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TO CONTROL LOCAL LAND USE**

***2003 Update: The Federal Endangered Species Act  
and How It Affects Land Use***

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# **2003 Update: The Federal Endangered Species Act and How It Affects Land Use\***

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## **I. INTRODUCTION**

This paper examines the federal Endangered Species Act ("ESA" or "Act"), a statute of special importance in land use matters. Enacted in 1973, and signed into law by President Nixon, the ESA provides the principal legal means for the conservation and protection of endangered and threatened species of wildlife, fish and plants. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, as amended; codified at 16 U.S.C. §§ 1531-1544.

The ESA provides "for conservation, protection and propagation of endangered species . . . by Federal action and by encouraging the establishment of State endangered species conservation programs." S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989-90. The Supreme Court of the United States, in the Tellico Dam case, said the ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978) (completion of multimillion dollar dam enjoined, snail darter). See Cheever, *Butterflies, Cave Spiders, Milk-Vetch, Bunchgrass, Sedges, Checker-Mallows, and Why the Prohibition Against Judicial Balancing of Harm is a Good Idea*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 313 (1998).

While often criticized, the ESA is apparently unique among the laws which govern land use: there are *no* reported cases holding that the application of the ESA constituted a "taking" entitling the land owner to compensation.<sup>1</sup> On the other hand, there is a reported case holding that Congress has the power under the Commerce Clause,

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<sup>1</sup> But in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed.Cl. 313, 2001 U.S. Claims LEXIS 72 (Fed. Cl. Apr. 30, 2001), the Court of Federal Claims held that California water users' contractually conferred rights to use water in the Tulare Lake Basin were taken from them when the federal government imposed water use restrictions under the ESA, and, therefore, the users may seek compensation for their loss. In *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir., 2002), Boise's claim of temporary take of timber, based on injunction against logging in spotted owl habitat without a permit was dismissed for failure to state a claim. The Owl had died, and Boise had been notified that a permit was no longer required. See also, *Gordon v. Norton*, 322 F.3d 1213 (10<sup>th</sup> Cir., 2003)(takings claims not ripe, gray wolf). See *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir., 1991)(imposition of regulations which denied land owner the right to mine coal.) See Merriam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. 1 (2001).

U.S. Const. Art. I, § 8, cl. 3, to prohibit the “taking” of the red wolf (*canis rufus*) on private land. *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir., 2000), *cert. denied, sub nom. Gibbs v. Norton*, 121 S.Ct. 1081 (2001).<sup>2</sup>

Once regarded as an esoteric statute of interest only to wildlife biologists, federal regulators and a relative handful of affected developers, the Endangered Species Act now has the attention of landowners, developers, land use attorneys, planners, conservative politicians and the general public.

Proponents of reform characterize the ESA as favoring needs of animals and insects over the needs of human beings. They blame the ESA’s restrictions for creating widespread economic hardship stretching from the Delhi Sands flower-loving fly (hospital construction delayed and mitigation cost of \$3,310,199 incurred, eight flies); the Valley longhorn elderberry beetle (mitigation for 43 clumps of elderberry shrubs adjacent to levee at cost of \$55,800 per shrub, 500 homes lost in flood when levee failed while mitigation decisions pending); the Piping plover (hatchlings, park road closed at 7 a.m., trapping campers until noon); the Kanab amber snail (200,000 protected snails on 500 acres preclude golf course and campground development); and cave bugs (owners of 1.45 acres unable to afford cost of incidental take permit required before they could build single family home).<sup>3</sup> The Department of Defense seeks amendments to environmental laws, including the ESA, claiming that the laws force military units into less-than-realistic training and hinder readiness.<sup>4</sup>

Those who favor limiting the Endangered Species Act have achieved success in their attempts to narrow the scope of the protections afforded by the Act. Prime examples of such success are *Arizona Cattle Growers' Ass'n. v. U.S. Fish and Wildlife Service, BLM*, 273 F.3d 1229 (9<sup>th</sup> Cir., 2001)(Federal agency improperly imposed conditions on use of land that did not contain endangered species, and no take would have resulted from issuance of permit); the challenge to the listing of the coastal California gnatcatcher (*Polioptila californica*) as a threatened species; *Endangered Species Committee of the Building Industry Ass'n v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994) (de-listing of gnatcatcher); and the ruling in the District of Columbia Court of Appeals in the *Sweet Home* case holding that the USFWS' inclusion of habitat modification within the definition of "harm" went beyond the Act and therefore was invalid *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir 1994).

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<sup>2</sup> See also, *Rancho Viejo, LLC v. Norton*, 322 F.3d 1062 (D.C. Cir., 2003) (ESA's application to private lands in order to protect an endangered species that lives entirely within one state does not violate the Commerce Clause. The regulated activity in question, construction of a housing development, is economic in nature. Additionally, regulation of the endangered species itself is economic in nature because extinction of a species would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity. Further, the ESA is explicitly connected to interstate commerce. Moreover, legislative history contains express congressional findings regarding the ESA's effect on interstate commerce. Finally, the relationship between the regulated activity and interstate commerce is not attenuated. Arroyo southwestern toad).

<sup>3</sup> For further information on these and other examples of ESA impacts, go to the website of the National Endangered Species Act Reform Coalition, at <http://www.nesarc.org>

<sup>4</sup> See, e.g., Lubold, *Endangered species vs. military training*, NAVY TIMES, June 24, 2002, p. 16, col. 1. In the interest of full disclosure, the author reveals that he is a retired U.S. Marine Corps Colonel.

Supporters of the ESA have not been shut out in the courts. *Oregon Natural Resources Council v. Daley*, 6 F.Supp.2d 1139 (D.Or. 1998)(National Marine Fisheries Service decision not to list Oregon coho salmon arbitrary and capricious and based on erroneous standard). But some of those victories have been short-lived. For example, the coho salmon has since been delisted.

But funding problems have created significant problems. Craig Manson, assistant Interior secretary for fish and wildlife and parks, said the U.S. Fish and Wildlife Service is neglecting protection of species and implementation of recovery plans because it must use most of its budget to fund court-ordered provisions that he described as a lower priority of the Act. Gugliotta, *Species Act 'Broken,' Interior Official Says*, THE WASHINGTON POST, May 29, 2003; Page A23

Reacting to criticism, the U.S. Fish and Wildlife Service has attempted to reform its approach to the application of the ESA. The Director of the FWS asserted that

With the administrative reforms we have made to the Endangered Species Act, such as safe harbor agreements, habitat conservation plans, and candidate conservation agreements with assurances [“CCAAs”], ranchers, timber companies and other landowners are able to participate in the conservation of at-risk species without the concern that their future plans may be delayed or halted.

The final safe harbor and candidate conservation agreements with assurances policies were published in the June 17, 1999, Federal Register, 64 Fed.Reg. 32705. On June 1, 2000, the FWS and the National Marine Fisheries Service published a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process. 65 Fed.Reg. 35242-47, June 1, 2000. The Final Addendum took effect July 3, 2000. The U.S. Fish & Wildlife Service’s site for Candidate Species and Candidate Conservation Agreements with Assurances for Private Property Owners may be found at <http://endangered.fws.gov/listing/cca.pdf>

But new concerns over the use of federal laws to control local land use and private property have arisen, not over endangered species, but over invasive species. McMaster, *When Aliens Invade: Regulating the Release of Exotic Species Through the “Takings Clause” of the Endangered Species Act*, 33 ELR 10583 (August, 2003). “Invasive species and their environmental damage are the most irreversible form of pollution,” according to David Lodge, chair of the National Invasive Species Advisory Committee of the federal Invasive Species Council, and an ecology and biology professor at University of Notre Dame. Cornell University reports that exotic plants and animals on land and water cost the United States up to \$138 billion annually, impacting human health, commercial activities, community infrastructures, natural resources, and agriculture production. Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA), 16 U.S.C. 4701-4751. National Invasive Species Act, Federal Plant Pest Act (7 U.S.C. 150aa et seq.), Federal Noxious Weed Act of 1974, as amended (7 U.S.C. 2801 et seq.), The Federal Interagency Committee for the Management of Noxious and Exotic Weeds (FICMNEW) reports that between 200 and 250 invasive plant species are

recognized as major problems in world agriculture. But the American Land Rights Association argues that the Invasive Weeds Awareness Coalition seeks to expand federal authority over private property.

The ESA retains much of its force for conservation and protection of endangered and threatened species, as it was when signed into law by that great environmentalist, Richard M. Nixon. It gained strength with the Supreme Court's decision in *Sweet Home*, holding, *inter alia*, that the ESA's broad purpose of providing comprehensive protection for endangered and threatened species supported the decision of President Nixon's Secretary of the Interior, James Watt, to include habitat modification within the definition of "harm" when he issued regulations implementing the ESA. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); Casenote & Comment, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon n.1: Defining "Harm" Under Section 9 of the Endangered Species Act*, 32 IDAHO L.REV. 81 (1995). The Supreme Court declined to hear a challenge to the ESA which claimed that Congress lacks the authority to protect a species (the Delhi Sands flower-loving fly) which exists in only one state. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir., 1997).

This paper provides an overview of the major features of the ESA, focusing on its impacts on land use. The ESA enjoys, if a statute can, even more vigor than it had when an earlier version of this paper was published in the April, 1992, issue of the ALI-ABA COURSE MATERIALS JOURNAL. See generally, Fleming, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB.L.REV. 497 (2001).

## II. THE FEDERAL ENDANGERED SPECIES ACT OF 1973.

### A. Species Protected Under the ESA.

1. **Species "Listed" as Endangered or Threatened.** An "endangered species" is any species of plant, fish or wildlife "which is in danger of extinction throughout all or a significant portion of its range . . . ." A "threatened species" is "any species of plant, fish, or wildlife 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(6) & (20). The Secretary of the Interior (the Secretary of Commerce with respect to those fish under the authority of the National Marine Fisheries Service) is required to prepare lists of "endangered" and "threatened" species. 16 U.S.C. § 1533. The Services' policy for listing endangered and threatened species and designating habitat may be found at 50 C.F.R. Part 424.
  - a. **Endangered species of wildlife** are listed in 50 C.F.R. § 17.11;
  - b. **Endangered plants** are those listed at 50 C.F.R. § 17.12 and designated as endangered;

- c. **Threatened species of wildlife** are listed in 50 C.F.R. § 17.11; and
  - d. **Threatened plants** are those listed at 50 C.F.R. § 17.12 and designated as threatened.
2. **Candidate species.** ESA § 4(b)(3)(C)(iii), 16 U.S.C. § 1533(b)(3)-(C)(iii), requires the Secretary of the Interior to make prompt use of authority under § 4(b)(7) of the ESA, 16 U.S.C. § 1533(b)(7), to prevent significant risk to the well being of *candidate species*, *i.e.*, those that are apparently suitable for listing but have not been formally proposed. 50 C.F.R. § 424.20; *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir., 1989) (construction in Southern Nevada; desert tortoise). The Ninth Circuit has held that designation of candidate status does not fulfill the duty to make findings in response to listing petitions. *Center for Biological Diversity v. Norton*, 254 F.3d 833 (9<sup>th</sup> Cir., 2001) (Chiricahua Leopard Frog and Gila Chub).
3. **Modifications to the Lists.** Any interested person may petition to add or remove any species. Persons requesting review must provide substantial evidence that the review is justified. ESA § 4(b)(3), 16 U.S.C. § 1533(b)(3). The burden rests on the petitioner to present substantial scientific evidence in support of the petition. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988) (petition for listing; also discussing agency's burden of expert analysis); *Endangered Species Committee of the Building Industry Ass'n of Southern California v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994) (failure to make raw data available requires new notice and comment proceeding for listing of California Gnatcatcher; listing maintained during pendency of proceeding); *Oregon Natural Resources Council v. Daley*, 6 F.Supp.2d 1139 (D.Or. 1998) (National Marine Fisheries Service decision not to list coho salmon arbitrary and capricious and based on erroneous standard); *see* Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation* 30 ELR. 10434 (June, 2000). The listing decision is to be made on the basis of the "best available data." ESA § 14. The D.C. Circuit has held that the FWS has no obligation to conduct an onsite population count or other independent study. *Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir., 2000). The Ninth Circuit has held that designation of candidate status does not fulfill the duty to make findings in response to listing petitions. *Center for Biological Diversity v. Norton*, 254 F.3d 833 (9<sup>th</sup> Cir., 2001) (Chiricahua Leopard Frog and Gila Chub). In *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9<sup>th</sup> Cir., 2002) (Spalding's Catchfly, Mountain Yellow-Legged Frog, Great Basin Redband Trout and Yellow-Billed Cuckoo), the Ninth Circuit reversed a district court decision and held that the FWS does not have discretion under ESA §4 to make an initial determination to list a petitioned species beyond the

ESA's 12-month deadline for making final determinations. See Kline, *Grizzly Bear Blues: A Case Study of the Endangered Species Act's Delisting Process and Recovery Plan Requirements*, 31 ENVTL. L. 371 (2001); Cheever, *The Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without Winning the War*, 31 ELR 11302 (Nov., 2001).

The Services' policy for listing endangered and threatened species and designating habitat may be found at 50 C.F.R. Part 424.

4. **Critical Habitat Designation.** Designation of critical habitat is a mandatory, nondiscretionary duty on the part of the Secretary of the Interior. In *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir., 1998) the Tenth Circuit held that the Secretary had violated the ESA by failing to designate critical habitat for the silvery minnow. In *Southern Appalachian Biodiversity Project v. U.S. Fish & Wildlife Service*, 181 F.Supp. 2d 883 (E.D. TN 2001) it was held that failure to designate critical habitat is a continuing violation that resets the six-year federal statute of limitations each day that the FWS fails to fulfill its duty. In *New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir., 2001) the Tenth Circuit set aside the CHD for the Southwestern Willow Flycatcher because the FWS' adoption of a baseline approach to measure the economic impact of the flycatcher CHD utilized a "but for" method for determining what economic impacts result from the CHD. Congress, however, intended that the FWS conduct a full analysis of all of the economic impacts of a CHD, regardless of whether the impacts are attributable co-extensively to other causes. The D.C. Circuit has held that the FWS must disclose site-specific information about the location of nesting sites of the *cactus ferruginous* pygmy owl in Arizona even though disclosure might lead to the identification of private property. *National Ass'n of Home Builders v. Norton* 325 F.3d 1165 (D.C. Cir., 2002)(*cactus ferruginous* pygmy owl). See the Coastal Wetlands Planning, Protection and Restoration Act, 16 U.S.C. §§ 3951-56, for a program for matching grants to coastal states for acquisition, restoration, enhancement and preservation of coastal wetlands.

The Services' policy for listing endangered and threatened species and designating habitat may be found at 50 C.F.R. Part 424. For a discussion of procedural aspects of critical habitat designation, including peer review, see *Building Industry Ass'n v. Norton*, 247 F.3d 1241 (D.C. Cir., 2001) (fairy shrimp). See Hicks, *Designation Without Conservation: The Conflict Between the Endangered Species Act and Its Implementing Regulations*, 19 VA.ENVTL.L.J. 491 (2000); Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L.REV. 209 (2000). Go to the U.S. Fish & Wildlife Service's site

[http://endangered.fws.gov/listing/critical\\_habitat.pdf](http://endangered.fws.gov/listing/critical_habitat.pdf) for a Fact Sheet on Critical Habitat. For an insightful comment on critical habitat and takings don't miss Kanner, *Redwoods, Junk Bonds, and Tools of Cosa Nostra: A Visit to the Dark Side of the Headwaters Controversy*, 30 ELR 10757 (September, 2000).

**B. How the ESA Protects Endangered Species by Influencing Federal Decisions: ESA § 7 and Federal Agency Planning Responsibilities.**

1. **Section 7 requires federal agencies to "insure" that their actions are not likely to jeopardize protected species, or their habitats covered by the Act.** *Fund for Animals v. Babbitt*, 903 F. Supp. 96, amended 967 F. Supp. 6 (D.D.C., 1995) (duty of the U.S. Fish and Wildlife Service; grizzly bears); *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209 (11<sup>th</sup> Cir., 2002) (Section 7 and NEPA).
2. **Agencies are to inquire of either the USFWS or NMFS whether any protected species may be present in the area of the proposed action.** ESA § 7(a)(2), (c)(1), 16 U.S.C. § 1536(a)(2), (c)(1); 50 C.F.R. § 402.01(b) (delegating authority to administer the ESA primarily to the USFWS under the Secretary of the Interior or, in the alternative, to the NMFS, for species listed in 50 C.F.R § 422.23 and § 227.4); *Newton County Wildlife Ass'n. v. Rogers*, 141 F.3d 803 (8<sup>th</sup> Cir., 1998) (biological evaluation with finding of "no effect" obviates need for consultation with FWS; bald eagle).

**If the answer is yes, the agency must prepare a "biological assessment" analyzing whether the action is likely to affect such species.** *Id.*

3. **If the biological assessment concludes that a protected species is likely to be affected, the agency must formally "consult" with the USFWS or NMFS.** *Id.* § 7(a)(2), § 1536(a)(2). The consultation is to result in the issuance of a "biological opinion" by either service. *Id.* § 7(b), § 1536(b); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir., 1985) (proposed timber road in a "recovery corridor" where the Forest Service failed to take the first procedural step: inquiring of the USFWS whether any endangered or threatened species "may be present in the area of . . . proposed action;" Rocky Mountain Gray Wolf).

- In *Pacific Rivers Council v. Thomas*, the Ninth Circuit enjoined the Forest Service from its ongoing agency actions, adopted prior to the listing of Chinook salmon as threatened species, until it consulted with the NMFS. 30 F.3d 1050 (9th Cir., 1994); see also *Silver v. Babbitt*, 68 F.3d 481 (9th Cir., 1995).



- In *Florida Key Deer v. Stickney*, the Federal Emergency Management Agency was required to consult the USFWS regarding FEMA's administration of the National Flood Insurance Program which allegedly encouraged development that harmed endangered deer. 864 F. Supp. 1222 (S.D. Fla. 1994).

The Interior Department's U.S. Fish and Wildlife Service and the Commerce Department's National Marine Fisheries Service, in conjunction with other agencies, have issued a handbook entitled ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT. The HANDBOOK is designed to promote consistency, flexibility, and a streamlined process for completing consultations.

The two agencies published a notice on the availability of the HANDBOOK in the June 10, 1999, Federal Register, 64 Fed.Reg. 31285. The HANDBOOK provides information and guidelines on the various consultation processes outlined in government regulations and is intended to promote consistent implementation within and between the two agencies. Chapters establish policies and procedures for informal, formal, emergency, and special consultations and conferences. The HANDBOOK also includes background information and sample consultations in its appendices. The HANDBOOK may be purchased through the Superintendent of Documents at the U.S. Government Printing Office (GPO) for \$55.00. The GPO stock number for the handbook is 024-010-00718-4. Contact the Superintendent of Documents order desk at (202) 512-1800 for further information. You may find the GPO order form on the Internet at GPO's site at: <http://bookstore.gpo.gov>.

4. **Examples of the ESA's Impact on Federal Activities.** Enacted as a Congressional reaction to the impacts of urbanization and commercial development on endangered species, the ESA has had a major influence on federal activities. Similarly, as the reach of the law has been extended and the number of listed species continues to expand, the ESA is a significant factor affecting land use and development. Among the numerous examples of the affect of the ESA on federal activities are the following:

- *TVA v. Hill*, 437 U.S. 153 (1978) (Tellico Dam completion enjoined; snail darter);
- *Conner v. Burford*, 848 F.2d 1441 (9th Cir., 1988), *cert. denied*, 489 U.S. 1012 (1989) (oil and gas leases; bald eagle, peregrine falcon, gray wolf, and grizzly bear);

- *Roosevelt Campobello International Park Commission v. EPA*, 684 F.2d 1041 (1st Cir., 1982) (National Pollutant Discharge Elimination System permit for refinery development; bald eagles and right and humpback whales); and
- *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir., 1998) (Bureau of Reclamation violated ESA by renewing water supply contracts before consulting with the FWS and the National Marine Fisheries Service).
- *Tulare Lake Basin Water Storage District v. United States*, 49 Fed.Cl. 313, 2001 U.S.Claims LEXIS 72 (Fed. Cl. 2001) (California water users' contractually conferred rights to use water in the Tulare Lake Basin were taken when the federal government imposed water use restrictions under the ESA; delta smelt and winter-run salmon).

**C. How the ESA Protects Endangered Species by Influencing Land Use Decisions: Section 9 and the Prohibition Against "Taking."**

1. **Section 9 of the Act reaches far beyond federal agencies to "any person or agency" and prohibits the "taking" of any endangered species of fish or wildlife.** ESA § 9(a)(1)(B)-(C), 16 U.S.C. § 1538(a)(1)(B)-(C); 50 C.F.R. § 17.12; *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir., 1981) (*Palila I*); *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir., 1988) (*Palila II*) (state action in maintaining feral sheep which significantly impaired essential behavioral patterns constituted "harm" resulting in "take" of the Palila, an endangered finch); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F.Supp. 1343 (N.D. Cal. 1995)(logging activities resulting in destruction and degradation of habitat such that behavioral, breeding or nesting patterns would be disrupted constituted "harm" under ESA; logging pursuant to timber harvest plan enjoined). See Boudreaux, *Understanding "Take" in the Endangered Species Act*, 34 ARIZ.ST.L.J. 733 (2002); Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1972: Learning to Live With a Powerful Species Preservation Law*, 62 U.COLO.L.REV. 109 (1991); Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV.ENVTL.L.REV. 311 (1990); Annotation, *Validity, Construction, and Application of Endangered Species Act of 1973*, 32 A.L.R. Fed. 332 (1977); Davison, *Alteration of Wildlife Habitat As a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL.L. 155 (1995); Comment, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB. L.REV. 497 (2001).

- a. **"Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19).**
  - b. **"Harm" is defined by the Secretary of the Interior as an act which actually kills or injures wildlife. It may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.** 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (ESA's broad purpose of providing comprehensive protection for threatened and endangered species supported inclusion of habitat modification within the definitions of "harm"); *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir., 1988) (*Palila II*) (same); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988) (harm of timber management program does not necessarily require proof of death of individual members of the species; red-cockaded woodpecker) *aff'd in part, vacated in part, sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir., 1991); see Davison, *Alteration of Wildlife Habitat As a Prohibited Taking Under the Endangered Species Act*, 10 J.LAND USE & ENVTL.L. 155 (1995).
2. **The habitat modification is included within the definition of "harm."** *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); Griffin *Beyond "Harm": Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to Harassment*, 52 VAND. L.REV. 1831 (1999); Quarles, MacLeod & Lundquist, *Sweet Home and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act* 26 ELR 10003 (1996); Casenote & Comment, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon n.1: Defining "Harm" Under Section 9 of the Endangered Species Act*, 32 IDAHO L.REV. 81 (1995). The Ninth Circuit has held that a school district's proposed construction of a new high school in an endangered pygmy owl (cactus ferruginous) habitat would not cause a "taking" as the owl had not been found within the site. *Defenders of Wildlife v. Bernal*, 204 F.3d 1477 (9<sup>th</sup> Cir., 2000).
  3. **Congress has the power under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, to prohibit the "taking" of an endangered species on private land.** *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir., 2000) (red wolf (*canis rufus*)); *Rancho Viejo, LLC v. Norton*, 322 F.3d 1062 (D.C. Cir., 2003) (ESA's application to private lands in order to protect

an endangered species that lives entirely within one state does not violate the Commerce Clause; Arroyo southwestern toad).

**4. Examples of the ESA's Impact on Private Development.** Projects impacted by the ESA include:

- **440-room hotel and convention center**, high-rise residential buildings on San Diego Bay; highway and flood control project; *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir., 1987)(California least tern and light-footed clapper rail);
- **2,235 residential unit development** on San Bruno Mountain; *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir., 1985)(Mission Blue butterfly);
- **17-lot residential subdivision**; *Maine Audubon Society v. Purslow*, 672 F. Supp. 528 (D. Me. 1987)(bald eagle) *aff'd* 907 F.2d 265 (1<sup>st</sup> Cir., 1990); and
- **9,000 homes, four golf courses and three resort hotels** in Dove Mountain development in Pima County, Arizona. Cart, "Arrival of Owl Stirs a Hornet's Nest," LOS ANGELES TIMES, A-5, col. 1, Feb. 17, 2000.

In *Strahan v. Coxe*, 127 F.3d 155 (1<sup>st</sup> Cir., 1997) the First Circuit held that the Act extended to the issuance of fishing licenses that indirectly authorized the taking of the Northern Right Whale. In *Loggerhead Turtle v. County Council of Volusia County, Florida*, the 11<sup>th</sup> Circuit held that the County could be held liable for approving a beach lighting system that adversely affected turtle nesting. 148 F.3d 1231 (11<sup>th</sup> Cir., 1998).

Further examples and discussion are provided in Coggins & Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO.L.J. 1433 (1982).

### **III. HOW THE ESA IS ENFORCED: LITIGATION UNDER THE ESA.**

- A. Federal Enforcement.** Section 11 of the Act, 16 U.S.C. § 1540, authorizes enforcement by the federal government and by citizen suits. This paper will concentrate on citizen suit enforcement.
- B. Federal Courts.** The federal Endangered Species Act has the preeminent role in this area of the law. This has given the federal courts a virtual monopoly on endangered species litigation. Some of the federal cases have attracted great public interest. The most famous are the snail darter case, *TVA v. Hill*, 437 U.S. 153 (1978) (Tellico Dam completion enjoined, snail darter) and the "Sweet Home" case, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding 50 CFR § 17.3 defining

"harm" to include habitat modification; red-cockaded woodpecker, northern spotted owl); Casenote & Comment, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon n.1: Defining "Harm" Under Section 9 of the Endangered Species Act*, 32 Idaho L.Rev. 81 (1995). Some have been repetitive: *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir., 1981) (*Palila I*); *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir., 1988) (*Palila II*) (state action in maintaining feral sheep that significantly impaired essential behavioral patterns constituted "harm" resulting in "take" of the Palila).

Because a major portion of the ESA § 7 imposes planning and data gathering and analysis obligations on federal agencies, it has become routine to find ESA counts joined with counts alleging that a federal agency has failed to follow its parallel environmental impact analysis obligations imposed by the National Environmental Policy Act of 1969 (NEPA). *See, e.g. Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209 (11<sup>th</sup> Cir., 2002) (Section 7 and NEPA). Indeed, even *TVA v. Hill*, one of the most famous of the ESA cases, was itself preceded by NEPA litigation.

## 1. Jurisdiction and Venue.

U.S. District Courts have jurisdiction over civil actions brought under the citizen suit provisions of the ESA without regard to diversity of citizenship and there is no jurisdictional amount required. Venue lies in the judicial district in which the violation is alleged to have occurred. ESA § 11(c), (g)(3)(A), 16 U.S.C. § 1540(c), (g)(3)(A).

## 2. Standing.

### a. Citizens' Suits.

**Standing under the ESA is open to "any person,"** subject to the Article III "cases and controversies" limitation on federal court jurisdiction. ESA § 11(g)(1), 16 U.S.C. § 1540(g)(1); *Allied-Signal, Inc. v. Lujan*, 736 F. Supp. 1558 (N.D. Cal. 1990) (hazardous waste cleanup, salt-marsh harvest mouse); *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 736 F. Supp. 267 (N.D. Ga. 1990) (timber cutting restrictions, red-cockaded woodpecker) *aff'd in part, vacated in part*, 993 F.2d 800 (11th Cir., 1993); *Shields v. Norton*, 289 F.3d 832 (5th Cir., 2002)(no case or controversy; rare fish, amphibian, and plant species found only in the San Marcos and Comal Springs area of Texas). A claim of imminent threat of future harm to a protected pair of spotted owls was held by the Ninth Circuit to be actionable under the citizen suit provision of the ESA. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781

(9th Cir., 1995). The Natural Resources Department of the Ministry of Nature and Environment of Mongolia was permitted to intervene in a case concerning the application of the Endangered Species Act to argali sheep located within Mongolia's borders. *Fund for Animals v. Interior Dep't*, 322 F.3d 728 (D.C. Cir., 2003). See *Friends of the Earth v. Laidlaw*, 528 U.S. 167 (2000); Comment, 89 GEO.L.J. 1001 (2001); *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir., 2000) (Clean Water Act; aesthetic and recreational values); Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENV. L & POL'Y F. 183 (2001); Healy, *Standing in Environmental Citizen Suits: Laidlaw's Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ELR 10455 (June, 2000); Adler, *Stand or Deliver: Citizens Suits, Standing, And Environmental Protection*, 12 DUKE ENV. L & POL'Y F. 39 (2001).

**Similarly, any person has standing to seek an injunction** to compel the Secretary of the Interior to take action to prevent the taking of any resident endangered or threatened species. ESA § 11(g)(1)(B), 16 U.S.C. § 1540(g)(1)(B).

Under ESA § 11(c), (g)(1)(A), 16 U.S.C. § 1540(c), (g)(1)(A), any person may commence suit in a U.S. District Court to enjoin any person (including any government agency) alleged to be in violation of the Act. U.S. District Courts have jurisdiction over civil actions brought under the citizen suit provisions of the ESA without regard to diversity of citizenship and there is no jurisdictional amount required. Venue lies in the judicial district in which the violation is alleged to have occurred. ESA §§ 11(c), 11(g)(3)(A), 16 U.S.C. §§ 1540(c), 1540(g)(3)(A).

Reversing the Ninth Circuit, the Supreme Court decided that plaintiffs whose economic interests were within the ESA's "zone of interests" have standing to bring suit under the ESA. *Bennett v. Spear*, 520 U.S. 154 (1997) (ranch operators and irrigation districts whose interests were economic had standing under the ESA to challenge a biological opinion issued by the FWS. In *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir., 2001)(seven endangered wetland species) intervention as a matter of right was granted to building contractor and trade associations, as they were found to have demonstrated interests not adequately represented by local government or federal agencies. See *Annot: Standing of Private Citizen, Association, or Organization to Maintain Action in Federal Court for Injunctive Relief Against Commercial Development or Activities, or Construction of Highways, or Other*

*Governmental Projects, Alleged to Be Harmful to Environment in Public Parks, Other Similar Recreational Areas, or Wildlife Refuges*, 11 A.L.R. Fed. 556.

**b. Associational Standing.**

In *Humane Society of the United States v. Hodel*, 840 F.2d 45 (D.C. Cir., 1988), the Humane Society was granted associational standing, the court finding that its members used the wildlife refuge system for recreational purposes and therefore would suffer aesthetic injury from witnessing animal corpses. *Accord, Defenders of Wildlife v. EPA*, 688 F. Supp. 1334 (D. Minn. 1988), *aff'd in part and rev'd in part*, 882 F.2d 1294 (8th Cir., 1989) (strychnine pesticide registration; FIFRA and ESA); *National Audubon Society v. Hester*, 801 F.2d 405 (D.C. Cir., 1986) (California condor capture program).

*But see, Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir., 1988) (also discussing article III "case and controversy" standing; consultation not required for agency actions abroad; organization cannot assert standing based upon ecosystem, animal or vocational nexus), *on remand*, 707 F. Supp. 1082 (D. Minn. 1989), *aff'd. sub nom, Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir., 1990), *rev'd and remanded*, 504 U.S. 555 (1992). *See also, Humane Society of the United States v. Clark*, 109 F.R.D. 518 (D.D.C. 1985) (hunting programs on national wildlife refuges), in which a non-profit organization (the National Rifle Association) was denied permission to intervene in a rule-making proceeding when it failed to show any difference between its position and that of another organization granted standing.

**c. Designation of Plaintiff.**

**Members of the protected species.** Standing was extended, without challenge, to an endangered **finch**, the Palila (*Loxiodes baileui*), which was the lead, but not the only, plaintiff in one of the most important "taking" cases decided under the Act, *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir., 1981) (*Palila I*). The other plaintiffs were the Sierra Club, the National Audubon Society, the Hawaii Audubon Society and a scientist who studied the Palila.

Similarly, the **Northern Spotted Owl** (*Strix Occidentalis Caurina*) was the lead (but again not the only) plaintiff in several widely publicized cases, *Northern Spotted Owl v. Hodel*,

716 F. Supp. 479 (W.D. Wash 1988) (listing) and *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991) (designation of critical habitat).

Likewise, an unknown number of **grizzly bears** were among the named plaintiffs in *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir., 1982) (mineral drilling in wilderness area).

The **marbled Murrelet** (*Brachyramphus marmoratus*), a small seabird which nests exclusively in old-growth coniferous forests within 30 miles of the northern Pacific coastline, was the plaintiff in *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995).

But standing was denied to the **Hawaiian Crow** ('*Alala*) in *Hawaiian Crow ('Alala) v. Lujan*, 906 F.Supp. 549 (D. Hawai'i, 1991).

### 3. The Burden of Proof.

#### a. Review of Agency Actions.

**The burden of proof in an ESA case depends on the nature of the action and the party bringing it.** For cases in which the issue is whether an agency has complied with the ESA's procedural requirements, *Thomas v. Peterson*, 753 F.2d 754 (9th Cir., 1985) (proposed road through national forest wilderness area; gray wolf) provides a good example. In *Thomas*, the plaintiffs alleged that in proposing to build a road in a wilderness area the U.S. Forest Service had failed to follow the first procedural step in the three-step consultation process prescribed under § 7: inquiring of the U.S. Fish and Wildlife Service whether any endangered or threatened species "may be present in the area of . . . proposed action." [16 U.S.C. § 1536(c)(1)]. The court stated succinctly:

A plaintiffs' [sic] burden in establishing a procedural violation is to show that the circumstances triggering the procedural requirement exist, and that the required procedures have not been followed.

*Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir., 1985).



**b. Civil Taking Cases.**

**In a civil action brought to establish a violation of the "taking" provision, the plaintiff must show that a "take" has occurred.** *Palila v. Hawaii Dept. of Land & Natural Resources*, 639 F.2d 495, 497 (9th Cir., 1981) (*Palila I*) (sheep destroying habitat; Palila). If it is established that a violation of ESA's substantive provisions has occurred or will occur, the exercise of traditional discretion by the courts has been held by the Supreme Court in the landmark "snail darter" case, *TVA v. Hill*, 437 U.S. 153 (1978) (dam; fish), to have been foreclosed by Congress through ESA § 7's mandate that federal agencies are to insure that their actions are not likely to jeopardize a listed species or modify its critical habitat. *Id.* at 173; Cheever, *Butterflies, Cave Spiders, Milk-Vetch, Bunchgrass, Sedges, Checker-Mallows, and Why the Prohibition Against Judicial Balancing of Harm is a Good Idea*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 313 (1998). But the Ninth Circuit, in a fact-specific case, held that a school district's proposed construction of a new high school in an endangered pygmy owl habitat would not cause a "taking" as the owl had not been found within the site. *Defenders of Wildlife v. Bernal*, 204 F.3d 1477 (9<sup>th</sup> Cir., 2000).

**c. Criminal Taking Cases.**

In a criminal prosecution for illegally "taking," the government is not required to prove that the defendant had the specific intent to take an endangered species. In a prosecution of a hunter for shooting a grizzly bear, the government's burden was to prove (1) that the defendant knowingly took the animal within the United States, (2) that the animal was a grizzly bear, and (3) that the defendant did not have permission to "take" the bear. The government was not required to prove that the defendant knew that the bear he was shooting was a grizzly bear. *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (reserving ruling on government's motion *in limine* as to defendant's belief that he was shooting an elk); *accord, United States v. McKittrick*, 142 F.3d 1170 (9th Cir., 1998) (Gray wolf); *United States v. Nguyen*, 916 F.2d 1016 (5th Cir., 1990) (Loggerhead sea turtle). See Annot., *Criminal Prosecution Under Endangered Species Act of 1973*, 128 ALR Fed. 271 and Schoch, "Policy Limits Endangered Species Act Prosecutions," LOS ANGELES TIMES, p. A37, col. 1, June 22, 2003.

Congress has the power under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, to prohibit the "taking" of an endan-

gered species on private land. *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir., 2000) (red wolf (*canis rufus*)); *Rancho Viejo, LLC v. Norton*, 322 F.3d 1062 (D.C. Cir., 2003) (ESA's application to private lands in order to protect an endangered species that lives entirely within one state does not violate the Commerce Clause; Arroyo southwestern toad).

There is no constitutional right to kill protected wildlife in defense of property. *Christy v. Hodel*, 857 F.2d 1324, 1329-1330 (9<sup>th</sup> Cir., 1988) (grizzly bear shot to protect flock of sheep), *cert. denied*, 490 U.S. 1114, (1989). Nor does prosecution of a Native American under the ESA violate the Religious Freedom Restoration Act. *United States v. Antoine*, 318 F.3d 919 (9<sup>th</sup> Cir., 2003); *United States v. Jim*, 888 F.Supp. 1058 (D. Or. 1995). *But cf. United States v. Carpenter*, 933 F.2d 748 (9<sup>th</sup> Cir., 1991) (birds shot in violation of the Migratory Bird Treaty Act in defense of property were not "acquired" within meaning of Lacey Act; convictions reversed).

#### 4. **Standard of Review of Agency Actions.**

**In reviewing agency actions under the ESA, the courts apply the "arbitrary or capricious" standard of the judicial review provisions of the Administrative Procedure Act.** 5 U.S.C. § 706(2)(A); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d at 685-686 (mineral drilling); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185 (9<sup>th</sup> Cir., 1988), *cert. denied*, 493 U.S. 873 (1989) (oil lease sale; Pacific gray whale).

#### 5. **Notice Requirements.**

ESA's broad citizen suit standing provision is narrowed somewhat by the requirement that **60 days' written notice is to be provided to the Secretary of the Interior before suit may be filed.** ESA § 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i).

In *Maine Audubon Society v. Purslow*, 672 F. Supp. 528 (D. Me. 1987), *aff'd* 907 F.2d 265 (1<sup>st</sup> Cir., 1990) (bald eagle nesting site), a complaint seeking to restrain development of property as a 17-lot residential subdivision was dismissed for failure to comply with the 60-day notice requirement of ESA § 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i). Moreover, plaintiff's attorney was sanctioned for failing to comply with the ESA's notice requirements.

In *Save the Yaak Committee v. Brock*, 840 F.2d 714 (9<sup>th</sup> Cir., 1988), *rev'd in part, remanded in part*, *Vance v. Block*, 635 F. Supp. 163 (D. Mont. 1986) (wilderness road reconstruction; grizzly bear, gray wolf,

and mountain caribou), where two letters had been sent to other officials but not to the Secretary of the Interior as required by ESA § 11, and neither letter gave specific notice of an intent to sue, the court held that it lacked jurisdiction, observing that an actual notice of intent filed 38 days before the complaint was filed did not satisfy the 60-day written notice requirement. *Accord, Hallstrom v. Tillamook County*, 493 U.S. 20, (1989), *reh'g denied*, 493 U.S. 1037 (1990) (strictly applying 60-day notice-delay provision under Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(1); *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir., 1998) (dismissal for failure of notice letters to provide sufficient information of violation of ESA; Southwestern Willow Flycatcher); *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 273 F.3d 480 (2<sup>nd</sup> Cir., 2001) (notice letter failed to provide notice of thermal discharges). *Contra, National Wildlife Federation v. Coleman*, 400 F. Supp. 705 (S.D. Miss. 1975), *rev'd on other grounds*, 529 F.2d 359 (5th Cir., 1976), *reh'g denied*, 532 F.2d 1375 (5th Cir., 1976), *cert. denied*, 429 U.S. 979 (1976) (plaintiff's letter to Federal Highway Administrator, opposing highway construction project, with copies provided to three offices in the Interior Department, found to be sufficient to provide notice, despite the fact that the copies did not purport to be the notice required by the Act; Mississippi Sandhill crane); *CARE v. Henry Bosma Dairy*, 305 F.3d 943, (9th Cir., 2002) (notice letter to dairy adequate).

But in *Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985) (red-cockaded woodpecker), 35 days' notice was found to constitute substantial compliance with the written notice requirement where, in response to plaintiff's written objection to a tree-cutting program, the USFWS had expressed its belief that the program was in full compliance with ESA, the USFWS was not reconsidering its position, and the government raised no claim of harm or prejudice due to the timing of the notice. In *National Wildlife Federation v. Coleman*, 400 F. Supp. 705 (D. Miss. 1975) plaintiff's letter to Federal Highway Administrator, opposing highway construction project, with copies provided to three offices in the Interior Department, was found to be sufficient to provide notice, despite the fact that the copies did not purport to be the notice required by the ESA; (Mississippi Sandhill crane), *rev'd on other grounds*, 529 F.2d 359 (5th Cir., 1975), *reh'g denied*, 532 F.2d (5th Cir., 1975). *Cf. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir., 1991) (sixty-day notice mandatory, but not jurisdictional, may not be raised for the first time on appeal; red-cockaded woodpecker). *Accord, Sierra Club v. Froehlke*, 392 F. Supp. 130, 143 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir., 1976) (ESA count added to NEPA [see III.B.7, below] and FWPCA [Federal Water Pollution Control Act or Clean Water Act] complaint 10 days before trial; flooded bat caves). See Craig, *Notice Letters and Notice Pleading: The Federal Rules of*

*Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR.L.REV. 105 (1999); Irvin, *When Survival is at Stake: A Proposal for Expanding the Emergency Exception to the Sixty-Day Notice Requirement of the Endangered Species Act's Citizen Suit Provision*, 14 HARV.ENVTL.L.REV. 343 (1990).

## 6. **Presumption of Validity.**

The ESA was enacted to meet the obligations of several treaties and international agreements. ESA § 2(a)(4), 16 U.S.C. § 1531(a)(4); *United States v. Bernal*, 90 F.3d 465 (11th Cir., 1996); see discussion in Erdheim, *supra*, at 291-293. Congress has the power under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, to prohibit the “taking” of an endangered species on private land. *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir., 2000) (red wolf (*canis rufus*)); *Rancho Viejo, LLC v. Norton*, 322 F.3d 1062 (D.C. Cir., 2003) (ESA's application to private lands in order to protect an endangered species that lives entirely within one state does not violate the Commerce Clause; Arroyo southwestern toad). Thus, in addition to the judicial deference usually accorded to acts of Congress, the ESA enjoys a particularly strong presumption of validity. See, e.g. *United States v. National Dairy Prods.*, 372 U.S. 29, 32 (1963)(strong presumption of validity attaches to an Act of Congress), *reh'g denied* 372 U.S. 961; Villareal, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEX.L.REV. 1125 (1998).

## 7. **Related Litigation.**

The planning, data gathering and analysis obligations imposed on federal agencies by ESA § 7 in many respects parallel requirements imposed by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370; see Mandelker, NEPA LAW AND LITIGATION. For that reason, it has become routine to find ESA counts joined with counts alleging that a federal agency has failed to follow the environmental impact analysis obligations imposed by NEPA. See, e.g., *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209 (11<sup>th</sup> Cir., 2002) (Section 7 and NEPA). Indeed, even *TVA v. Hill*, 437 U.S. 153 (1978) (Tellico Dam completion enjoined; snail darter) perhaps the most famous of the ESA cases, was itself preceded by NEPA litigation. *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir., 1972). See also, *Environmental Defense Fund v. TVA*, 371 F. Supp. 1004 (E.D. Tenn., 1973), *aff'd*, 492 F.2d 466 (6th Cir., 1974) (preliminary injunction against proceeding with Tellico project dissolved; Tennessee Valley Authority complied with NEPA).

The Ninth Circuit has held that NEPA does not apply to the designation of critical habitat under the ESA. *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir., 1995) (Northern Spotted Owl), *cert. denied* 133 L.Ed.2d 655. The Tenth Circuit considered the Ninth Circuit's views and reached the opposite conclusion, applying NEPA to the designation of critical habitat. *Catron County, New Mexico v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir., 1996); *see New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10<sup>th</sup> Cir., 2001) (baseline approach to measuring economic impact of CHD erroneous) (Southwestern Willow Flycatcher). *See Designations of Critical Habitat Pursuant to the Endangered Species Act: Does NEPA Apply?* FORDHAM ENVTL L.J. 397 (1996).

### C. State Court Litigation.

1. Under § 6 of the Act, the Secretary of the Interior is authorized to enter into cooperative management agreements with states that have acceptable conservation programs. Such an agreement makes the state eligible for federal funding. It is not surprising to find here, as with other programs in environmental law, that the states' programs fit the federal template. Moreover, any state law that may permit that which the ESA prohibits is void to that extent. ESA § 6(f), 16 U.S.C. § 6(f); *Swan View Coalition v. Turner*, 824 F.Supp. 923 (D. Mont., 1992)(state law less restrictive than ESA void.). *United States v. Glenn-Colusa Irr. Dist.*, 788 F.Supp. 1126 (E.D.Ca., 1992) (less restrictive state law on "taking" preempted by federal ESA)(water pumping, salmon). As a consequence, there has been relatively little endangered species litigation in the state courts. Among the notable examples are:

- *State v. Billie*, 497 So. 2d 889 (Fla. Dist. Ct. App. 1986), *rev. denied*, 506 So.2d 1040 (Fla. 1987) (ESA does not preempt right of states to enact consistent legislation concerning endangered species conservation; Florida panther);
- *People v. Sakai*, 56 Cal. App. 3d 531, 128 Cal. Rptr. 536 (1976) (state statute not preempted by ESA, argument that endangered species statutes constituted a "taking" rejected as without merit; seizure of whale meat from grocery); *accord, Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y., 1970), *aff'd per curiam*, 440 F.2d 1319 (2d Cir., 1971), *cert. denied*, 404 U.S. 983 (1971) (predecessor statute; prohibition by state of sale of alligator shoes not preempted by federal law);
- *San Bernardino Valley Audubon Society v. City of Moreno Valley*, 44 Cal.App.4th 593 (1996) (questioning authority of California Department of Fish and Game to issue incidental take permit; Stephens' kangaroo rat); and

*State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78, 31 ELR 20167 (N.Y. App.Div. 2000) (construction of a 3,500-foot long “snake-proof fence” to keep rattlesnakes off of property constituted a “taking;” timber rattlesnake).

2. States have little motive to embark on divergent programs, in view of the ESA's preemptive effect. For an excellent discussion, see Comment, *Palila v. Hawaii Department of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973*, 10 Ecology L.Q. 281 (1982); *National Audobon Soc'y v. Davis*, 307 F.3d 835 (9th Cir., 2002)(California law prohibiting certain types of federally authorized trapping preempted as it directly conflicts with ESA).

Given the wide reach and liberal standing which has been allowed under the ESA, it is not anticipated that the state courts will assume any distinct role in endangered species litigation. But see Eaton, *Of Salmon, Salamanders and Lizards: Can State and Local Conservation Plans “Preempt” the Endangered Species Act?*, 87 CORNELL L.REV. 185 (2001).

#### **IV. SURVIVING WITH THE ESA: HABITAT CONSERVATION PLANS AND THE SECTION 10(a) "INCIDENTAL TAKE" PERMIT.**

##### **A. Section 10(a).**

In the context of land use, the ESA is a federal statute of unusual dominance. As the courts have taken a protective attitude toward the statute and its objectives, the question is not how to challenge the statute, but how to work effectively within its framework. See Bean & Dwyer, *Mitigation Banking as an Endangered Species Conservation Tool*, 30 ELR 10537 (July, 2000)

Ironically, the ESA provides not only seemingly absolute prohibitions against "takings," but also, as a result of amendments in 1982, Pub. L. No. 97-304, 96 Stat. 1422-23, a grant of authority to the Secretary to authorize "incidental takings." Under ESA § 10(a), 16 U.S.C. § 1539(a), the Secretary may authorize incidental takings of protected species pursuant to an approved Habitat Conservation Plan (HCP). The regulations of the U.S. Fish and Wildlife Service implementing ESA § 10(a) may be found at 50 C.F.R. § 17.22.

##### **B. The Habitat Conservation Plan.**

Under § 10(a), 16 U.S.C. § 1539(a), the Secretary may authorize incidental takings of protected species pursuant to an approved Habitat Conservation Plan (HCP).

Applications for permits under ESA § 10(a) must include an HCP which specifies, among other things, the steps the applicant will take to monitor,

minimize and mitigate the impact that will result from the taking, and the funding that will be available to implement the steps. In *Gerber v. Norton*, 273 F.3d, 173 (D.C. Cir., 2002) (Delmarva fox squirrel), the U.S. Court of Appeals for the District of Columbia held that the Fish and Wildlife Service violated the Act by failing to make available for public comment a map which the Service had received with the application for an incidental take permit.

By adopting a “No Surprise” policy, the FWS and NOAA have attempted to provide holders of HCP incidental take permits a degree of regulatory assurance that no additional land use restrictions or financial compensation will be required of permit holders with respect to species covered by their permits, even if unforeseen circumstances arise after issuance of the permit. 50 C.F.R. Parts 17, 222. The final Safe Harbor and Candidate Conservation Agreements With Assurances policies were published in the June 17, 1999, Federal Register, 64 Fed.Reg. 32705. On June 1, 2000, the FWS and the National Marine Fisheries Service published a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process. 65 Fed.Reg. 35242-47, June 1, 2000. The Final Addendum took effect July 3, 2000. The U.S. Fish & Wildlife Service’s site for Candidate Species and Candidate Conservation Agreements with Assurances for Private Property Owners may be found at <http://endangered.fws.gov/listing/cca.pdf>

In *National Wildlife Federation v. Babbitt*, 128 F.Supp.2d 1274 (E.D. Calif., 2000) the 53,000-acre HCP for the giant garter snake, in the Natomas Basin, north of Sacramento, California, was challenged on the basis that the FWS lacked information to justify the “mitigation fee” and could not, therefore, make the finding required by ESA § 10(a)(2)(B)(ii) that the HCP will, to the maximum extent practicable, minimize and mitigate the impacts of the taking. Kostyack, *NWF v. Babbitt: Victory for Smart Growth and Imperiled Wildlife*, 31 ELR 10623 (June 2001); Sheldon, *Habitat Conservation Planning: Addressing the Achilles’ Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL L. J.279 (1998); Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 50 STAN. L.REV. 305 (1997); Comment, *Reforming the Endangered Species Act: Voluntary Conservation Agreements, Government Conservation and Incentives for Private Action*, 22 COLUM.J ENVTL.L. 137 (1997).

### **C. The San Bruno Mountain Conservation Plan.**

The San Bruno Mountain Conservation Plan served as the prototype HCP. Its history and the legislative history of § 10(a), 16 U.S.C. § 1539(a) are analyzed in *Friends of Endangered Species v. Jantzen*, 760 F.2d 976 (9th Cir., 1985) (proposed development of 2,235 residential units; Mission Blue butterfly); see also Comment, *Habitat Conservation Plans Under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243 (1987). See generally National Research Council, SCIENCE AND THE ENDANGERED SPECIES ACT (1995); C. Mann & M. Plummer, NOAH'S CHOICE: THE FUTURE OF THE ENDANGERED SPECIES ACT

(1995); Flournoy, *Beyond the "Spotted Owl Problem": Learning From the Old-Growth Controversy*, 17 HARV.ENVTL.L. REV. 261 (1993); Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U.COLO.L.REV. 293 (1994); Note: *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 STAN.L.REV. 319 (1995); Bean & Dwyer, *Mitigation Banking as an Endangered Species Conservation Tool*, 30 ELR 10537 (July, 2000).

## V. CONCLUSION AND PREDICTIONS FOR THE FUTURE OF THE ESA.

### A. The State of the ESA: Mixed Messages.

- The Endangered Species Act is succeeding, according to *On the Road to Recovery* a report issued in June, 1999, by the Environmental Defense Fund and the Endangered Species Coalition.
- Critics of the ESA often point to the small number of recovered species as evidence that the ESA is a failure. However, the *On the Road to Recovery* report argues that the ESA has actually fostered significant improvement in the well-being of many listed species. "The report argues that the (low) figure is not the best measure of success or failure of the ESA to this point," said Michael Bean, director of the Environmental Defense Fund's wildlife program. "Many endangered species are making steady progress toward recovery under the Endangered Species Act."
- According to the U.S. Fish and Wildlife Service, the USFWS' Partners for Fish and Wildlife (PFW) program has continued to grow and flourish. This U.S. Fish and Wildlife Service (Service) program assists landowners with restoring important fish and wildlife habitats throughout the United States. Since 1987, the PFW program has worked with private landowners who have voluntarily offered their drained, degraded and marginal waters and soils to restore for fish and wildlife habitats. Since its inception, more than 19,000 landowners have voluntarily participated nation-wide in PFW. Over 400,000 acres of important wetlands, 300,000 acres of associated uplands and 2,000 miles of riparian and in-stream aquatic habitat have been restored. During 1998, approximately 46,000 acres of wetlands, 51,000 acres of associated uplands and 430 miles of riparian and in-stream aquatic habitat were restored.
- Environmental groups, industry representatives and many members of Congress agree: the Endangered Species Act needs to be revised and updated. The timber industry, homebuilders and property rights advocates want private landowners to be compensated if the use of their land is restricted for wildlife protection. "If you're told you can't farm or ranch or cut trees on an area of your property because of endan-



gered species, I think there ought to be a fund to pay somebody for that," according to W. Henson Moore, president of the American Forest & Paper Association.

- Environmental groups oppose such compensation and have been able to block it from advancing in Congress.
- The Clinton administration dramatically increased the use of HCPs. Industry groups would like to have the law revised to codify the "no surprises" rule, which guarantees landowners they will not be required to take measures to help a particular species beyond what is agreed to in an HCP.
- Industry groups would like to see changes that would speed up the way federal agencies assess the impact of a proposed action on listed species. Currently, the endangered species law specifies that the U.S. Fish & Wildlife Service and the National Marine Fisheries Service are the two agencies that assess that impact. The timber industry and others are seeking a provision known as "self-consultation," which would allow other agencies, such as the Forest Service, to do at least initial parts of the assessments in their areas. The Department of Defense seeks amendments to environmental laws, including the ESA, claiming that the laws force military units into less-than-realistic training and hinder readiness.<sup>5</sup>
- Biodiversity: the clear trend is toward ecosystem management. *See, e.g.,* Tarlock, *Biodiversity Conservation in the United States: A Case Study in Incompleteness and Indirection*, 32 ELR 10529 (May, 2002); Harte, *Land Use, Biodiversity and Ecosystem Integrity: The Challenges of Preserving Earth's Life Support System*, 27 ECOL. L.Q. 929 (2001); Bean & Dwyer, *Mitigation Banking as an Endangered Species Conservation Tool*, 30 ELR 10537 (July, 2000); Drozdowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W.RES.L.REV. 553 (1994); Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U.COLO.L.REV. 293 (1994); Note: *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 STAN.L.REV. 319 (1995).
- New concerns over invasive species will divert attention from ESA reform. "Invasive species and their environmental damage are the most irreversible form of pollution," according to David Lodge, chair of the National Invasive Species Advisory Committee of the federal Invasive Species Council, and an ecology and biology professor at University of Notre Dame. Cornell University reports that exotic plants and ani-

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<sup>5</sup> *See, e.g.,* Lubold, *Endangered species vs. military training*, NAVY TIMES, June 24, 2002, p. 16, col. 1.

mals on land and water cost the United States up to \$138 billion annually, impacting human health, commercial activities, community infrastructures, natural resources, and agriculture production.

**B. Additional Information.**

**1. Treatises covering the ESA:**

National Research Council, SCIENCE AND THE ENDANGERED SPECIES ACT (1995);

C. Mann & M. Plummer, NOAH'S CHOICE: THE FUTURE OF THE ENDANGERED SPECIES ACT (1995);

J. Delaney, S. Abrams and F. Schnidman, LAND USE PRACTICE AND FORMS: HANDLING THE LAND USE CASE, Second Ed., (2002);

W. Snape, BIODIVERSITY AND THE LAW, (1996).

U.S. Fish & Wildlife Service, *et al.*, ENDANGERED SPECIES CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT.

**2. Recommended articles:**

Adler, *Stand or Deliver: Citizens Suits, Standing, And Environmental Protection*, 12 DUKE ENV. L & POL'Y F. 39 (2001);

Bean, *The Endangered Species Act and Private Land: Four Lessons Learned from the Past Quarter Century* 28 ELR 10701 (December, 1998);

Bean, *Major Endangered Species Act Developments in 2000*, 31 ELR 10283 (March, 2001);

Bean & Dwyer, *Mitigation Banking as an Endangered Species Conservation Tool*, 30 ELR 10537 (July, 2000);

Boyd *et al.* *The Law and Economics of Habitat Conservation, Lessons From an Analysis of Easement Acquisitions*, 19 STANFORD ENVTL. L.J. 209 (2000);

Boudreaux, *Understanding "Take" in the Endangered Species Act*, 34 ARIZ.ST.L.J. 733 (2002);

Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1972: Learning to Live With a Powerful Species Preservation Law*, 62 U.COLO. L.REV. 109 (1991);

Cheever, *Butterflies, Cave Spiders, Milk-Vetch, Bunchgrass, Sedges, Checker-Mallows, and Why the Prohibition Against Judicial Balancing of Harm is a Good Idea*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 313 (1998).

Cheever, *The Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without Winning the War*, 31 ELR 11302 (Nov., 2001);

Coggins & Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO.L.J. 1433 (1982).

Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENV. L & POL'Y F. 183 (2001);

Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR.L.REV. 105 (1999);

Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L.REV. 209 (2000);

Davison, *Alteration of Wildlife Habitat As a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVT'L.L. 155 (1995);

Doremus, *Delisting Endangered Species: An Aspirational Goal, Not a Realistic Expectation* 30 ELR. 10434 (June, 2000);

Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U.COLO.L.REV. 361 (2001);

Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L.REV. 325 (2002);

Drozdowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W.RES.L.REV. 553 (1994);

Eaton, *Of Salmon, Salamanders and Lizards: Can State and Local Conservation Plans "Preempt" the Endangered Species Act?*, 87 CORNELL L.REV. 185 (2001);

Erdheim, *The Wake of the Snail Darter: Insuring the Effectiveness of § 7 of the Endangered Species Act*, 9 ECOLOGY L.Q. 629 (1981);

Fleming, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB.L.REV. 497 (2001);

Flournoy, *Beyond the "Spotted Owl Problem": Learning From the Old-Growth Controversy*, 17 HARV.ENVTL.L.REV. 261 (1993);

Griffin, *Beyond "Harm": Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to Harassment*, 52 VAND. L.REV. 1831 (1999);

Harte, *Land Use, Biodiversity and Ecosystem Integrity: The Challenges of Preserving Earth's Life Support System*, 27 ECOL. L.Q. 929 (2001);

Healy, *Standing in Environmental Citizen Suits: Laidlaw's Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ELR 10455 (June, 2000);

Hicks, *Designation Without Conservation: The Conflict Between the Endangered Species Act and Its Implementing Regulations*, 19 VA.ENVTL.L.J. 491 (2000);

Irvin, *When Survival is at Stake: A Proposal for Expanding the Emergency Exception to the Sixty-Day Notice Requirement of the Endangered Species Act's Citizen Suit Provision*, 14 HARV.ENVTL.L.REV. 343 (1990);

Kanner, *Redwoods, Junk Bonds, and Tools of Cosa Nostra: A Visit to the Dark Side of the Headwaters Controversy*, 30 ELR 10757 (September, 2000).

Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U.COLO.L.REV. 293 (1994);

Kline, *Grizzly Bear Blues: A Case Study of the Endangered Species Act's Delisting Process and Recovery Plan Requirements*, 31 ENVTL. L. 371 (2001);

Kostyack, *NWF v. Babbitt: Victory for Smart Growth and Imperiled Wildlife*, 31 ELR 10623 (June 2001);

Kubasek *et al.* *It Takes an Entire Village to Protect an Endangered Species: Individualism, Overlapping Spheres, and the Endangered Species Act*, 10 FORDHAM ENVTL. L.J. 155 (1999);

Lee & Hall-Rivera, *Breathing New Life Into the ESA: The Pacific Northwest Endangered Species Act Experiment in Devolution*, 31 ELR 10102 (January, 2001);

Meyer, *The Economic Impact of the Endangered Species Act on the Housing and Real Estate Markets*, 6 N.Y.U. ENVTL L.J. 450 (1998);

O'Keefe, *A "New American Land Ethic": Utilizing the Endangered Species Act to Settle Land Use Disputes*, 21 FLA. ST.U.L.REV. 1031 (1994);

Ortiz, *Biodiversity, The City and Sprawl*, 82 B.U.L.REV. 145 (2002);

Petersen, *et al.*, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL.L.J. 423 (2000);

Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U.MICH.J.L.REF. 805 (1986), *reprinted in* 19 LAND USE & ENVTL.L.REV. 389 (1988);

Quarles, MacLeod & Lundquist, *Sweet Home and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, 26 ELR 10003 (1996);

Ruhl, *While the Cat's Asleep: The Making of the "New" ESA*, NAT. RESOURCES & ENV'T, Winter, 1998, at 187;

Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV.ENVTL.L.REV. 311 (1990);

Shasheen, *The Endangered Species Act: Inadequate Species Protection in the Wake of Destruction of Private Property Rights*, 55 OHIO ST.L.J. 453 (1994);

Sheldon, *Habitat Conservation Planning: Addressing the Achilles' Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL L. J.279 (1998);

Tarlock, *Biodiversity Conservation in the United States: A Case Study in Incompleteness and Indirection*, 32 ELR 10529 (May, 2002);

Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 50 STAN. L.REV. 305 (1997);

Villareal, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEX.L.REV. 1125 (1998);

Comment, *Reforming the Endangered Species Act: Voluntary Conservation Agreements, Government Conservation and Incentives for Private Action*, 22 COLUM.J.ENVTL.L. 137 (1997) and

Comment, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB. L.REV. 497 (2001).

### **3. Internet Resources:**

- <http://endangered.fws.gov> is the U.S. Fish & Wildlife Service's endangered species website.
- [http://endangered.fws.gov/listing/critical\\_habitat.pdf](http://endangered.fws.gov/listing/critical_habitat.pdf) is the U.S. Fish & Wildlife Service's site for a Fact Sheet on Critical Habitat.
- <http://endangered.fws.gov/policy/cca.htm> is the U.S. Fish & Wildlife Service's site for Candidate Species and Candidate Conservation Agreements with Assurances for Private Property Owners.
- <http://www.nesarc.org> is the website of the National Endangered Species Reform Coalition.
- <http://ficmnew.fws.gov/> is the website for the Federal Inter-agency Committee for the Management of Noxious and Exotic Weeds (FICMNEW)
- <http://contaminants.fws.gov/Issues/InvasiveSpecies.cfm> is the website for the Invasive Species homepage of the U.S. Fish & Wildlife Service's Division of Environmental Quality
- <http://www.100thmeridian.org/> is the website of the 100<sup>th</sup> Meridian Initiative, a cooperative effort between state, provincial, and federal agencies to prevent the westward spread of zebra mussels and other aquatic nuisance species in North America.
- <http://www.invasivespecies.gov/council/main.shtml> is the website of the federal Invasive Species Council

**2003 Update: The Federal Endangered Species Act  
and How It Affects Land Use**

by

**Rufus C. Young, Jr.**

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