central to our own quality of life.<sup>195</sup> The crucial importance of preserving diversity through endangered and threatened species conservation is a factor which weighs in favor of ensuring the uncompromising guardianship of all species facing a risk of extinction.

### 2. The Consumptive Ethic

American and other western cultures generally harbor a pervasive consumption-oriented ethic in which the natural resources — land, water, forests, and wildlife — are to be *used* for financial gain and physical comfort. Natural systems are generally not valued by our

---

186. See *infra* text and notes at notes 197-207.

187. See *infra* text and notes at notes 208-11.

188. See *infra* text and notes at notes 211-12.

189. See *infra* text and notes at notes 212-14.

190. See *infra* text and notes at notes 214-15.

191. Chandler, *Up for Review: The Endangered Species Act*, THE NATURE CONSERVANCY NEWS 17 (1982). See also Pough, *The Need for Species Diversity*, DEFENDERS 37 (1981).

192. See, e.g., H.R. REP. NO. 412, *supra* note 73, at 4-6; S. REP. NO. 307, 93rd Cong. 1st Sess. 2 (1973).

193. Roush, *On Saving Diversity*, THE NATURE CONSERVANCY NEWS 6 (1982).

194. *Id.*

195. *Id.* at 7-8.

society until they are digested into a form or product that society will pay for. Land is considered more valuable when it is tilled or developed. Forests provide timber. Water is used for drinking, cleansing, and manufacturing. Fish and wildlife provide food, clothing, and recreation. Hunting, fishing, and trapping of wildlife beyond the needs of basic subsistence are one aspect of this social ethic.

Congress identified this consumptive ethic as a primary cause of species extinction when it declared in the Endangered Species Act that such extinction was "a consequence of economic growth and development untempered by adequate concern and conservation."<sup>196</sup> In passing the Act, Congress essentially attempted to legislate a new social ethic of conservation in place of consumption. If Congress is to give effect to such profound social change over the long term, it seems evident that institutional safeguards are required to prevent the legislative scheme from buckling under the pressure of demanding "social norms."

### 3. The "Consumption-Oriented" Persuasion of Wildlife Managers

Wildlife managers traditionally have been trained to modify and manage land and water habitats in order to increase their productivity and their "carrying capacity" for *consumable* fish and wildlife.<sup>197</sup> They have not, until very recently, been trained in ecological principles;<sup>198</sup> nor have they been encouraged to maintain natural systems with an emphasis on overall species diversity.<sup>199</sup> The primary reason for this "consumption-oriented" management training is that most wildlife managers are employed by state fish and wildlife agencies or the United States Fish and Wildlife Service. These agencies are usually financed in large part through taxes, hunting and fishing license fees, and, in the case of the FWS, duck stamp proceeds.<sup>200</sup> In addition, all such agencies tend to align themselves with the interests of their most vocal constituents. Consequently, state and federal managers tend to be extremely sensitive to the traditional hunting, fishing, and trapping constituencies in making managerial and political decisions regarding wildlife resources.<sup>201</sup>

196. 16 U.S.C. § 1531(a) (1982).

197. Coggins and Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59, 65-66 (1981).

198. *Id.* at 66-69.

199. *Id.*

200. *Id.* at 66 (citing R. DASMANN, ENVIRONMENTAL CONSERVATION 283 (3d ed. 1972); see also J. GOLDMAN, THE CEQ WILDLIFE LAW STUDY: LESSONS IN INSTITUTIONAL REFORM 8-10 (unpublished manuscript, December 1978).

201. Coggins and Ward, *supra* 197, at 73-74.

The emphasis on managing for consumption is reinforced by the fact that most *state* wildlife agencies are completely dependent upon the Governor and the state legislature for what limited managerial resources they possess. It is well established that state agency conservation decisions are frequently made "on the basis of non-biological considerations at the behest of politicians or influential land users."<sup>202</sup> Though less directly dependent upon the financial and political vagaries of traditional constituencies, *federal* fish and wildlife managers are subject to the same pressures. It has been noted by scholars in this area<sup>203</sup> that in several instances, the FWS has arguably violated statutory requirements through "small shifts in emphasis to accommodate long-time constituencies and clientele."<sup>204</sup> The authors observe that, perhaps such deference is endemic to government, federal and state, but *until agency staffs can acquire or assert a far larger degree of independence from such influences, their credentials as experts or scientists merit less deference.*<sup>205</sup>

This vulnerability of state and federal wildlife agencies to political influences, as well as the increased public interest in wildlife conservation, has prompted Congress to enact federal wildlife legislation providing "enforceable standards and guidelines against which the decisions and standards of wildlife managers can be judged."<sup>206</sup> Recent federal wildlife legislation has therefore adopted legislatively-imposed conservation standards and permitted less managerial discretion.<sup>207</sup>

#### 4. Public Attitudes Toward Predator Species

Many threatened and endangered species, such as the timber wolf, the grizzly bear, and various birds of prey, are predators or potential

---

202. *Id.*

203. *See supra* note 197.

204. *Id.* at 88. Examples of such practices include: (1) permitting extended hours for water fowl hunting to the potential detriment of an endangered species, *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977); (2) permitting a state to preserve an artificial sport hunting area to the detriment of an endangered species, *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981); and (3) bowing to pressure of a State Governor to permit non-wildlife recreation uses on a National Wildlife refuge, *Defenders of Wildlife v. Andrus*, 11 E.R.C. 2098 (D.D.C. 1978); *Defenders of Wildlife v. Andrus*, 455 F. Supp. 446, 449 (D.D.C. 1978).

205. *Id.* at 73.

206. *Id.* at 72.

207. *Id.*

predators. Because many predator species are carnivores and often compete for the same resources as humans, they are particularly subject to human taking. A recent study of public attitudes by Dr. Stephen Kellert showed that although the majority of Americans support protection of endangered and threatened species, including predators and potential predators, isolated segments of society have strong negative attitudes toward such protection.<sup>208</sup> Such negative attitudes toward predators are especially prevalent among farmers and livestock ranchers.<sup>209</sup> Whereas the overwhelming majority of the public favored individualized predator control (seventy percent) and opposed poisoning of predators (ninety percent), farmer and livestock rancher groups invariably (ninety-five percent) supported wide-scale elimination of the predator species and the use of poisons as control measures.<sup>210</sup>

Kellert's findings suggest that state and federal conservation measures for the protection of threatened predator species are often subject to intense local pressure from ranching and farming constituencies. Explicit legislative standards regarding the permitted taking of threatened species would help shield wildlife agencies from such pressure and would hold them accountable to the general public to uphold those standards.<sup>211</sup>

##### 5. The Need for Management Flexibility in Threatened Species Conservation

Although broad administrative discretion tends to subject agency decision-making to political pressure, wildlife managers *are* generally more qualified to make day-to-day conservation decisions than are congressmen. Ecological strategies for restoring threatened species populations are as many and as varied as the species themselves. Identifying the measures best suited to species conservation requires knowledgeable judgments as to feasibility, biological effect, and allocation of resources to optimize conservation of threatened and endangered species. Consequently, the imposition of strict legislative standards must grant federal and state agencies sufficient flexibility to allow them to fulfill the mandate to conserve threatened and en-

---

208. Kellert, *Americans' Attitudes and Knowledge of Animals*, 45 TRANS. N. AMER. WILDL. CONF. 111-23 (1981).

209. *Id.* at 119.

210. S. KELLERT, PUBLIC ATTITUDES TOWARD CRITICAL WILDLIFE AND NATURAL RESOURCE ISSUES, PHASE I 52 (U.S. Fish and Wildlife Service, Washington, D.C. 1979).

211. Coggins and Ward, *supra* note 197, at 72, 88-89.

dangered species. In this case, the need to restrict the unwarranted taking of protected species must be balanced with the need to provide wildlife managers with the necessary tools to conserve those protected species.

#### 6. Problems with Managing Wildlife from Afar

Endangered and threatened species conservation is a national interest and is therefore subject to federal legislation and federal agency administration. The effects of the law and regulations, however, are felt at the local level. State and municipal authorities often strongly oppose federal control of natural resources that were traditionally regulated at the state and local level. They perceive Washington politicians and bureaucrats as too far removed to respond to local needs or to accomplish their own management objectives effectively.

Due to the cost-effectiveness of decentralized resource management<sup>212</sup> and local opposition to federal intrusion, state participation is critical to the effective conservation of threatened and endangered species. This realization prompted Congress to direct the Secretary to enter into cooperative agreements with qualified states under section 6 of the Act.<sup>213</sup> This presented Congress with a problem, however, since it recognized that it would have to afford the states broad discretion to permit the taking of threatened species in order to maximize state participation in conservation.<sup>214</sup> To achieve this goal, Congress in turn would have to vest the Secretary with the discretion to set minimum conservation standards which would permit the taking of threatened species. As a result, Congress' decision as to whether or not to impose a strict standard on taking involved a trade-off between optimizing state participation in species conservation and protecting threatened species from unwarranted taking.

#### 7. Distance as a Buffer from Local Pressure

Although centralized national wildlife management sometimes lacks efficiency, it offers the advantage of buffering managerial decisions from local pressures. Further, by limiting the discretion of the Secretary to permit the taking of threatened species, Congress removes that decision from the Interior Department and FWS and

---

212. See, e.g., H. REP. NO. 412, *supra* note 73, at 7; S. REP. NO. 307, *supra* note 192, at 3.

213. 16 U.S.C. § 1535(c) (1982). See *supra* text and notes at notes 80-95.

214. *Id.*

thereby reduces agency vulnerability to its "consumption-oriented" constituencies. Pressures for excessive predation control, for instance, are buffered by the fact that the agency has no authority to permit such takings. Similarly, by retaining federal control over conservation programs and setting strict guidelines for state conservation programs, Congress can better insure that state wildlife managers will not compromise the conservation goals of the Act under pressure from hunters, fishermen, ranchers, farmers, developers, or state politicians.

The history of the timber wolf controversy vividly illustrates the interplay of these various and often conflicting considerations. It further suggests the advisability of imposing a strict legislative standard on the taking of threatened species.

### *B. The Timber Wolf Lesson*

The Department of the Interior has made a final decision to return control of the wolf to the state of Minnesota and to permit its widespread taking. This decision violates the terms of sections 3(3) and 4(d) of the Endangered Species Act since the wolf population in Northern Minnesota does not represent "the extraordinary case where population pressures within a given ecosystem cannot be otherwise resolved."<sup>215</sup> Further, it ignores Congress' objectives in passing the Act. The timber wolf is precisely the type of species for which Congress intended to provide "halfway house" protection.<sup>216</sup> Although its small population seems healthy in northern Minnesota, the factors which initially endangered the continued existence of the eastern timber wolf continue to jeopardize the species today: (1) intensive human settlement of timber wolf habitat; (2) direct conflict with domestic livestock; (3) a lack of understanding of wolf ecology; (4) fears and superstitions about the animal; and (5) a propensity toward overzealous predator control programs.<sup>217</sup> Without protective regulations, these factors could once again place the species in imminent danger of extinction.

In addition, the timber wolf is a profound symbol of the value of species diversity. The wolf represents an important link in the ecology of the North Woods, maintaining the deer and moose populations within their biological carrying capacity.<sup>218</sup> Historically, the

215. See *supra* text and notes at notes 62-98.

216. See *supra* note 73.

217. See *supra* text and note at note 50.

218. L.D. MECH, *THE WOLF: THE ECOLOGY AND BEHAVIOR OF AN ENDANGERED SPECIES* (1970).

wolf has provided humanity with valuable information: primitive man learned wilderness survival techniques from observing the wolf;<sup>219</sup> modern man continues to learn from observing the wolf's complex social structure.<sup>220</sup> Finally, the wolf has provided humanity with a source of ritual, mystery, and spiritualism, whether it be in the nature of religious rites or tribute to the spirit of the wilderness.<sup>221</sup>

The consumptive ethic of western society has been, and continues to be, a major threat to the viability of the timber wolf. Proponents of livestock ranching, farming, hunting, forestry, mining, and transmission line right-of-way have opposed measures to set aside remote wilderness-like areas as critical wolf habitats. Livestock ranchers, trappers, and hunters have opposed regulations prohibiting the taking of wolves, perceiving the animal as either a threat to their livestock or deer hunting success, or as a valuable furbearer resource. The intense political pressure exerted by these groups upon the FWS to eliminate protective regulations<sup>222</sup> suggests the need for institutional safeguards to insure the long-term effectiveness of the conservation ethic embodied in the Endangered Species Act.

The consumption-oriented bent of Minnesota's wildlife managers also emphasizes the compelling need for strict taking regulations. The Minnesota DNR, like most state wildlife agencies, is financially and politically dependent on its hunting and fishing constituency and the state legislature.<sup>223</sup> The agency perceives that its top priority is the management of the deer population and contends that the deer are threatened by wolf populations in northern Minnesota.<sup>224</sup> Furthermore, livestock ranchers in northern Minnesota are a vocal political group which relied upon the DNR, prior to 1974, to control livestock predation by all predators.<sup>225</sup> The DNR has been openly loyal to these interests, and has made clear its intention to manage the threatened timber wolf at "optimum" population densities which do not pose a threat to these interests.<sup>226</sup> If the wolf conservation program is to be turned over to the Minnesota DNR and still retain the conservation goals of the Endangered Species Act, the discretion

---

219. LOPEZ, OF WOLVES AND MEN ch. 2 (1978).

220. *Id.*, ch. 1.

221. *Id.*

222. *See supra* text and notes at notes 163-74.

223. *See supra* note 200.

224. *See supra* text and note at note 54.

225. *See supra* text and notes at notes 21-26.

226. MINNESOTA DNR, MINNESOTA TIMBER WOLF MANAGEMENT PLAN 11, 15 (February 1980).

of the DNR to permit taking must be limited by explicit federal guidelines.

Recommendations by FWS wildlife personnel, particularly those at the regional and field levels, to permit the taking of non-depredating timber wolves, were influenced by pressures from the Agency's "long-term constituencies and clientele."<sup>227</sup> The Service, however, successfully upheld the prohibition on taking for eight years, and modified its position only when a new legal interpretation removed the strict limitation on taking.<sup>228</sup> The history of the timber wolf controversy from 1973 to 1982 thus confirms the value of a legislatively-imposed standard in restricting the influence of consumption-oriented constituencies in wildlife conservation decision-making.

The range of public attitudes toward the wolf mirror attitudes toward predators generally,<sup>229</sup> and provide a strong rationale for a legislatively-imposed standard in wolf conservation. The FWS recognizes hostile attitudes toward the wolf as a major factor threatening the species' recovery.<sup>230</sup> These attitudes are apparently concentrated among the livestock ranching, farming, and, in some cases, the hunting constituencies of northern Minnesota.<sup>231</sup> These constituencies, as noted previously, are extremely influential within the state legislature, the DNR and, indirectly, the FWS. They have successfully pressured the FWS to weaken its regulations on predation control and thus effect a significant expansion in the program. In contrast, the very large constituency that supports timber wolf conservation is dispersed throughout the nation and has little direct influence on state and federal wildlife decision-makers except through their congressional representatives. Without a legislatively imposed restriction on taking, the proponents of extensive predator control will likely prevail in spite of the nationwide support for preservation of the timber wolf.

The need for broad flexibility in day-to-day management of the timber wolf and the problems inherent in centralized management of

---

227. See *supra* note 204. The FWS personnel response to DNR pressure fits the pattern of instances described by Coggins and Ward, *supra* note 197, wherein FWS arguably violated statutory standards through "small shifts in emphasis to accommodate long-time constituencies and clientele."

228. See *supra* text and notes at notes 160-74.

229. See *supra* text and notes at notes 208-11. See also, R. Hook, Public Attitudes Toward Wolves in Michigan (1982) (unpublished Ph.D. thesis, Northern Michigan University, Marquette, Michigan).

230. See *supra* text and notes at notes 50, 173.

231. See *supra* note 229.



the species require careful consideration in determining the optimal approach to timber wolf conservation. Two conditions are vital to wolf conservation in northern Minnesota at present: (1) maintaining a predation control program which adequately protects livestock interests while safeguarding non-depredating wolves; and (2) enforcing prohibitions on the taking of wolves in extensive and often inaccessible areas with an understaffed enforcement team.

The FWS largely resolved these problems with respect to the predation control program by locating the program in northern Minnesota and placing it under the supervision of Dr. L. David Mech, a renowned wolf expert and long-time resident of the state. Managerial flexibility in implementation of this program was narrowed considerably by the 1978 *Fund for Animals* injunction,<sup>232</sup> which in some instances actually hampered the effectiveness of the program. The Service's 1983 regulations do, however, include some well-advised changes which expand FWS flexibility in day-to-day predation control decisions. These changes, in and of themselves, could improve the effectiveness of the depredation control program.

The FWS recognized, however, that state cooperation and resources were necessary to improve the enforcement of its taking prohibitions, and apparently concluded that the need for state participation outweighed the need for a strict protective regulation on the taking of wolves. The Agency thus changed its regulations to permit taking, basing its decision upon sociological circumstances, and not on any rational biological basis.<sup>233</sup> The FWS justified this decision on its belief that it had the discretion to loosen these restrictions on taking in order to gain the management and enforcement resources of the state, rather than comply fully with the legislatively-imposed standard restricting taking and forego the cooperation of the state. In so doing, the Agency violated the very terms of the Endangered Species Act.

Although local management and broad managerial flexibility are integral to threatened species conservation, they were in this case achieved at the expense of the very essence of the conservation scheme mandated by the Endangered Species Act: threatened species are to be taken only where biological circumstances make taking of the species in its own best interest.<sup>234</sup> The timber wolf management controversy suggests that, in light of the pressures to

---

232. See *supra* text and notes at notes 39-42.

233. See *supra* text and notes at notes 174-80.

234. 16 U.S.C. §§ 1532(3), 1533(d) (1982).

subvert conservation to "consumptive" interests, managerial discretion to permit taking should be limited to protect threatened species from taking which is not based on the biological consideration of species population pressures.

The eastern timber wolf controversy further attests to the political vulnerability of state wildlife agencies and the need for a strict legislative standard to buffer sensitive decisions from local influence. State DNR wolf management policies are affected by loyalties to its constituencies and its dependence on the state legislature.<sup>235</sup> Hence, strict federal supervision of state conservation efforts is essential to insure long-term compliance with the conservation goals of the Act.

The FWS and the Interior Department are subject to similar local pressures. The Service and the Department of the Interior were subject to political pressure from two sides: the Minnesota congressional delegation expressed the strong anti-wolf and anti-federal feelings of the vocal northern Minnesota constituency.<sup>236</sup> Furthermore, the Minnesota DNR persistently sought to regain control of the eastern timber wolf for management as a furbearer resource and as a predator of livestock and deer.<sup>237</sup> The FWS and Interior Department were particularly susceptible to pressure from the DNR because of the statutory requirement to cooperate with the states.<sup>238</sup>

The federal agencies could have insulated themselves from much of this political pressure had they continued to observe the strict statutory restriction on takings. Under such a strict legislative mandate, the agencies could have responded to local pressures by asserting that the decision was made by Congress and not subject to modification. While the legislative restriction on takings in the wolf controversy did not prevent the Interior Department from reaching a largely political decision, it has at least provided the legal basis for a citizen suit contesting the legality of the decision under the Endangered Species Act, and thus rendered the agencies accountable for their actions.<sup>239</sup>

---

235. *See supra* text and notes at notes 197-205.

236. *See supra* text and notes at notes 160-70, 208-11.

237. *See supra* text and notes at notes 53-57 and 141-63.

238. *See supra* text and notes at notes 7, 16, 83-93.

239. *See supra* text and notes at notes 21-22. In the absence of a strict statutory standard for taking of endangered and threatened species, the decision to permit taking of the timber wolf would be left to the discretion of the Secretary and subject to a much less rigorous level of judicial review.

## VII. CONCLUSION

The objective of the Endangered Species Act is to channel the energies of federal and state resource management agencies into the conservation of threatened and endangered species. The experts upon whom Congress must depend for implementation of the Act, however, often retain strong political, economic, and philosophical ties to constituencies that embrace a traditional "consumption-oriented" ethic toward protected species. The potential for local pressure to permit the taking of threatened species is particularly acute because of the states' traditional control over the taking of resident fish and wildlife, the consumptive ethic which drives such taking, and the "halfway house" status of threatened species.

For all these reasons, threatened species conservation optimally should be achieved by imposing a strict legislative standard on the taking of threatened species and restricting the Secretary's discretion to permit taking only "in the extraordinary case where population pressures . . . cannot be otherwise relieved," as required by section 3(3) of the Act. By articulating a specific legislative standard on taking, Congress made available judicial review of the Secretary's managerial decisions, and thus rendered those responsible for these decisions accountable to the public. The legal process is essential to making wildlife agencies accountable to the public in their managerial decision-making:

[L]egislatures impatient with perceived failures have loaded the agencies with onerous new duties; private organizations have functioned as agency watchdogs; and courts have become willing to measure agency performance against statutory standards.<sup>240</sup>

Without a legislatively imposed standard for the taking of resident threatened species, a crucial aspect of the strategy for preventing the world-wide extinction of fish and wildlife is left to the discretion of wildlife agencies vulnerable to intense political pressure. It is unlikely that Congress intended to allow this landmark conservation law to be rendered meaningless through the administrative decisions of its implementing agencies.

---

240. Coggins and Ward, *supra* note 197, at 155.