

## ENDANGERED SPECIES ACT 2005 LITIGATION UPDATE<sup>1/</sup>

Prepared by:  
Wildlife and Marine Resources Section  
Environment and Natural Resources Division  
United States Department of Justice  
Washington, D.C.

### I. SECTION 4 LITIGATION

#### A. Deadline Cases

Center for Biological Diversity v. Hamilton, 385 F. Supp. 2d 1330 (N.D. Ga. 2005) Plaintiffs challenged the United States Fish and Wildlife Service's ("FWS") failure to designate critical habitat for the goldline darter and blue shiner after issuing a "not determinable" finding in 1992. Court granted motion to dismiss plaintiffs' claims as barred by the general six-year statute of limitations, 28 U.S.C. § 2401. The Court reasoned that the ESA does not impose a continuing duty on FWS to designate critical habitat and that plaintiffs were aware of the violation and could have instituted suit in 1993, the end of the one-year period afforded to FWS by making a "not determinable" finding.

Save Our Springs Alliance v. Norton, 361 F. Supp. 2d 643 (W.D. Tex. 2005). Plaintiffs challenged alleged failure to make timely "90-day" and "12-month" findings pursuant to ESA section 4(b)(3)(A) with respect to plaintiffs' petition to list the karst spider as endangered or threatened. Plaintiff also requested that the court compel the FWS to make a determination on their "emergency listing" request. The court denied as moot the parties' motions on the emergency listing claim because FWS had made a 90-day finding in which it addressed the emergency listing request. The court granted defendants' cross-motion for summary judgment on the remaining claims and ordered FWS to issue its "12-month" finding on plaintiffs' petition by December 8, 2005, as proposed by the FWS.

#### B. Substantive Challenges to Listing Decisions

Center for Biological Diversity v. Norton, 03-CV-252 (D. N.M.) On December 19, 2005, the Court entered judgment in favor of the Fish & Wildlife Service in this challenge to FWS's decision not to list the Rio Grande cutthroat trout. The Court upheld FWS's interpretation of the phrase "significant portion of the range," and rejected the interpretation given to this phrase by the Ninth Circuit in Defenders of Wildlife v. Norton (the flat-tailed horned lizard case), National Wildlife Federation v. Norton (District of Vermont gray wolf litigation), as well as Defenders v. Norton (Canada lynx case). The Court noted that the term "significant" relates to the biological

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importance, rather than the geographic breadth, of the species' range. As such, the Court read "significant portion of the range" to mean a portion "that is so important to the continued existence of a species that threats to the species in that area can have the effect of threatening the viability of the species as a whole." The Court noted that FWS must take into account the species' historical range and reductions thereto, but even with a reduction in range (and a reduction in absolute numbers of fish), if the remaining core populations ensure the species' survival throughout its range or a significant portion thereof, the species is not endangered.

Center for Biological Diversity, et al. v. FWS, \_\_\_ F.Supp.2d \_\_\_, 2005 WL 3199433 (D. Or. Nov. 16, 2005) (Coastal cutthroat trout) - By order dated November 16, 2005, the Court granted summary judgment for FWS, upholding its decision to withdraw a proposed rule to list the Southwestern Washington/Columbia River DPS of coastal cutthroat trout as threatened. Plaintiffs' arguments focused on FWS's consideration of the anadromous life-history strategy of coastal cutthroat trout, which constitute only one of the three life-history strategies that make up the DPS. Plaintiffs claimed that FWS: (1) failed to properly consider the declines in the anadromous life-history strategy and its habitat in light of current threats; (2) improperly collapsed any distinction between the life-history strategies to diminish threats to the anadromous life-history strategy; (3) ignored the question of whether existing regulatory mechanisms are adequate to address threats to the anadromous life-history strategy; and (4) failed to consider whether either the "anadromous-only" habitat or the Lower Columbia River portion of the range constituted a "significant portion of [the DPS's] range." With respect to population trend, the Court agreed that because the FWS team unanimously concluded based on the best available data (including new data since the proposed rule) that the DPS did not meet the definition of a threatened species that FWS had considered the relevant factors and articulated a rational connection between the facts found and the choice made. With respect to Plaintiffs' other claims, the Court held that FWS took the requisite "hard look" when considering (1) how threats to the anadromous life-history strategy affect the decision on whether to list the DPS as a whole, (2) listing factors A & D, and (3) whether the coastal cutthroat trout is in danger of extinction in a significant portion of its range. One notable point the Court agreed with FWS on is that, with respect to listing factor D, the inquiry is not whether existing regulatory mechanisms are adequate, but whether they "are so inadequate that they represent a threat to the DPS and, either alone or in concert with the other listing factors, lead FWS to a conclusion that the species is threatened or endangered."

Tucson Herpetological Society v. Norton, No. 04-0075-PHX-NVW (D. Ariz. Aug. 30 2005). Finding FWS' decision to withdraw the proposed rule to list the flat-tailed horned lizard as threatened was arbitrary. FWS found that the area in which the lizard is expected to continue to survive is much smaller than its historical range, FWS' task is forward looking and therefore must consider a significant portion of the range based on the lizards' current range. The Court found this arbitrary and inconsistent with the Ninth Circuit's decision in Defenders of Wildlife v. Norton, 258 F.3d 1136 (9<sup>th</sup> Cir. 2001). Specifically, the Court found that FWS' position of neglecting historical lost habitat was incorrect and that once FWS determined that lizard currently exists in an area much smaller than its historical habitat, FWS was required to assess and explain why the area in which the species can no longer live is not a significant portion of its range.

Western Watersheds Project v. Foss, 2005 WL 2002473, No. CV04-168-MHW (D. Idaho Aug. 19, 2005). Reversing and remanding FWS' decision that listing of the slickspot peppergrass was not warranted. The Court found that FWS could rely on an executed conservation agreement in general, but that FWS had failed to explain how the conservation agreement would avoid extinction in the "foreseeable" future.

Center for Biological Diversity v. U.S. Fish and Wildlife Service, 2005 WL 2000928, No. C04-04324WHA (N.D. Cal. Aug. 19, 2005). Vacating and remanding FWS' decision to downlist the Santa Barbara and Sonoma County populations of California Tiger salamander for endangered to threatened.

California Native Plant Soc'y v. Norton, 2005 WL 768444, No. Civ. A. 03-1540 (JR) (D.D.C. March 24, 2005) (San Fernando Valley spineflower). Plaintiffs challenged FWS' "warranted but precluded" finding for the San Fernando Valley spineflower. On March 24, 2005, the court granted plaintiffs' motion for summary judgment in part, but dismissed one of plaintiffs' claims. The FWS spineflower finding had been subject to review through the Candidate Notice of Review process which combines "recycled" petition findings and candidate findings. Here the 2002 CNOR was challenged by plaintiffs with regard to its determination that the spineflower remained warranted but precluded due in part to expenditures required for critical habitat designation. The court held that FWS may not rely on critical habitat actions to justify preclusion of listing decisions because the statute specifically refers only to listing decisions in authorizing the "warranted but precluded" status determination. The court also held that FWS' justifications otherwise required additional detail, although the court did not require the level of detail demanded by plaintiffs. Finally, the court held that FWS' CNOR system met the ESA's requirement for monitoring of precluded species and dismissed that claim.

Wyoming v. Morrison, 360 F. Supp. 2d 1214 (D. Wyo. 2005). Court held that letter to State of Wyoming concerning the state wolf management plan was not a reviewable final agency action for purposes of Administrative Procedure Act review. Court also held that FWS did not have mandatory duty to delist the gray wolf and state must instead follow the delisting petition process.

Home Builders Ass'n v. Williams, No. Civ. S-04-345 LKK/GGH (N.D. Cal. March 2, 2005) (California tiger salamander). Court dismissed as moot case challenging merits of FWS' designation of two distinct population segments ("DPSs") of the California tiger salamander. Court ruled that intervenors would not suffer legal prejudice from dismissal of the action despite possibility of future, related litigation.

National Wildlife Federation v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005). Court granted summary judgment to plaintiffs in this challenge to the FWS' decision under the ESA to reclassify the listed gray wolf into three distinct population segments and to downlist two of the three segments (the Eastern DPS and the Western DPS) from endangered status to threatened status based upon the species' recovery progress. The court found that FWS' reclassification relied upon an improper definition of "significant portion of its range" and that the division of the prior 48-state-wide listing into three distinct population segments violates the agency's DPS Policy and is arbitrary and capricious. The court vacated and remanded the Final Rule.

Defenders of Wildlife v. United States Dep't of the Interior, 354 F. Supp. 2d 1156 (D. Or. 2005) (gray wolf). Court granted summary judgment to plaintiffs in this challenge to the FWS' decision under the ESA to reclassify the listed gray wolf into three distinct population segments and to downlist two of the three segments (the Eastern DPS and the Western DPS) from endangered status to threatened status based upon the species' recovery progress. The court found that FWS' reclassification relied upon an improper definition of "significant portion of its range" and that the division of the prior 48-state-wide listing into three distinct population segments violates the agency's DPS Policy and is arbitrary and capricious. The court enjoined and vacated the Final Rule.

Washington State Grange v. Evans, Civ. No. 04-86 (E.D. Wash. Nov. 10, 2004) (steelhead trout). Plaintiffs challenge the listing rules for three evolutionarily significant units of steelhead trout. Plaintiffs

allege that National Marine Fisheries Service violated the ESA by listing only naturally spawned fish even though NMFS included hatchery fish in the definition of the ESU. In addition, plaintiffs allege that NMFS should have included resident, nonmigratory fish in the definition of the ESU. NMFS is currently reconsidering the rules challenged in light of the court's holding in Alsea, so federal defendant filed a "Motion for Stay" until June 14, 2005, when NMFS expects to issue revised final listing determinations. On November 12, 2004, the court found that in this instance the doctrine of prudential mootness applies and granted a stay until June 30, 2005. The court determined that time spent addressing the merits of plaintiffs' claims would be unproductive given the pendency of a new final listing determination. On January 6, 2005, the court granted a stay until January 6, 2006, based on the parties' stipulation.

#### D. Substantive Challenges to Critical Habitat Designations

Nebraska Habitat Conservation Coalition v. U.S. FWS, et al., 03-3059 (D. Neb.) (piping plover).

In this case, Plaintiff challenged FWS' critical habitat designation in Nebraska for the northern Great Plains population of the piping plover. On October 13, 2005, the Court granted in part and denied in part Plaintiffs' motion for summary judgment. The Court first found that Plaintiff had standing to challenge the CH designation. Next, the Court found that FWS' definition of "occupied" was sufficient, but found that FWS' application of the definition was faulty because FWS designated CH in areas not occupied by the plover. The Court then found that FWS inappropriately designated areas as CH that did not contain the PCEs and that were not essential to the conservation of the species, based on FWS' statements to that effect in the rule. Next, the Court upheld FWS' approach of defining CH as the areas "between the banks" of the rivers. Moreover, the Court found that FWS' economic analysis was deficient because FWS understated the economic costs associated with the CH designation by (1) wrongly considering areas "occupied" and thus attributing those economic impacts solely to listing, and (2) failing to consider the economic impacts associated with future consultations resulting from federal agricultural subsidy payments. The Court rejected Plaintiff's arguments that FWS should have excluded more lands based on management plans in place because the plans were not provided to FWS during the designation process. Although Plaintiff raised challenges against FWS' compliance with NEPA, the Court did not address those claims. The Court vacated and remanded the rule for redesignation of CH in Nebraska and on the Missouri River adjacent to Nebraska and did not specify a time to complete the redesignation.

Center for Biological Diversity v. Evans, 2005 WL 1514102, No. C 04-04496 (N.D. Cal. June 14, 2005) (northern right whale). Court ruled that NMFS' denial of plaintiffs' petition to revise critical habitat of northern right whale based on a lack of information was arbitrary and capricious. In addition, the court held that NMFS had unreasonably delayed designating critical habitat for the North Pacific stock of right whale based, in part, on the right whale recovery plan. Court set deadlines for NMFS to propose critical habitat for the Pacific Ocean population of the northern right whale by October 28, 2005, and to make a final determination on that proposal by June 30, 2006.

Center for Biological Diversity v. United States Army Corps of Eng'rs, CV 03-29-M-DWM (D. Mt. May 25, 2005) (Kootenai River white sturgeon). Court granted plaintiffs' motion for summary judgment and remanded the FWS' designation of critical habitat for the Kootenai River white sturgeon. Plaintiffs alleged that critical habitat designation was inadequate because it did not include all habitat that might contain suitable characteristics (cobble substrate). Plaintiffs argued that FWS failed to properly observe the recovery purpose of critical habitat by including areas that largely lacked the appropriate characteristics and which were apparently per se inadequate, given that the fish are not successfully

reproducing in the wild. FWS countered that it had designated all the areas where known spawning was documented in the past and that the areas that plaintiffs want to be designated are neither accessible to the fish nor (when made accessible by modifying the flow regime from Libby Dam in Montana) used by the fish. Court held that “institutionalized caution” underlying the ESA (as recognized in TVA v. Hill) means there is an obligation to designate more than enough spawning habitat, where the designated habitat isn’t “getting the job done.” Court remanded the designation but left it in place, and imposed a deadline for a new designation. Court rejected plaintiffs’ argument that Gifford Pinchot has any direct implications for critical habitat designations as opposed to section 7 consultations.

E. RECOVERY PLANS

Grand Canyon Trust v. Norton, No. 04-CV-636 PHX-FJM (D. Ariz. June 13, 2005) (humpback chub). Plaintiffs challenged FWS’ alleged failure to include implementation cost and time estimates in humpback chub recovery plan. Court rejected argument that final agency action is a component of the ESA citizen-suit provision, stating that plaintiffs sufficiently alleged that the FWS failed to perform a non-discretionary duty under section 4 of the ESA. However, court dismissed plaintiffs’ APA claims challenging contents of recovery plan, stating that a recovery plan is not final agency action. “The adoption of a recovery plan is not an action by which legal rights and obligations have been determined, or from which legal consequences flow.”

II. SECTION 7 LITIGATION

A. ESA § 7(a)(1)

“The Secretary [of Interior or Commerce] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to [the Act].” 16 U.S.C. 1536(a)(1)

Bear Creek Council v. Heath, CV-04-96-BLG-RFC (D. Mont. April 26, 2005). Plaintiffs challenged timber sale on the Gallatin National Forest in grizzly bear habitat. Plaintiffs brought three ESA section 7 claims against the Forest Service and FWS. Court held that the record supports the biological assessment’s “not likely to adversely affect” determination and FWS’ concurrence therewith, that the Project complies with motorized access density standards in the 1995 BiOp, and that the Forest Service has fulfilled its section 7(a)(1) obligations.

B. ESA § 7(a)(2)

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Interior or Commerce], insure that any action, authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “action agency”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected states to be critical . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.” 16 U.S.C. 1536(a)(2)

“Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03

1. Requirement to Consult

Forest Service Employees for Environmental Ethics v. U.S. Forest Service, 397 F.Supp.2d 1241 (D. Mt. 2005) On October 24, 2005, the Court granted Plaintiffs’ motion for summary judgment in this challenge under NEPA and the ESA to the Forest Service’s use of chemical fire retardants in their firefighting activities. With respect to the ESA claims, the Forest Service had argued that (1) Plaintiffs were bringing an improper “programmatic” challenge, in violation of Norton v. SUWA and Lujan v. NWE, and that Plaintiffs could only challenge specific instances of fire retardant use which adversely affected listed species; and (2) the Forest Service had satisfied its Section 7 obligations by utilizing the “emergency” consultation provisions in set forth in the ESA regulations (50 C.F.R. 402.05). The Court rejected both arguments. After stating that there was no requirement for “final agency action” for suits brought under the ESA’s citizen suit provision, the Court found that the Forest Service’s authorization, funding, and use of chemical fire retardant is a challengeable action under the ESA. The Court also found that the Forest Service’s reliance on emergency consultation was improper, noting that “[t]he emergency exception is meant for unexpected exigencies. The use of fire retardant by the USFS is not unexpected but guaranteed; the only question is when and where it will be used.” As such, the Court concluded that “there is no reason why the USFS cannot conduct formal consultation with FWS and no reason to find that the ESA requires anything less,” notwithstanding the fact that not knowing when and where the retardant will be used would seemingly preclude any kind of meaningful consultation. The Court ruled for the Plaintiffs on their NEPA claims as well, concluding that there was a “major federal action” requiring preparation of an EA or EIS. The Court ordered the Forest Service to begin ESA Section 7 consultation and to come into compliance with NEPA, but did not order an interim injunction.

Edward Mudd and Wild Alabama v. Palmer, et al. 03-148 (N.D. Al.) On October 3, the district court granted EPA’s motion for judgment on the pleadings, and dismissed all counts of Plaintiffs’ Complaint. This suit challenged EPA’s alleged, tacit “ongoing approval” of Alabama Department of Environmental Management’s (ADEM) issuance of “general construction permits” and “stormwater general permits” as part of its National Pollution Discharge Elimination System program under the Clean Water Act. EPA had transferred authority for administering the program to the state in 1979, and had approved the amendment of the program to feature general permits in 1991. EPA did not consult on either decision. Plaintiffs brought suit in 2003, alleging violations of both the Clean Water Act and ESA (Section 7 and 9), but failed to identify any particular final agency action by EPA that was both within the statute of limitations and alleged to have direct effects on any particular listed species. Plaintiffs alleged that the permits issued by the state allowed the discharge of sediment into waterways that have been designated as an “impaired waterway” for sediment (per CWA Section 303(d)) and that, because some of these impaired waterways harbor federally listed species, EPA (or the ADEM) should be required to consult under the ESA with the Fish and Wildlife Service. Plaintiffs further alleged that by tacitly “approving” or failing to “supervise” ADEM’s general permits, EPA is causing the “take” of listed species occurring in the impaired waterways (in violation of ESA Section 9). EPA responded that, because EPA has no role in the issuance of individual NPDES permits (except where it exercises its discretion to overrule the state), Plaintiffs failed to identify any specific federal action allegedly causing harm. Once the NPDES program is approved by

EPA, it is a state program and not a federal program, and thus any obligation to consult under the ESA or avoid “take” is the state’s responsibility. The district court agreed that the Complaint failed to state a claim under either the CWA or ESA, noting that Plaintiffs had identified neither a specific federal action nor a particular listed species allegedly affected by any such action.

Sierra Club, et al. v. U.S. Forest Service, et al., 2005 WL 2233560, No. Civ. A. 7:04-CV00591, (W.D. Va. Sept. 13, 2005) (Indiana Bat). Plaintiffs alleged that the Forest Service violated the ESA by failing to engage in formal consultation with FWS prior to issuing a permit for the construction of a power line on 300 acres of National Forest land in the vicinity of the endangered Indiana Bat. Plaintiffs also alleged that the Forest Service violated 16 U.S.C. § 497(c), which authorizes the agency to permit the use of no more than 80 acres of national forest land for commercial purposes. In an opinion issued on September 13, 2005, the Court denied the Defendants’ motion to dismiss the ESA claims for lack of standing, holding that plaintiffs had alleged sufficient injury-in-fact by claiming that the power line would diminish their members’ use and enjoyment of the affected areas. The Court granted the Forest Service’s motion to dismiss Plaintiffs NFMA claim under 16 U.S.C. § 497(c) for failure to state a claim. The Court held that the permit was issued under 43 U.S.C. § 1761(a)(4), which specifically authorizes the Forest Service to grant rights-of-way for “systems of generation, transmission, and distribution of electric energy” and contains no acreage limitation. Because the Forest Service did not act under 16 U.S.C. § 497(c), a claim under that provision was not appropriate.

Defenders of Wildlife v. Flowers, 414 F.3d 1066 (9th Cir. 2005) affirming 2003 WL 22143270, No. CIV 02-196 TUC CKJ, (D. Ariz. Aug. 18, 2003) (cactus ferruginous pygmy-owl). Appeal of district court’s affirmance of Corps decisions not to consult based on the Corps’ conclusions that the projects at issue would have “no effect” on pygmy owls. The Ninth Circuit affirmed the district court decision upholding the Corps’ decisions not to consult. The Ninth Circuit noted that its previous ruling on the merits of the listing determination, National Ass’n of Home Builders v. Norton, 340 F.3d 835 (2003), puts in doubt the status of the Arizona pygmy-owl as a significant part of its taxon and would seem to require its delisting as a DPS. Defenders, 2005 WL 1625027 at \*3. While suggesting that it could rely on the previous decision to affirm the judgment of the district court, the court reviewed the merits of the district court’s decision “[o]ut of an abundance of caution.” The Court upheld the Corps’ no effect determinations concluding that “the decision rested on the firm foundation that no pygmy-owls had been found to live within either project area.” Id.

Karuk Tribe v. U.S. Forest Serv., 379 F. Supp.2d 1071(N.D. Cal. 2005). Challenge to the Forest Service’s regulation of suction dredge mining on forests in the Northwest Forest Plan planning area. The case centered on the agency’s interpretation of a forest plan standard and guideline that appears to require plans of operations (“PoOs”) for all mining in riparian reserves (“RRs”). Plaintiffs brought claims under National Forest Management Act (“NMFA”), NEPA, and the ESA, arguing that the agency had to follow the forest plan by requiring PoOs for all mining in RR’s under NFMA, and that it had to undertake NEPA and ESA compliance when it accepted a notice of intent (“NOI”) to mine rather than required a PoO. The court found that acceptance of NOIs was not an “agency action” within the meaning of the ESA, because the limited mining operations at issue in the case take place under the authority of the general mining law and do not need to be approved or licensed by the agency before they can occur.

Texas Indep. Producers & Royalty Owners Ass’n v. EPA, 410 F.3d 964 (7<sup>th</sup> Cir. 2005). EPA complied with ESA by completing informal consultation on National Pollutant Discharge Elimination System (“NPDES”) general permit for storm water discharges from oil and gas construction activities. Private

contractors utilizing the general permit by filing a notice of intent and storm water pollution prevention plan (“SWPPP”) do not engage in federal action subject to consultation requirement.

Forest Guardians v. Forsgren, No. CIV 04-0143 RB/DJS (D.N.M. May 10, 2005). Court held that the Forest Service is not required to consult on possible effects of Land Resource Management Plans for Carson National Forest or Santa Fe National Forest on the Canada lynx, because threatened Distinct Population Segment of lynx does not include individual animals in New Mexico.

National Wildlife Fed’n v. Brownlee, \_\_\_ F.Supp.2d \_\_\_, 2005 WL 3254196, No. 03-1392 (JR) (D.D.C. Mar. 31, 2005). Case challenged the Corps' decision to approve the use of four Clean Water Act section 404 nationwide permits for use in panther habitat in Florida. The court held that the permits constitute reviewable final agency actions and that plaintiffs' lawsuit, while not challenging specific NWP authorizations, was sufficiently ripe for review. The court reasoned that the lack of public notice requirements for specific projects authorized under the NWPs would unfairly prejudice plaintiffs if the court required plaintiffs to bring their claims in conjunction with a project-specific challenge. As to the merits of plaintiffs' claims, the court held that the Corps unlawfully failed to complete ESA consultation with FWS prior to approving the NWPs for use in panther habitat. According to the court, consultation is required notwithstanding the NWP conditions requiring project specific consultations. However, the court predicted that this ESA violation easily may be corrected through the use of informal consultation procedures, provided that FWS agrees with the Corps concerning the sufficiency of existing permit conditions and procedures for project specific reviews.

Wyoming Outdoor Council v. U.S. Army Corps of Eng’rs, 351 F. Supp. 2d 1232, No. 02-CV-155-D (D. Wyo. Jan. 7, 2005). Challenge to the U.S. Army Corps of Engineers General Permit 98-08, which authorizes the discharge of dredge and fill materials associated with development of coalbed methane gas in the Powder River Basin of Wyoming. Plaintiffs alleged that the Corps failed to assess the impact of the General Permit on endangered species, notwithstanding permit conditions to ensure ESA consultations on an individual basis. Court held that “[t]he Corps’ reliance on the permit conditions was rational and does not amount to a ‘clear error in judgment.’” Id. at 1248.

National Wildlife Fed’n v. FEMA, 345 F. Supp. 2d 1151 (W.D.Wa. 2004). In this case, plaintiffs challenged FEMA’s failure to consult on implementation of the National Flood Insurance Program (“NFIP”) and the impact it may have on the Puget Sound chinook salmon. On November 15, 2004, Judge Zilly granted the parties’ cross motions for summary judgment in part and denied in part and ordered FEMA to initiate consultation regarding the impacts on Puget Sound chinook salmon on some aspects of the NFIP. The court held that FEMA must consult on its regulations establishing the minimum eligibility criteria, the mapping of the floodplains and the Community Rating System. Final judgment was entered on January 3, 2005.

2. Scope of Consultation/ Discretionary versus Nondiscretionary Actions/ Authority to Impose Conditions

Defenders of Wildlife v. EPA, 420 F.3d 946 (9<sup>th</sup> Cir. 2005). Holding EPA violated the ESA by failing to consider the loss of ESA consultation as an indirect effect of its action to transfer administrative authority for implementing the Clean Water Act in Arizona from the federal government to the state. In its holding, the Court also expressly held that an agency is required to take actions under the ESA even if the agency’s organic statute does not otherwise allow the action. In this regard, the Circuit noted that its holding was in conflict with holding of the Fifth and D.C. Circuits.

National Wildlife Fed'n v. NMFS, 2005 WL 1278878, CV 01-640-RE and CV 05-23-RE (D. Or. May 26, 2005). Court invalidated NMFS' November 2004 BiOp on the Federal Columbia River Power System ("FCRPS"). The court ruled that the BiOp was legally flawed on four grounds: (1) improper application of 50 C.F.R. § 402.03 to exclude non-discretionary operations and the existence of the dams from the proposed action; (2) application of 50 C.F.R. § 402.02 to consider only the incremental effects of the proposed action rather than the aggregate effects of the proposed action and cumulative effects and the environmental baseline; (3) inadequate analysis of critical habitat as regards considerations of recovery and short-term adverse effects; and (4) failure to adequately consider impacts to recovery in the jeopardy analysis.

### 3. Scope of Action

NRDC v. Rodgers, 381 F.Supp.2d 1212 (E.D. Cal. 2005), recons. den., 2005 WL 2466067, No. CIV. 5-88-1658 LKK (E.D. Cal. July 28, 2005) ("Friant"). Plaintiffs challenged various BiOps issued by FWS and NMFS in 2001, which preceded renewal of long-term water contracts in the Friant, Buchanan, and Hidden water units in California. In an order filed July 28, 2005, Sr. Judge Karlton granted plaintiffs' motion for summary judgment related to the ESA. In particular, the district court found that: 1) the Services applied an improper definition of "adverse modification" and did not adequately consider recovery; 2) FWS failed to properly consider all of the effects of the renewed contracts and unlawfully segmented its consultation; 3) FWS failed to consult on the full amount of water deliveries authorized by the contracts; 4) NMFS failed to properly analyze the effects of the action on steelhead and spring-run chinook; 5) NMFS failed to properly address the Hidden and Buchanan contracts; 6) the Bureau of Reclamation committed resources before completing ESA Section 7 consultation because NMFS did not issue a BiOp on the Hidden and Buchanan contracts; and 7) the Bureau's renewal of the contracts was arbitrary and capricious. The court's order did not address remedy.

Buckeye Forest Council v. United States Forest Serv., 378 F.Supp.2d 835 (S.D. Ohio 2005); 337 F. Supp. 2d 1030 (S.D. Ohio Aug. 24, 2004). (Indiana bat). Plaintiffs challenged two timber sales in the Wayne National Forest (SE Ohio) on NEPA, NFMA, and ESA grounds, based on the effects of the projects on the endangered Indiana bat. Plaintiffs alleged that Section 7 consultation requirements were not satisfied because the FWS issued tiered BiOps performed for each sale, which incorporated information from the Forest-wide programmatic BiOP. In an order filed August 24, 2004, the court granted plaintiffs' motion for preliminary injunction, the court stated it was not yet persuaded of the legality of the tiered consultation approach used in this case. However, in an order filed July 20, 2005, the court found that the tiered consultation scheme was entitled to deference under Skidmore v. Swift and held that "Defendants' use of the tiered consultation system has not impeded their fulfilling all requirements mandated by the ESA and its implementing regulations, and if anything, has increased Defendants' efficiency in fulfilling those requirements." Id. at \*8. Summary judgment was also granted in defendant's favor on the NEPA and NFMA claims.

Northwest Env'tl Assocs. v. NMFS, 2005 WL 1427696, No. C04-0666RSM (W.D. Wa. June 15, 2005). Court upheld BiOp on Columbia River Channel Improvement Project noting that NMFS' "no jeopardy" determination was supported by analysis of project effects, including restoration component, on the environmental baseline.

N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, No. J04-0006 CV(JKS) (D. Alaska Jan. 10, 2005) (spectacled and Steller's eiders). Plaintiffs challenge the Department of the Interior's ("DOI") adoption of a multiple-use management plan for the northwest part of the Northwest Petroleum Reserve-Alaska, which opens the entire planning area of 8.8 million acres to oil and gas development. The immediate focus was an oil and gas lease sale held in May. The court allowed the sale to proceed but enjoined any surface disturbing activity pending a ruling on the merits. With respect to their ESA claims, plaintiffs argued that FWS' BiOp fails to consider the entire action as required by Conner v. Burford and that FWS impermissibly relied on future consultations in reaching its "no jeopardy" determination. The court granted summary judgment in DOI's favor on all issues. On the ESA issues the court essentially adopted FWS' position that FWS did not impermissibly segment its analysis or rely on future consultations in reaching its "no jeopardy" determination.

#### 4. Reliance on Future Measures As Part of Action/RPA

In formulating their biological opinion, FWS and NMFS are to "[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat." 50 C.F.R. 402.14(g)(3). In evaluating the effects of the action and cumulative effects, the Services are to consider the beneficial and harmful effects of future state or private activities "that are reasonably certain to occur." 50 C.F.R. 402.02

Pacific Coast Federation of Fishermen's Ass'ns v. NMFS, 426 F.3d 1082 (9th Cir. 2005). See entry below.

#### 5. Adverse Modification Regulation Challenges to Consultation

Forest Guardians v. Veneman, No. CV 03-451-TUC-CKJ (D. Ariz. Nov. 15, 2004); 2005 WL 820528 (D. Ariz. March 31, 2005). On November 15, 2004, the district court entered an order requiring further briefing in this challenge to a BiOp regarding the effects of grazing on the loach minnow/spikedace on 16 allotments in the Apache-Sitgreaves National Forest. The parties had stipulated that, since the critical habitat for the spikedace and loach minnow had been vacated, the court need not reach plaintiffs' claims regarding the proper standard for assessing adverse modification premised on the Gifford Pinchot ruling. The court, sua sponte, asked that the parties brief the impact of the Gifford Pinchot ruling, "specifically, the parties should discuss how the Ninth Circuit would likely evaluate the 'jeopardize the continued existence of' definition in light of the decision in Gifford Pinchot." On March 31, 2005, the court held that Gifford Pinchot did not invalidate the definition of the term "jeopardy."

#### 6. Merits/Best Available Evidence/ Record Challenges

Pacific Coast Federation of Fishermen's Ass'ns v. NMFS, 426 F.3d 1082 (9th Cir. 2005). On October 18, 2005, the Ninth Circuit issued its opinion in favor of PCFFA, finding that the district judge had erred by declining to enjoin the Bureau of Reclamation's short-term flows for the operation of the Klamath Project. BOR was operating pursuant to a 10-year biological opinion issued by NMFS, which consisted of three "phases." BOR proposed to provide higher flows in phase 3 (which NMFS determined would be sufficient to avoid jeopardy for the Southern Oregon/Northern California Coast coho salmon) but would not provide those higher flows until 2010; until that time BOR would provide flows based upon a framework endorsed by the National Research Council. The district court had found that the BiOp was

invalid because the agencies could not demonstrate that the flow levels planned for phase 3 were reasonably certain to occur, since the agencies were unable to identify the source for those higher future flows. The district court, however, allowed BOR to continue to operate phase 1 and phase 2 under BOR's present flow schedule. The Ninth Circuit reversed, with instructions that the district court issue the "appropriate injunction" because the record failed to demonstrate that phase 1 and phase 2 flows were sufficient to avoid jeopardizing the coho in the short term. Specifically, the Ninth Circuit found that "[t]he BiOp contains no analysis of the effect on the SONCC coho of the first eight years of implementation of the RPA, and thus we cannot sustain the agency's decision." Although the district court had held that the BiOp "implicitly" recognized that the short-term flows would avoid jeopardy, the Ninth Circuit found that "the RPA cannot be sustained... by reliance on the agency's unstated assumptions about the effects of phases I and II." The Court found that the BiOp was simply conclusory and contained no "reasoned explanation" for the conclusion that jeopardy would be avoided.

Nez Perce Tribe v. USFS, NOAA, FWS, Civ. No. 04-CV-299 (D. Id.). Plaintiff challenged the North Lochsa Face Ecosystem Management Project in the Clearwater National Forest alleging NEPA, NFMA, and ESA violations. On September 21, 2005, Judge Lodge granted and denied in part Defendants' motion for summary judgment. With respect to NEPA, the Court found that the EIS failed to disclose the limitations of the sedimentation model WATBAL, failed adequately to discuss mitigation measures (PACFISH), found the cumulative impacts analysis for the watershed lacking, but rejected Plaintiffs' claims that there was an insufficient range of alternatives and that the Forest Service relied on stale information. The Court also found a violation of NFMA relying on its NEPA analysis. As to the ESA, although the opinion is somewhat contradictory, it appears that the Court found that because the "no jeopardy" determination in NMFS' and FWS' programmatic BiOps for PACFISH assumed that the PACFISH standards would be implemented at a project level, NMFS and FWS were under an obligation to analyze whether all projects complied with the PACFISH standards. Under this framework, the Court found that NMFS' BiOp for the North Lochsa Face project was sufficient. The Court then proceeded to state that it rejected Plaintiffs' argument that FWS' concurrence letter was insufficient because it failed to insure compliance with PACFISH; however, it then went on to find that the NLAA decision was arbitrary because it failed to provide this analysis. In short, the Court granted the government's motion on NMFS' BiOp and denied it with respect to FWS' concurrence letter.

Oceana v. Evans, 384 F. Supp. 2d 203 (D.D.C. Aug. 2, 2005), clarified by 389 F.Supp.2d 4 (D.D.C. 2005). Plaintiff challenged Amendment 10 to the Scallop Fishery Management Plan ("FMP") and Framework 16 alleging violations of the ESA, NEPA, and the Magnuson-Stevens Fishery Conservation and Management Act. On August 2, 2005, the court granted summary judgment in favor of federal defendant, with two exceptions, and denied plaintiff's request for permanent injunctive relief. As to the ESA claims, the court found that: (1) NMFS utilized the best available science when using limited data and an uncertain model; (2) NMFS properly defined the action area; and (3) NMFS is not required to quantify the amount take in the environmental baseline before rendering a "no jeopardy" determination.

Hammond v. Norton, 370 F. Supp. 2d 226 (D.D.C. 2005). Court upheld BiOp on pipeline project, despite alleged failure to include "baseline population data" on four endangered fish species. Court noted that it is FWS' responsibility to use "the best scientific and commercial data available" in formulating its opinion. "Plaintiffs have adduced no authority to support the proposition that in evaluating 'the current status of any endangered species or habitat' in a biological opinion, FWS specifically must include current baseline population data, whether or not those data exist." Id. at 264.

Florida Keys Citizens Coalition v. U.S. Army Corps of Eng'rs, 374 F.Supp.2d 1116 (S.D. Fla. 2005). Plaintiffs challenged a Corps decision to issue a Clean Water Act section 404 permit for the discharge of dredge and fill material into waters of the United States in connection with planned road widening and other improvements to U.S. 1 between Key Largo and Homestead, Florida. Court upheld FWS' BiOp and NMFS' "not likely to adversely affect" concurrence regarding project effects on the endangered Florida manatee and the smalltooth sawfish, respectively.

Habitat Educ. Ctr. v. Bosworth, 363 F. Supp. 2d 1090 (E.D. Wis. 2005). Court upheld Forest Service's "no effect" determination with respect to the Canada lynx, based on the fact that there is no established lynx population in the Chequamegon-Nicolet National Forest.

Florida Key Deer v. Brown, 364 F. Supp. 2d 1345 (S.D. Fla. 2005). Court held that key deer BiOp and reasonable and prudent alternative are insufficient due to failure to account for the effects of the RPA within the environmental baseline or otherwise address the status of the species since FEMA began implementing the RPA. Court held that the RPA itself is insufficient to avoid jeopardy because it relies on the voluntary cooperation of individual property owners. Court further held that FEMA violated the ESA by erroneously relying on FWS' BiOp.

Fund for Animals v. Norton, 365 F. Supp. 2d 394 (S.D.N.Y. 2005). Court upheld use of informal consultation in case challenging double-crested cormorant public resource depredation order. "The agency's internal debates as to the best means of protecting the four relevant endangered species does not constitute a recognition by the agency that endangered species are likely to be affected by the [depredation order]." Id. at 426.

Rock Creek Alliance v. United States Fish & Wildlife Serv., 2005 WL 928604, No. CV 01-152-DWM (D. Mont. Mar 25, 2005). Plaintiffs challenged FWS BiOp on construction and operation of copper and silver mine in Sanders County, Montana. Court held that BiOp on grizzlies and bull trout was arbitrary and capricious for failure to explain "no jeopardy" conclusions based on available data in the record. However, court held plaintiffs failed to show a violation of ESA section 7(d) based on timing of acquisition of mitigation lands.

National Wilderness Inst. v. U.S. Army Corps of Eng'rs, 2005 WL 691775, Civ. No. 01-0273(TFH) (D.D.C. March 23, 2005). Plaintiffs challenged the Corps' operation of the Washington Aqueduct and Federal Highways' Wilson Bridge project in this ESA suit alleging impacts to shortnose sturgeon with regard to the Washington Aqueduct operations and to the bald eagle with regard to the Wilson Bridge project. Early in the case, the court denied plaintiffs' motion for preliminary injunction and the matter was briefed on cross motions for summary judgment. Court held that: 1) where the EPA and the Corps took what was in essence a joint regulatory action, the EPA was properly designated as lead agency for ESA consultation and the Corps did not need to separately engage in consultation; 2) the NOAA Fisheries BiOp on the Washington Aqueduct discharges was not arbitrary, including its determination that discharges during non-spawning season would not jeopardize sturgeon; 3) there was no ESA 7(d) violation where EPA's discharge permit was issued prior to the conclusion of consultation because EPA's action is not "irretrievable" since it retained discretion to modify the permit as necessary upon completion of consultation; and 4) the Corps was not liable under section 9 of the ESA since incidental takings authorized under a BiOp, as they were here, are not illegal takings under the ESA. Regarding plaintiffs' claims against the Wilson Bridge project, the court rejected plaintiffs' challenges to the consulting agencies' section 7 determinations. The court held that NOAA Fisheries' concurrence with Federal

Highways that limitations on underwater blasting and pile pulling were sufficient to avoid adverse impacts to the sturgeon was not arbitrary and that FWS' BiOp determining that project disturbance would not "take" bald eagles because the area was not a concentrating nesting area and the eagles could relocate, was also not arbitrary. Finally, the court held that plaintiffs failed to state a claim regarding FWS' failure to designate critical habitat for the shortnose sturgeon since the sturgeon was listed in 1967, before Congress imposed mandatory provisions for critical habitat designation.

#### 7. Incidental Take Statements

Friends of the Clearwater v. Lohn, No. CV04-384-C-EJL (D. Id. March 31, 2005). Plaintiffs sought preliminary injunctive relief in case challenging the Yew Rock timber sale and "Meadow Face Stewardship Project" in the Nez Perce National Forest alleging NEPA, NFMA, and ESA claims. Court granted the plaintiffs' PI motion in part and enjoined future timber harvesting. The court found that plaintiffs had raised serious questions and had "at least a fair chance" of success on whether the Forest Service's NEPA cumulative effects analysis on past timber harvests and grazing was sufficient in light of the Ninth Circuit's recent decision in Lands Council v. Powell. The court, however, did find that there was not a substantial chance of success on the remaining NEPA, NFMA, and ESA claims. With respect to the ESA claims, the court found that plaintiffs' challenge to the incidental take statement ("ITS") failed because: (1) an ITS provides only an exemption of liability under section 9 and therefore is irrelevant to the jeopardy determination; and (2) although NMFS could not quantify the amount of take, the ecological surrogate and monitoring was sufficient under Arizona Cattle Growers. The court also found that plaintiffs' challenge to the jeopardy analysis did not have a substantial chance of success because the sediment modeling, baseline, and cumulative effects analysis were sufficient.

#### 8. Salmon Hydrosystem Cases

National Wildlife Federation v. NMFS, 2005 WL 3576843, No. CV 01-640-RE (D. Ore. Dec. 29, 2005) (Hydropower). On December 29, 2005, Judge Redden issued his decision on Plaintiffs' request for further injunctive relief. Plaintiffs had requested the Court to order additional spill in the spring and summer as well as additional measures to make water available in the late spring and summer for flow augmentation. The Court granted Plaintiffs' motion in part and denied it in part. Specifically, the Court denied Plaintiffs' request for additional flows, finding that Plaintiffs had not provided adequate scientific support for the additional flow. The Court also found that the Plaintiff did not adequately justify why their proposed spill in the spring and summer was needed in light of the Corps plans additional spill for 2006. The Court, however, rejected the Corps' proposal to shift almost entirely to transportation at four dams in the late spring as a departure from the Corps' approach of sharing the risk equally between spill and transportation. The Court also rejected the Corps' proposal to shut down spill in the summer on August 15 if 95% of the fish had passed. The Court directed the Corps to keep its proposed spill program in place until August 31.

Nat'l Wildlife Fed'n v. NMFS, 2005 WL 1398223, CV 01-640-RE and CV 05-23-RE (D. Or. June 10, 2005) aff'd, 418 F.3d 971 (9<sup>th</sup> Cir. 2005), as amended 422 F.3d 782 (9<sup>th</sup> Cir. Sept. 1, 2005), remanded, 2005 WL 2488447 (D. Or. Oct. 7, 2005). Court granted preliminary injunction in case challenging operation of dams and water projects in the Federal Columbia River Power System. Court found that plaintiffs were likely to succeed on the merits of their ESA claims because BiOp was legally flawed and injunctive relief was necessary to avoid irreparable harm. Court also found that there had been a "substantial procedural violation" in that the agencies had consulted only on part of their "action" because

effects of the existence of the dams were considered part of the “baseline” instead of the “proposed action.”

On July 26, the Ninth Circuit affirmed, in a 36-page opinion, the district court’s June 10 order entering a preliminary injunction requiring essentially maximum “spill” at five dams in the Federal Columbia River Power System (“FCRPS”) through August 31. Although generally upholding the district court’s fact-finding and exercise of discretion, the court remanded to the district court to determine if any modifications to the spill order are warranted on the basis of either factual complications that have arisen in implementing the order, or on the legal ground that the relief ordered against the Corps of Engineers was not narrowly tailored to the ESA violations found by the district court.

National Wildlife Fed’n v. NMFS, 2005 WL 1278878, CV 01-640-RE and CV 05-23-RE (D. Or. May 26, 2005). Court invalidated NMFS’ November 2004 BiOp on the Federal Columbia River Power System (“FCRPS”). The court ruled that the BiOp was legally flawed on four grounds: (1) improper application of 50 C.F.R. § 402.03 to exclude non-discretionary operations and the existence of the dams from the proposed action; (2) application of 50 C.F.R. § 402.02 to consider only the incremental effects of the proposed action rather than the aggregate effects of the proposed action and cumulative effects and the environmental baseline; (3) inadequate analysis of critical habitat as regards considerations of recovery and short-term adverse effects; and (4) failure to adequately consider impacts to recovery in the jeopardy analysis.

#### 9. Missouri River

In re: Operation of the Missouri River Sys. Litig., 421 F.3d 618 (8<sup>th</sup> Cir. 2005) affirming 363 F. Supp. 2d 1145 (D. Minn. 2004), petition for cert. filed, 74 U.S.L.W. 3324 (U.S. Nov. 14, 2005) (No. 05-631). The Court of Appeals affirmed the District Court’s opinion upholding the FWS’ 2003 BiOp for Missouri River Operations, the Army Corps of Engineers Revised Master Manual for operating the Missouri River and a revised Annual Operating Plan. The court rejected challenges to the 2003 RPAs for the least tern, piping plover, and pallid sturgeon, finding that the RPAs, which differed from those issued in 2000, were supported by the record and would be sufficiently protective of the species. The court also found that the Corps’ plan for operating the River to insure against jeopardy—including flow changes and construction of artificial habitat—was reasonably certain to occur, and thus could be the basis for a no-jeopardy conclusion. The court rejected take claims on the ground that an ITS was issued concurrently with the 2003 BiOp. The court also ruled against Nebraska and the Nebraska Parties’ ESA claims, finding that the requirement for an RPA to be “economically and technologically” feasible meant only that the Corps have the resources and technology to implement the RPA and rejecting Nebraska’s “best available science” claim. The court also denied a third set of plaintiffs’ claims that lower flows would result in take to the sturgeon.

### III. SECTION 9 LITIGATION

#### A. Constitutional Challenges

GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, No. 01-51099 (5<sup>th</sup> Cir. Mar. 26, 2003), reh’g and reh’g en banc denied, 362 F.3d 286 (5<sup>th</sup> Cir. Feb. 27, 2004), cert. denied 125 S.Ct. 2898, No. 03-1619 (June 13, 2005). Rejecting Commerce Clause challenge to constitutionality of ESA § 9 take prohibition as applied to six species of endangered cave invertebrates found only in two counties in Texas.

B. Merits

San Carlos Apache Tribe v. United States, No. 03-16874, 2005 WL 1903556 (9<sup>th</sup> Cir. Aug. 9, 2005) (unpublished memorandum opinion affirming San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860 (D. Ariz. 2003)). Court affirmed District Court's holding on summary judgment that plaintiffs had failed to adduce sufficient evidence to raise a genuine dispute of material fact as to their ESA section 9 take claim.

Idaho Watersheds Project v. Jones, 127 Fed. Appx. 976, 2005 WL 900197, No. 03-35870 (9<sup>th</sup> Cir. Apr. 18, 2005). Court reversed and remanded district court's entry of summary judgment for further proceedings to determine whether there was a reasonably certain imminent threat that lack of fish diversion screen would kill or injure bull trout. "In determining whether the evidence demonstrates a reasonably certain imminent threat, we treat all probative evidence as relevant." Id. at \*1.

IV. SECTION 10 LITIGATION

EPIC v. USFWS & NOAA Fisheries (N.D. Cal.) On November 10, 2005, Judge Breyer issued a memorandum and order associated with Plaintiffs' challenge of the Pacific Lumber Company's habitat conservation plan, incidental take permit, biological opinion and NEPA documentation. As a matter of law, the Court dismissed Plaintiffs NEPA and ESA enforcement claims, ruling as follows: EPIC alleged that "adaptive management" led to changes to the HCP and therefore "new information" existed that required a supplemental EIS on the Incidental Take Permit. The Court held that adaptive management did not constitute a "major federal action" and relied on Cold Mountain v. Garber (9th Cir. 2004) and Norton v. SUWA (S.Ct. 2004). Since the changes did not alter any responsibilities under the terms of the permit, there was no major federal action.

EPIC also alleged that the ITP should be revoked based on the ESA §10, which states that "[t]he Secretary shall revoke a permit... if he finds that the permittee is not complying with the terms and conditions of the permit." Citing Heckler v. Cheney (S.Ct 1985) and Atlantic Sea Green Turtle v. Volusia (M.D. Fla. 2005), the Court held that Congress did not intend to circumscribe agency enforcement and had not provided meaningful standards for defining the limits of that discretion.

National Wildlife Federation v. Norton, 2005 WL 2175874, No. CIV-S-04-0579 (E.D.Cal. Sept. 7, 2005). Judge David Levi granted summary judgment to the Federal Defendants in this challenge to the City of Sacramento's Natomas Basin Habitat Conservation Plan (NBHCP) and the Fish & Wildlife Service's incidental take permit (ITP). The permit covered incidental take of the Giant garter snake, Swainson's hawk, and other species, due to development near Sacramento, CA. The Court upheld the NBHCP and ITP in the entirety, based primarily on the agency's analysis in its biological opinion, environmental impact statement, and other ITP documents.

Atlantic Green Sea Turtle v. County Council of Volusia County, Florida, 2005 WL 1227305, No. 04-1576 ORL (M.D. Fla. May 3, 2005) (appeal pending). Plaintiffs in this action alleged that public driving on the beaches of Volusia County, Florida, results in unlawful taking of endangered sea turtles and piping plovers. In a previous lawsuit, plaintiffs unsuccessfully challenged a 1996 U.S. Fish and Wildlife permit for the incidental taking of sea turtles. However, the permit expired in late 2001. Although the County

applied for a renewal and amendment of the permit to address possible takings of both sea turtles and piping plovers, plaintiffs alleged that no takings are currently authorized. Plaintiffs also alleged that both Volusia County and FWS failed to adhere to regulatory criteria for permit renewals.

The court dismissed all of plaintiffs' claims. Noting that the piping plover is not due to return to Florida until September, by which time FWS will likely take action on the County's permit application, the court dismissed plaintiffs' claims concerning alleged harm to the plover in deference to FWS' primary jurisdiction. The court also dismissed plaintiffs' claims that beach driving authorized by the County resulted in the unlawful "take" of sea turtles. The court reasoned that the 1996 permit remained in effect pending FWS' final determination on the County's renewal request. The court rejected plaintiffs' assertion that FWS' alleged failure to render a final determination on the County's application constitutes a reviewable final agency action under the APA. The court also held that the ESA's citizen-suit provision does not authorize plaintiffs to bring an action alleging that a party has violated the terms of an incidental take permit ("ITP") issued by FWS. The court reasoned that this enforcement authority is reserved for the Service. Citing Heckler v. Chaney, 470 U.S. 821 (1985), the court further held that plaintiffs are not entitled to challenge FWS' decision not to enforce the terms of an ITP.

Envtl. Prot. Info. Ctr. v. Fish & Wildlife Serv., Civ. No. 04-4647 (N.D. Cal., April 22, 2005). In case challenging ITP issued to Pacific Lumber Corporation to take spotted owls, court dismissed claim that FWS erroneously issued permit for activity prohibited under state law. Plaintiffs asserted that activity was not an "otherwise lawful activity" pursuant to 16 U.S.C. § 1539(a)(1)(B), because California law prohibits the taking of birds of prey, including spotted owls. Court reasoned that "[i]f Pacific Lumber's activities also violate California law, California may enforce its laws against Pacific Lumber."

Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. FWS, Civ. No. 03-0508 MCA/LCS (D.N.M., Jan. 31, 2005). Plaintiffs challenged the FWS' NEPA and ESA compliance for its Mexican gray wolf reintroduction program in areas of Arizona and New Mexico, pursuant to section 10(j) of the ESA. The court found that certain plaintiffs lacked standing, but that others did have standing to allow the claims to proceed. The court found that certain claims (most notably, the section 10(j) "failure to conserve" claim) were subject to res judicata because of a previous case concerning challenges to the Final Rule for the Mexican wolf reintroduction program, New Mexico Cattle Growers Ass'n v. FWS, Civ. No. 98-367 M/JHG (D.N.M. Oct. 28, 1999). The court also held that the day-to-day operations of the Mexican wolf reintroduction program were not subject to judicial review under the APA, pursuant to Norton v. SUWA, 124 S. Ct. 2373 (2004).

## V. OTHER ISSUES

### A. JURISDICTIONAL ISSUES

#### 1. Standing

City of Santa Clarita v. Dept. of Interior (C.D.Cal.). ESA and NEPA challenges by the City of Santa Clarita to an FWS biological opinion associated with a proposed sand and gravel mining project by CEMEX on BLM lands near Santa Clarita, California. On November 22, the Court issued a 60-page opinion granting Defendants' motion for summary judgment and denying the City's motion. Although the Court found that the City had standing, it otherwise rejected every argument raised by the Plaintiffs. Specifically, the Court upheld FWS' no jeopardy opinion and incidental take statement, and also found that no NEPA analysis was required for FWS' issuance of biological opinion.

Sierra Club, et al. v. U.S. Forest Service, et al., 2005 WL 2233560, No. Civ. A. 7:04-CV00591, (W.D. Va. Sept. 13, 2005) (Indiana Bat). See entry above.

## 2. Mootness

Spirit of the Sage Council v. Norton, 411 F.3d 225 (D.C. Cir. 2005). Court held that appeal challenging order enjoining FWS from applying “No Surprises” rule pending completion of public comment period for FWS permit revocation rule was moot, where FWS had already completed required rulemaking. District court opinion was vacated and remanded.

Am. Rivers v. NOAA Fisheries, Civ. No. 04-0061-RE (D. Or. January 24, 2005). Court declined to invalidate and set aside NOAA Fisheries’ 2001 BiOp and 2002 Supplemental BiOp on the Bureau of Reclamation’s Upper Snake River Basin water projects. Court found that most of the issues raised are moot because reinitiated consultation is already underway on these projects and a new BiOp is expected by the end of March 2005. The court also noted that the 2000 BiOp on the Federal Columbia River Power System, upon which the Upper Snake Biop expressly relied, has also now been superseded. However, the court ruled that the issue regarding whether consultation has been improperly “segmented” from the separate consultation on the FCRPS is not moot.

## 3. Final Agency Action

Trout Unlimited v. Lohn and NMFS, 2005 WL 3242262, No. C05-1128C (W.D. Wa. Nov. 30, 2005). On November 30, the Court denied the Federal Defendant’s motion to dismiss Plaintiffs’ First Amended Complaint, which attempts to state NEPA and APA claims challenging the National Marine Fisheries Service’s 2005 Hatchery Listing Policy. NMFS argued that the Court lacked jurisdiction over Plaintiffs’ claims because Plaintiffs have failed to identify “final agency action.” The Court disagreed, finding that the “policy” was an agency action that is binding on NMFS in that it provides direction and mandatory procedures for considering hatchery fish in listing determinations under the ESA.

National Ass’n of Home Builders v. Norton, 415 F.3d 8 (D.C. Cir. 2005) (affirming 298 F. Supp. 2d 68 (D.D.C. 2003)). Plaintiffs challenged formulation, adoption, and implementation of survey protocols relating to the Quino checkerspot butterfly. Court affirmed decision granting defendants’ summary judgment motions. Court reasoned that survey protocols were not final agency action for purposes of judicial review under the APA because protocols did not determine rights or obligations of landowners.

## 4. Other Jurisdictional Issues

Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047 (9<sup>th</sup> Cir. 2005) (reversing 159 F. Supp.2d 1253 (D. Or. 2001)). Court reversed district court decision dismissing on res judicata grounds and remanding for development of a factual record on the privity issue.

City of Tacoma v. NMFS, 385 F. Supp. 2d 89 (D.D.C. Aug. 11, 2005). Challenge to NMFS biop in relation to FERC relicensing order for the Cushman hydroelectric project had to be brought in the Court of Appeals under the Federal Power Act at the same time as challenge to FERC license decision as a whole.

Idaho Rivers United v. Foss, 373 F. Supp. 2d 1158 (D. Id. 2005). Plaintiff challenged FWS’ BiOp on the effect, on several species of freshwater snails, of Federal Energy Regulatory Commission’s license re-

issuance for five hydropower projects on the Snake River. Court granted motion to dismiss for lack of subject-matter jurisdiction on the basis that the Federal Power Act permits judicial review of FERC orders only in the appropriate court of appeals, thereby precluding collateral attacks in district court, such as plaintiff's challenge to the BiOp. FERC incorporated terms and conditions from the BiOp as conditions of the FERC licenses, so plaintiff's challenge was essentially an attack on the license itself. The district court found that Ninth Circuit precedent required dismissal, though expressed several reservations about the practical effect of dismissal.

## B. INJUNCTIVE RELIEF

Center for Biological Diversity, et. al. v. Bureau of Land Management, 04-4736 (N.D. Cal.) (San Benito Evening-Primrose). Suit claiming that BLM is violating Section 7 of the ESA by failing to ensure that its management of the Clear Creek Management Area ("CCMA") in California is not likely to jeopardize the San Benito evening-primrose. On October 28, the Court issued interim relief, stating that BLM must follow a biological opinion issued in 1997. The Court also found that the APA's arbitrary and capricious standard of review governs review of Plaintiffs' claims, but that review is not limited to the administrative record to the extent that BLM has taken action "without reliance on or in contradiction to an agency decision."

Florida Key Deer v. Brown, 386 F. Supp. 2d 1281 (S.D. Fla. Sept. 12, 2005). Court previously held that a BiOp and reasonable and prudent alternative addressing the effects of FEMA's flood insurance program on Key Deer are insufficient due to failure to account for the effects of the RPA within the environmental baseline or otherwise address the status of the species since FEMA began implementing the RPA. Court held that the RPA itself is insufficient to avoid jeopardy because it relies on the voluntary cooperation of individual property owners. Court further held that FEMA violated the ESA by erroneously relying on FWS' BiOp. The Court issued its remedy in this opinion. On this basis, the Court entered an injunction enjoining FEMA from issuing any new flood insurance in areas of Key Deer habitat. In so doing, the Court rejected arguments that such an injunction would itself violate the National Flood Insurance Act which precludes FEMA's from denying flood insurance to qualified applicants.

Swan View Coalition v. Cathy Barbouletos, 03-112-M-DWM (D. Mt. June 27, 2005) (grizzly bears). Challenge to timber harvesting activities in the Flathead National Forest alleging that FWS violated the ESA by issuing site-specific BiOps that authorize incidental take that is greater than the level of incidental take authorized in the plan level BiOp for the same Forest, and that the Forest Service failed to perform a proper NEPA cumulative effects analysis. In a brief order that did not discuss the merits of the case, the Court granted plaintiffs' TRO in part and denied in part. The the court found that the balance of harm favors the defendants, but that all logging in units that contain grizzly core areas must cease until the court conducts a hearing on plaintiffs' preliminary injunction motion.

Washington Toxics Coalition v. EPA, 413 F.3d 1024 (9<sup>th</sup> Cir. 2005) cert. denied, CropLife America v. Washington Toxics Coalition, \_\_ S. Ct. \_\_ (U.S. Jan. 9, 2006) (No. 05-395). Upholding District Court injunction enjoining pesticide registrations in salmon habitat in the Pacific northwest. See item above.

## C. ATTORNEYS' FEES

There are two possible bases for attorneys' fees in an ESA case. Cases against individuals or federal action agencies are compensable pursuant to the ESA's citizen-suit provisions which allow a fee award to "any party, whenever the court determines such award is appropriate." 16

U.S.C. § 1540(g)(4). Cases challenging the validity of the BiOp can be compensable under the Equal Access to Justice Act (“EAJA”) in which “prevailing parties” can be awarded fees. 28 U.S.C. § 2412.

California State Grange v. Evans, 2005 WL 1278927, No. 0-2-6044-HO (D. Or. May 25, 2005). Court denied attorneys’ fees under the ESA where plaintiffs failed to obtain the relief they were seeking, although plaintiffs obtained a *de minimus* victory, the case “did not contribute to interpreting a listing decision beyond what had already occurred in Alsea and in that sense did little to contribute to the goals of the ESA.” Id. at \*2.

Center for Biological Diversity v. Norton, No. 04-156 JDB (D.D.C. Jan 26, 2005). Court approved 5% across-the-board reduction in ESA fees.

#### D. REQUISITE NOTICE OF INTENT TO SUE

Strahan v. Rumsfeld, 05-10275 (D. Mass.) On November 18, 2005, Judge Gorton granted the Defendants' motion to dismiss Plaintiff's complaint in this ESA/MMPA challenge to the Navy's Atlantic vessel operations and training activities. The Court held that Plaintiff could not rely on a 60-day notice sent in 1996, and because the Plaintiff failed to satisfy the notice requirement, the Court lacked jurisdiction. Hawai'i Orchid Growers Ass'n. v. United States Dep't of Agriculture, No. 04-914 JR (D.D.C. March 24, 2005). Court dismissed ESA citizen-suit claim for lack of 60-day notice. Court held that notice requirement is jurisdictional and cannot be circumvented by relying on the APA.

Sierra Club v. Bosworth, 352 F. Supp. 2d 909 (D. Minn. 2005). In case challenging timber sale on National Forest land adjacent to Boundary Waters Canoe Area, court held that failure to provide 60 day notice does not bar ESA claim, because APA provides for review of all “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Court upheld the use of informal consultation for timber sale, noting that defendants used the best available scientific data in their “not likely to adversely affect” determination concerning alleged impacts on Canada lynx.

Pulaski v. Chrisman, 352 F. Supp. 2d 1105 (C.D. Cal. 2005), aff'd, 2005 WL 1111862, No. 05-55187 (9<sup>th</sup> Cir. May 9, 2005). Court lacked jurisdiction over ESA claims alleging harm to piping plover due to conversion of existing mobile home park into a public campground. 60-day notice letter was deficient due to failure to mention alleged harm to piping plover, although plaintiffs mentioned other species and therefore “never provided the state the opportunity to rectify the asserted ESA violation. . . .” Id. at 1117.

#### E. FIFTH AMENDMENT TAKINGS

Klamath Irrigation District v. United States 67 Fed. Cl. 504 (Fed. Cl. Aug. 31, 2005), modified, 68 Fed. Cl. 119 (Fed. Cl. Sept. 23, 2005), cert denied, \_\_\_ Fed. Cl. \_\_\_, 2005 WL 3485956, No. 01-59L (Fed. Cl. Feb. 28, 2005). Holding that water users could not pursue a 5<sup>th</sup> Amendment takings claims for alleged deprivation of water rights due to ESA constraints; rather only remedy had to be pursued through breach of contract claim.

#### F. DISCOVERY/PRIVILEGE

Washington Toxics Coalition v. United States Dep't of the Interior, Case No. C04-1998C (W.D. Wash. June 14, 2005). Court ordered supplementation of administrative record in EPA pesticide counterpart regulations case including: (1) FWS' internal agency deliberations; (2) communications by the Services with other agencies and industry; and (3) documents maintained by the Services relating to the Services' past criticisms of the EPA's past actions on particular pesticides.

Natural Res. Def. Council v. United States EPA, 2005 WL 1241904, Civ. No. RDB 03-2444 (D. Md. Nov. 24, 2004 and May 24, 2005). The district court judge reversed magistrate's findings and recommendations and prohibited discovery. Plaintiff alleged that EPA had violated the ESA by failing to consult on the registration of a pesticide, an action taken pursuant to FIFRA. The magistrate had held that because EPA had failed to take an action (consult), there could be no record underlying this inaction. The district court reversed, finding that even cases of agency inaction are governed by the APA standard and scope of review. The court held that "[a] plaintiff cannot force discovery when it chooses to file a complaint, which fails to specifically allege a claim arising under 5 U.S.C. § 706(1) or facts supporting such a claim, prior to final agency action and then seek[] discovery because it claims there is no record." Id. at \*10.

#### G. VENUE

California Farm Bureau Fed'n v. Badgley, 2005 WL 1532718, No. 02-2328 (RCL) (D.D.C. Jun. 29, 2005). Court granted defendants' motion to transfer venue to Eastern District of California because nearly identical litigation is pending in that district.

Home Builders Ass'n of Northern Calif. v. United States Fish & Wildlife Serv., CV F 05-0422 (E.D. Cal. Jul. 6, 2005). Plaintiffs challenge 27 critical habitat designations in California. Court granted an intra-district transfer to Sacramento, where three plaintiffs reside and some of the rules were drafted. The court reasoned that a "substantial part" of the critical habitat was not located in Fresno and, in any event, the location of critical habitat was not determinative of venue because it was merely the outcome of the defendants' "rule-setting activities," which were the real focus of the complaint.