Stay the Hand: New Directions for the Endangered Species Act

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STAY THE HAND: NEW DIRECTIONS FOR THE ENDANGERED SPECIES ACT

Thomas France* and Jack Tuholske**

The wolf has long been depicted in story and song as a mysterious menace to man's very existence... As a result we have been driven by an ethic which would lead to the wolf's extinction. But Congress has now mandated that each person who would slay the wolf must stay his hand.

—Judge Miles Lord

I. INTRODUCTION

The 1973 passage of the Endangered Species Act¹ (ESA) stands as a landmark event in the evolution of wildlife law in the United States. While earlier statutes such as the National Environmental Policy Act² (NEPA) and the Fish and Wildlife Coordination Act³ required the consideration of wildlife values in federal agency decision making, the ESA mandated substantive protections for plants and animals listed under it as threatened or endangered.⁴ These protections have sharply modified or halted numerous activities which had the potential for affecting listed species.⁵

While the ESA has made an undeniable contribution towards protecting rare plant and wildlife species in the United States over the past

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⁴ In addition, the ESA is broader in its application than NEPA, which applies only to major federal actions significantly affecting the environment. By contrast, the ESA applies to all federal activities however modest. Village of False Pass v. Clark, 733 F.2d 605, 611 (9th Cir. 1984).
⁵ See generally Coggins and Russell, Beyond Shooting Snail Darters into Pork Barrels: Endangered Species and Land Use in America, 70 GEO. L.J. 1433 (1982). This excellent, comprehensive article analyzes impacts of the Act on land and resource management, and predicts even greater future applications. In addition to an exhaustive compilation of case law and legislative history, the article recognizes the importance of the conservation and taking duties discussed herein.
fifteen years, key provisions of the law have received little attention from either federal agencies or the courts. In particular, the ESA’s imposition of an affirmative duty on federal agencies to take all steps necessary to recover threatened and endangered wildlife populations to the point where they no longer need the protections of the Act\(^6\) has been largely overlooked. Similarly, the potential breadth of the Act’s prohibitions against the taking of any listed species\(^7\) has received only limited judicial scrutiny.

Several recent initiatives on the part of both federal agencies and the nation’s private conservation organizations have, however, focused renewed attention on these key provisions. As the importance of these measures continues to emerge, further changes in federal decision making and the better management of listed plants and animals can be expected.

II. The Initial Impacts of the Endangered Species Act

To understand fully the way in which the affirmative duty and taking provisions of the ESA are beginning to alter management practices of federal agencies and private entities involved in resource development, it is necessary to review how the Act traditionally has been implemented by federal agencies and interpreted by the federal courts.

As the ESA has evolved since 1973, there can be little question that its most important component has been the so-called jeopardy provisions of section 7.\(^8\) While other parts of the Act, such as the process for the listing of threatened species,\(^9\) have greatly benefited endangered wildlife, section 7 has dramatically reoriented the approach taken by federal agencies when their activities affect endangered species.

Under section 7, every federal agency must insure that any action authorized, funded, or carried out by it “is not likely to jeopardize” any threatened or endangered species or result in the destruction or adverse modification of habitat critical to the survival of such species.\(^10\) The mechanism for insuring that these responsibilities are carried out is a consultation process between federal agencies and the United States Fish and Wildlife Service (FWS). Whenever a federal agency embarks on a

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9. 16 U.S.C. § 1533. The listing process entails submission of a petition by an interested person under 5 U.S.C. § 553(c) (1982), the rulemaking provision of the Administrative Procedures Act. Within ninety days, the Secretary determines whether the petition presents “scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). If so, the Secretary has twelve months to make a final determination as to endangered or threatened status of a species. Once listed, a species’ status may be changed (delisted) only by a determination by the Secretary that it is no longer threatened or endangered. There is surprisingly little case law on listing decisions. See Coggins, supra note 5, at 1453-59.
course of action which may affect a listed species, a biological opinion is developed through the consultation process by FWS. Should the FWS conclude that the action will result in jeopardy to a listed species, the acting agency must either modify or drop the project if it is to be in compliance with the ESA. Thus a jeopardy opinion effectively either vetoes a project or forces the agency to implement mitigation measures.

The duties not to jeopardize the existence of a species or destroy its critical habitat must be considered absolute after the landmark Supreme Court decision in TVA v. Hill, the snail darter case. Rarely has the Court been presented with such a clear cut factual scenario: "The proposed impoundment of water behind the proposed Teleco Dam would result in total destruction of the snail darter's habitat." TVA's proposed operation of the dam would have resulted in the "eradication of an endangered species." Based on these facts, the Court found that the Act "admitted of no exceptions" and held that neither the continued appropriations of money by Congress nor the expenditure of over a hundred million dollars on the dam were sufficient to overcome the clear prohibition against jeopardizing a listed species found in the ESA. Construction on the almost completed dam was enjoined. The nonjeopardy duty articulated in TVA v. Hill has had a profound impact on federal agencies, forcing them to modify or drop projects so as to avoid jeopardizing a listed species.

TVA v. Hill remains a powerful case, notwithstanding the exceptions to the ESA's nonjeopardy provisions which resulted from the ruling. The case stands as controlling precedent for situations where jeopardy will occur as a result of an agency's action. While the clear-cut factual circumstances surrounding Hill are unlikely to arise again in the future,
the Court's sweeping policy declarations and vivid insights as to congressional intent provide compelling arguments for any claim brought under the ESA whenever the jeopardy of a species is at issue.

III. THE AFFIRMATIVE DUTY TO RECOVER ENDANGERED SPECIES

In addition to the consultation duties and the prohibition against jeopardizing listed species, section 7 contains another powerful mandate. Every federal agency must affirmatively develop programs for the conservation of threatened and endangered species.19 The definition of "conservation" is as follows: "The terms 'conserve,' 'conserving,' and 'conservation' mean to use and 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."20

This broad definition recognizes no limit to the affirmative duties imposed on federal agencies by section 7. Simply, the duty requires agencies to use "all methods and procedures" needed to bring listed species to the point where they no longer need the protection of the ESA. There are no qualifications extended with regard to economic efficiency or political expediency, nor is any limit suggested as to the number of "conservation" measures which must be employed. Instead, the ESA, in clear and unequivocal language, demands all agencies of the federal government to work ceaselessly for the recovery of listed species.

The duty to conserve, then, is distinct from the duty not to jeopardize listed species or to destroy their critical habitat. It is not enough for a federal agency simply to avoid actions which might negatively impact listed species and to consult with the Fish and Wildlife Service. In addition to these responsibilities, agencies must continuously develop programs which positively affect rare plants and animals and which will bring them to the point where they can be taken off the list of threatened and endangered species.

A. Interpreting the Duty to Conserve Endangered Species

1. Legislative History

While the duty to conserve threatened and endangered species has received only intermittent attention from either federal agencies or the courts, a review of the ESA's legislative history, judicial interpretations of this history and the Act itself underscore the importance of the conservation duty.

In 1973, as the congressional conference committee report on the ESA noted, the bill which passed the House of Representatives failed to define the meaning of the term "conservation." The Senate, however, recognizing the importance of such a definition to the overall purposes of the ESA, defined conservation:

to include generally the kinds of activities that might be engaged 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.22

The Supreme Court in TVA v. Hill noted that Congress had spoken with clarity and purpose in drafting both the nonjeopardy prohibition and the conservation duty found in section 7. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."23 The Court further elaborated that section 7 created an unprecedented and paramount obligation, stating flatly that the "legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to give first priority to the declared national policy of saving endangered species."24

That Congress fully intended the affirmative duties of the ESA to take priority over other agency responsibilities was made manifest in 1978 when the ESA was amended. These amendments, in the wake of TVA v. Hill, focused on the need to create a limited mechanism for circumventing section 7's jeopardy prohibition.25 It is noteworthy, however, that nothing was done to modify the conservation duties imposed by the Act. Indeed, amendments to accomplish such an objective were squarely rejected. As the committee reports show, the American Mining Congress proposed to amend section 7(a)(1) so as to clearly relegate the ESA's conservation responsibilities to a secondary role that was subservient to the agency's primary mission. These proposed changes in the Act were rejected in committee and never reached the floor of either House.26

22. Id.
24. Id. at 185.
25. 16 U.S.C. § 1536(g).
2. Cases Construing the Duty to Conserve

While Congress clearly expected section 7's conservation requirements to trigger action on the part of federal agencies, the exact parameters of the duty await comprehensive definition by the courts. The provision has been discussed in a handful of opinions, but none completely define its mandate. It is apparent, however, that the breadth of the conservation duty is slowly being expanded through judicial interpretations as appropriate factual settings for its application are brought into court.

The first, and as such, one of the more significant cases considering the provision occurred in 1977 in *Defenders of Wildlife v. Andrus.* Plaintiffs sought to have the Department of Interior found in violation of the ESA for allowing hunting of migratory birds one-half hour before sunrise and one-half hour after sunset. They argued that poor lighting at dawn and dusk made it likely that hunters would mistakenly shoot endangered migratory birds along with legally taken species. The government countered by stating that the Act only required that hunting not jeopardize listed species, and that the loss of habitat, not the incidental taking of endangered birds was the critical issue in determining jeopardy.

Judge Gezell viewed the ESA differently than the Department of the Interior. Noting the strict definition of "conservation" in the Act, the Judge wrote: "[T]he Fish and Wildlife Service, as part of Interior, must do more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so." The court overturned the hunting regulations because "[u]nder the Endangered Species Act of 1973 the agency has an affirmative duty to increase the population of protected species."

The conservation duty was again recognized a year later in *Conner v. Andrus,* but, on somewhat similar facts, another court reached an opposite conclusion. In *Conner,* the Fish and Wildlife Service promulgated regulations prohibiting all duck hunting in parts of Texas, New Mexico and Arizona so as to protect the endangered Mexican Duck. The court, while recognizing the affirmative duty of the agency to conserve endangered species, overturned the regulations, finding that a ban on hunting would not increase the Mexican Duck population. In addition, the court

28. *Id.* at 168-69.
29. *Id.* at 170.
30. *Id.*
32. *Id.* at 1041.
also felt that it was important to balance the adverse effects on hunting against the conservation effects of the regulations. 33

As judicial interpretations of the conservation duty have continued, the Conner holding has become increasingly isolated. Not only has the duty to conserve been upheld and extended in subsequent cases, but the balancing test employed by the court has not been used elsewhere. Indeed, the mandatory language of the ESA leaves little room for the courts to consider competing interests when endangered species are at stake.

For four years after Conner, there was judicial silence on the scope of the conservation duties imposed by the ESA. Federal agencies continued to focus their efforts on avoiding the ESA's jeopardy provisions during this period and no cases are reported in which an agency was challenged for failing to meet its affirmative duties under the Act.

In 1982 however, the government, for the first time, used the conservation duties imposed by the ESA as an affirmative defense. In Carson-Truckee Water Conservancy District v. Clark, 34 a federal district court upheld the Secretary of Interior's decision to give priority to use of a reclamation project's waters for two species of endangered fish. Members of the irrigation district sued the Department for release of water for irrigation needs. The irrigation district urged a construction of the Act wherein "the Secretary is only obligated to avoid jeopardizing the bare survival of these species." 35

The court rejected this argument, finding that the Secretary was upholding his duty under the ESA by using reclamation project waters as part of a program to recover the endangered fish. Citing both Conners 36 and Defenders of Wildlife v. Andrus, 37 the court found that under section 7(a)(1): "the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of [the reclamation project's waters] until the Cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered." 38 Thus, in the court's view, not only was it permissible for the Secretary to develop a program for restoring the fish to non-endangered population levels, the Secretary was required to do so.

In response to the decision in Carson-Truckee, the Solicitor of the 33. Id.
34. 549 F. Supp. 704 (D. Nev. 1982), aff'd in part, vacated in part, 741 F.2d 257 (9th Cir. 1984), cert. denied, 105 S. Ct. 1842 (1985). The endangered species were two fish, the Cui-ui and the Lahontan cutthroat trout, both residents of Pyramid Lake. To increase their populations, the Secretary undertook a program of water release from the Stampede Dam to insure a supply of cold water in the Truckee River which provides spawning habitat for the fish. The plaintiffs wanted this water released for irrigation purposes even though this would have hindered the program for the recovery of the fish.
38. 549 F. Supp. at 710.
Department of Interior drafted a guidance memorandum for use by the Fish and Wildlife Service which expressly rejected the district court's holding that the conservation provisions of the ESA require federal agencies to give priority to threatened and endangered species until they no longer need the Act's protections. According to the Solicitor, section 7(a)(1) has the more limited purpose of allowing, but not mandating federal agencies to integrate endangered species considerations into their planning processes. In reaching this conclusion, the opinion argued that because section 7(a)(1) does not contain the explicit language found in section 7(a)(2), it cannot be construed to have the same decisive effect as the ESA's prohibition against jeopardy. As support for this rather subjective analysis of the plain language of the Act, the opinion cites the lack of a detailed legislative history on the conservation duties of the ESA as contrasted with the exhaustive treatment of the Act's jeopardy provision, and points to the problems which might arise if agencies were required to give their conservation duties priority over other responsibilities.

The circuit court decision in Carson-Truckee, and the subsequent decisions in National Wildlife Federation v. Hodel and Sierra Club v. Clark, all find more substance in the conservation requirements of the ESA than was acknowledged by the Solicitor. Each decision firmly held that the Secretary is mandated to pursue action for the conservation of endangered species, but it is fair to say the none of the opinions defined the ultimate extent of the conservation requirement.

In affirming the district court holding in Carson-Truckee, the Ninth Circuit wrote: "[Section 7(a)(1), moreover, specifically directs that the Secretary 'shall' use programs administered by him to further the conservation purposes of ESA. Those sections, as the district court found, direct that the Secretary actively pursue a species conservation policy."

While the court was careful to underscore the unequivocal nature of section 7(a)(1), it also noted that the question arose of how to resolve a direct conflict between the conservation duty and another statute. The court did not rule on the extent of the Secretary's duty had he chosen not to protect fish.

In 1984 the ESA's conservation requirements were once again

40. Id. at 5.
41. Id.
42. 741 F.2d 257 (9th Cir. 1984).
44. 755 F.2d 608 (1985).
45. 741 F.2d at 261-62 (citation omitted).
46. Id. at 262, n. 5.
brought under judicial scrutiny. In *Sierra Club v. Clark*, the State of Minnesota and the Department of Interior proposed a sport trapping season on the Eastern Timber Wolf, a threatened species in northern Minnesota. The season, when challenged, was struck down. The federal district court found, "[f]rom a plain reading of the Act and research into its legislative history . . . the Secretary clearly has an affirmative duty to bring the wolf population to the point where the protections of the Act are no longer needed."

The Interior Department attempted to defend the proposed hunt by relying on the broad language found in the definition of "conservation," asserting that a regulated taking was allowed "in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved . . . ." The court dismissed this argument by finding that the Department had not proven such extraordinary circumstances existed prior to authorizing the hunt. Without such proof, the court held, a trapping season was inimical to the clearly expressed congressional goals of the ESA. The Eighth Circuit affirmed Judge Miles Lord's prohibition of sport trapping, also relying on the legislative history of the term "conservation."

However, neither court relied on this definition expressly within the context of section 7. Indeed, the Minnesota wolf kill decisions may ultimately be viewed as "takings" cases rather than affirmative duty cases. Still, the repeated references to congressional history and strict construction of "conservation" will buttress future attempts to solidify the section 7 duty to conserve.

The most recent affirmative duty case provides perhaps the clearest delineation of the conservation duty. In *National Wildlife Federation v. Hodel*, plaintiffs alleged that the Secretary violated his duty under section 7(a)(1) by failing to take steps to stop bald eagle mortality resulting from the ingestion of lead shot even though such steps would clearly have

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47. 577 F. Supp. 783 (D. Minn. 1984), aff'd, 755 F.2d 608 (8th Cir. 1985). This litigation began nearly a decade earlier. In Fund for Animals v. Andrus, 11 Env't Rep. Cas. (BNA) 2189 (D. Minn. 1978), FWS was enjoined from trapping wolves unless the trapping was directed at specific wolves committing livestock degradations.


49. 16 U.S.C. § 1532(3).

50. This case has created a major controversy in Montana over the state's annual grizzly bear hunting season. While the grizzly is listed as threatened under the Endangered Species Act, neither the state nor the U.S. Fish and Wildlife Service has ever found that such extraordinary circumstances exist so as to warrant the hunt. The Montana Department of Fish, Wildlife and Parks has just released an environmental impact statement in the hopes of meeting this high standard, and the FWS will apparently continue to approve a grizzly hunting season on an annual basis. See 50 C.F.R. § 17.40(b) (1985).


prevented additional fatalities. Plaintiffs introduced evidence compiled by the Interior Department that showed that eagles were eating ducks and geese crippled by lead gunshot during the hunting season and that the eagles were often dying of secondary lead poisoning. Between 1976 and 1985, at least ninety-six eagles died from consuming toxic lead shot. According to the Federation, the Secretary had the option under the ESA of either closing the hunting season in areas heavily used by eagles or requiring the use of nontoxic steel shot.\(^{54}\) The government countered that while the ESA did impose an affirmative duty to conserve endangered wildlife, the Department of Interior had complete discretion to pick and choose which conservation measures to employ.\(^{58}\) The court rejected this contention:

>D]efendants have not clearly identified the factors which the agency considers relevant to their choosing to authorize the use of lead shot in the disputed areas. Moreover, assuming defendants correctly identified the factors which are relevant to their decision, defendants have failed to articulate a rational connection between the factors found and the choice that they made. This court, finding no clearly articulated factors considered by defendant in choosing this course of action, has no basis upon which to uphold defendants' choice.\(^{56}\)

The court held that not only did the Department have a duty to consider appropriate conservation measures, but that it was also required to clearly document why such measures were rejected.\(^{57}\)

Under Hodel, the proper standard for reviewing an agency's responsibilities under section 7(a)(1) requires the agency first to consider a reasonable range of programs or actions that will lead to the recovery of listed species and then to specify the basis for rejecting any particular measure. Given that the duties imposed by the ESA require agencies “to afford first priority to the declared national policy of saving endangered species,”\(^{58}\) it is difficult to imagine a rational basis for rejecting any reasonable conservation effort. Under Hodel, it appears that private

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54. *Id.* at 2-3.
55. *Id.* at 9.
56. *Id.* at 9-10.
57. In reaching this conclusion, the court was careful to set out the standard of review used. *Id.* at 8.
organizations and individuals may suggest conservation strategies with the expectation that agencies will give them serious consideration, either voluntarily or under court order.

3. **Implementing the Duty to Conserve**

The gradual clarification of the ESA's affirmative conservation responsibilities by the courts has significant implications for federal agencies. At both the program and project level, the expanding duties of the ESA promise to affect many aspects of federal decision making, forcing both a more thorough consideration of threatened and endangered species issues and a reshaping of project design and implementation. Some of these changes have already begun while others are just now beginning to emerge.

For example, the grizzly bear is listed as a threatened species.\(^{59}\) As part of its effort to protect the bear and encourage its recovery, FWS has developed a recovery plan\(^{60}\) and identified six major ecosystems that can support viable grizzly populations.\(^{61}\) As the chart for the Northern Continental Divide Ecosystem indicates, nearly all of the habitat needed to support a sustaining grizzly population is situated on federal land.

### Northern Continental Divide Ecosystem Occupational Habitat\(^{62}\)

<table>
<thead>
<tr>
<th>Administrative Unit</th>
<th>Current Occupied Habitat Acres (Thousand)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Forest</td>
<td></td>
</tr>
<tr>
<td>Flathead</td>
<td>2056</td>
</tr>
<tr>
<td>Helena</td>
<td>180</td>
</tr>
<tr>
<td>Lewis &amp; Clark</td>
<td>776</td>
</tr>
<tr>
<td>Lolo</td>
<td>281</td>
</tr>
<tr>
<td>Kootenai</td>
<td>207</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>3500</strong></td>
</tr>
</tbody>
</table>

\(^{59}\) 50 C.F.R. § 17.11 (1985).

\(^{60}\) Under the ESA, the Secretary is directed to develop recovery plans “for the conservation and survival of endangered species and threatened species . . . unless he finds that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f).

\(^{61}\) The six ecosystems are: Greater Yellowstone (Yellowstone Park and surrounding lands in Montana, Idaho and Wyoming); Northern Continental Divide (northern Montana); Selway-Bitterroot (Montana and Idaho); Cabinet Yaak (Northwestern Montana); North Cascades (northern Washington); and Selkirk (Idaho). The recovery goals for each of these areas are delineated in the **Grizzly Bear Recovery Plan** implemented January 29, 1982 by Robert Jantzen, Director of FWS.

Arguably, the duty to conserve should be pre- eminent for all management activities initiated by the federal government in the Northern Continental Divide Ecosystem. Indeed such activities are wide ranging, as the area is important for commercial timber harvests, a myriad of recreational activities and potential oil and natural gas exploration and development. Yet management decisions are not always made with the conservation of the bear in mind.

The reluctance of federal land management agencies to fully integrate the conservation requirements of the ESA into their management activities is illustrated by a dispute over natural gas development in the Lewis and Clark National Forest. A nonjeopardy opinion was issued for a proposed gas well. However, the Forest Service’s Environmental Assessment\(^\text{63}\) noted that the proposed well would inhibit bear recovery to optimal levels in the area.\(^\text{64}\) Thus the Forest Service was approving a project that would lessen the chances of recovery, rather than taking all measures necessary to conserve the species.\(^\text{65}\)

While recognizing the conservation duty in general, the government contended that agencies have wide discretion in developing conservation programs. In this case, the Forest Service had no duty to recover populations to their full potential, and could select whatever conservation measures it chose.\(^\text{66}\) The Forest Service also cited other, unrelated

\[\text{63. The Bureau of Land Management has the authority to issue leases and approve drilling permits for minerals on federal lands. 30 U.S.C. § 352 (1982). By agreement, the Forest Service conducts environmental analyses on mineral production activities on Forest Service lands as required by the National Environmental Policy Act. 42 U.S.C. §§ 4321-4370 (1982).}
\[\text{64. Hall Creek Environment Assessment at 100, Appendix C-2, C-27 (1985)(available from the Northern Rockies Resource Clinic, Missoula, Montana). The Environmental Assessment found that the biological potential of the area was four adult female grizzlies. However, if the well was in place, even with full mitigation, the area would provide habitat for only two female adult grizzlies.}
\[\text{65. The Environmental Assessment and Finding of No Significant Impact was appealed by numerous conservation groups. Glacier - Two Medicine Alliance et al., 85 Interior Board of Land Appeals (IBLA) 445. (Notice of appeal filed March 1, 1985) (available from the Northern Rockies Resource Clinic, Missoula, Montana).}
\[\text{66. Answer of the Department of the Interior, Glacier - Two Medicine Alliance et al., 85 IBLA 445 at 448-50. (available from the Northern Rockies Resource Clinic, Missoula, Montana). This answer, in the manner of a reply brief, was filed by the Department of the Interior as a response to legal}
programs that fulfilled its duty to conserve.67 The agency's message was clear: an unlimited conservation duty on each project "would act as a total bar to uses of federal land identified as potential habitat for endangered or threatened species."68 In remanding the case, the Interior Board of Land Appeals did not reach the conservation duty issue.69

The government's argument that the ESA's conservation language provides the agency with virtually unlimited latitude in the development of such programs is not surprising in light of the Solicitor's Opinion discussed earlier.70 Such a view, however, falls short of the conservation obligations imposed on the Fish and Wildlife Service in National Wildlife Federation v. Hodel.71 The rejection of any particular measure must be based on the reasonable consideration of that measure and the articulation of those considerations which preclude the measure's adoption. Failure to provide evidence of such consideration or to articulate the thinking behind the decisions will place the agency in violation of the ESA.

There are indications, however, that federal agencies are beginning to pay closer attention to the conservation duties of section 7. A case in point is endangered wolves and forest planning. Like the grizzly, the endangered gray wolf is targeted for recovery in the remote mountains of Montana and Idaho.72 One such area exists in central Idaho and occupies parts of the Clearwater National Forest.73 The Forest Service, as part of a nation-wide planning effort is currently preparing a forest plan for the Clearwater.74 This plan will allocate the Clearwater's lands to various activities and identify prescriptions for managing such activities. Because implementing the plan will affect the gray wolf, the ESA was triggered and the Forest Service initiated consultation with FWS.

67. Id. at 50.
68. Id. at 48.
69. Glacier - Two Medicine Alliance et al., 88 IBLA 133 (1985). The decision turned on the agency's failure to ensure against jeopardy. The jeopardy problem involved the failure of the Forest Service to guarantee that it could implement mitigation measures designed to reduce mortality, which FWS had required as part of its original nonjeopardy opinion.
70. See supra note 39 and accompanying text.
72. See U.S. Fish and Wildlife Service, Northern Rocky Mountain Wolf Recovery Plan (Revised Agency Review Draft, Dec. 1983). The Plan proposes three recovery areas: Northwest Montana, Central Idaho and the greater Yellowstone area. These areas encompass large blocks of federal land which are relatively free from human disturbance and which have an adequate prey base.
73. The Clearwater National Forest covers slightly more than 1.8 million acres of land in northe-central Idaho. Nearly 1.2 million acres on the forest are either designated wilderness or roadless lands. In addition to wolves, the Clearwater contains other significant resources, such as an outstanding coldwater fishery, large populations of elk and deer, and of course, timber.
74. The forest planning requirements are contained in the National Forest Management Act, 16 U.S.C. §§ 1600, 1611-1614 (1982).
The Biological Opinion prepared by FWS on the Clearwater concluded that implementing the proposed forest plan would not jeopardize the gray wolf. However, after reaching the nonjeopardy conclusion, FWS noted the precarious nature of wolf populations in Idaho, and incorporated a lengthy series of conservation recommendations into the Opinion. The most controversial recommendations contained in the Opinion suggested that the Forest Service refrain from developing and roading certain areas of the forest which contained key wolf habitat components.

As a result of the Biological Opinion, FWS and the Forest Service entered into further discussions concerning conservation strategies on the Clearwater. These discussions led to a supplemental Biological Opinion in which the FWS retracted some of their recommendations which would have most infringed on timber production but retained others. The Forest Service in turn agreed to keep one important area roadless, to close certain roads to public use and to involve the FWS in the design of timber sales and road construction. While it is arguable whether this compromise offers sufficient concessions to wolf recovery, the Forest Service clearly changed management direction where the FWS identified specific conservation measures.

The Clearwater Forest Plan and the Hall Creek project provide interesting studies in the way in which the ESA’s conservation duty is slowly beginning to affect agency decisions and to redefine management alternatives. If judicial construction continues to develop along the lines of Hodel and Carson-Truckee, conservation considerations will play an increasingly larger role in agency thinking. In the Northern Rockies, where habitat requirements of grizzlies and wolves can range across hundreds of thousands of acres, agencies may have to put off many types of development activities until the grizzly and the wolf have been recovered.

IV. THOU SHALL NOT TAKE

With most of the attention focused on section 7 duties, it is not surprising that other parts of the Act have received limited judicial


76. According to the Opinion, there are fewer than fifteen wolves in central Idaho with only infrequent sitings being recorded in the Clearwater. Id. at 5, 14.

77. Id. at 16-19.


79. See, Biological Opinion, supra note 75 at 16-19; letter from William Shake to James Bates, supra note 78.
scrutiny. Yet the implications of broad judicial interpretation go beyond the affirmative duty under section 7. This is especially true for section 9 of the Act, the "takings" provision.

Section 9 makes it unlawful to take any endangered species.\(^8\) Taking is defined to include any action to "harass, harm, pursue, hunt, wound . . . or attempt to engage in such conduct."\(^8\) Harass is defined by regulation as negligent or intentional disruption of the normal behavior patterns of an endangered animal.\(^8\) Most significantly, harm is defined to include activities that result in significant environmental modification or degradation of an endangered species' habitat.\(^8\)

These definitions expand the application of section 9 far beyond the affirmative duty provision of section 7. Because section 9 makes it "unlawful for any person"\(^8\) to take an endangered species, federal action is not required. The definition of harm to encompass habitat destruction or modification provides a much broader standard than an affirmative duty to conserve. The spectrum of government and private activities that modify or destroy habitat is overwhelming—air, water, soil and noise pollution, urban growth, resource development and outdoor recreation activities, to name a few.\(^8\) Add to this range of activities the scope of endangered species' habitat and the implication of a broad application of section 9 is clear.

Two 1980 cases set forth divergent opinions on section 9. In *North Slope Borough v. Andrus*,\(^8\) plaintiffs sought to prevent the authorization of oil and gas leases in the Beaufort Sea north of Alaska.\(^8\) Despite the distinct possibility of habitat modification and mortality to the endangered bowhead whale from drilling, the court concluded that this would result at most in a future taking and declined to find a violation of the ESA.\(^8\) Because plaintiff sought to prevent leasing rather than drilling and exploration activities, the court's reluctance to find a taking is understandable.

By contrast, the facts in *Palila v. Hawaii Department of Land and
presented a real and immediate threat to endangered species. The endangered Palila bird’s only remaining habitat was being destroyed by feral sheep and goats. The Hawaii Department of Land and Natural Resources sought to maintain the sheep and goats for sport hunting, notwithstanding the continued destruction by the sheep and goats of the Palila’s bird’s only known habitat. Finding the acts and omissions of the Department clearly within the regulation’s definition of “harm,” the court enjoined the defendant from maintaining the sheep and goats, and ordered them eradicated. The Ninth Circuit upheld the decision, which provides the strongest support to date that habitat modification constitutes a taking under section 9. The rationale expressed by the Ninth Circuit has yet to be applied in other circumstances. The only significant attempt by conservationists to apply the habitat modification regulations occurred in a dispute surrounding an emergency deer hunt in the Florida Everglades.

In 1982, the takings provision was amended to permit an incidental taking of endangered species where such a taking was expressly authorized by the Secretary. This provision received judicial interpretation in *Friends of Endangered Species v. Jantzen*. Although the Ninth Circuit in *Jantzen* upheld the taking of habitat utilized by the endangered Mission Blue butterfly, the decision does not restrict future application of section 9.

The facts of *Jantzen* differ markedly from *Palila*. A real estate developer sought to develop several thousand acres of San Bruno Mountain. Part of this included grassland habitat essential to the Mission Blue butterfly. However, the developer submitted a Habitat Conservation Plan...
Based on the Biological Study conducted by FWS. The plan dedicated nearly 800 acres to local agencies and preserved 86% of the butterfly's habitat. Moreover, the plan promised $60,000 annually to improve the species' habitat. While some taking of habitat would occur as a result of the development, the agency concluded and the court agreed that the overall effect of the plan "was likely to enhance the survival of the Mission Blue butterfly."

The court concluded that FWS had met its statutory obligations in approving an incidental taking. Given the facts relied upon by the court, such a decision was reasonable.

It is important to recognize that the ESA's prohibition against taking extends only to species listed as endangered. However, both agency practice and judicial interpretation extend the Act's protections to threatened species. When a species is listed as threatened, the ESA requires the Secretary to adopt regulations providing for the conservation of the species. Through these regulations, the ESA expressly authorizes the Secretary to prohibit the taking of any threatened species. Under this provision, the Secretary has promulgated blanket regulations which prohibit individuals from taking any threatened species unless a permit to do so has been issued through the Fish and Wildlife Service.

In an important test of the Secretary's discretion to authorize the taking of threatened species, the Eighth Circuit Court of Appeals held in Sierra Club v. Clark that the Secretary could permit such an occurrence only under the most exacting circumstances. As has been discussed, the case involved a proposal to permit a limited sport trapping season on the threatened timber wolf population in northern Minnesota. The Secretary

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98. Id. at 980.
99. Id.
100. Id. at 982 (emphasis in original). The court noted that the habitat improvement fund would be used to eliminate shrubs that were encroaching on the butterfly's grassland habitat. Additionally, the court noted that as a result of the restrictions included in the realtor's development scheme, such as park land and open space, a substantial amount of habitat would be permanently protected.
101. Id. The court set forth a four-part test to ascertain the legitimacy of the taking under 16 U.S.C. § 1539: (1) whether it was incidental, (2) whether the FWS permit minimizes impacts to the maximum extent possible, (3) whether there is adequate funding for the Conservation Plan, and (4) whether the taking will appreciably reduce the likelihood of the species' survival. The appellant challenged FWS actions regarding the second and fourth criteria. The court rejected both challenges.
102. In addition, the court looked to the congressional hearings on the 1982 amendments, which referred to the San Bruno Mountain Conservation Plan as an excellent model of what must be done before a takings is permissible. Id. at 982-83.
103. 16 U.S.C. § 1533(d).
104. Id.
105. 50 C.F.R. § 17.31 (1985).
106. 755 F.2d 608 (8th Cir. 1985). See supra notes 47-52 and accompanying text, where the implications of this case and the affirmative duty are discussed.
argued that provisions in the ESA directing him to issue regulations for the conservation of threatened species implicitly granted the authority to allow a taking of such species to occur.\footnote{107} The court resolved the issue by focusing upon the definition of conservation; a regulated taking can occur only in the "extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved . . . ."\footnote{108} This provision when read in concert with the entire Act established the parameters of the Secretary's authority. Since no showing of an extraordinary case had been made, the court held that the Secretary did not have the discretion to permit the regulated taking of wolves.\footnote{109} It should be noted, however, that the court expressly affirmed the Secretary's authority to establish a control program to take individual wolves preying on livestock.\footnote{110}

Another recent pronouncement on the takings issue came in the previously discussed case,\footnote{Another recent pronouncement on the takings issue came in the previously discussed case, National Wildlife Federation v. Hodel, for its holding on the ESA's conservation duties. In that case, the court found that because the FWS authorized activities that directly contributed to the death of bald eagles, a taking was present: "[T]he defendants' authorization of lead shot for hunting in the 1985-86 hunting season . . . constitutes such a taking."\footnote{111} The FWS in Hodel submitted a mitigation plan aimed at minimizing the taking. Unlike the plan in Jantzen, the court concluded that the FWS's mitigation measures "would do nothing to mitigate the incidental taking of bald eagles this coming hunting season."\footnote{112} The court imposed a strict standard on the sufficiency of a mitigation plan. Future promises of reduced taking, no matter how effective, do not obviate the need for immediate mitigation.\footnote{113} As case law on the takings provision continues to emerge, actions harming listed species will be further curtailed. Given the breadth of the definition of takings, conservation groups will attempt to have it applied to a wide variety of circumstances. If courts continue to uphold these interpretations, it will have a significant impact on private and governmental activities.

\footnote{107. Id. at 612.}
\footnote{108. 16 U.S.C. § 1532(3).}
\footnote{109. 755 F.2d at 613-18.}
\footnote{110. Id. at 614 n.8.}
\footnote{112. Id. at 11.}
\footnote{113. The FWS proposed to eliminate lead shot for the 1986-87 hunting season. These future promises were found to be inadequate because mortality would still occur.}
V. Conclusion

In 1977, the United States Supreme Court dramatically altered the substantive duties imposed by the ESA by providing an encompassing interpretation of section 7(a)(2). No longer a conservationist's wish list of considerations the government ought to make when its actions affected endangered species, the Act became an absolute yardstick against which agency actions would be measured.

Nearly a decade later, a more gradual though no less important evolution of other substantive duties imposed by the Act has occurred. In addition to not jeopardizing the existence of endangered species, agencies must take affirmative steps to promote their recovery. Moreover, neither agencies nor private citizens may take actions that more than incidentally contribute to the taking of the species or its habitat. While the precise parameter of these requirements await further judicial delineation, the affirmative duty and takings provisions of the Act will have a profound impact on land management activities wherever endangered species are present.