

OVERVIEW OF THE ENDANGERED SPECIES ACT AND HIGHLIGHTS OF RECENT LITIGATION¹

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I. HISTORY AND BACKGROUND OF THE ENDANGERED SPECIES ACT (ESA)

A. ESA of 1973 and Amendments

1. **Enactment.** The ESA of 1973 completely revised and strengthened earlier endangered species legislation. Codified at 16 U.S.C. § 1531 et seq.

a. Prior to enactment of the Endangered Species Act, there were two acts that attempted to protect endangered species, but lacked the requisite enforcement authority:

(i) Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966)

(ii) Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969)

2. **Amendments.** Congress has made major amendments to the ESA on three occasions since 1973 in an attempt to improve the listing process and balance more equitably the conflicts between species protection and economic development. See, e.g., Act of Nov. 10, 1978, Pub L. No. 95-632, 92 Stat. 3751; Act of Dec. 28, 1979, Pub. L. No. 96-159, 93 Stat. 1225; Act of Oct. 13, 1982, Pub L. No. 97-304, 96 Stat. 1411.

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3. **Functions.** The ESA has two primary functions: (1) the protection of species listed as endangered and threatened, and (2) implementation of the **Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)**. T.I.A.S. 8249 (discussed in Section VII, below).

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). Plain intent of Congress in enacting ESA was to halt and reverse trend towards species extinction, whatever the cost.

Catron County Board of Commissioners v. FWS, 75 F.3d 1429 (10th Cir. 1996). ESA's core purpose is to prevent extinction of species by preserving and protecting the habitat on which species depends from the intrusive activities of humans

Palila v. Hawaii Department of Land & Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986), aff, 852 F.2d 1106 (9th Cir. 1986). Main purpose of ESA is conservation and preservation of ecosystems upon which endangered species depend.

Flouke Co. v. Brown, 463 F. Supp. 1142 (E.D. Cal. 1979). ESA was enacted to "to provide for conservation of domestic and endangered species of fish and wildlife through federal action and through cooperation with state endangered species conservation programs consistent with the federal law."

U.S. v. Species of Wildlife Consisting of a Fully Mounted Leopard, 404 F. Supp. 1298 (E.D. N.Y. 1975). Purpose of ESA is to serve as effective deterrent to would-be violators and eliminate illegal traffic in endangered species by drying up market for endangered species.

II. SECTION 4: LISTING PROVISIONS (ESA § 4, 16 U.S.C. 1533)

A. Statutory Provisions:

1. The ESA allows the listing of a species if it is endangered or threatened throughout "all or a significant portion of its range." 16 U.S.C. § 1532(6), (20).

- a. **Endangered**: Any species which is in danger of extinction throughout all or a significant part of its range. ESA § 3(6), 16 U.S.C. § 1532(6). As of April 30, 2001, 1,488 animal and plant species are listed as endangered.
- b. **Threatened**: Any species which is likely to become endangered within foreseeable future throughout all or a significant part of its range. ESA § 3(20), 16 U.S.C. § 1532(20). As of April 30, 2001, 313 animal and plant species listed as threatened.
- c. **Similar in Appearance**: Even if a species does not qualify to be listed under ESA section 4(a)(1), it may still be listed as endangered or threatened if it is so similar in appearance to a species already listed that not listing it would create an enforcement problem. 16 U.S.C. § 1533(e).

2. General Listing Procedure

- a. **Who Initiates**: Listing may be proposed by Secretary of the Interior or any interested person. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(4)(b)(3)(A).
- b. **Responsibility for Listing**: Listings are made by Secretary of the Interior (U.S. Fish and Wildlife Service) for terrestrial species and by the Secretary of Commerce (National Marine Fisheries Service) for virtually all marine species except some marine mammals. ESA §§ 3(15) & 4(a), 16 U.S.C. §§ 1532(15) & 1533(a).
- c. **Factors for Listing**. Under the ESA and its regulations, to qualify for addition to the endangered and threatened species list, a species must be threatened with extinction by any one of the following five factors:
 - (i) The present or threatened destruction, modification, or curtailment of its habitat or range;
 - (ii) Overutilization for commercial, recreational, scientific, or educational purposes;

- (iii) Disease or predation;
- (iv) Inadequacy of existing regulatory mechanisms;
and
- (v) Other natural manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1)(A)-(E); 50 C.F.R. § 424.11(c).

Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 480-82 (W.D. Wash. 1988). "The Service's role in deciding whether to list ... is to assess the technical and scientific data in the administrative record against the relevant listing criteria ... and then to exercise its own expert discretion in reaching its decision."

d. Lists of endangered and threatened species and their critical habitat are found at:

- (i) Endangered or Threatened Wildlife: 50 C.F.R. § 17.11, 17.95.
- (ii) Endangered or Threatened Plants: 50 C.F.R. § 17.12, 19.96.

3. Species Definition: The FWS/NMFS can list entire species, a subspecies, or a distinct population segment of a species.

National Ass'n of Homebuilders v. Norton, 340 F.3d 835 (9th Cir. 2003) (Cactus ferruginous pygmy owl). Challenge to FWS' listing of the Arizona population of the Cactus ferruginous pygmy owl as endangered. The court found that record did not support FWS' finding that the Arizona population of pygmy owl constituted a distinct population segment within the meaning of the ESA and therefore constituted a listable entity under the ESA. The Court assumed that the Service's Distinct Population Policy (DPS Policy) applied and found that FWS properly determined that the Arizona population pygmy-owl population is discrete within the meaning of the policy. The Court, however, determined that FWS' record did not support its finding that the pygmy owl met the significance criteria of the DPS Policy, specifically finding that FWS' record did not show why the loss of the Arizona pygmy-owl population would be significant to

the taxon as a whole.

State of Maine v. Norton, 257 F. Supp. 2d 357 (D. Maine 2003) (Atlantic salmon). Granting summary judgment upholding the listing of the Gulf of Maine distinct population segment of Atlantic salmon. Among other things, the Court specifically: (1) rejected challenges to the Services' Distinct Population Segment Policy (DPS Policy) and found it was entitled to *Chevron* deference; (2) the Services properly determined that the Gulf of Maine population of Atlantic salmon is a distinct population segment and therefore a listable entity; and (3) the Services' record supported their finding that the DPS was endangered and the agencies' determination was based on the best available evidence.

Center for Biological Diversity v. Lohn, ___ F. Supp. 2d ___, 23004985 (W.D. Wa. 2003). Challenge to NMFS' determination that "Southern Resident" orca whales of Puget sound did not constitute a distinct population segment, and did not warrant listing under the ESA. The Court: (1) rejected challenges to the Services' Distinct Population Segment Policy (DPS Policy) and found it was entitled to *Chevron* deference; but (2) found that NMFS did not rely on the best scientific evidence available in making its DPS determination because it relied upon an inaccurate global taxonomic category in analyzing the significance of the Southern Resident population to the taxon. The Court remanded to the agency.

Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224 (10th Cir. 2000). The line dividing protected and unprotected (or differently protected) animals under the ESA can be an international boundary, a state boundary, a county boundary, a measure of latitude, a point on the coast, a distance from the coastline, or a point on a river.

United States v. Guthrie, 50 F.3d 936 (11th Cir. 1995). Finding that Alabama red-bellied turtle was valid species was rationally based despite questions regarding speciation from Florida red-bellied red turtle.

Endangered Species Comm. of Bldg. Ind. Ass'n of So. Calif. v. Babbitt, 852 F.Supp. 32 (D.D.C. 1994). Remanding gnatcatcher listing to review data for decision to establish separate populations.

4. Time Limits for Listing Determinations:

- a. Receipt of Petition.** After receipt of a petition from any interested person to list or delist a species, the Secretary must "to the maximum extent practicable," within 90 days make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petition may be warranted. 16 U.S.C. § 1533(b)(3)(A).
- b. Determination on Petition.** Within 12 months after receiving a petition that is found to be warranted, the Secretary must make one of the following findings:
- (i)** Petition action is not warranted, with publication of decision in Federal Register.
 - (ii)** Petition action is warranted, with publication of decision and proposed regulation in Federal Register.
 - (iii)** Petition action is warranted, but promulgation of a final regulation is precluded by pending proposals, which must be published in Federal Register. 16 U.S.C. § 1533(b)(3)(B).

American Lands Alliance v. Norton, 242 F.Supp.2d 1 (D.D.C. 2003)(Gunnison Sage Grouse). Challenge to FWS' candidate notice the Gunnison sage grouse as an inadequate petition findings, and facial challenge to the FWS' Petition Management Guidance ("PMG") policy, adopted in 1996, which is used as a guide by FWS in its treatment of new petitions for listing of species under the ESA, as well as those species being treated under the candidate species listing process. The Court found that while the candidate notice issued for on December 28, 2000 may qualify for a 90-day substantial information finding, it did not meet the requirements of a 12-month finding. The Court also found that the challenged portion of the PMG was invalid. In a subsequent order, the Court reconsidered its holding on the validity of the candidate notice, finding that the claim and been mooted by a subsequent candidate notice of

review addressing the Gunnison sage grouse.

Defenders of Wildlife v. Norton, 239 F.Supp.2d 9 (D.D.C. 2002) appeal pending. Challenge to FWS' determination to list the Canada lynx as a threatened species rather than as endangered and also sought an order compelling the Service to designate critical habitat for the species. As to the deadline claim, FWS conceded liability. The Court ordered FWS to engage in "prompt" rulemaking on the designation and in the interim issued an injunction enjoining FWS from issuing "concurrence" letters under ESA section 7 on actions deemed "not likely to adversely affect" by action agencies, instead requiring formal consultation for all actions.

Biodiversity Legal Foundation v. Badgley 284 F.3d 1046, 2002 WL 440399 (9th Cir., Mar. 21, 2002) Appeal of district court decision finding that FWS was not required to complete initial ESA section 4 petition findings within 12 months if making such a finding was not practicable, and finding that the Court did not retain any equitable discretion under the ESA for withholding issuance of an injunction for failure to perform mandatory duties under ESA section 4. On March 21, the Ninth Circuit issued an opinion adverse to FWS on all counts, finding: (1) the case was not moot; (2) FWS has a nondiscretionary duty to make an initial petition finding within 12 months of receiving a petition; (3) the ESA deprives the district court of equitable discretion to refrain from issuing an injunction for FWS' failure to perform the nondiscretionary duty.

Biodiversity Legal Foundation v. Badgley 309 F.3d 1166 (9th Cir., 2002) (superseding 284 F.3d 1046) Appeal of district court decision finding that FWS was not required to complete initial ESA section 4 petition findings within 12 months if making such a finding was not practicable, and finding that the court did not retain any equitable discretion under the ESA for withholding issuance of an injunction for failure to perform mandatory duties under ESA § 4.

Center for Biological Diversity and Pacific River Council v. Norton and Jones, 2001 WL 1602696, No. C 01-2106 SC (N.D. Cal., Dec. 12, 2001). Court established deadlines for FWS determinations to make 12-month finding for Yosemite toad and Sierra Nevada population of the mountain yellow-legged frog. Court adopted schedule proposed by agency, using its equitable discretion, because the ESA citizen suit provision lacks the “shall compel” language and does not expressly declare that it does not have such discretion, to account for certain practical realities such as existing court-ordered obligations and budgetary shortfalls.

Skippy Moonwort, Biodiversity Legal Foundation, and Nicole Rosmarino v. Norton and Jones, No. 01-D-182 (D. Colorado, Oct. 29, 2001). Case deemed administratively closed with leave to reopen if defendants fail to publish skinny moonwort’s second 12-month finding by 6/6/02. Court determined there was no live case or controversy to warrant exercise of jurisdiction once FWS published the 12-month finding.

Center for Biological Diversity v. Norton, 163 F.Supp.2d 1297 (D.N.M., July 31, 2001). Court ordered FWS to complete 12-month finding on petition to list the Sacramento mountains checkerspot butterfly as an endangered species with critical habitat. Court reasoned that 10th Circuit decision in Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999), precludes consideration of agency’s budgetary crisis, which is caused by judicially-imposed deadlines in other cases.

Center for Biological Diversity v. Badgley, 2000 WL 1513812, No. 00-1045-KI, (D. Or., Oct. 11, 2000). Plaintiffs challenged Secretary’s alleged failure to make 12-month finding for yellow-billed cuckoo. In setting schedule for agency action, court accepted agency’s argument regarding the need for new study on genetic data.

Center for Biological Diversity v. Babbitt, No. CV-99-424 TUC-JMR (D. Ariz., Jan. 24, 2000). *rev’d by*, **Center for Biological Diversity v. Norton**, 254 F.3d 833 (9th Cir. June 20, 2001). Reversing district court, 9th Circuit held that inclusion of Chiricahua leopard frog and Gila chub in list of candidate species was insufficient to comply with the technical requirements of the ESA for 12-month petition findings.

Center for Biological Diversity v. Babbitt, No. CV-99-424 TUC-JMR (D. Ariz. Jan. 24, 2000). Listing gila chub and chirchahua leopard frog as candidate species satisfied 12-month finding requirement.

Oregon Natural Resources Counsel v. Kantor, 99 F.3d 334 (9th Cir. 1996). Plain language of ESA clearly required Secretary to publish final regulation on listing of threatened species of salmon within 12 months of date on which proposed regulation had been published, rather than 24 months after filing of citizen petition.

- c. **Emergency Listing:** Secretary can bypass formal listing procedures and statutory time limits if an emergency poses a significant risk to the well-being of any species. Emergency regulations only remain in force for 240 days. ESA § 4(b)(7), 16 U.S.C. § 1533(b)(7).

Fund for Animals v. Williams, 246 F.Supp.2d 27 (D.D.C. 2003) motion for reconsideration and appeal pending (Trumpeter Swan). Suit alleging, with respect to the ESA, that FWS failed to timely act on Plaintiffs' petition to emergency list the Tri-State population of Trumpeter Swans as endangered. The Court found that (1) FWS' January 28, 2003 petition finding mooted plaintiffs' ESA section 4 failure to act claim; and (2) a FWS letter decision denying emergency listing under the ESA of the Trumpeter swan was not sufficiently explained and therefore remanded for further explanation.

Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989). Secretary can issue emergency regulations with less evidence than for formal regulations.

- 5. **Basis for Listing Determinations:** Determination to list species as endangered or threatened must be made solely on the basis of best scientific and commercial information available. ESA § 4(b)(1)(A), 16 U.S.C. 1533(b)(1)(A).

American Wildlands, et al. v. Gale Norton, et al. 2002 WL 500869, 193 F.Supp.2d 244 (D.D.C. Mar. 31, 2002) On March 31, 2002, Judge Sullivan remanded US Fish and Wildlife Service's decision that listing the Westslope cutthroat trout as threatened under the Endangered Species was not warranted. Holding that FWS's decision was inconsistent with the best available science, the Court focused primarily on the Service's treatment of the question of hybridization, and found that the Service failed to reconcile its recognition of hybridization as a threat to the species' viability with its inclusion of hybrid stock in the population assessed for listing. The Court ordered that a new determination be issued one year from the date of judgment.

Building Industry Ass'n of Superior California v. Babbitt, 247 F.3d 1241 (D.C. Cir. 2001), cert denied, 2002 WL 32577 (Jan. 14, 2002). FWS listing of species of fairy shrimp did not violate the notice and comment provisions of the APA or the

ESA's best science requirement. FWS also not required to apply internal policy on peer review that was issued 22 months after the close of comment period.

Alsea Valley Alliance v. Evans, 161 F.Supp.2d 1154 (D. Or., Sept. 10, 2001). Court overturned NMFS final rule listing the Oregon Coast Evolutionary Significant Unit ("ESU") coho salmon as "threatened" pursuant to the ESA). Court reasoned that agency's listing decision arbitrarily excluded "hatchery spawned" coho because naturally spawned and hatchery spawned coho comprised the same "distinct population segment" and "evolutionary significant unit."

Cook Inlet Beluga Whale v. Daley, 156 F.Supp.2d 16 (D.D.C., Aug. 20, 2001). Court upheld decision of the Secretary of Commerce and NMFS to list the Cook Inlet Beluga Whale as "depleted" under the Marine Mammal Protection Act, but not as "endangered" or "threatened" under the ESA. Court noted that "best available data" requirement makes it clear that the Secretary has no obligation to conduct independent studies in assessing biological status of and threats to species.

Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir., July 31, 2001). Court overturned FWS decision not to designate the flat-tailed horned lizard as a threatened species. Court reasoned that agency improperly failed to consider the possibility of extinction throughout a significant portion of the species' range. See also, Defenders of Wildlife v. Norton, No. 97-CV-2330 W (LSP) (S.D. Calif., Oct. 24, 2001) (remanding matter to Department of the Interior for further proceedings and adopting deadline proposed by Interior to permit agency to assess new scientific data).

Center for Biological Diversity v. Badgley, 2001 WL 844399, No. 99-287-FR (D. Or., June 28, 2001). Court upheld FWS "not warranted" decision for Northern goshawk on 12-month status review. Court reasoned that the agency utilized best available science in its status review. Court also rejected a challenge to the peer review process for the proposed decision, finding that FWS is not required to follow a particular procedure.

Carlton v. Babbitt, 147 F.Supp.2d 4 (D.D.C., May 30, 2001). Plaintiffs challenged determination that it may be appropriate to pursue a change in the listing status of the grizzly bear that would recognize Selkirk bears and the Cabinet-Yaak bears as one distinct population segment. Court held that agency's distinct population segment analysis was not a final agency action, barring judicial review.

Southwest Center for Biological Diversity v. Babbitt, 131 F.Supp.2d 1 (D.D.C., Jan. 4, 2001). Court permitted extra-record submissions concerning FWS' denial of petition to list cutthroat trout as endangered species. Extra-record submissions were for limited purpose of determining whether agency failed to consider all factors relevant to its decision.

San Luis & Delta-Mendota Water Authority, 136 F.Supp.2d 1136 (E.D. Cal., June 28, 2000). In case challenging decision to list Sacramento splittail, court held that Secretary failed to use best available data.

Federation of Fly Fishers v. Daley, 131 F.Supp.2d 1158 (N. D. Cal. Oct. 25, 2000). Court rejected decision to withdraw proposed listing of steelhead salmon as threatened species based on conservation agreements with state

Southwest Center for Biological Diversity v. Babbitt, 215 F.3d 58 (D.C. Cir. 2000). In case challenging alleged failure to list the Queen Charlotte goshawk, requirement for use of best available scientific information does not require Secretary to perform independent study of goshawk population.

6. Challenges to Listing Determinations

Center for Biological Diversity v. Norton, 335 F.3d 1097 (9th Cir. 2003) (Northern goshawk). Upholding FWS' determination that listing of the Northern goshawk was not warranted, finding that FWS' decision was amply supported by the record.

State of Maine v. Norton, 257 F. Supp. 2d 357 (D. Maine 2003) (Atlantic salmon). Granting summary judgment upholding the listing of the Gulf of Maine distinct population segment of Atlantic salmon. Among other things, the Court specifically: (1) rejected challenges to the Services' Distinct Population Segment Policy (DPS Policy) and found it was entitled to *Chevron* deference; (2) the Services properly determined that the Gulf of Maine population of Atlantic salmon is a distinct population segment and therefore a listable entity; and (3) the Services' record supported their finding that the DPS was endangered and the agencies' determination was based on the best available evidence.

Walt Moden v. U.S. Fish and Wildlife Service, 281 F. Supp2d 1193 (D. Ore. 2003). Challenge to FWS' denial of a petition to delist the Lost River and Shortnose Suckers, which occur in the Klamath Basin. The Court granted in part and denied in part each of the parties' motions for summary judgment. The Court dismissed a count of the complaint brought under the ESA citizen-suit provision because Plaintiffs' 60-day notice, which was inserted into their petition for delisting, was premature and thus invalid. The Court remanded the FWS finding on the merits for further explanation on two specific issues. Specifically, the Court directed FWS to "more fully explain the differences in methodology that render comparisons between current estimates [of sucker populations] and estimates prior to listing uninformative" and to "extrapolate on the data supporting its conclusion that 'estimates show no overall trend for increasing populations within the last decade.'"

Defenders of Wildlife v. Norton, 239 F.Supp.2d 9 (D.D.C. 2002). Challenge to

FWS' determination to list the Canada lynx as a threatened species rather than as endangered and also sought an order compelling the Service to designate critical habitat for the species. As to the listing challenge the Court held that FWS' determination that the populations in three regions were not a "significant portion of the range" was arbitrary, therefore undermining the decision to list as endangered rather than threatened. The court therefore remanded the decision, and ordered the Service to reconsider within 180 days.

Southwest Center for Biological Diversity v. Norton, 2002 WL 1733618 (D.D.C. June 29, 2002) Magistrate Judge recommends that DCT largely uphold FWS's determination not to list the Queen Charlotte goshawk but recommends remand to FWS to address the narrow question of what is the conservation status of the subspecies of goshawk on a specific Canadian island.

Common Sense Salmon Recovery v. Evans, No. 99-1093 (PLF) (D.D.C. 2002) (court declines to preliminarily enjoin four chinook listings pending review. Summary judgment decision is pending. Also pending Alsea based challenges to suckers in Klamath Lake and to Southern Oregon/Northern California coho.

American Wildlands. v. Norton, 193 F.Supp.2d 244 (D.D.C. 2002) Court remanded decision that not warranted finding for Westslope cutthroat trout as threatened under the Endangered Species was not warranted. The court to reconcile its recognition of hybridization as a threat to the species' viability with its inclusion of hybrid stock in the population assessed for listing.

Defenders of Wildlife v. Norton, No. 99-2072 HHK (D.D.C., Dec. 13, 2001). FWS ordered to revisit "not warranted" listing decision for Florida black bear. FWS cannot rely on possibility of future action to justify a determination that the bear is not currently threatened. FWS was reasonable in its interpretation of what constitutes a significant portion of the species range and its finding that the bear was not likely to become endangered.

Southwest Center for Biological Diversity et al., v. Norton, No. 97-0593 RWR (D.D.C., Dec. 11, 2001). Court upheld FWS decision to withdraw proposal to list the short-leaved Dudleya as endangered species. Court reasoned that FWS' reliance upon existing and proposed protective regulations was not arbitrary or capricious. Species would be afforded long-term protection through the imminent adoption of the Multiple Species Conservation Program.

National Ass'n of Home Builders v. Norton, CIV-00-0903-PHX-SRB (D. Ariz., Sept. 19, 2001). Court granted FWS's request for limited remand on cactus ferruginous pygmy-owl critical habitat, which court found invalid, and vacated

critical habitat designation. Court reasoned that the invalid critical habitat designation need not remain in place pending remand, because species listing afforded sufficient protection. Court further reasoned that majority of land designated as critical habitat was publicly held and could not be developed in time before the new designation. Court upheld FWS' decision to divide "western population" of owl at international border in order to protect the population segment facing extinction within the U.S. Court reasoned that ESA allows FWS to list an animal as endangered through a portion of its range. Such areas can coincide with national or state political boundaries.

Alsea Valley Alliance v. Evans, 161 F.Supp.2d 1154 (D. Or., Sept. 10, 2001). Court overturned NMFS final rule listing the Oregon Coast Evolutionary Significant Unit ("ESU") coho salmon as "threatened" pursuant to the ESA). Court reasoned that agency's listing decision arbitrarily excluded "hatchery spawned" coho because naturally spawned and hatchery spawned coho comprised the same "distinct population segment" and "evolutionary significant unit."

Federation of Fly Fishers v. Daley, 131 F.Supp.2d 1158 (N. D. Cal. Oct. 27, 2000). Court rejected decision to withdraw proposed listing of steelhead salmon as threatened species based on conservation agreements with state

Defenders of Wildlife v. Babbitt, No. 97-CV-2330 W (S. D. Cal. Feb. 28, 2000) Court upheld decision to withdraw proposed rule to list flat-tailed horned lizard based on conservation agreement.

Douglas County v. Daley, No. 98-6024-HO (D. Or. Dec. 14, 1998). Court granted summary judgment to the government in this case. Plaintiff had challenged the NMFS decision to list the Umpqua River cutthroat trout as an endangered species under the ESA, alleging that this decision was not based on the best available scientific and commercial data, as required by statute. The plaintiff alleged that NMFS had failed to 1) validate critical data on the species; 2) use scientific and commercial data that was available; and 3) conduct scientific tests that were feasible, reasonable, and suggested by the evidence to determine whether the species was actually endangered. The court rejected plaintiff's arguments, and found that NMFS had properly sought the best available scientific data, considered the relevant factors in making its determination, and articulated a rational connection between the facts found and the choice made, despite the limited information available on the species. The court agreed with the government that the best available data standard of 16 U.S.C. § 1533 did not require NMFS to perform the additional studies plaintiff believed should have been performed prior to listing

Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of Interior, No. 94-1058-M Civil (D. N.M. Mar. 20, 1998). Court upholds listing of Mexican Spotted Owl despite minor delays in listing process.

Oregon Natural Resources Council v. Daley, 6 F.Supp.2d 1139 (D. Or. 1998). Court found that NMFS was arbitrary and capricious when it decided not to list the Oregon Coast coho salmon as threatened on the basis of a conservation plan put forth by Oregon. Although NMFS can consider federal efforts such as the President's Northwest Forest Plan and state conservation efforts, NMFS may not consider uncertain future actions or voluntary actions in deciding whether a listing is appropriate.

Friends of the Wild Swan v. FWS, 81 F.3d 168 (9th Cir. 1997). Challenge to FWS finding that listing of bull trout as threatened or endangered was "warranted but precluded."

Defenders of Wildlife v. Babbitt, 958 F.Supp. 670 (D.D.C. 1997). FWS acted arbitrarily and capriciously in deciding not to list Canada lynx as endangered species. Service did not rely on best scientific evidence available, but on "conclusive evidence" and faulty factual assumptions.

Friends of the Wild Swan, Inc. v. U.S. Fish and Wildlife Service, 945 F. Supp. 1388 (D. Or. Nov 13, 1996). Environmental group challenged FWS finding that listing of bull trout under ESA was "warranted but precluded" where FWS relied upon on land management plans of other agencies with future effect. Court held that FWS "cannot rely upon its own speculations as to the future effects of another agency's management plans to put off listing a species."

Biodiversity Legal Foundation v. Babbitt, 943 F.Supp. 23 (D.D.C. Oct. 10, 1996). In challenge to decision not to list, FWS could not rely on future possibility that Forest Service would revise its national forest land and resource management plan (LRMP) to ensure survival of species of wolf as ground for determining that listing of wolf species as threatened or endangered under ESA was not warranted, absent existing plan by Forest Service to protect wolf.

Southwest Center for Biological Diversity v. Babbitt, 939 F. Supp. 49 (D.D.C., September 25, 1996). Environmental group challenged FWS finding that listing of Queen Charlotte goshawk under the ESA was "not warranted" where FWS relied upon recent proposals and actions of Forest Service to modify forest management practices and conserve goshawk habitat. Court reasoned that "promises of proposed future actions" did not excuse the Secretary from making a determination based on the existing record.

Carlton v. Babbitt, 900 F. Supp. 526 (D.D.C. 1995) and **Biodiversity Legal Foundation v. Babbitt**, 26 F.Supp.2d 102 (D.D.C. 1998). In 1995 court found the decision of FWS not to reclassify a population of grizzly bears as endangered to have been arbitrary and capricious, and remanded the decision back to the agency.

On remand, the FWS reached the same determination; and, on October 28, 1998, the Court again remanded the matter back to the agency. The Court concluded that the FWS has not established that the Selkirk population of grizzly bears can sustain the current rate of human-caused mortality; that present regulatory mechanisms are adequate; that the population is not endangered by virtue of its size; and that habitat in Canada will be continue to be available to the population.

Endangered Species Comm. of Bldg. Ind. Ass'n of So. Calif. v. Babbitt, 852 F.Supp. 32 (D.D.C. 1994). Court remanded decision to list the gnatcatcher on the grounds that the Secretary was in error making a final decision without having raw data underlying important study to make available to interested parties so they could meaningfully analyze and comment. Upon subsequent motion, the Court allowed the listing to remain in place while the data was obtained and analyzed.

Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995), **rev'g** 839 F.Supp. 739 (D. Idaho. 1993). Reinstating listing of Bruneau hot spring snail.

American Fisheries Society v. Verity, Civil No. 88-0174 RAR-JFM (E.D. Cal. Feb. 1989). Commerce could consider regulatory measures adopted by other federal and state agencies in determining whether to list a species.

Northern Spotted Owl v. Hodel, 716 F.Supp. 479 (W.D. Wash. 1988). Agency decision not to list spotted owl was not supported by administrative record.

Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981). FWS listing determination exempt from NEPA since preparing an environmental impact statement would not serve the purposes of the ESA.

B. Listing Moratorium of 1995-96

On April 10, 1995, Congress passed Public Law No. 104-6, which contained a moratorium provision that precluded the Secretary from making any final determination that a species is threatened or endangered, by cutting off all funds. 109 Stat 7386 (1995). The listing moratorium expired on September 30, 1995. Congress passed a joint resolution continuing the listing moratorium until November 13, 1995, or the passage of an appropriations bill, whichever occurred first.

On April 25, 1996, Congress enacted the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub L. No. 104-134 (April 25, 1996), which restored funding in the amount of \$4,000,000.00 to the FWS

listing program. To process the backlog of petitions created during the moratorium period, the FWS developed a "Listing Priority Guidance," (LPG) 50 C.F.R. Part 17, 61 Fed. Reg. 64475 (Dec. 5, 1996).

C. Case Law Involving Budget Moratorium and Other Appropriations Shortfall Issues

Center for Biological Diversity v. Badgley, No. 00-1045-KI, 2000 WL 1513812 (D. Or. Oct. 11, 2000). Plaintiffs challenged Secretary's alleged failure to make 12 month finding for yellow-billed cuckoo. In setting schedule for agency action, court accepted agency's argument regarding the need for new study on genetic data.

Southwest Center for Biological Diversity v. Babbitt, No. CIV 99-519 LFG/LCS-ACE (D. N.M. Mar. 13, 2000). Court declined to defer to FWS proposed schedule in case challenging alleged failure to designate critical habitat for Mexican spotted owl.

Southwest Center for Biological Diversity v. Clark, 90 F.Supp.2d 1300 (D. N.M. 1999). Court set deadline for final FWS determination on whether to designate critical habitat for the spikedace and loach minnow.

Forest Guardians v. Babbitt, 164 F.3d. 1261 (10th Cir. Dec. 22, 1998). Plaintiffs seek to force designation of critical habitat for silvery minnow within 30 days. In light of budgetary constraints and LPG, FWS seeks a two-year stay until October 30, 1999. Trial court is persuaded by prudential considerations, i.e., other species may be harmed by designating CH before listings are completed. Two year stay granted. Court of Appeals reversed, stating: (1) order was appealable; (2) Secretary was under statutorily-imposed mandatory deadline to designate critical habitat for minnow; (3) Administrative Procedure Act (APA) requires reviewing court to compel agency action unlawfully withheld or unreasonably delayed and allows for no equitable discretion in that instance; (4) when agency fails to meet concrete statutory deadline, it has unlawfully withheld agency action within meaning of APA; and (5) performance of duty would be compelled notwithstanding Secretary's claim of inadequate resources.

Environmental Defense Center v. Babbitt, No. CV 94-5561 ER

(C.D. Cal. November 10, 1998). Court ordered FWS to make a final critical habitat designation for the western snowy plover no later than December 1, 1999. The Service had proposed critical habitat in April 1995, but the moratorium on final listing decisions prevented the Service from finalizing the designation by the required date of November 1995. Once the moratorium was lifted, the Service sought and obtained a number of stays of the litigation based on the low priority that critical habitat designation had been given in the Listing Priority Guidance until the court ruled on plaintiffs' renewed motion for summary judgment.

Biodiversity Legal Foundation v. Babbitt, 146 F.3d 1249 (10th Cir. June 29, 1998). FWS failed to make 90-day finding for Columbian sharp-tailed grouse based on 1997 Listing Priority Guidance. District court finds that delay does not violate ESA and Tenth Circuit affirms. Section 4(h) allows FWS to promulgate guidelines to insure the purposes of § 4 are achieved efficiently and effectively, including ranking systems. This provides FWS with authority to issue Listing Priority Guidance. Further, FWS could interpret phrase "maximum extent practicable" in 90 day requirement to mean that 90 day findings receive lowest priority during budgetary shortfall. Tenth Circuit states that "the 1997 LPG is eminently reasonable." However, court specifically notes that "the question of the 1997 LPG's validity where a violation of a mandatory provision of the ESA is alleged is not before us."

Southwest Center for Biological Diversity v. Babbitt, Case No. 98-CV-0180-K (S.D.Cal. May 5, 1998). On February 2, 1998, plaintiffs sue to force a final determination and designation of critical habitat for 44 species (43 plants and a lizard). FWS argues that delay should be accepted under LPG. Court finds that "FWS is more that 2 years removed from the lifting of the moratorium and there exists no legislative barrier to its compliance with its express duties under Section 4 of the ESA." Court finds that it has equitable jurisdiction to fashion a remedy allowing listing within a "reasonable" time after lifting of listing moratorium in 1996. Court states that final decisions must be made by September 30, 1998, including critical habitat determinations.

Catron County v. FWS, Civ. No. 93-730-HB (D. N.M., Aug. 21, 1997). In action brought by plaintiffs alleging that FWS was in contempt of court for failure to redesignate critical

habitat after initial court finding vacating designation because there was no NEPA compliance, court held that it would defer to the Secretary's priority system. "The lack of funding necessitates such a system and prevents the secretary from complying with the deadlines set out in the ESA."

Marbled Murrelet v. Babbitt, 918 F. Supp. 318 (W.D. Wash. 1996). Rider to emergency appropriations bill did not relieve federal defendants of obligation to comply with court order requiring final designation of critical habitat for marbled murre let, a threatened species under ESA unless defendants could establish that making of determination was impracticable.

Sierra Club v. Babbitt, Civ. No. S-95-299 EJJ/GGH (E.D. Cal.) (April 10, 1996). Court granted a stay based upon the funding moratorium imposed by Public L. 104-06, 109 Stat. 73, 86 (April 10, 1995) and continued by H.J. Res. 170 (March 29, 1996), which prevented completion of the final listing determination for the Peninsular bighorn sheep at that time); 948 F. Supp. 56 (July 24, 1996) (continuing the stay in this case and reasoning that, although Congress lifted the funding moratorium, it nevertheless would have been impossible for the Defendants to discharge their statutory obligations as to all pending species within the current fiscal year); (November 26, 1996) (extending the stay and certifying for interlocutory appeal the question of whether the "defendants' budget constraints and consequential allocation of their limited resources to species of the greatest biological importance excuse their obligation under the Endangered Species Act to render a listing decision on the peninsular bighorn within one year of their proposal that the peninsular bighorn be listed as an endangered species?"); 142 F.3d 445 (table) (dismissing appeal on mootness grounds). Note- the determination at issue in this case was already two years overdue when the congressional funding moratorium began on April 10, 1995.

Silver v. Babbitt, 924 F. Supp. 972 (D. Ariz. 1995). Pursuant to plain language of legislative rider, in order for FWS to avoid court-ordered deadline for designating habitat for species protected under ESA, FWS had to establish that meeting deadline was "impracticable" as factual matter due to rider's rescission of funds.

Environmental Defense Center v. Babbitt, 73 F.3d 867 (9th

Cir. 1995). Secretary had mandatory, nondiscretionary duty to act on proposed rule within one year of date of publication; (2) appropriations rider did not remove Secretary's duty; (3) rider did not repeal or modify listing provisions of ESA; but (4) rider did prevent Secretary from complying with duty; and (5) determination as to endangered status of frog was delayed until reasonable time after appropriated funds are made available.

D. Section 4(d): Protective Regulations for Listed Species (16 U.S.C. § 1533(d)).

1. If a species is listed as threatened, Secretary shall issue regulations to provide for the conservation of the species. ESA § 4(d), 16 U.S.C. § 1533(d).
2. **50 C.F.R. § 17.31**: Automatically applies all regulatory prohibitions applicable to endangered species to threatened species unless agency adopts a special rule to the contrary.
3. The Secretary, through regulations, may extend prohibitions against taking endangered species contained in ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1), to threatened fish and wildlife.

Washington Environmental Council v. NMFS, 2002 WL 511479 (W.D.Wash. Feb. 27 2002), the district court upheld the rule and found that the environmentalists challenge to the application of the limit to Washington State forestry activities was unripe because that limit had been neither applied for nor approved. See also *Kittitas County v. Evans*, C01-1955R (W.D.Wash. August 1, 2002) (similarly upholding same regulation against challenge by local government).

Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), modified, 17 F.3d 1463, rev'd on other grounds, 515 U.S. 687 (1995). Upholding FWS regulation extending prohibitions for endangered species to all threatened species by blanket rule.

Safari Club Int'l v. Babbitt, Civ. No. 93-001 (W.D. Tex. 1993). Court upheld special regulation to prohibit

importation of personal, sport-hunted argali (wild sheep) trophies taken in Mongolia, Kyrgystan, and Tajikistan. Court also held that FWS is not required to comply with NEPA with development of ESA § 4(d) regulations.

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), cert. denied, 490 U.S. 1114 (1989). Regulations protecting grizzly bear did not deny landowner's due process rights.

State of Louisiana ex rel. Guste v. Verity, 853 F.2d 322 (5th Cir. 1988). Shrimping regulations designed to protect sea turtle were not arbitrary and capricious.

III. SECTION 4: CRITICAL HABITAT

A. Critical Habitat. When Congress enacted the ESA in 1973, it found one reason for species extinction to be "economic growth and development [that was] untempered by adequate concern and conservation." Act of Dec. 28, 1973, Pub. L. No. 93-205, § 2(a)(1), 87 Stat. 884 (codified at 16 U.S.C. § 1531(a)(1)). It thus concluded the Act should protect the ecosystems upon which endangered and threatened species depend, in addition to protecting the species themselves. 16 U.S.C. § 1531(b). One mechanism that Congress chose to provide such protection was to prohibit federal agencies from undertaking actions that would destroy or adversely modify habitat of listed species that was determined to be "critical." 16 U.S.C. § 1536

Sierra Club v. U.S. Fish and Wildlife Service, No. 00-30117 (5th Cir. Mar. 15, 2001). Section 7 consultation process is not substitute for designating critical habitat of the gulf sturgeon.

B. **Definition:** Critical habitat is defined as the specific areas within the geographical area occupied by the species on which are found physical or biological features essential to the conservation of the species and which may require special management considerations and protections. ESA § 3(5), 16 U.S.C. 1532(5).

1. The statutory definition is not further defined, but the Joint Endangered Species Regulations for listing and critical habitat (50 C.F.R. pt. 424), provide examples of physical and biological features which may be considered essential to the conservation of a species.

These include areas important for population growth, food and water resources, shelter, breeding and rearing sites, and habitats that are representative of the historic distribution of the species. Id. § 424.12(b).

Habitat outside the geographical areas actually occupied by a species at the time of its listing may be designated as critical "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. §424.12(e).

- C. Timing of Designation:** The Secretary is to designate critical habitat at the time of listing, although the Secretary may extend determination for the one year period. ESA § 4(b)(6)(C), 16 U.S.C. 1533(b)(6)(C).

California Trout v. Norton, No. C-97-3779-SI (N.D. Cal.) (Orders dated February 26, 2003, September 30, 2003), appeal pending (Santa Ana Sucker). The Court granted Plaintiffs' Motion for Summary Judgment against FWS for failure to timely designate critical habitat for the Santa Ana sucker within the statutory deadlines. With respect to remedy, the Court found that it had discretion to set a reasonable time line for the designation, and required the final designation to be done within 360 days. The Court also imposed an injunction enjoining FWS from completing any ESA section 7 consultations on projects that may affect the Santa Ana sucker pending completion of the final designation. In a subsequent order, the Court denied FWS' Rule 59(e) motion to alter the judgment as it related to the ESA section 7 injunction.

Environmental Defense Center v. U.S. Fish and Wildlife Service, No. 03-195 (C.D. Cal. 2003). Challenge to FWS' failure to meet the ESA deadline for designating critical habitat for the Santa Barbara county distinct population segment of the California tiger salamander, after making a "not determinable" finding concurrent with the final listing determination. The Court ordered FWS to issue a proposed critical habitat designation by January 15, 2004 and a final designation by November 15, 2004. In a subsequent order, the Court denied FWS' Rule 60(b) motion for an extension.

Center for Biological Diversity v. Norton, No. 02-1291 (D.N.M. 2003) (Order dated September 30, 2003) (Southwest Willow flycatcher). Suit alleging that FWS failed to perform a mandatory duty under ESA section 4 to designate critical habitat for the Southwest Willow flycatcher. FWS had issued a critical habitat designation for the flycatcher in 1997, but the designation was ultimately vacated and remanded to FWS by the Tenth Circuit. Plaintiffs argued that the vacatur by the Tenth Circuit rendered FWS in immediate violation of the nondiscretionary duty under the ESA to designate critical habitat. The Court issued an order granting plaintiffs motion for summary judgment, finding FWS in immediate violation of an ESA section 4 duty. As to remedy, the Court directed FWS to

promulgate a proposed rule within one year and a final rule one year thereafter.

Institute for Wildlife Protection v. Norton, No. 02-1404 (W.D. Wash. 2003) (Mono sage grouse). Suit alleging that FWS failed to issue a timely 90-day finding pursuant to Section 4 of the Endangered Species Act. Entering judgment for FWS, finding that FWS had demonstrated that it was not practicable for FWS to issue the finding any sooner than it did.

Institute for Wildlife Protection v. Norton, No. 03-5006 (W.D. Wash. 2003) (Order dated October 3, 2003) (Eastern sage grouse). Suit alleging that FWS failed to issue a timely 90-day finding pursuant to Section 4 of the Endangered Species Act. FWS conceded liability. The Court ordered FWS to issue the 90-day finding within ninety days of its order.

Butte Environmental Council v. White, No. S-00-0797 WBS GCH (E.D.Cal. Sept. 25, 2002) Court declined to grant plaintiffs request to hold Interior in contempt despite the fact that Interior had missed a court ordered deadline for acting on a petition to designate critical habitat for 15 vernal pool species. Court also declined plaintiffs request that all Section 7 consultations and Section 10 permits be enjoined pending designation of critical habitat.

Southern Appalachian Biodiversity Project v. USFWS, 2001 WL 1729122, __F.Supp.2d__ (E.D. Tenn., Nov. 8, 2001). Court established deadline for FWS determinations on whether to designate critical habitat for sixteen species of endangered or threatened plants and animals found in Tennessee. Court adopted schedule proposed by agency.

Natural Resources Defense Council v. U.S. Department of the Interior, 2001 WL 760519, No. 99-56075, (9th Cir., July 5, 2001). Court held that designation of critical habitat for tidewater goby mooted the United States' appeal of district court decision, which directed FWS to complete habitat determination by a date certain. Mootness exception of action "capable of repetition, yet evading review" was inapplicable.

Missouri ex rel. Jeremiah W. Nixon v. Secretary of the Interior, 158 F.Supp.2d 984 (W.D. Mo., June 18, 2001). Court held that challenge for failure to designate critical habitat for least tern is barred by the six-year statute of limitations for claims against the United States. Court reasoned that limitations period was not tolled by a continuing violation of agency's mandatory obligation to make a critical habitat determination, since agency had made "not prudent" determination.

Butte Environmental Council v. White, 145 F.Supp.2d 1180 (E.D. Cal., Feb. 9, 2001). Court ordered FWS to designate critical habitat for four species of fairy shrimp within six months. Court declined to adopt schedule proposed by FWS, under which FWS would consider "ecosystem approach" to provide comprehensive protection for 23 species of

fairy shrimp.

Southwest Center for Biological Diversity v. Babbitt, No. CIV 99-519 LFG/LCS-ACE (D. N.M., Mar. 13, 2000). Court declined to defer to FWS-proposed schedule in case challenging alleged failure to designate critical habitat for Mexican spotted owl.

Colorado Wildlife Federation v. Turner, 1992 WL 467984, 23 E.L.R. 20402 (D. Colo. 1992). Statutory deadline for designating critical habitat for the razorback sucker had passed; court directed FWS to make proposed designation within specified time.

Northern Spotted Owl v. Lujan, 758 F.Supp. 621 (W.D. Wash. 1991). FWS required to designate critical habitat concurrently with listing decision unless the administrative record demonstrates why designation is not presently determinable.

Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981). The requirement of designating a critical habitat does not apply to any species listed prior to November 10, 1978, when Congress amended the ESA requiring designation of critical habitat concurrent with listing species.

1. Post Judgment/ Rule 60(b) Deadline Cases

Southern Appalachian Biodiversity Project v. U.S. Fish and Wildlife

Service, No. 2:00-CV-361 (E.D. Tenn.) (Order dated Jan. 17, 2004). Granting FWS Rule 60(b) motion and extending court imposed deadlines for critical habitat determinations for 14 mussel species and two plant species.

Center for Biological Diversity v. Norton, 2003 WL 22225620 (S.D. Cal. 2003). Granting FWS' Rule 60(b) motion to modify and extend court imposed deadlines for critical habitat determinations for 8 plant species finding that FWS' exhaustion of FY 2003 funds required modification of the court's order and represented a significant change in circumstances justifying a modification because it would be unworkable and against the public interest to require FWS to remain bound by the present deadlines.

Center for Biological Diversity v. U.S. Fish and Wildlife Service, No. 01-0352 (N.D. Cal.) (Order dated September 29, 2003). Granting FWS' Rule 60(b) motion to modify and extend court imposed deadlines for critical habitat determination for the Ventura Marsh Milk-Vetch finding that the passage of the fiscal year 2003 budget and subsequent lapse in funds constituted a significant change in circumstances warranting Rule 60(b) relief, and that modification was required because it would be legally impermissible in view of the Anti-Deficiency Act to compel FWS to continue work.

Marianas Audubon Society v. Norton, No. 00-243 (D. Guam 2003) (Orders

dated June 7, 2003 and October 16, 2003), appeal pending (Guam species). Case originally settled via stipulated dismissal providing for final deadlines for designation of critical habitat for 6 Guam species. The Court issued an order in which it granted a Rule 60(b) request by the government of Guam ("GovGuam") to extend the deadlines in the stipulation. In a subsequent order, the Court denied Plaintiffs Rule 60(b) motion finding that the appeal divested it of jurisdiction.

Center for Biological Diversity v. Norton, No. 01-409 (D. Ariz.) ("Mexican Spotted Owl") (Orders dated October 10, 2003, and November 13, 2003). Denying FWS' Fed. R. Civ. P. 60(b) motion seeking to stay or extend Court imposed deadlines for re-designation of critical habitat for the Mexican spotted owl because of lack of funds. In the subsequent order, the Court granted FWS a "a very limited extension" until August 20, 2004 to complete the rulemaking.

Southwest Center for Biological Diversity v. U.S. Fish and Wildlife Service, No. 99-2992 (N.D. Cal. 2003) (Order dated October 25, 2003). Denying FWS' Fed. R. Civ. P. 60(b) motion seeking to stay or extend Court imposed deadlines for designation of critical habitat for the La Graciosa thistle because of lack of funds. Setting show cause date for March 2004 if the designation is not done.

Environmental Defense Center v. U.S. Fish and Wildlife Service, No. 03-195 (C.D. Cal. 2003). Challenge to FWS' failure to meet the ESA deadline for designating critical habitat for the Santa Barbara county distinct population segment of the California tiger salamander, after making a "not determinable" finding concurrent with the final listing determination. The Court ordered FWS to issue a proposed critical habitat designation by January 15, 2004 and a final designation by November 15, 2004. In a subsequent order, the Court denied FWS' Rule 60(b) motion for an extension.

- D. Revision of Critical Habitat:** If the Secretary receives a petition from an interested person to revise a critical habitat designation, he must within 90 days make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. 16 U.S.C. § 1533(b)(3)(D).

Biodiversity Legal Foundation v. Norton, 285 F. Supp2d 1 (D.D.C. 2003) (Cape Sable seaside sparrow). Suit for missed deadline and unreasonable delay regarding Plaintiffs' petition to revise critical habitat for the endangered Cape Sable seaside sparrow. The Court found that FWS' 12-month finding issued in October 2001 discharged FWS' duty to make a 12-month finding. The Court also found that FWS' delay in proposing a revision rule was not unreasonable at this time, but did impose a date certain deadline.

Morrill v. Lujan, 802 F. Supp. 424 (S.D. Ala. 1992). Secretary has discretion as to whether to revise the designation of critical habitat; plaintiff has no standing to affirmatively enjoin the Secretary to add property to the designated area of critical habitat.

E. Criteria For Designation of Critical Habitat: The Secretary must list critical habitat to the "maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3).

New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir., 2001). Court set aside and remanded FWS critical habitat designation for the southwestern willow flycatcher citing insufficient economic analysis on the effects of the designation. Court rejected FWS argument that economic impacts of species listing and critical habitat designation are co-extensive.

New Mexico Cattle Growers Assn. v. Norton, No. 02-461 (D.N.M. 2003) (Arkansas River shiner) (Order dated September 30, 2003). Challenge to the final rules designating critical habitat for the Arkansas River shiner listed pursuant to the ESA, specifically the FWS's reliance on its "incremental baseline" approach under which the agency looks only at the economic and environmental effects of the critical habitat designation above and beyond any effects attributable to the listing of the species. FWS conceded the merits of the ESA issue in light of the Tenth Circuit's **New Mexico Cattle Growers** decision, and took the position that the rule should be remanded to the FWS for issuance of a new rule. The Court vacated the final rule and remanded the matter to the agency to promulgate a proposed rule in one year and a final rule one year thereafter.

Center for Biological Diversity v. Norton, 240 F.Supp.2d 1090 (D. Ariz. 2003) (Mexican Spotted Owl Critical Habitat). Challenge to FWS' critical habitat designation for the Mexican spotted owl as under inclusive. The Court granted Plaintiffs' motion for motion for summary judgment, finding (1) FWS's interpretation of the ESA's definition of "critical habitat" to exclude areas where adequate management or protections are already in place is arbitrary, and the existence of other habitat protections does not relieve the FWS from designating critical habitat. According to the Court, what is determinative is whether or not the habitat is essential to the conservation of the species and special management of that habitat is possibly necessary; FWS can consider the benefits of its relationship with an Indian Tribe as a "relevant impact" under ESA Section 4(b)(2), however, in this case the FWS's failure to produce the San Carlos Apache Management Plan, which also played a part in the FWS's decision, was in violation of the ESA and APA; and (3) FWS improperly excluded all unoccupied habitat on Forest Service lands in Arizona and New Mexico because section 3(5)(A)(ii), does not allow exclusion

based on special management considerations where, as here, FWS otherwise found the unoccupied lands are essential for the conservation of the owl. The Court required the FWS to re-propose critical habitat for the Mexican spotted owl within three months of the Court's Order, and publish its final designation of critical habitat for the Mexican spotted owl within six months of the Court's Order. By subsequent order, the Court extended these deadlines.

Coos County Board of County Commissioners v. U.S. Department of Interior, No. 02-6128 (D. Ore. 2003) (Snowy Plover) (Order dated May 7, 2003) (appeal pending). Challenge to critical habitat designation for the Western snowy plover. The Court granted the FWS' motion for voluntary remand to reconsider the critical habitat designation for the Western Snowy Plover, on the grounds that the economic impacts analysis done for the Plover was insufficient in light of the Tenth Circuit's New Mexico Cattle Growers decision. The Court also granted FWS' to leave in place 24 of the 28 critical habitat areas in the interim, and adopted FWS' schedule on remand.

Home Builders Association v. US Fish & Wildlife Service, 268 F. Supp2d 1197 (E.D. Cal. 2003), appeal pending (Alameda whipsnake). Challenge to FWS' designation of critical habitat for the Alameda whipsnake. The Court granted Plaintiffs' motion for summary judgment, vacated and remanded the designation holding: (1) the 10th Circuit was correct" in New Mexico Cattle Growers, finding that FWS' baseline approach to assessing economic impacts under ESA section 4(b)(2) was not consistent with the ESA; (2) FWS did not sufficiently identify physical or biological features essential to the conservation of the species; (3) FWS failed to make findings regarding the need for special management considerations; (4) FWS could not defer assessment of specific lands on which essential habitat features were found until consultations on proposed federal actions; and (5) FWS failed to identify areas within the geographic area occupied by the whipsnake with sufficient specificity. The Court also analyzed remand with and without vacatur, and determined that vacatur of the rule was required. In a subsequent order, the Court set a schedule under which a new proposed designation is due October 1, 2005 and the final designation October 1, 2006.

National Ass'n of Homebuilders v. Evans, 2002 WL 1205743 (D.D.C. April 30 2002) Over the objection of environmental groups, court entered a consent decree vacating salmon critical habitat designations based on *New Mexico Cattle Growers*; see also *Ass'n of California Water Agencies v. Evans*, No. F-00-6148 REC/DLB (Aug. 15, 2002) (dismissed economic challenge to salmon critical habitat in light of the D.C. ruling); *Environmental Defense Center v. Evans*, No. 00-1212 AHS (MLGx) (C.D.Cal. Nov. 13, 2002) D.C. vacature of salmon critical habitat mooted environmentalists challenge to adequacy of designation.

Building Industry Legal Defense Foundation v. Norton, ____ F.Supp.2d.____,

2002 WL 31455759 (D.D.C. Oct. 30, 2002) Court follows *New Mexico Cattle Growers* and vacates critical habitat designation for the arroyo southwestern toad and a number of vernal pool fairy shrimp species.

Home Builders Ass'n of Northern California v. US FWS, No F-01-5722 AI SMS (E.D.Cal. July 2, 2002) (Memorandum Opinion And Order Re: Defendants' Motion For Voluntary Remand) District court refuses to allow for voluntary remand of Alameda whipsnake critical habitat designation despite *New Mexico Cattle Growers* and requires summary judgment briefing (still pending).

Middle Rio Grande Conservancy District v. Norton, 294 F.3d 1220 (10th Cir. 2002) Despite finding that "protections of a [critical habitat] designation are particularly needed by the Silvery Minnow, a species placed on the brink of extinction by habitat loss," court found that an EIS was nevertheless required prior to the designation because the designation would have significant impacts on the human environment.

National Ass'n of Home Builders v. Norton, CIV-00-0903-PHX-SRB (D. Ariz., Sept. 19, 2001). Court granted FWS's request for limited remand on cactus ferruginous pygmy-owl critical habitat, which court found invalid, and vacated critical habitat designation. Court reasoned that the invalid critical habitat designation need not remain in place pending remand, because species listing afforded sufficient protection. Court further reasoned that majority of land designated as critical habitat was publicly held and could not be developed in time before the new designation. Court upheld FWS' decision to divide "western population" of owl at international border in order to protect the population segment facing extinction within the U.S. Court reasoned that ESA allows FWS to list an animal as endangered through a portion of its range. Such areas can coincide with national or state political boundaries.

Middle Rio Grande Conservancy District v. Babbitt, Nos. 99-870, 99-1445M/RLP (D. N.M. Nov. 27, 2000). Court invalidated final rule designating critical habitat for silvery minnow, holding that agency record was insufficient.

NRDC v. Department of Interior, 113 F.3d 1121 (9th Cir. 1997). The fact that the majority of critical habitat for gnatcatcher (a songbird) was privately-owned and thus not directly subject to ESA's requirement for consultation with Secretary of Interior about actions by federal agencies did not justify decision not to designate any critical habitat upon listing as threatened species.

Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995). FWS adequately explained facts and policy concerns relied on in declining to designate critical habitat of grizzly bear, and those assertions and opinions were not shown to be unlawful, arbitrary, capricious, or wholly irrational.

1. Critical habitat designation is not prudent if species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat, or if designation of critical habitat would not be “beneficial” to the species. 50 C.F.R. § 424.12(a)(1).

Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434 (5th Cir., Mar. 15, 2001). Court overturned agency’s “not prudent” determination regarding designation of critical habitat for gulf sturgeon. Court reasoned that Section 7 consultation process is not substitute for designating critical habitat for threatened species.

Middle Rio Grande Conservancy District v. Babbitt, Nos. 99-870, 99-1445M/RLP (D. N.M. Nov. 27, 2000) (appeal pending). Court invalidated final rule designating critical habitat for silvery minnow, holding that agency record was insufficient.

Building Industry Association of Superior California v. Babbitt, No. 95-0726 (PLF) (D.D.C. Mar. 28, 2000). Court rejected “not prudent” determination in case alleging failure to designate critical habitat for 4 species of fairy shrimp. Court found that asserted basis for decision not to designate critical habitat--concern of potential vandalism to species habitat--was not documented in the agency record.

Southwest Center for Biological Diversity v. Babbitt, CIV 97-704 TUC ACM) (D. Ariz. Oct. 9, 1998). FWS determined that designation of critical habitat and publication of detailed location information would increase the risk of vandalism and harassment to cactus ferruginous pygmy-owl and water umbel species. Therefore, FWS found that designation of critical habitat is "not prudent" for the two species. The court held that the record lacked sufficient evidence to justify either determination and remanded this matter to the agency to decide "without further delay" whether or not to designate critical habitat based on the best scientific and commercial information available.

Conservation Council for Hawai'i v. Babbitt, 996 F.Supp. 1254 (D. Haw. 1998). Court overturned FWS findings that designation of critical habitat for 245 plant species was “not prudent.” Court states that ESA requires designation of critical habitat in all but rare cases. To make a not prudent finding, FWS must consider evidence specific to each species regarding the increased likelihood of taking caused by designation. FWS made no effort to compare threats from increased taking against potential benefit to species from designation. Based on NRDC v. DOI, FWS cannot base a “not prudent” determination on the theory that designation will have little benefit to species

on private land.

NRDC v. Department of Interior, 113 F.3d 1121 (9th Cir. 1997). Neither ESA nor its implementing regulations authorized nondesignation of critical habitat upon listing of threatened species of songbird merely on basis that such designation allegedly would be less beneficial to species than protection offered by state habitat management program.

Orleans Audubon Society v. Babbitt, Civ. No. 94-3510 (E.D. La., Oct. 30, 1997). Court remands FWS/NMFS 1995 decision that designation of critical habitat for the Gulf sturgeon was “not prudent.” Court specifically declined to follow the 9th Circuit’s decision in *NRDC v. DOI* and held that the FWS/NMFS could permissibly find that designation would not be beneficial because it would add nothing to the protections already in place. However, court also found that, as to the Gulf sturgeon, the agencies had made no connection between the scientific data in the record and the finding of “not prudent.” On remand, FWS/NMFS once again found that designation of critical habitat was “not prudent.” See also **Sierra Club v. U.S. Fish and Wildlife Service**, No. 98-3788 (E. D. La. Jan. 24, 2000) (upholding “not prudent” decision declining to designate critical habitat for gulf sturgeon).

2. **Secretary may defer making a designation** if the critical habitat is not determinable because there is not sufficient information on the impacts of the designation or the biological needs of the species are not sufficiently well known to permit identification of the critical habitat. 50 C.F.R. §424.12(a)(2).

Northern Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991). ESA impresses on Secretary affirmative duty to seek out or, at a minimum, to identify prior to final listing decision the biological and economic data that will be necessary to making designation of critical habitat; automatic extension of time is not authorized merely upon finding that critical habitat is not presently “determinable” where no effect has been made to secure the information necessary to make the designation.

Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985). Secretary did not abuse his discretion by failing to designate critical habitat for a plant species listed as endangered and thought to be extinct but later found, since it had been found in nonnative habitat and biological and physical features essential to its existence were unknown thereby making its critical habitat incapable of being determined.

3. Secretary must make critical habitat designations based on the “best scientific data available” and must also take into consideration any economic or

other "relevant" impacts. 16 U.S.C. § 1533(b)(2). If the Secretary finds that failure to designate an area as critical habitat will result in the extinction of the species concerned, he must include such area within the designation regardless of the economic or other non-biological impact. 16 U.S.C. § 1533(b)(2).

- F. Application of NEPA** - The Circuits are split as to whether NEPA requirements must be followed for designation of critical habitat.

Catron County Board of Commissioners, New Mexico v. FWS, 75 F.3d 1429 (10th Cir. 1996). FWS must comply with provisions of NEPA when designating critical habitat for two listed fishes.

Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042, reh'g. denied, 516 U.S. 1185. FWS exempt from NEPA requirements in designating critical habitat for Northern spotted owl.

IV. SECTION 4(f): RECOVERY PLANS (16 U.S.C. § 1533(f))

- A. Recovery Plan Requirements** The ESA requires that the Secretary develop and implement recovery plans for the conservation and survival of endangered and threatened species, unless he finds that "such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). A recovery plan is a technical, scientific document prepared by biological experts from federal, state, and local agencies, and in some cases the private sector, identifying specific actions to be undertaken in order to conserve and recover a particular species and developing a plan to implement such actions. The Secretary must incorporate in each plan:
- a description of such-site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
 - objective, measurable, criteria which, when met, would result in a determination, in accordance with the provisions of Section 1533, that the species be removed from the list;
 - estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps

toward that goal. 16 U.S.C. § 1533(f)(1)(B)(i)-(iii).

1. **Recovery Team.** Recovery plans are formulated and are carried out by a "recovery team" which is usually comprised of federal, state and private sector individuals. 16 U.S.C. § 1533(f)(2).
2. **Priority System.** The Secretary must also develop a priority system for development of recovery plans in which he gives priority to those species that are most likely to benefit from such plans, without regard to taxonomic classification. *Id.* § 1533(f)(1)(A).
3. **Procedures for Finalizing a Recovery Plan.** The Secretary must give public notice and opportunity to comment on proposed recovery plans and take into account any comment provided prior to finalizing a recovery plan. 16 U.S.C. §1533(f)(4)-(5).

B. Cases Interpreting Scope of Duty to Develop & Implement Recovery Plan.

Environmental Defense Center v. U.S. Department of Interior, No. 99-9042 CM (Mcx) (C.D. Cal. Mar. 10, 2001). ESA § 4 and APA challenge, alleging FWS has unreasonably delayed in developing an implementing a recovery plan for the Tidewater Goby in violation of ESA 4(f). Although 16 U.S.C. § 1533(f) lacks deadline for completing recovery plan, Court found that the ESA's requirement for developing recovery plans is mandatory.

However, Court found that there was a disputed issue of fact as to the biological status of the goby and its priority relative to other species. Pending discovery, the court declined to enjoin the Service to develop recovery plan for the endangered tidewater goby.

Defenders of Wildlife v. Babbitt, 130 F.Supp.2d 121 (D.D.C. Feb. 12, 2001). Court noted that pronghorn recovery plan did recommend actions or steps that could ultimately lead to actions to address the threats identified, and it would not substitute its judgment for the agency's. However, the Court found the recovery plan lacked the 4(f) criterion of "objective, measurable criteria which, when met, would result in a determination ... that the species be removed from the

list."

Board of County Commissioners of Catron County v. FWS, Civ. 93-730 HB/JHQ (D. N.M. Nov. 12, 1998). Court held that FWS did not violate the ESA by adopting recovery plans prior to designating critical habitat for the spikedace & loach minnow. The court also upheld the agency's decision not to prepare an EIS when developing species recovery plans.

Strahan v. Linnon, 967 F.Supp. 581 (D. Mass. 1997), aff'd 187 F.3d 623, 1998 WL 1085817 (1st Cir. 1998) (Table) (*Northern right whale*). Content of recovery plans under ESA is discretionary; all that is required in recovery plan is identification of management actions necessary to achieve plan's goals for conservation and survival of species.

Mountain States Legal Foundation v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996). Lack of EIS for grizzly bear recovery plan, which was relied upon by FWS in biological opinion used by Forest Service in choosing timber harvest plan, did not establish that Forest Service's selection of plan limiting timber harvesting violated NEPA, absent identification of alleged recovery plan or what role it might have played in framing of biological opinion or other agency decision.

Fund For Animals v. Rice, 85 F.3d 535 (11th Cir. 1996). Recovery plans under ESA are for guidance purposes only and provide general guidance as to what is required in recovery plan. Recovery plan does not have the force of law. There would be absolutely no point to the consultation and preparation of a biological opinion if the opinion were predetermined based upon whether proposed project lands fell within the borders of properties discussed in recovery plan documents.

Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995). In response to challenge that grizzly bear recovery plan was not adequate, court held that: (1) recovery plan satisfied "site-specific management action" requirement; (2) recovery plan did not satisfy "objective, measurable criteria" requirement; (3) rational reason for monitoring methods incorporated in plan was not shown; (4) designation of population targets was not arbitrary and capricious, but FWS would

be required to explain why any reliance on Canadian bear populations to justify low population goals was reasonable; and (5) FWS adequately explained facts and policy concerns relied on in declining to designate critical habitat, and those assertions and opinions were not shown to be unlawful, arbitrary, capricious, or wholly irrational.

Sierra Club v. Lujan, (*Edwards Aquifer*), 1993 WL 151353, 36 ERC 1533 (W.D. Tex. 1993), appeal dis'd, 995 F.2d 571 (5th Cir. 1993). FWS has a mandatory obligation to develop and disseminate information identified in recovery plans for listed species.

Morrill v. Lujan, 802 F.Supp. 424 (S.D. Ala. 1992). In seeking to protect endangered mouse from coastal development, FWS had considerable discretion in determining when to adopt and how to implement recovery plans. Court denied plaintiff's request for injunction requiring the Secretary to adopt recovery plan with specific critical habitat designation.

United States v. Glenn-Colusa Irrigation District, 788 F. Supp. 1126 (E.D. Cal. 1992). ESA could be enforced prior to development of recovery plan.

Hawaiian Crow v. Lujan, 906 F. Supp. 549 (D. Haw. 1991). Plaintiff brought suit alleging failure to implement recovery plan because private landowner whose land was partially designated in recovery plan would not allow access so FWS could take affirmative steps. Court allowed amendment of complaint to specific areas for access.

National Wildlife Federation v. National Park Service, 669 F. Supp. 384 (D. Wyo. 1987). Continuing operation of campground at national park did not violate provision of ESA requiring Secretary to develop recovery plans for endangered species, since Secretary was required to develop recovery plan only insofar as he reasonably believed that it would promote conservation and he could reasonably have concluded that implementation of plan concerning grizzly bears should be stayed on an interim basis, pending results of EIS.

VI. SECTION 7 - CONSERVATION/CONSULTATION OBLIGATIONS OF FEDERAL AGENCIES (16 USC 1536)

- A. Section 7(a)(1): Affirmative obligation to conserve. All federal agencies are directed to use their authorities by carrying out programs for the conservation of listed species, but have discretion as to how this is accomplished.

Northwest Environmental Advocates v. EPA, 268 F.Supp.2d 1255 (D. Ore. 2003). ESA section 7 challenge against EPA and NMFS biological opinion related to EPA's approval under the Clean Water Act of Oregon water quality standards on the Lower Willamette and Columbia Rivers. The Court found that ESA section 7(a)(1) does not require agencies to utilize their authorities to develop conservation programs on a species-specific basis. ESA section 7(a)(1) obligations extend no further than engaging in conservation programs that benefit threatened species generally. Because EPA was participating in six programs to benefit threatened species, EPA met its section 7(a)(1) obligations. [case also noted under ESA section 7(a)(2)]

Oregon Natural Resources Council Fund v. U.S. Army Corps of Eng'rs, 2003 WL 117999 (D. Ore. 2003) ("Elk Creek Dam"). Challenge to Corps actions with respect to the Elk Creek Dam. The Court granted the Corps' motion for partial dismissal, finding that Section 7(a)(1) of the ESA applies to agency programs, not agency actions, and that Plaintiffs failed to state a claim upon which relief can be granted because they did not allege that the Corps lacks a conservation program or that the Corps had failed to follow the required procedures in formulating a conservation program.

San Francisco Baykeeper v. Corps, 219 F.Supp.2d 1001 (N.D.Cal. 2002) Can rely on compliance with 7(a)(2) to satisfy 7(a)(1) obligations.

California Native Plant Society v. Norton, No. 01-1742-IEG (JAH) (Apr. 10, 2002) The court agreed with FWS's argument that section 7(a)(1) applies only to programmatic challenges, and the suit filed by Plaintiffs involved a challenge to a specific action -- namely, the issuance of an incidental take permit for the willowy monardella plant. The court did not address FWS's argument that section 7(a)(1), by its terms, does not apply to the FWS's implementation of the ESA. The court suggested that Plaintiffs could amend their complaint to raise a 7(a)(1) claim that under the MSCP, FWS has become a "participating partner" and improperly expanded

their permitting power under section 10, but Plaintiffs had failed to make such allegations in their Complaint. The court ordered that Plaintiffs may amend their on or before May 6th to raise such allegation, which would (arguably) allow a programmatic challenge to the issuance of the willow monardella take permit.

Grant School District No. 3, et al. v. Dombeck, No. CV-99-01263 (D. Ore. Apr. 5, 2000). Court dismissed claim that U.S. Forest Service failed to utilize its authorities to carry out programs for the conservation of listed species in violation of ESA Section 7(a)(1). Court held that 7(a)(1) does not mandate specific actions by federal agencies.

Defenders of Wildlife v. Babbitt, 130 F.Supp.2d 121 (D.D.C. Feb. 12, 2001). Court found that "[t]he case law is well settled that federal agencies are accorded discretion in determining how to fulfill their § 1536(a)(1) obligations.... Likewise, this court is not the proper place to adjudge and declare that defendants have violated the ESA as a matter of law by not implementing the processes listed by [plaintiff]." (quoting Coalition for Sustainable Resources v. U.S. Forest Service, 48 F.Supp.2d 1303, 1315-16 (D.Wyo.1999).

Hells Canyon Preservation Council v. U.S. Forest Service, No. 00-755-HU (D. Or. Jan. 30, 2001). Plaintiffs alleged that the failure to consult on the 1994 public and private regulations in the Hells Canyon National Recreation Area violated ESA Sections 7(a)(1) and 7(a)(2). Court held that initiation of consultation renders moot a claim alleging failure to consult under Section 7(a)(2) and further noted that agency's 7(a)(1) actions are highly discretionary.

Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000). Court held that Bureau of Reclamation has authority to direct operations of the Link River Dam to comply with the ESA. Court reasoned that Reclamation remains the owner in fee simple of the dam and held that Reclamation can take control of the Dam when necessary and override the contractual water rights of irrigators.

WaterWatch of Oregon v. U.S. Army Corps of Engineers, No. 99-861-BR 2000 WL 1100059 (D. Or. Jun. 8, 2000). "While it might be desirable for the Corps to have a more organized approach to carrying out programs for the conservation of listed species, and for the Corps to have a conservation program applicable to pump station permits, it is clearly beyond this court's authority to order that any specific conservation measure to be undertaken."

Grant School District No. 3 v. Dombeck, No. 99-1263-AA (D. Or. Apr. 5, 2000). In challenge regarding management of Malheur National Forest, court granted motion to dismiss. Plaintiffs claims, including 7(a)(1) claims, were too vague.

“Section 7(a)(1) does not contain a mandatory duty to adopt specific programs or measures, or even to consider certain programs or measures.”

Coalition for Sustainable Resources v. U.S. Forest Service, 48 F.Supp.2d 1303, 1315 (D. Wyo. 1999). “The case law is well settled that federal agencies are accorded discretion in determining how to fulfill their §1536(a)(1) obligations.”

Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998). In this case, the Sierra Club challenged USDA’s farm subsidy program under ESA Section 7(a)(1) and 7(a)(2), and the USDA’s organic acts, and had prevailed on all three claims before the District Court. On appeal, the Fifth Circuit found that, contrary to the government’s arguments, plaintiffs did have standing for their 7(a)(1) claim. The Court found that 7(a)(1) imposes a duty on all federal agencies to consult and develop programs for the conservation of each endangered and threatened species, and rejected the government’s argument that there is no law to apply under 7(a)(1). The 7(a)(2) consultation was found to be moot. The court ruled against plaintiff on the organic statutes claims, finding that USDA had not unlawfully refused or unreasonably delayed in developing and implementing programs under the ESA. The Court of Appeals remanded the action to the District Court for further findings regarding compliance with 7(a)(1).

Hawksbill Sea Turtle v. FEMA, 11 F.Supp.2d 529 (D. V.I. 1998). In action challenging construction of emergency shelter, FEMA provided evidence that it had adopted various, specifically targeted mitigation measures in an attempt to conserve the Virgin Islands Tree Boa and the marine environment in Vessup Bay. Court held that FEMA’s “actions as a whole did not constitute an arbitrary and capricious failure to conserve threatened and endangered species.”

American Forest and Paper Ass’n v. US EPA, 137 F.3d 291 (5th Cir. 1998). EPA approved Louisiana’s NPDES permitting program and, in doing so, established conditions to ensure the protection of endangered and threatened species. Fifth Circuit overturned conditional approval finding that EPA could not deny states program based on ESA criteria because those criteria were not enumerated in the CWA. Court finds that if EPA lacks the power to add additional criteria to CWA § 402(b) and that nothing in the ESA grants the agency authority to do so.

Reservation Ranch v. US, 39 Fed. Cl. 696 (Fed.Cl. 1997). Section 7(a)(1) gives Forest Service ability to promote conservation of listed species and justifies taking discretionary action to cancel timber sale contract.

Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997), *aff’d* 187 F.3d. 623, 1998 WL 1085817 (1st Cir. 1998) (Table) (*Northern right whale*). Section 7(a)(1) does not mandate particular actions and, in any event, plaintiff failed to indicate that federal defendant had failed to take any actions that it should have been taking under

7(a)(1).

Florida Key Deer v. Stickney, 864 F. Supp. 1222 (S.D. Fla. 1994). Court held that agency that undertook no action, refused to consult even after requests by FWS and substantial evidence supported finding of its actions causing harm to endangered species, that agency had violated 7(a)(1).

Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Committee, 962 F.2d 27, reh'g denied, 972 F.2d 1362 (D.D.C. 1992). Provisions of ESA did not expand powers conferred on FERC by its enabling act.

Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy, 898 F.2d 1410 (9th Cir. 1990). Plaintiffs challenged the Navy's program of leasing lands with rights to water to farmers for agricultural development. Plaintiffs alleged that the leasing program violated the Navy's conservation obligation under ESA section 7(a)(1) because water use depleted flows into Pyramid Lake, the habitat of an endangered species of fish. The court concluded that the Navy had not abused its discretion in following its leasing program since it had in fact cut back on the amount of water rights land it was leasing, had hired experts to conduct studies of water conservation alternatives, and, as a result of the studies, had made a commitment to reduce its water consumption even further and to improve its water delivery system to reduce water loss. The court's conclusion that the Navy was acting consistently with its 7(a)(1) duty to conserve was not predicated upon any showing of the degree to which the Navy's conservation program would improve the situation of the species.

National Wildlife Federation v National Park Service, 669 F. Supp. 384 (D. Wyo. 1987).

Carson-Truckee Water Conservancy District v. Watt, 549 F. Supp. 704 (D. Nev. 1982), modified, 741 F.2d 257 (9th Cir. 1984), cert. denied, 470 U.S. 1083 (1985). Purpose of section which directs Secretary to conserve species to extent they are no longer threatened or endangered is to ensure that government does not undertake actions that incidentally jeopardize existence of endangered or threatened species.

V. SECTION 7(a)(2): DUTY OF FEDERAL AGENCIES TO CONSULT (16 U.S.C. § 1536)

A. Duty to avoid jeopardy (Section 7(a)(2))

1. **All** federal agencies have a substantive duty to insure, in consultation with FWS and/or NMFS, that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. The term “agency action” is interpreted

broadly.

Southwest Center for Biological Diversity v. Cohen (D. Az.) No. 99-203-TUC-ACM (“Fort Huachuca”). ESA section 7 claim against the Army and challenge to FWS biological opinion with respect to the Army's water usage and pumping at Fort Huachuca, Arizona and its resultant effects on the Huachuca water umbel (a riparian plant species) and the Southwestern willow flycatcher (a riparian songbird). Court granted Plaintiff’s motion for summary judgment and denied our cross-motion for summary judgment. The Court held that the biological opinion was arbitrary and capricious because instead of issuing a jeopardy opinion with an reasonable and prudent alternative that would require the Army to balance its water pumping deficit, as it did in the draft biological opinion, the FWS issued a no-jeopardy opinion on the basis of the Army’s voluntary, non-binding commitment to participate in region-wide planning efforts and also to develop a water resources management plan within three years. The Court also held that by relying on FWS’s arbitrary and capricious biological opinion that the Army had violated its independent duties under ESA Section 7 to ensure that its operations of Fort Huachuca did not jeopardize the continued existence of listed species. Injunctive relief was neither requested nor granted.

Greenpeace, American Oceans Campaign, and Sierra Club v. National Marine Fisheries Service, 106 F.Supp.2d 1066 (W.D. Wash. Jul. 20, 2000). Court enjoined commercial pollock fishery because National Marine Fisheries Service could not ensure against jeopardizing monk seal absent a valid biological opinion.

Hobbs v. Sprague, No. C 99-0512 SC, 87 F.Supp.2d 1007 (N.D. Cal. Mar. 7, 2000) Plaintiffs sought consultation regarding effects of ongoing land and resources management plans for national forest. Court held that plaintiffs lack standing based on alleged failure to consult. Alleged injury was not fairly traceable and not redressable by order requiring consultation.

Kentucky Heartwood, Inc. v. Worthington, 20 F.Supp.2d 1076 (E.D. Ky June 18, 1998). Court finds that it has jurisdiction to review ESA challenges for failure to consult on forest plans even in light of recent Supreme Court decision in Ohio Forestry Ass’n v. Sierra Club, 118 S.Ct. 1665 (1998) (finding that challenge to forest plans under NFMA were not ripe). Court finds that it may have been arbitrary and capricious for Forest Service to have failed to formally consult on recent plan amendments and policies or to have failed to consult following the listing of new species. Accordingly, court enjoins timber sales.

Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), aff'g Pacific Rivers Council v. Robertson, 854 F. Supp. 713 (D. Or. 1993). Forest Service Land Resource Management Plans for timber sales, range activities and road building projects are agency actions requiring consultation.

Forest Conservation Council v. Espy, 835 F. Supp. 1202 (D. Idaho 1993). Consultation not required for abandoned actions and NMFS does not have to develop and evaluate alternatives to the action proposed by the agency.

Profitt v. Dept. of Interior, Civ. No. C-92-0695-L (W.D. Ky. July 6, 1993). Court lacked jurisdiction over federal agencies absent federal nexus to construction of regional sewage system.

Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 962 F.2d 27 (D.D.C. 1992), reh'g denied, 972 F.2d 1362. Renewal of license for operation of hydroelectric facility with same terms and conditions was not an agency action within meaning of ESA.

Lane County Audubon Society v. Jamison, 958 F.2d 290 (9th Cir. 1992). An announcement of BLM's timber harvest levels for FYs 1991 and 1992 in Oregon, is an "action" for ESA Section 7 purposes.

Marin Audubon Society v. Seidman, Civ. No. 91-2029 (N.D. Cal. Nov. 21, 1991), aff'd, No. 92-15003, 1993 U.S. App. LEXIS 18198 (9th Cir. July 13, 1993). FDIC's sale of a note was environmentally neutral action that did not trigger ESA § 7 consultation, even when note was secured by property that was wetland habitat for the endangered salt marsh harvest mouse.

Connor v. Burford, 848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989). Issuance of a permit or a regulation is a federal action for the purposes of the ESA.

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985). Corps' act of authorizing nationwide permits allowed discharges and thus triggered its obligation to consult under 7(a)(2).

2. Federal agencies include any department, agency or instrumentality (including federal regulatory agencies).

Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 2000), cert. denied, 531 U.S. 812 (2000). Court held that Bureau of Reclamation has authority to direct operations of the Link River Dam to comply with the ESA. Court reasoned that Reclamation remains the owner in fee simple of the dam and held that Reclamation can take control of the Dam

when necessary and override the contractual water rights of irrigators.

Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993), cert. denied, 510 U.S. 1040 (1994). Timber purchasers are not license or permit applicants within meaning of consultation regulations. The term “agency action” is interpreted broadly.

National Wildlife Federation v. Coleman, 529 F.3d 359 (5th Cir. 1976), reh’g denied, 532 F.2d 1375, cert. denied, 429 U.S. 979. State that voluntarily sought federal funding for highway project was subject to 7(a)(2) requirements.

3. Consultation between action agency or wildlife agency is the process for ensuring that jeopardy is avoided. Regulations governing consultation are set out at 50 C.F.R. Part 402. An extensive preamble was included with publication of final regulations. 51 Fed. Reg. 19926 (June 3, 1986).
4. Responsibility for determining whether jeopardy is likely to occur rests with the "action" agency.

Friends of Pavette v. Horseshoe Bend Hydroelectric, 988 F.2d 989 (9th Cir. 1993). Upholding Corps of Engineers’ determination that project would not significantly affect endangered species.

National Wildlife Federation v. Coleman, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976). The ultimate decision whether to proceed with the proposed action is committed to the discretion of the action agency.

Sierra Club v. Froehlke, 534 F.2d 1289, 1303 (8th Cir. 1976).

5. **Extra-territorial Application of Section 7** - Consultation not required for actions when occur outside the U.S. or the high seas

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), rev’g on other grounds **Defenders of Wildlife v. Lujan**, 911 F.2d 117 (8th Cir. 1990). Holding that regulation illegally restricted scope of ESA Section 7 to exclude federal agency actions occurring in foreign countries.

Defenders of Wildlife v. Babbitt, Civ. No. 3-93 Civil 607 (D. Minn. Sept. 14, 1993), dis’d as moot (Mar. 30, 1994). Renewed challenge to failure to consult over effects of Three Gorges Dam in China.

B. Duty To Consult (Section 7(a)(2))

1. Section 7(a)(2) requires federal agencies to consult with the Secretary to ensure their actions are not likely to jeopardize species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.10, 424.19(b)(8).

FWS/NMFS jointly define “destruction or adverse modification of critical habitat” as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both survival and recovery of a listed species.” 50 CFR 402.02.

Sierra Club v. FWS, 245 F.3d 434 (5th Cir. 2001), the court found that this definition violated the ESA by only requiring consultation where an action affects both survival and recovery. Rather, the court found that the ESA requires consultation if an action affects recovery alone through alteration of critical habitat. FWS/NMFS have not yet promulgated a new regulation. **NRDC v. Evans**, ___ F.Supp.2d. ___, 2002 WL 31445165 (N.D.Cal. 2002), Magistrate judge follows 5th Circuit ruling and faults a critical habitat evaluation in a biological opinion for failing to examine whether project was likely to adversely affect the recovery of a species even when the action was not likely to affect the species’ survival.

Gifford Pinchot Task Force v. US FWS, No. 00-5462 FDB (W.D.Wash. July 12, 2002) Plaintiffs argued that “*any* adverse effect to critical habitat violates the ESA.” Court rejects this approach and finds that only alterations that *appreciably diminish* the value of critical habitat” rise to an ESA violation.

Okanagan County v. NMFS, No. CS-01-192-RHW (E.D.Wash. 2002) Plaintiff irrigators argued that NMFS had improperly equated the jeopardy standard with a “recovery” standard based on restoring streams to their “proper functioning condition.” The court found that “at least for the specific situation of the fish at issue in this case, the actions that would ensure a species survival might be the same . . . as those needed to ensure recovery.

Save Our Danville Creeks v. Corps, No. 02-1306-VRW (N.D.Cal. June 10, 2002) In the Federal Register notice designating critical habitat for the California red-legged frog, FWS had written that “a minimum of 300 ft of upland habitat is essential.” Nevertheless, the court upheld a biological opinion permitting development within this 300 ft zone finding that the 300 ft discussion was merely “an expression of the habitat conditions necessary to avoid take . . . , not a statement of required conditions of projects for which incidental take is approved.” Furthermore, given that the project would only affect 67 acres of the 4 million acres designated as critical habitat (which the court describes as “minute acreage”) coupled with mitigation adopted by the Corps provides a rational basis for the conclusion that the project would not

adversely modify critical habitat.

2. Consultation is required if an action "may affect" listed species.

Southwest Center for Biodiversity v. U.S.F.S., 100 F.3d 1443 (9th Cir. 1996). Forest Service's initial determination that salvage timber sale would have no effect on threatened or endangered species of spotted owl obviated need for formal consultation with FWS under ESA.

3. Consultation takes place between the action agency and U.S. Fish and Wildlife Service (Department of the Interior) or the National Marine Fisheries Service (Department of Commerce) depending on the species involved, to determine whether jeopardy is likely to occur.

4. **Consultation Required For Discretionary Actions** -Consultation requirements only apply to agency actions in which there is discretionary federal involvement or control. 50 C.F.R. 402.03, 402.16.

50 C.F.R. § 402.03 states that an agency is only required to consult over its discretionary activities. This regulation has been upheld by numerous district and circuit courts.

Okanagan County v. NMFS, 347 F.3d 1081 (9th Cir. 2003). The Forest Service consulted with NMFS about the effects of issuing special use permits allowing irrigators to use ditches across Forest Service land. As part of that consultation, the Forest Service placed minimum in-stream flow rate requirements on the special use permits. The court upheld the process finding that the Forest Service did have authority to impose in-stream flow requirements on permit holders for ESA purposes and doing so did not interfere with vested water rights under state law.

Rio Grande Silvery Minnow v. Keyes, 333 F.3d 1109 (10th Cir. 2003), **vacated**, ___ F.3d ___, 2004 WL 25310 (10th Cir. 2004) (Silvery Minnow). Challenge to U.S. Bureau of Reclamation's compliance with ESA section 7 and U.S. Fish and Wildlife Service's biological opinion regarding the effects on the endangered Rio Grande silvery minnow arising from BOR operations on the Rio Grande River. BOR had consulted on its uncontested discretionary actions and received a jeopardy opinion and an RPA over the effects on the Rio Grande Silvery Minnow. Plaintiffs sued and argued that BOR should have consulted on whether to short the irrigation contracts or not. In a 2-1 split opinion, the 10th Circuit found affirmed the District Court's holding that BOR had discretion to short the contract if necessary to meet ESA needs. Specifically, the Court found (1) BOR had discretion to

reduce previously contracted water deliveries to comply with ESA under authorizing statutes and water delivery contracts; and (2) diversion of water for species was a “beneficial use.” In the concurring opinion, the Court held that even if the water delivery contracts themselves did provide sufficient discretion to reduce water deliveries, under the doctrine of “unmistakable terms” applicable to contracts with the United States, the subsequently enacted ESA nonetheless modified the contracts. (On January 5, 2004, while petition for rehearing was pending, the Tenth Circuit found that the appeal had been mooted and therefore vacated it prior opinion).

Sierra Club v. EPA, ___ F.3d ___, 2004 WL 51114 (D.C. Cir. 2004).

Challenge to EPA’s promulgation of technology-based standards under the Clean Air Act governing the emissions of hazardous air pollutants from primary copper smelters. The Court found that EPA was not required to consult under ESA section 7 on issuance of the standards because the Clean Air Act specifically channeled endangered species concerns to a later phase of the CAA rulemaking.

Turtle Island Restoration Network v. NMFS, 340 F.3d 969 (9th Cir. 2003).

ESA section 7 challenge to NMFS’ issuance of permits for U.S. flagged vessels for fishing on the high seas under the High Seas Fishing Compliance Act. Reversing district court grant of summary judgment to NMFS, holding that: (1) NMFS’ issuance of HSFCA permits constituted agency action within the meaning of ESA section 7; and (2) NMFS retain sufficient discretion to impose conditions on the permits to protect listed species thereby triggering the ESA section 7 consultation requirement

Sierra Club v. Norton, 74 Fed. Appx. 376, 2003 WL 22018886 (5th Cir.) (unpublished). Challenge under ESA section 7 to the National Park Service's Oil and Gas Management Plan for the Padre Island National Seashore and to NPS/FWS' informal consultation on NPS' permit to BNP Petroleum for specific wells in the Park. The Court affirmed the district court grant of summary judgment in favor the NPS holding that NPS was not required to consult on the non-binding Oil and Gas Management Plan because the plan did not constitute a final agency action requiring consultation under ESA section 7; and (2) NPS and FWS' conclusions that the specific well projects wells were not likely to adversely affect the endangered Kemp's ridley sea turtle, and therefore properly dealt with through informal consultation, were supported by the record.

Wyoming Outdoor Council v. Bosworth, 284 F.Supp.2d 81 (D.D.C. 2003). ESA section 7 challenge against the U.S. Forest Service and

U.S. Bureau of Land Management related to the issuance of oil and gas leases under the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (“FOOGLRA”) in and near the Shoshone National Forest. Plaintiffs claimed that the agencies improperly failed to consult on the leases and that the Forest Service improperly failed to re-initiate consultation on a 1993 biological opinion. The Court granted summary judgment for the Federal agencies finding that: (1) Plaintiffs’ claims concerning the failure of the agencies to consult on the leases were not ripe for review because the lessee’s legal rights had not still not been determined and would not until BLM or the Forest Service approves an Application For A Permit to Drill on that lease ; and (2) that the Forest Service’s decision not to re-initiate consultation was supported by the record.

Defenders of Wildlife v. Norton, 257 F. Supp. 2d 53 (D.D.C. 2003). Claims that U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, and National Marine Fisheries Service failed to consult with respect to the effects of BOR’s management of the lower Colorado River on listed species in the Colorado River Delta in Mexico. Granting summary judgment for the federal defendants, finding that BOR did not have a duty to consult because BOR did not have the discretion to release water into Mexico due to a Supreme Court injunction, the Law of the River and international treaty.

Rio Grande Silvery Minnow v. Keys, No 99-1320 JP/RLP-ACE (D.N.M. April 19, 2002) Reclamation only consults on what it believes are the discretionary aspects of its operations of storage and diversion projects along the Rio Grande. The FWS issued a jeopardy opinion but set forth an RPA which allowed portions of the river to temporarily go dry under certain flow conditions. The district court found that Reclamation had more discretion than it claimed to provide water for the minnow but upheld the biological opinion based on the Ninth Circuit’s opinion that FWS need not pick the best RPA for fish only one that avoids jeopardy. *Southwest Center for Biological Diversity v. Reclamation*, 143 F.3d 515 (9th Cir. 1998). Thus, the fact that a better RPA could have been derived if BOR used its now-discretionary powers was irrelevant.

Rio Grande Silvery Minnow v. Keys, No. 99-1320 JP/RLP-ACE (D.N.M. September 24, 2002) The water runs out sooner than expected and BOR cannot comply with prior RPA without using the powers that the district court had ruled were discretionary. The district court finds that the BOR must now use its discretionary powers to provide more flow for the fish. The 10th Circuit immediately stayed this injunctive opinion pending expedited appeal.

Okanagan County v. NMFS, No. CS-01-192-RHW (E.D.Wash. 2002) The

Forest Service consulted with NMFS about the effects of issuing special use permits allowing irrigators to use ditches across Forest Service land. As part of that consultation, the Forest Service placed minimum in-stream flow rate requirements on the special use permits. The court upheld the process finding that the Forest Service did have authority to impose in-stream flow requirements on permit holders.

Klamath Water Users Protective Assoc. v. Patterson, 204 F.3d 1206 (9th Cir. 2000), cert. denied, 121 S.Ct. 44 (2000). Court held that Bureau of Reclamation has authority to direct operations of the Link River Dam to comply with the ESA. Court reasoned that Reclamation remains the owner in fee simple of the DAM and held that Reclamation can take control of the Dam when necessary and override the contractual water rights of irrigators.

Natural Resources Defense Council v. Houston, 146 F.3d 1118 (9th Cir. June 24, 1998), cert. denied, 526 U.S. 111 (1999) (Winter-run chinook and renewal of water contracts). Contract renewals are “agency action” and subject to consultation because Reclamation has discretion to negotiate renewal terms.

Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997), aff'd 187 F.3d. 623, 1998 1085817 (1st Cir. 1998) (Table) (*Northern right whale*). Upholds validity of 50 C.F.R. § 402.03, which states that agencies need only consult over discretionary actions.

Marbled Murrelet v. Babbitt, 111 F.3d 1447 (9th Cir. 1997). Concurrence letter from FWS indicating its opinion that proposed timber harvest plans would avoid taking of protected species did not create serious question on merits of whether FWS engaged in "agency action" triggering requirements of ESA or "major federal action" triggering requirements of NEPA, absent any evidence of federal discretionary involvement or control over timber harvest plans which instead had to be approved by state.

Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996). There was no discretionary federal involvement or control over lumber companies proposed salvage operations, and thus no "federal action" under section 7 of the ESA.

Sierra Club v. Babbitt, 65 F.3d 1502 (9th Cir. 1995). No consultation required where BLM lacked discretion to right-of-way contract that was entered into prior to enactment of ESA.

Florida Key Deer v. Stickney, 864 F.Supp. 1222 (S.D. Fla. 1994). Federal Emergency Management Agency must consult under ESA Section 7 on its implementation of the National Flood Insurance Program; FEMA had

discretion in implementation and planning issues under NFIP.

Lane County Audubon Society v. Jamison, 958 F.2d 290 (9th Cir. 1992). An announcement of BLM's timber harvest levels for FYs 1991 and 1992 in Oregon, is an "action" for ESA Section 7 purposes.

5. The consultation process first requires the action agency to determine the scope of the action area, that is, the area upon which the proposed action may have a direct or indirect impact. The regulations then establish an incremental approach to assess the degree of the project's impact on listed species and critical habitat, first analyzing whether there will be any effect, then whether there will be any adverse effect, and finally whether species will likely be jeopardized, or critical habitat destroyed or adversely modified. The regulations provide several different mechanisms for making these determinations: early consultation (applicable to permittees and licensees), biological assessment, informal consultation, and formal consultation.

Confederated Tribes and Bands of the Yakama Nation v. McDonald, 2003 WL 1955763 (W.D. Wa. 2003). Challenge to U.S. Bureau of Reclamation's actions and NMFS' biological opinion related to a dam repair project on the Keechelus Dam under the Safety of Dams Act. The Court found that the agencies properly limited the action and scope of the biological opinion the repair of the dam rather than long-term operations of the re-constructed dam because the entire agency action at issue was limited by the express terms of the Safety of Dams Act to repair of the dam.

Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002) Forest Service and FWS arbitrarily limited the scope of the "action area" subject to consultation to exclude "sheep grazing area" adjacent to the subject timber sale even though NEPA document had found that the grazing area could have a significant impact on listed grizzly bears due to the potential that grizzly bears roaming into the area could be killed by ranchers.

San Francisco Baykeeper v. Corps, 219 F.Supp.2d 1001 (N.D.Cal. 2002) Requiring FWS/NMFS to analyze the effects of changed shipping lanes on all species in the Bay-Delta ecosystem, or potentially, the West Coast based on a theory that the ships might introduce exotic invasive species "would necessarily require a degree of speculation not contemplated by § 7 of the ESA, which focuses on actions that are 'likely to jeopardize' the continued existence of listed species.

Save Our Danville Creeks v. Corps, No. 02-1306-VRW (N.D.Cal. June 10, 2002) Mere fact that other developments might share infrastructure with the project under consultation does not mean that they are effects of the actions.

Prospects of future developments might be “too tenuous” to qualify as an effect of the action.

Ground Zero Center for Non-Violent Action v. Navy, No. 01-5339FDB (W.D.Wash. Oct. 29, 2002) Court rejects plaintiffs challenge that Navy had failed to Navy’s consultation on the expansion of the Bangor Submarine Base to potentially handle nuclear weapons because Navy had not analyzed the harm to species from accidental detonation.

Blue Water Fishermen’s Ass’n v. NMFS, 226 F.Supp.2d 330 (D.Mass. 2002) After finding that the northern subpopulation of loggerhead turtles was a “critical component of the species,” NMFS could properly find that a fishery would jeopardize the species as a whole even when the fishery only impacts that subpopulation. NMFS also did not have to find that the pelagic longlining fishery was the predominant threat to the fishery prior to issuing an RPA limiting the fishery.

Bear Creek Council v. Garber, No. CV-160-BLG-JDS, (D. Mont., July 11, 2001). Court upheld FWS decision to use informal consultation in its review of Darroch/Eagle timber sale located in the Gallatin National Forest. Absent evidence that FWS’ analysis was arbitrary, capricious, or abuse of discretion, court upheld FWS definition of “action area” for purposes of consultation. See also, Order filed Sept. 12, 2001 (denying motion for injunction pending appeal).

Defenders of Wildlife v. Babbitt, No. 99-927 (ESH), 130 F.Supp.2d 121 (D.D.C., Feb. 12, 2001). Court held that action area subject to consultation concerning effects of federal actions on the Sonoran pronghorn must include “areas where the pronghorn may be directly or indirectly affected by the agency action.” Court also held that, considering low overall population numbers, FWS failed to account for cumulative effects of incidental take authorizations included in numerous biological opinions.

6. Reliance on Future Measures as Part of Action/RPA

In formulating their biological opinion, FWS and NMFS are to “evaluate 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

Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003) (Colville National Forest/ Stimson Lumber). The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the U.S. Fish & Wildlife Service and U.S. Forest Service, finding that the agencies complied

with the ESA and NEPA in granting an easement and allowing attendant road construction to proceed in Colville National Forest in relation to timber harvests to be done in private in-holdings by Stimson Lumber Company. With respect to the ESA, the Court found: (1) FWS and USFS may rely on final Conservation Agreements in complying with their respective obligations under ESA section 7; (2) the Conservation Agreement represented the best available scientific information within the meaning of ESA section 7; and (3) FWS had discretion as to the method to be used in evaluating cumulative impacts and FWS acted reasonably in relying on the Conservation Agreement to the cumulative effects analysis here.

Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, No. 02-2006 (N.D. Cal. 2003) (Order dated July 15, 2003), appeal pending, (Klamath),. Challenge to the National Marine Fisheries Service's (NMFS) 10-year biological opinion (BO) relating to Bureau of Reclamation (BOR) management of the Klamath Basin. The Court issued an order on summary judgment finding: (1) the phasing of the project and flow rates relied upon by NMFS in the reasonable and prudent alternative were supported by the record and consistent with the best available science; but (2) the RPA was invalid because it relied upon speculative future actions by third party states, Tribes and private parties to achieve long-term flow levels;(3) the incidental take statement was invalid because they did not adequately set forth the amount or extent of allowable take; and (4) the Court declined to grant the injunctive relief the Plaintiffs and Tribes sought, and left the 2002 biological opinion in place during the remand to the agency.

American Rivers v. United States Army Corps of Engineers, 271 F.Supp.2d 230 (D.D.C. 2003) (Missouri River). Challenge to FWS' 2003 supplemental biological opinion and the U.S. Army Corps of Engineers' 2003 Annual Operating Plan for operations on the Missouri River. The Court granted a motion for preliminary injunction finding that plaintiffs had shown a likelihood of success that the 2003 biological opinion was arbitrary and capricious because it relied upon future measures that may not come to pass.

Northwest Environmental Advocates v. EPA, 268 F.Supp.2d 1255 (D. Ore. 2003). ESA section 7 challenge against EPA and NMFS biological opinion related to EPA's approval under the Clean Water Act of Oregon water quality standards on the Lower Willamette and Columbia Rivers. The Court found NMFS' no jeopardy conclusion in its biological opinion to be arbitrary and capricious because NMFS relied upon "largely speculative and unenforceable" commitments by the State of Oregon to undertake

conservation actions in the future. The Court found that the ESA requires the agency to “be reasonably certain” that promised future actions will occur, and there was no such finding here. The Court found EPA in violation of ESA section 7 largely for the same reason. The Court remanded the biological opinion for further proceedings but did not vacate.

7. Revised joint regulations were issued in 1986 defining all consultation procedures for compliance with Section 7(a)(2). 50 C.F.R. Part 402. Preamble to regulations also explains consultation process. 51 Fed. Reg. 19926, et seq.

C. **Informal Consultation.**

1. The action agency may, at its option, engage in informal consultation to determine whether a proposed action is likely to adversely affect listed species or critical habitat. 50 C.F.R. § 402.13. The purpose of informal consultation is to determine whether formal consultation or a conference is required.
2. If the action agency concludes, and the consulting agency concurs in writing, that the proposed action will not adversely affect listed species, then the consultation process is terminated and no formal consultation is required. 50 C.F.R. § 402.13(a).

Hawksbill Sea Turtle v. Federal Emergency Management Agency, 11 F.Supp.2d 529, 544-45 (D. V.I. 1998).

Lake Worth Drainage District v. Caldera, Case No. 96-08827 CIV-ASG/98-5857 (S.D. Fla., Oct. 7, 1998). In this action, a special water-use district has sued the Army Corps challenging recent changes in the water delivery schedule designed to improve environmental conditions in the Loxahatchee National Wildlife Refuge. The court held that, by completing informal consultation with the U.S. Fish and Wildlife Service, the Corps complied with Section 7(a)(2) of the ESA. The court reasoned that the Corps properly relied upon the Service's findings that the water delivery changes would benefit the endangered snail kite and wood stork as intended.

Fund for Animals v. Thomas, 127 F.3d 80, 84 (D.C. Cir. 1997).

Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 916 F. Supp. 1557, 1569 (N.D. Ga. 1995), aff'd 87 F.3d 1242 (11th Cir. 1996).

3. During informal consultation, the consulting agency may suggest changes in the proposed action that would avoid an "adverse effect" or “may adversely

affect” situation and the consequent need to consult formally on the action. Id.

4. For major construction activities or other federal actions with similar physical effects, the action agency prepares a biological assessment on the proposed agency action to determine whether it will adversely affect the listed species or critical habitat. The biological assessment may be done as part of the action agency's compliance with other environmental laws, such as the National Environmental Policy Act (NEPA). 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.06.

Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002) Case implies that Biological Assessments standing alone are reviewable but it appears that court was looking at the larger obligations of the Forest Service and the FWS.

Sierra Club v. Corps, 295 F.3d 1209 (11th Cir. 2002) Corps prepared a BA and an EIS in 1993/94 for the Suncoast Parkway in Florida. “If new information regarding endangered species became available, or if environmental consequences not already evaluated came to light, the Corps would have been required to prepare a new BA or an SEIS. It would not, however, have been required to prepare both.”

City of Sausalito v. O’Neill, 211 F.Supp.2d 1175 (N.D.Cal. 2002) Complete failure to do a biological assessment may be reviewable but contents are not. Preparation of a NEPA document can satisfy BA requirement.

D. Formal Consultation.

Formal consultation begins with a written request by the action agency to initiate formal consultation (50 C.F.R. § 402.14(c)) and ends with issuance of a biological opinion by FWS and/or NMFS. 50 C.F.R. § 402.14(l)(1). Preparation of a biological assessment by the action agency (see C.4 above) is usually required.

1. Jeopardy determination or finding of adverse modification of critical habitats
 - a. The purpose of the biological opinion is to assess whether the proposed agency action is likely to jeopardize the continued existence of species that are listed or proposed for listing. 50 C.F.R. § 402.02; 16 U.S.C. § 1536(b).
 - b. In addition to assessing the likelihood of jeopardy, the biological opinion is required to assess whether the proposed action is likely to result in destruction or adverse modification of designated or proposed

critical habitat. 50 C.F.R. § 402.02.

c. Reviewability of Biological Opinion

Bennett v. Spear, 520 U.S. 154 (1997).

Plaintiffs can be injured by biological opinion ("BiOp") for standing purposes because it can have a "determinative or coercive effect upon the action of someone else." Action agency must not only articulate its reason for disagreement (which normally requires discussion of issues which are not within the agency's expertise) but it runs a substantial risk if its (inexpert) reasons turn out to be wrong. Action agency is technically free to disregard the BiOp and proceed with its proposed action but it does so at its own peril because it won't be covered by the take provisions and may be subject to § 9 enforcement. BiOp is final agency action. It marks the consummation of FWS's decisionmaking process and legal consequences flow from the BiOp because the BiOp (and its Incidental Take Statement) alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. See also **Aluminum Company of America v. Administrator, Bonneville Power Admin.**, 175 F.3d 1156 (9th Cir. 1999), cert. denied **Columbia Falls Aluminum Co. v. Administrator, Bonneville Power Admin.**, 528 U.S. 1138 (2000) (upholding action agency's decision to accept consulting agency's jeopardy opinion).

American Rivers v. NMFS, 126 F.3d 1118, amending 109 F.3d 1484 (9th Cir. 1997) (*Snake River salmon*). Ninth Circuit holds that challenge to 1994 BiOp is moot in light of 1995 BiOp. Even though plaintiffs failed to provide proper notice concerning the 1995 BiOp, challenge against NMFS claiming that the 1995 BiOp was arbitrary and capricious under the Administrative Procedure Act may go forward in light of Bennett v. Spear.

d. In making a determination of jeopardy or adverse

modification, the agency must assess both direct and indirect effects of the action.

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985). Action agency is required to consider impact of both direct and indirect effect discharges.

National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), reh'g denied, 532 F.2d 1375, cert. denied, 429 U.S. 979 (1976). Action agency must consider indirect as well as direct impacts of agency action.

2. Formulation of Reasonable and Prudent Alternatives.

- a. If the consulting agency finds that the proposed action is likely to jeopardize listed species or result in adverse modification of critical habitat, the consulting agency is required to determine whether there are any "reasonable and prudent alternatives" to the proposed action which would not result in the likelihood of jeopardy or adverse modification, and which can be taken by the action agency or applicant in implementing the agency action. 16 U.S.C. § 1536(b)(3)(A) (1988); 50 C.F.R. § 402.14(h)(3); 50 C.F.R. § 402.14(g)(5).

Bennett v. Spear, Case No. 93-6076-HO (D. Or. Jan. 20, 1998) (on remand.) The 1992 BiOp found that long-term operation of the Klamath Project is likely to jeopardize Lost River and shortnose suckers. As part of a Reasonable and Prudent Alternative ("RPA"), the BiOp set minimum reservoir levels for several reservoirs. District court finds that the RPA "must be rationally related to the purpose of avoiding jeopardy" although admits that the case law appears to be lacking on the issue of the required nexus between RPAs and jeopardy. Court finds that the record does not support a finding that the minimum lake elevations and other RPAs in Clear Lake and Gerber reservoirs will help avoid jeopardy to suckers either in those lakes individually or in an action area that is interdependent or interrelated to those lacks.

Remands to FWS for better explanation.

Hawaii Longline Ass'n v. NMFS, 2002 WL 732363 (D.D.C. April 25, 2002) NMFS issues a biological opinion with an RPA which closed the Hawaiian swordfish fishery. Magistrate recommends that district court vacate the RPA because NMFS failed to recognize that the Longline Association was an applicant which was entitled to comment on a draft of the biological opinion. District Court judge subsequently approved the recommendations and vacated the opinion.

San Francisco Baykeeper v. Corps, 219 F.Supp.2d 1001 (N.D.Cal. 2002) Can consider impact of beneficial future mitigation measures as well as potential negative impacts. Furthermore, if NMFS finds that the original action is not likely to jeopardize, NMFS cannot be found arbitrary for failing to recommend additional voluntary mitigation measures to the agency.

Save Our Springs Alliance v. Cooke, 2002 WL 31757473 (W.D.Tex. Nov. 12, 2002) FWS can rely on assurances from EPA that the mitigation will be carried out and can consider beneficial activities being carried out by state and local entities.

The Ocean Conservancy v. NMFS, No. 02-00393 ACK-LEK (D.Hawaii Nov. 22, 2002) NMFS found that, under certain assumptions, experimental fishery may cause harm but also assumed that benefits could be exported to foreign countries vastly improving the turtle's environment. Court stated "The ESA does not prevent an agency from considering both the harms and benefits in determining jeopardy." Court found that agency had likely violated NEPA but nevertheless did not enjoin the fishery. The Ninth Circuit issued an injunction pending appeal.

Center for Biological Diversity v. Rumsfeld, 198 F.Supp.2d 1139 (D.Az. 2002) Finds that mitigation measures "must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations, and most, important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." While the last obligation is correct, the court appears to have overstated the stringency required of mitigation measures as evidenced by both the *Southwest Center* case and others. The degree of certainty of the mitigation measure should be tied to the degree of certainty as to the future threat and its immediacy. If the threat is speculative, the mitigation may be speculative. Similarly, if the threat is a long term

issue, there may be time to explore various potential mitigation options while still not diminishing the prospects for the species survival and recovery.

Kandra v. United States of America, 145 F.Supp.2d 1192 (D. Or., Apr. 30, 2001). Court rejected challenge to reasonable and prudent alternatives in biological opinion concerning operating plan for Klamath Reclamation Project. Court noted that agency has “wide latitude” to determine what is the “best scientific and commercial data available.” “[I]t is presumed that agencies have used the best data available unless those challenging agency actions can identify relevant data not considered by the agency.”

Southwest Center for Biological Diversity v. Babbitt, No. 95-2833 PHX (HRH) (D. Ariz. Mar. 16, 2000). Court construed sufficiency of RPA in case alleging harm to southwest willow flycatcher due to operation of Roosevelt Dam. RPA permitted destruction of potential habitat at Roosevelt Lake based on purchase of replacement habitat area at another location. Court held that failure to require preservation of Roosevelt Lake habitat does not render the RPA arbitrary and capricious.

Southwest Center for Biological Diversity v. US Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998), pet’n reh’g and reh’g en banc denied. FWS can rely on after-the-fact, off-site mitigation measures as part of an RPA. Plaintiffs challenge Reclamation’s operation of Hoover Dam and the RPA set forth FWS’s Lower Colorado River BiOp. The FWS found that the RPA would avoid jeopardy to the southwestern willow flycatcher even though a large area flycatcher habitat would be lost on the Lake Mead delta. Ninth Circuit states that FWS not required to pick the first RPA it came up with and not even required to pick the best alternative or the one that would most effectively protect the flycatcher from jeopardy. FWS need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency. FWS not required to explain why it chose one RPA over another or to justify his decision based solely on apolitical factors.

Center for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996). Agency generally can avoid finding that it has placed endangered or threatened species in jeopardy, in violation of (ESA), by complying with reasonable and prudent alternative spelled out in biological opinion, unless decision to implement biological opinion was arbitrary or capricious. Even if agency does not fully implement

reasonable and prudent alternatives of biological opinion, agency has not violated its obligation to avoid placing endangered or threatened species in jeopardy if agency took alternative, reasonably adequate steps to ensure continued existence of any endangered or threatened species.

Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1193-1194 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989). An action agency may lawfully elect to satisfy the requirements of section 7 by taking “alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species.”

- b. An alternative to a proposed action is "reasonable and prudent" only if it is consistent with the intended purpose of the action, within the scope of the action agency's legal authority and jurisdiction, and economically and technologically feasible. 50 C.F.R. § 402.02.

North Slope Borough v. Watt, 20 Env'tl. Rptr. Cases 1457, 1461-64 (D. Alaska 1984). Court upheld decision of action agency to deviate from reasonable and prudent alternatives recommended by wildlife agency.

- 4. **Incidental take statement.** Where the Service reaches a no jeopardy conclusion, it must include an incidental take statement. 16 U.S.C. 1536(b)(4); 50 C.F.R. 402.14(i). Such an incidental take statement, if followed, exempts the action agency applicant from the ESA Section 9 taking prohibitions. ESA § 7(o)(2), 16 U.S.C. 1536(o)(2).

Arizona Cattle Growers' Ass'n v. FWS, 273 F.3d 1229 (9th Cir. 2001). Court held that FWS acted arbitrarily and capriciously by issuing Incidental Take Statements (ITS) imposing terms and conditions on land use permits where there either was no evidence that the endangered species existed on the land or no evidence that a take would occur if the permit were issued. Specifically found that FWS is not required to issue an incidental take statement for every biological opinion. Also found that FWS can use surrogate measures rather than providing a numerical estimate of take but that these measures must not be too vague and must be related to minimizing take. Many copy cat suits by grazers and others seeking to strike onerous incidental take statements.

Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, No. 02-2006 (N.D. Cal. 2003) (Order dated July 15, 2003), appeal pending, (Klamath),. Challenge to the National Marine Fisheries Service's (NMFS) 10-year biological opinion (BO)

relating to Bureau of Reclamation (BOR) management of the Klamath Basin. The Court issued an order on summary judgment finding: (1) the phasing of the project and flow rates relied upon by NMFS in the reasonable and prudent alternative were supported by the record and consistent with the best available science; but (2) the RPA was invalid because it relied upon speculative future actions by third party states, Tribes and private parties to achieve long-term flow levels;(3) the incidental take statement was invalid because they did not adequately set forth the amount or extent of allowable take; and (4) the Court declined to grant the injunctive relief the Plaintiffs and Tribes sought, and left the 2002 biological opinion in place during the remand to the agency.

NRDC v. Evans, ___ F.Supp.2d. ____, 2002 WL 31445165 (N.D.Cal. 2002) District court misreads holding of *Arizona Cattle Growers* in a preliminary injunction and finds that “As the May 30, 2002 biological opinion does not contain an ITS, it violates the ESA.” District Court also argues that, if NMFS were to issue an ITS, it “must *establish*, however, that no numerical value could be practically obtained.”

Save Our Danville Creeks v. Corps, No. 02-1306-VRW (N.D.Cal. June 10, 2002) After noting that *Arizona Cattle Growers* said that “we have never held that a numerical limit is required,” court uphold ITS despite plaintiffs challenge that it did not provide a numerical quantification of take.

Southwest Center for Biological Diversity v. US Forest Service, No. 97-666-TUC JMR (D.Az. Nov. 5, 2002) Finds that challenges to grazing incidental take statements for which the biological opinion had not expired were not moot and invalidated the statements pursuant to *Arizona Cattle Growers* for those which had not been replaced by a new biological opinion.

Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996). Issuance of an incidental take statement under § 7 may, in appropriate circumstances, permit parties that are neither federal agencies nor applicants to engage in incidental takes consistent with the statement without applying for more formal § 10 permits for private parties. See also **Friends of the Wild Swan v. Babbitt**, 168 F.3d 498 (Table), 1999 WL 38606 (9th Cir. 1999) (upholding validity of incidental take statement issued for voluntary conservation agreement entered by nonfederal parties.).

5. **Use of Best Data Available.** The ESA requires both the action and consulting agencies to utilize the “best scientific and commercial data available” in meeting their section 7(a)(2) obligations [16 U.S.C. § 1536(b)(1)(B)(i); 50 C.F.R. § 402.14(e)].

Bennett v. Spear, 520 U.S. 154 (1997). The Supreme Court states that the obvious purpose of the requirement that each agency “use the best scientific and commercial data available” is to ensure that the ESA is not implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of species preservation, we think it readily apparent that another object (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. . . We believe that the “best scientific and commercial data” provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations.”

Southwest Center for Biological Diversity v. US Bureau of Reclamation, 143 F.3d 515 (9th Cir. May 4, 1998), pet’n reh’g and reh’g en banc denied (*Lake Mead*). Although Secretary must rely on “best available scientific and commercial data” in formulating RPA, ESA does not explicitly limit FWS’s analysis to apolitical considerations. If two proposed RPAs would avoid jeopardy, FWS must be permitted to choose the one that best suits all of its interests, including political or business interests.

Hawaii Longline Association v. NMFS, 281 F. Supp.2d 1 (D.D.C. 2003), ___ F.Supp.2d ___, 22433320 (D.D.C. 2003). Challenge by association representing the Hawaii-based longline fishing industry to regulations implementing the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific, and a biological opinion regarding the impacts of such fishing on endangered and threatened sea turtles. The Court granted plaintiff’s motion for summary judgment finding that: (1) NMFS’ 2002 regulations implementing the fishery management plan were arbitrary and capricious because they relied upon a vacated 2001 biological opinion; (2) NMFS’ 2002 biological opinion regarding the fishery was arbitrary and capricious also because it relied upon a vacated 2001 biological opinion. The court vacated and remanded both the regulations and the biological opinion but in its subsequent opinion on motions for reconsideration stay effectiveness of its order until April 1, 2004.

Center for Biological Diversity v. Federal Highway Administration, 2003 WL 22700917 (S.D. Cal. 2003) (State Road 125). Challenge to informal consultation and biological opinion related to the construction of a toll road, State Road 125 South in San Diego County. The ESA claims involved a challenge to two FWS non-jeopardy biological opinions for six species (quino checkerspot butterfly, spreading navarettia, San Diego fairy shrimp, vernal pools, California gnatcatcher, Least Bell’s vireo) and to an informal consultation between FHWA and FWS on the Otay Mesa Mint. The Court granted

summary judgment on all issues to the Federal agencies, finding that the both the informal consultation and biological opinions were supported by the record.

Defenders of Wildlife v. Flowers, 2003 WL 22143263 (D. Ariz. 2003), appeal pending. Challenge raising 5 distinct claims regarding U.S. Army Corps of Engineers' administration of Clean Water Act Section 404 program related to the Cactus ferruginous pygmy owl in southern Arizona. In a series of opinions, the Court granted summary judgment for the Corps and FWS with respect to all claims. The found that Plaintiffs' claim that the Corps had a "pattern, practice, and policy" of making "no effect" determinations regarding 404 permits issued for activities in unoccupied pygmy-owl habitat was not justiciable because it failed to challenge specific agency actions. The Court found two of the three Corps' "no effect" determinations to be supported by the record. As to the third "no effect" determination, the Court did not reach the merits but dismissed the challenge for lack of standing. The Court entered judgment for FWS with respect to a Biological Opinion regarding the Saguaro Canyon development in northern Tucson, finding the claim to be moot because EPA had transferred the NPDES program to Arizona before the action that was the subject matter of the BO (approval to discharge under the federal NPDES stormwater permit) could take place..

Center for Biological Diversity v. Fish and Wildlife Service, No. 02-412 (C.D. Cal. 2003) (Order dated November 12, 2003). Plaintiff alleged violations of the APA and ESA by the Fish and Wildlife Service in association with (1) the issuance of a Biological Opinion with respect to a proposed sand and gravel mining operation in Los Angeles County, California and (2) a determination not to designate critical habitat for the listed Unarmored Three-spined Stickleback. The court granted the Federal defendant's motion for summary judgment.

Save Our Springs Alliance v. Cooke, 2002 WL 31757473 (W.D.Tex. Nov. 12, 2002) Plaintiffs alleged that "national FWS officials shifted positions from the draft biological opinions in response to pressure from the political appointees at the EPA and the lobbying muscle of TxCABA." Plaintiffs point to the "abrupt about-face of FWS" between the draft Biological Opinion and the final no-jeopardy opinion as evidence of political influence *per se*." Citing *Southwest Center*, court finds that political concerns are not relevant and, in any event, "the Austin Field Office of the FWS could have just as easily been motivated by political pressure as the national office."

Pacific Coast Fed'n of Fishermens Ass'ns v. National Marine Fisheries

Service, 265 F.3d 1028 (9th Cir., Sept. 5, 2001). Court held that NMFS' "no jeopardy" determinations in four separate biological opinions concerning the impact of 23 proposed timber sales on the Umpqua River cutthroat trout and the Oregon Coast coho salmon were inadequately supported by the best available science. Court reasoned that NMFS failed to address the long-term, cumulative effects of individual timber sales on small tributaries within watersheds.

Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1992). Secretary acted within its discretion in choosing data on which to rely. Despite uncertainty of data, NMFS complied with ESA by basing its decision on best available scientific data and grounding its decision in consideration of relevant factors.

Alabama Power Co. v. FERC, 979 F.2d 1561 (D. D.C. 1992). FERC not liable for failure to study snail under low flow conditions because of impossibility.

Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984). Agency that does not initiate feasible and necessary tests or studies or initiates test and studies and then acts prematurely before results are known violates requirement of basing decision on "best scientific and commercial data available."

Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983), *aff'd* 716 F.2d 946 (1st Cir.). ESA imposes continuing duty to consider ongoing studies for determination even though the studies were not available at time determination was made.

Roosevelt Campobello Park Commission v. EPA, 684 F.2d 1041 (1st Cir. 1982). EPA did not comply with duty to obtain best available evidence because of evidence submitted that real time simulation study was necessary to finding of determination of safety.

E. Timing for Formal Consultation.

1. Generally, formal consultation must be concluded within ninety days from the date on which it is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).
2. If no permit or license applicant is involved, the consulting and action agencies may agree to extend the consultation period for any period of time that is mutually agreeable to them. *Id.*

3. During formal consultation, the consulting agency may request the action agency for an extension of consultation in order to obtain better information upon which to issue a biological opinion. 50 C.F.R. § 402.14(f).
 - a. Such a request does not "suspend" the consultation period, which may only be extended in accordance with the procedures in the statute and regulations.
 - b. If the action agency does not agree to the extension, the consulting agency will issue a biological opinion using the best data available. Id. The action agency runs the risk, however, that a reviewing court may conclude that the information requested is "available" and that the action agency has violated its obligations under ESA section 7(a)(2) by not obtaining it for consideration in the biological opinion.

F. New Information and Re-initiation of Consultation.

If new information develops which indicates that agency action might threaten an endangered species, consultation must be reinitiated.

Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. United States Department of Energy, 232 F.3d 1300 (9th Cir., Nov. 20, 2000). National Defense Authorization Act of 96 exempted Department of Energy from reinitiating consultation with Fish and Wildlife Service prior to sale of oil field tract containing endangered species and permitted private purchaser to step into shoes of Department and continue oil field operations under Department's existing biological opinion.

Greenpeace, American Oceans Campaign, and Sierra Club v. National Marine Fisheries Service, 80 F.Supp.2d 1137 (W. D. Wash. Jan. 25, 2000). Reinitiation of consultation does not moot a pending Section 7 claim.

Center for Marine Conservation v. Brown, 917 F. Supp. 1128 (S.D. Tex. 1996). Record established that federal defendants reinitiated consultation, as required under ESA regulation, in response to increased levels of turtle strandings.

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987). Not "every modification of or uncertainty in a complex and lengthy project requires the action agency to stop and reinitiate consultation."

Village of False Pass v. Watt, 565 F. Supp. 1123, (D. Alaska 1983), aff'd, 733 F.2d 605 (9th Cir. 1984).

North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1979), aff'd in part, rev'd in part on other grounds, 642 F.2d 589 (D.D.C.).

G. Limitation on Commitment of Resources (Section 7(d))

1. From the time that the agency initiates or reinitiates consultation, Section 7(d) prohibits action agencies from making any "irreversible or irretrievable" commitment of resources "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative" to the proposed agency action. 16 U.S.C. § 1536(d).
2. **Injunctive relief** can be obtained if consultation is not complete and the action constitutes an irreversible and irretrievable commitment of resources

Southwest Center for Biological Diversity v. U.S. Forest Service, Nos. CV 97-66 TUC JMR, CIV 97-2562-PHX-SMM (D. Ariz. Mar. 30, 2001). Court declined to enjoin grazing during voluntary remand in case challenging sufficiency of Section 7 consultation concerning effects of multiple grazing permits on the endangered Mexican spotted owl and the threatened loach minnow. Court found that continued grazing during consultation was not likely to jeopardize the continued existence of the species. Court considered economic hardship to ranchers that would result from requested injunction, because plaintiffs made insufficient showing that continued grazing would result in irreparable harm to the species.

Southwest Center for Biological Diversity v. U.S. Forest Service, 82 F.Supp.2d 10070 (D. Ariz. Feb. 1, 2000). Court held that initiation of consultation moots 7(a)(2) claim in case challenging management of Tonto National Forest.

Pacific Rivers Council v. Robertson, 854 F. Supp. 713 (D. Or. 1993), *aff'd in part, rev'd in part* **Pacific Rivers Council v. Thomas**, 30 F.3d 1050 (9th Cir. 1994), *on remand*, Civ. No. 92-1322 (D. Or. 1994). Injunction on implementation of Forest Services' land resource management plans pending completion of FWS consultation on threatened salmon.

The Bays' Legal Fund v. Browner, 828 F. Supp. 102 (D. Mass. 1993), *vacated without opinion*, Civ. No. 93-2128 (1st Cir. 1994). Denying injunction and allowing continued construction of sewage outfall tunnel.

Forest Conservation Council v. Espy, 835 F. Supp. 1202 (D. Idaho 1993). Allowing construction of Forest Service road.

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).

National Wildlife Federation v. National Park Service, 669 F. Supp. 384

(D. Wyo. 1987).

Enos v. Marsh, 616 F. Supp. 32 (D. Haw. 1984), aff'd, 769 F.2d 1363 (9th Cir. 1985).

North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1979), modified, 642 F.2d 589 (D.C. Cir. 1980).

H. Challenges Under Section 7

National Wildlife Federation v. Caldera, 2002 WL 628649 (D.C.C., Mar. 26, 2002) (Florida panther) Court dismissed plaintiffs' claims in this lawsuit challenging 23 Corps of Engineers permits for projects located in possible Florida panther habitat. Plaintiffs claimed that the permits were "examples" of allegedly unlawful permitting and ESA consultation procedures on the part of the Corps and the U.S. Fish and Wildlife Service, respectively. The court held that such programmatic claims are precluded under the Supreme Court's decision in Lujan v. National Wildlife Federation and related cases. Noting that plaintiffs' challenge to the Corps' nationwide permits poses a "loose end", the Court left the door open for plaintiffs to refile a lawsuit to pursue a challenge seeking "consideration of whether any more work could be done under those (nationwide permits) in the areas of panther habitat."

Okanogan County v. NMFS No. CS-01-192-RHW (E.D.Wash., Mar. 14, 2002) Court granted summary judgment on all counts to NMFS. The Court found that the Organic Act gives the Forest Service the authority to impose instream flows where consistent with the forest purposes. The Court also upheld the validity of NMFS' biological opinion. In addition, it found that NMFS' guidance document for making jeopardy determinations where the action involves impacts to habitat was not a rule requiring notice and comment.

Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service, 273 F.3d 1229 (9th Cir. 2001). Court held that FWS acted arbitrarily and capriciously by issuing Incidental Take Statements imposing terms and conditions on land use permits where there either was no evidence that the endangered species existed on the land or no evidence that a take would occur if the permit were issued. Court also found that FWS was arbitrary and capricious in issuing terms and conditions so vague as to preclude compliance.

San Carlos Apache Tribe v. United States of America, No. 99-255-T-ACM (D. Ariz., Nov. 19, 2001). Plaintiffs alleged that Bureau of Indian Affairs unlawfully failed to consult over the operation of Coolidge Dam. Court held that plaintiffs failed to provide requisite 60-day notice but proceeded to address merits of claim that BIA has sufficient discretion over water discharges to trigger ESA consultation

requirements. Court found, as a matter of law, that BIA has discretion over water discharges by virtue of its ownership of the dam and the fact that Congress retained the ability to modify operations of the reservoir by subsequent legislative enactment. Since Congress had specifically altered project operations by legislation several times, the court reasoned that it must have impliedly amended its own legislative limitations on the project when it passed the ESA in 1973.

Environmental Protection Information Center v. The Simpson Timber Co., 255 F.3d 1073 (9th Cir., July 9, 2001). Plaintiffs challenged alleged failure by FWS to reinitiate consultation with itself about the effect that an incidental take permit issued to lumber company concerning the northern spotted owl might have on the marbled murrelet and the coho salmon. Court affirmed district court ruling that FWS lacked sufficient discretionary control over incidental take permit to trigger reinitiation of consultation.

Natural Resources Defense Council and Miccosukee Tribe of Indians v. United States, 2001WL 1491580, No. 00-0033 (S.D. Fla., June 28, 2001). Magistrate issued report and recommendation to deny plaintiffs' motion for preliminary injunction in this case challenging the Corps of Engineers' implementation of the FWS' recommended reasonable and prudent alternatives to avoid jeopardizing the continued existence of the Cape Sable seaside sparrow through the operation of the Central and South Florida Project. The record before the court indicated that some FWS staff had voiced concerns about the sufficiency of the Corps' compliance to date. However, the court deferred to the Corps' expertise in interpreting the complex hydrological models used by both agencies to gauge compliance with the FWS recommendations. The magistrate did not address the merits of our motion for summary judgment.

Greenpeace Foundation v. Evans, No. 00-00068 SPK-KSC (D. Haw., June 14, 2001). Court denied plaintiffs' request for injunction to halt bottomfish fishery pending completion of ESA consultation. Court reasoned that plaintiffs failed to show that continued bottomfish fishing is unlikely to cause injury or irreparable harm to seals pending completion of a new EIS and biological opinion by NMFS.

Mount Graham Coalition and Apache Survival Coalition v. McGee, No. CIV 00-412 TUC ACM (D. Ariz., May 21, 2001) (Memorandum of Decision). No further ESA consultation necessary for installation of buried powerline where Congress expressly authorized construction of telescopes and necessary support facilities without further compliance with environmental statutes.

Sierra Club v. U.S. Army Corps of Engineers, No. 3:99-cv-286-J-I6B (M. D. Fla. Dec. 13, 2000) (appeal pending). Court upheld challenge to sufficiency of consultations on Corps of Engineers permits for construction of Suncoast Parkway Tollroad.

Hells Canyon Preservation Council v. U.S. Forest Service, No. 00-755-HU (D. Or. Mar. 30, 2001). Plaintiffs allege that the failure to consult on the 1994 public and private regulations in the Hells Canyon National Recreation Area violated ESA Sections 7(a)(1) and 7(a)(2).

Hawksbill Sea Turtle v. Federal Emergency Management Agency, 11 F. Supp.2d 529 (D. V.I. 1998). Court denied plaintiffs' request for declaratory and injunctive relief and upheld determinations by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that the emergency housing project is not likely to adversely affect the endangered Virgin Islands tree boa, the endangered hawksbill sea turtle, or the threatened green sea turtle, under Section 7(a)(2) of the ESA. FEMA's actions to protect threatened and endangered and threatened species were sufficient under Section 7(a)(1) of the ESA. FEMA's actions had not resulted in any unauthorized "taking" of these species under Section 9 of the ESA.

Pacific Coast Federation of Fishermen's Assoc. v. NMFS, No. 97-775 (W.D. Wash., May 29, 1998). This case challenges both programmatic and site-specific consultations regarding the Umpqua cutthroat trout and Forest Service timber harvesting in the Pacific Northwest under the President's Plan. Court granted summary judgment for the government on all challenges to the programmatic consultation. This is the first decision upholding streamlined consultation processes. The court granted summary judgment to plaintiffs on Count V, a challenge to a number of site-specific consultations on individual timber sales, finding the biological opinions to be inadequate.

Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724 (10th Cir. 1997). Plaintiff's action against BLM claiming that it violated ESA by failing to consult with FWS regarding impact that BLM's management schedule for wilderness study area might have on threatened Welsh's Milkweed, was moot, where BLM completed informal consultation with FWS and received FWS's written concurrence in schedule, concurrence specifically stated that schedule would not adversely impact Milkweed, and only relief sought was consultation.

Fund For Animals v. Rice, 85 F.3d 535 (11th Cir. 1996). FWS was justified in issuing "no jeopardy" biological opinion concerning landfill project's effect on Florida Panther where there had been no verified panther sightings in ten years, the Florida Panther Habitat Protection Plan concluded that no habitat existed in that county, the land was not designated as critical habitat, and the area was not reintroduction site for Florida Panthers.

Northwest Resource Information Center v. NMFS, 56 F.3d 1060 (9th Cir. 1995). Environmental organizations' claim that NMFS violated ESA by issuing permit for collection and transportation of endangered species of salmon concerned expired permit and, thus, was moot.

Idaho Dep't of Fish & Game v. NMFS, 850 F. Supp. 886 (D. Or. 1994), **dis'd as moot**, 56 F.3d 1071 (9th Cir. 1995). Court held that NMFS' BO for operation of Northwest dam system on endangered salmon populations was arbitrary and capricious and an abuse of discretion.

Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1992). NMFS fulfilled procedural and substantive duties under § 7 in setting a total allowable catch of pollock in Gulf of Alaska which allegedly threatened the Stellar sea lion.

Pyramid Lake Paiute Tribe v. U.S. Department of Navy, 898 F.2d 1410 (9th Cir. 1990).

American Littoral Society v. Herndon, 720 F.Supp. 942 (S.D. Fla. 1988).

Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984). In issuing final notice of sale of leases for oil, Secretary did not violate ESA by failing to adopt specific measures to protect whales from oil spills, because it was only making recommendations that would be later implemented after lease and he specified continuing control of any post-sale drilling.

Thomas v. Peterson, 589 F. Supp. 1139 (D. Idaho 1984). Forest Service complied with Section 7 by considering effect of road construction on Rocky Mountain gray wolf, despite FS' failure to comply with duty to inquire from FWS what endangered species occurred in area.

Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976).

I. Exemption From Duty to Avoid Jeopardy - "God Committee" (Section 7(e)-(h))

Exemption from the consultation requirements of Section 7(a)(2) may be sought by application to the "God Committee" which is comprised of 7 Cabinet Secretaries and agency administrators. See CRS publication "Endangered Species Act: The Listing and Exemption Processes" CRS No. 90-242 ENR (May 8, 1990)

- 1. Northern Spotted Owl:** Exemption Committee granted the BLM an exemption from ESA Section 7 for 13 timber sales that would jeopardize the Northern Spotted Owl; **Portland Audubon Society v. The Endangered Species Committee**, 984 F.2d 1534 (9th Cir. 1993) (petition challenging exemption dismissed by Court after BLM stated it would not go forward with exempted sales.)
- 2. Snail Darter:** exemption denied. Congress later passed special legislation allowing Tellico Dam to be completed. See **TVA v. Hill**, 437 U.S. 153 (1978).

3. **Grayrocks Dam (Nebraska v. REA)** - prior to Northern Spotted Owl, only exemption ever granted by the "God Committee."

VII. Section 9 - "TAKINGS," CRIMINAL/CIVIL SANCTIONS - 16 U.S.C. 1538

- A. Prohibitions for Endangered/Threatened Species: Section 1538(a) provides as follows:
- (1) Except as provided in Sections 1535(g)(2) and 1539 . . . with respect to any **endangered** species of **fish or wildlife** . . . **it is unlawful for any person** subject to the jurisdiction of the United States to --
- (A) import any such species into, or export any such species from the United States;
 - (B) **take** any such species within the United States or the territorial sea of the United States;
 - (C) **take** any such species upon the high seas;
 - (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
 - (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
 - (F) sell or offer for sale in interstate or foreign commerce any such species; or
 - (G) violate any regulation pertaining to such species or to any **threatened** species of fish or wildlife....
- (2) Except as provided in §1535(g)(2) and 1539 . . . with respect to any **endangered species of plants** . . . , it is unlawful for any person subject to the jurisdiction of the United States to --
- (A) import any such species into, or export any such species from, the United States;
 - (B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;
 - (C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial

- activity, any such species;
- (D) sell or offer for sale in interstate or foreign commerce any such species; or
- (E) violate any regulation pertaining to such species or to any **threatened** species of plant....
- (g) It is unlawful for any person subject to the jurisdiction of the United States to **attempt to commit, solicit another to commit, or cause to be committed**, any offense defined [16 U.S.C. §§ 1538(a)(1) or (2)]

B. Prohibitions for Threatened Species Found Primarily In Regulations

Fund for Animals v. Turner, Civ. No. 91-2201, 1991 WL 206232 (D.D.C. Sept. 27, 1991). Court preliminary enjoined FWS regulation authorizing hunt in Montana of the threatened grizzly bear.

Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984), modified, 755 F.2d 608 (8th Cir.), on remand, 607 F. Supp. 737 (1985). Court held that regulations could not permit take of threatened species absent showing of extraordinary population pressures on ecosystem.

C. What is a "Take":

1. **Statutory definition of take:** To "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).
2. **Regulatory definition of "harm":**
 - a. U.S. Fish and Wildlife Service ("FWS") regulations further define "harm" to mean an act which actually kills or injures fish or wildlife, but such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3.

Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt, 515 U.S. 687 (1995).

Upholding habitat modification portion of FWS's harm definition.

Palila v. Hawaii Department of Land and Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988) (Palila II). Upheld habitat modification portion of FWS's harm definition.

- b. The National Marine Fisheries Service ("NMFS") recently published a regulatory definition of "harm" under the ESA. 64 Fed. Reg. 60,727 (November 8, 1999); 50 C.F.R. § 22.102. According to this definition, "harm" means an "act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation, which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding spawning, rearing, migrating, feeding or sheltering." Thus, the NMFS definition adds to the list of essential behavioral patterns "spawning, rearing, migrating" in its definition of "harm." 50 C.F.R. § 222.102.

3. Cases Examining Whether Take has Occurred

a. Government enforcement cases

i. Criminal

United States v. Clavette, 135 F.3d 1308 (9th Cir. 1998). Clavette found guilty of illegally killing grizzly bear. Sentenced to 3 years probation, \$2,000 fine and \$6,250 restitution to FWS. Four elements of offense: 1) Clavette knowingly killed a bear; 2) bear was a grizzly; 3) Clavette did not have a permit to kill bear; 4) Clavette did not act in self-defense or in the defense of others (if acting in self-defense, must report to FWS within 5 days). Court rejected Clavette's claim of self-defense because of inconsistencies in Clavette's story and the fact that all shots entered the bear from the rear.

ii. Civil

United States v. West Coast Forest Resources L.P., No. Civ. 96-1575-HO, 2000 WL 298707 (D. Or. Mar. 13, 2000). Government sought to enjoin clearcut harvest of private forest land in Lane County, Oregon (Good Hominy Unit) to protect spotted owls. Court denied permanent injunction and noted that "[P]laintiff has failed to satisfy its burden of establishing to a reasonable certainty that harvesting the Unit will result in significant habitat modification that would actually kill or injure the owls by significantly impairing the owls' essential behavioral patterns."

United States v. Grants Pass Irrigation District, Case No. 98-3034-HO (D. Or. May 29, 1998) (*coho salmon*). The United States moved for a TRO/PI enjoining defendant from conducting water diversion activities at Savage Rapids Dam prior to the end of the juvenile Southern Oregon/Northern California coho migration. Juvenile coho are either entrained through diversion screens or impinged on the screens during water diversion activities. Court issued TRO and parties subsequently agreed to a stipulated preliminary injunction allowing diversions, provided that monitoring indicated that the coho migration had substantially ended that year.

National Audubon Society v. 101 Ranch, Case No. 98-1414-CIV-MOORE (S.D. Fla. May 28, 1998) (*Florida grasshopper sparrow*). In order to avoid likelihood of harming endangered Florida grasshopper sparrow, court grants US motion for a preliminary injunction. Order enjoins parties to either install or restore culverts.

United States v. Town of Plymouth, 6 F.Supp.2d 81 (D. Mass. 1998) (*pipin plover*). United States sought an injunction against town seeking to enjoin authorization of off-road vehicles on town's beach out of concerns for piping plovers. Court finds that ESA's prohibitions contemplate both the actions of individuals who directly take a species and those of a third party authorized by the government to engage in an activity resulting in a taking. To prove likelihood of success on the merits, US must demonstrate that Town has caused, through its action

or inaction, the illegal taking of the piping plover on Beach or that future takes will occur if management of beach continues on its present course.

Must show actual as opposed to potential harm. Court finds that ORV access to beach has actually harmed plovers and will continue to harm them in the future if ORV access remains unchecked. Harm results from both the documented death of plover chicks and the modification of feeding habitat. Failure to take quick and decisive action to close beach resulted in death of plover chick by vehicle.

Boise Cascade Corp v. Spear, Civil No. 97-1810-JO (D. Or. Apr. 1, 1998) (*Northern spotted owls*). Boise Cascade ("BC") filed suit seeking declaratory judgment that logging of Walker Creek Unit will not constitute a "taking" of northern spotted owls because no owls currently nest there. BC sought a preliminary injunction prohibiting FWS from filing an enforcement action to prevent logging. FWS moved to dismiss on the grounds that there was no live case or controversy since it had no current plans to seek an enforcement action against BC. Court finds that "significant habitat modification -- such as Boise Cascade's proposed logging -- can constitute a taking of an endangered or threatened species even if no members of that species are immediately present." Based on the reasonable likelihood that the male Walker Creek owl will return to the site in a year or two, logging the unit could easily harm the species and thus, BC would be liable for a taking on the ESA. Accordingly, court enjoined timber harvest.

Shuler v. Babbitt, CV-96-110-GF-PGH (D. Mont. Mar. 17, 1998). Court reversed the FWS' assessment of an ESA civil penalty of \$5,000 for shooting and killing a threatened grizzly bear. The court found that Shuler had acted in self-defense when he killed the grizzly bear that "charged toward him." The court rejected the agency's finding that Shuler had provoked the conflict with the bear and therefore could not plead self-defense.

Berthelson v. USFWS, No. CV-96-136-GF (D. Mont. Mar. 9, 1998) (*grizzly bear*). In 1989, Berthelson

receives a call that a grizzly bear is in his pasture. He grabs a gun and runs out to see a mother and two cubs 150 yards away. Berthelson shoots over their heads and the bears run away. Berthelson gets in his truck and chases them at high speed over rough terrain, driving through two barbed wire fences. He kills one of the cubs and is charged with the knowing taking of a threatened species but jury acquits of criminal charges. FWS gets administrative civil penalty for \$5,000 and Berthelson claims self defense/double jeopardy. Court finds that US did not have to establish Berthelson's specific intent to take grizzly bear.

Court held that a criminal violation of the ESA is a general intent crime and the US need only prove that Berthelson knowingly shot an animal which turned out to be a protected bear. Court held that firing in the bears' direction is enough, and subject did not have to intend to kill the bear. Court finds that a person must be in imminent or immediate danger of bodily harm in order to avail himself of claim of self defense. Since Berthelson was never in any danger, he was not entitled to shoot in "self-defense". Civil penalty here was remedial and not punitive and therefore double jeopardy does not apply.

United States v. West Coast Forest Resources Ltd.,
Civ. No. 96-1575-HO (D. Or. Jul. 28, 1997).

Government sought a permanent injunction against the defendants' harvest of a 94-acre parcel of land containing habitat suitable for the northern spotted owl, alleging the harvest would result in the take of a particular pair of owls. Court found that the government had not met its burden of proof regarding take since there was no direct evidence that the owls were using the unit, but issued a one-year injunction against the defendants' harvest to allow FWS to gather information on areas actually used by owls through radiotelemetry.

United States v. Worley (S.D. Fla., Civ. No. 96-14184) (*Florida scrub jay*). Government sought injunction against property owner and lessee to prevent taking of the threatened Florida scrub jay.

Defendant Worley, the lessee of property occupied by the jays, was in the process of clearing the oak scrub on which the jay depends from the 800 acre

property without having applied for an incidental take permit, as he had previously been advised to do. The court issued a TRO. A settlement was subsequently reached with both the owner and the lessee precluding clearing unless certain conditions were met. In related criminal action, United States v. Worley, No. 97-CR-14020 (S.D. Fla.), Worley was sentenced and ordered to pay a \$17,500 fine and \$17,500 in restitution to FWS and placed on six months probation following guilty plea to a charge of taking Florida Scrub Jays.

b. Citizen enforcement cases

San Carlos Apache Tribe v. United States, 272 F. Supp2d 860 (D. Ariz 2003.). Challenge alleging that the U.S. Bureau of Indian Affairs' operation of Coolidge Dam on the San Carlos Reservoir had resulted in an illegal take under ESA section 9 and that insufficient water to properly support the Tribe's trophy fishery, in violation of federal common law of public nuisance, the National Historic Preservation Act, the Archeological Resources Preservation Act, the Native American Graves Protection and Repatriation Act, the government's tribal trust responsibility, NEPA, and the Fish and Wildlife Coordination Act. The district court granted the Federal Defendants' Motion for Summary Judgment and with respect to the ESA section 9 claim finding that Plaintiffs had not presented sufficient evidence of a take to raise a material issue of disputed fact.

Pacific Rivers Council v. Brown, 2003 WL 21087974 (D. Ore. 2003). ESA citizen suit against Oregon Department of Forestry alleging the state agency's approval of certain logging operations on private lands result in the unlawful take of threatened Oregon Coast coho salmon. Motion for preliminary injunction denied finding that the evidentiary record was not sufficiently developed to find that Plaintiffs had met their burden.

Idaho Watershed Project v. Jones, No. 00-0730-E-BLW (D.Idaho Nov. 14, 2002) Court finds that Jones had violated Section 9 by maintaining inadequately screened diversions on his property.

Center for Biological Diversity and Turtle Island Restoration Network v. NMFS, 2001 WL 1602707, No. C-01-17-6 VRW (N.D. Cal., Nov. 28, 2001). Court held that NMFS permitting process for longline fishing vessels is not subject to ESA consultation requirements. Court reasoned that permit issuance is ministerial function and NMFS lacks discretion to place conditions on permits that inure to the benefit of protected species. Accordingly, the court further held that NMFS is not liable for species takings of NMFS-

permitted third parties.

Greenpeace Foundation v. Daley, 122 F.Supp.2d 1110 (D. Haw. Jun. 5, 2000). Court found that plaintiffs demonstrated likelihood of success on the merits of their claim that the crustacean fishery in the Northwestern Hawaiian Islands harms the endangered Hawaiian monk seal but denied requested preliminary injunction because government had voluntarily suspended the fishery. At summary judgment, court found that the bottomfish fishery results in illegal “take” of the monk seal but held that plaintiffs had not proven that the lobster fishery results in take. 122 F.Supp.2d 1123 (D. Haw. Nov. 15, 2000).

Loggerhead Turtle v. County Council of Volusia, 92 F.Supp.2d 1296 (M.D. Fla. 2000). County's adoption of allegedly ineffective beachfront lighting ordinance was not cause of harm to endangered sea turtle hatchlings.

Citizens Opposing Northern Alabama Pipeline Project, Wild Alabama, and Gasp Coalition v. U.S. Fish and Wildlife Service, No.CV 99-B-0097-NE (N. D. Ala. Mar. 30, 2000). Court denied preliminary injunction and held that alleged injury to endangered species was too speculative.

Defenders of Wildlife v. Bernal, No. 98-16099, 204 F.3d 920 (9th Cir. Feb. 28, 2000). Court declined to enjoin construction of school complex on property that contained potential habitat for the endangered cactus ferruginous pygmy-owl. Court found that species was not present on property in question and credited testimony that the owl can tolerate a high degree of human presence.

Hawksbill Sea Turtle v. FEMA, 11 F. Supp.2d. 529, No. 96-114 & 97-187 (D.V.I. Jul. 7, 1998). Plaintiffs allege that construction takes Virgin Islands Tree Boa and sea turtles through excess sewage. No direct evidence establishing presence of Tree Boas on site during construction. Although project did significantly modify tree boa habitat, there was no evidence that tree boas have died or been injured as a result of changes in their feeding and sheltering patterns. Citing O'Connor's concurring opinion in Sweet Home, court finds that a “take” requires a showing of “significant habitat modification that cause actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals.” Plaintiffs failed to provide evidence of one dead or injured Sea Turtle, or studies documenting the general decline in the population since the onset of the Project.

Coastside Habitat Coalition v. Prime Properties, Inc. No. C 97-4025 CRB, 1998 WL 231024 (N.D.Cal. Apr. 30, 1998). Plaintiffs allege that protected species would be taken unless construction of private campground is

enjoined, even though FWS found that a conservation easement on the private property would ensure that no protected species were taken. Court held that, to prove take, plaintiffs must prove that (a) listed species is located on property, and (b) that defendants' activities are "reasonably certain to constitute threat of imminent harm" to the listed species. "Imminent" means "ready to take place; near at hand" (citing FCC v. Rosboro Lumber Co., 50 F.3d 781, 785 (9th Cir. 1995)). Plaintiff was unable to show the presence of any protected species on the property except within the conservation easement (which would not be affected by the construction). Court noted that defendants do not have to conduct an elaborate scientifically rigorous survey in order to defeat plaintiffs' lawsuit. Burden is on plaintiffs to demonstrate presence of species. Harm not imminent if defendant has no current plans to develop property even though all necessary permits have been acquired.

Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997), aff'd 187 F.3d. 623, 1998 WL 1085817 (1st Cir. 1998)(Table) (*Northern right whale*). Plaintiff alleges that Coast Guard is taking endangered whales through vessel impacts. As to Coast Guard vessels, both the district court and First Circuit agree that the measures voluntarily adopted by Coast Guard to protect the whales cover substance of specific measures proposed by the plaintiff. Where measures differed, the courts deferred to agency expertise. Plaintiff had also alleged that Coast Guard was liable for third party "takes" caused when a private vessel killed a whale because private vessels were required to have Coast Guard Certificates of Documentation and Inspection. Citing Strahan v. Coxe, 127 F.3d 155, 163-64 (1st Cir. 1997), the First Circuit upholds district court finding that Coast Guard not liable for takings by non-Coast Guard vessels.

Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997), cert. denied, 525 U.S. 830 and 525 U.S. 978 (1998). First Circuit finds that Massachusetts has and will cause a taking of right whales through its licensing scheme falls within "the normal boundaries of causation as interpreted in the common law." Unlike other licensing schemes where there is an intervening independent action, here the state has specifically licensed an individual to do the act which results in a taking. First Circuit also finds that an injunction issued by the district court did not impose a federal regulatory regime on state in violation of 10th Amendment.

Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995), aff'd as amended, 83 F.3d 1060 (9th Cir. 1996), cert denied, 519 U.S. 1108 (1997). Defendant's implementation of timber harvest plan would "harm" the endangered species as defined in 50 C.F.R. § 17.3, and thereby cause a "take" of the species in violation of 16 U.S.C. § 1538(a)(1)(B).

Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir.

1995). In action to enjoin lumber company from clear-cutting timber on private lands plaintiff showed that defendant's proposed harvest was reasonably certain to injure the endangered owls by significantly impairing their essential behavioral patterns, including breeding, feeding, and sheltering. Court held that injury to wildlife occurs, in the past, present, or future, would satisfy the injury requirement of the Secretary's definition of "harm", including "actual injury.

Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508 (9th Cir. 1994) (corn spill was localized in nature and did not cause significant habitat modification or cause significant impact).

American Bald Eagle v. Bhatti, 9 F.3d 163 (1st Cir. 1993) (no violation where there is no evidence that deer hunt actually caused harm to bald eagles).

United States v. Glenn-Colusa Irrigation Dist., 788 F.Supp. 1126 (E.D. Cal. 1992) (order permanently enjoining water district from diverting water through defective intake pipes that resulted in death of endangered species).

Morrill v. Lujan, 802 F.Supp. 424 (S.D. Ala. 1992) (habitat modification caused by beach development did not constitute "harm" to Perdido Key beach mouse because no showing that actual injury would occur to mouse).

Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991), **aff'g Sierra Club v. Lyng**, 694 F. Supp. 1256 (E.D. Tex. 1988) (enjoined Forest Service timber practices following documented dramatic decline in red-cockaded woodpecker colonies directly traceable to lumbering practice).

Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990) (evidence did not establish that diversion of water actually caused spawning problems).

Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294 (8th Cir. 1989) (EPA authorization of strychnine held a "take").

Nat'l Wildlife Fed'n v. National Park Service, 669 F. Supp. 384 (D. Wyo. 1987) (insufficient evidence of injury from plan designed to reduce conflicts between humans and grizzly bear).

- D. Regulatory Definition of "Harass":** "Harass" is also defined as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns. 50 C.F.R. § 17.3.

Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995). Defendant's implementation of timber harvest plan would "harass" endangered bird as defined in 50 C.F.R. § 17.3, and thereby cause a "take" of the species in violation of 16 U.S.C. § 1538(a)(1)(B).

E. Other cases relating to "take":

United States v. Hayashi, 22 F.3d 859 (9th Cir. 1993). Court construed term "harass" under Marine Mammal Protection Act not to include "reasonable steps" to deter porpoise from eating fish or bait off a fisherman's line.

Seattle Audubon Soc. v. Evans, 952 F.2d 297 (9th Cir. 1991). Habitat destruction leading to individual owl deaths is not a "take" as defined by the MBTA although it is a "take" under ESA.

United States v. City of Rancho Palos Verdes, 841 F.2d 329 (9th Cir. 1988). Subsequent 1988 amendment to ESA broadened definition of "person" expressly to include municipalities.

United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987). ESA taking prohibitions apply to on-reservation activities of Indians.

F. Remedies and Penalties Available:

1. Section 1540(b) provides that:

- 1) Any person who **knowingly** violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to record keeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than [\$100,000 for individuals, \$200,000 for organizations] or imprisoned for not more than one year, or both. Any person who knowingly violates any provisions of any other regulation issued under this chapter shall, upon conviction, be fined not more than \$25,000 or imprisoned for not more than six months, or both.

2. **"Knowingly"** means that the act at issue was done voluntarily and intentionally and not because of mistake or accident.² **"Knowingly"** does not

^{2/}Before 1978, Section 11(b)(1) (16 U.S.C. § 1540(b)(1)) required the government to prove that a defendant had "willfully commit[ted] [a prohibited] act." In 1978, Congress amended Section 11(b)(1) (16 U.S.C. § 1540(b)(1)) by substituting "knowingly" for "willfully." The purpose of this amendment was to make "criminal violations of the act a general rather than a specific intent

mean that the government is required to prove that the defendant knew of, or intended to violate, the law. The government is required, however, to prove that the person knew the biological identity of the fish, wildlife or plant at issue.

United States v. McKittrick, 142 F.3d 1170 (9th Cir.) cert. denied, 525 U.S. (1999). (government not required to prove the defendant knew he was shooting at a wolf in order to meet its burden in proving an ESA violation, but government rejected that position in the cert. opp. petition).

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 697 n. 9 (1995). The "knowingly violates" or "otherwise violates" provision of the ESA should be "read to incorporate ordinary requirements of proximate causation and foreseeability".

United States v. Kuipers, 1994 WL 130770 (N.D. Ill. 1994) (evidence of previous illegal possession of protected species is probative of intent, knowledge and absence of mistake), *aff'd* **United States v. Kuipers**, 49 F.3d 1254 (7th Cir. 1995).

United States v. Ivey, 949 F.2d 759 (5th Cir. 1991).

United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1990). The term "knowingly" does not mean that the prosecution must show that the defendant knew that the act he or she "knowingly" committed constituted a violation of law.

United States v. St. Onge, 676 F. Supp. 1044 (D. Mont. 1988) (grizzly bear).

United State v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) (Florida panther).

Note, however, that the government has recently decided it will no longer employ an instruction informing the jury that the government need not prove a defendant knew the biological identity of the animal at issue at the time it was

crime... See H.R. Rep. No. 1625, 95th Cong., 2d Sess. 26, reprinted in 1978 U.S. Code Cong. & Admin. News 9453, 9476; H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 26, reprinted in 1978 U.S. Code Cong. & Admin. News 9484, 9493. The committee explicitly stated that it did "not intend to make knowledge of the law an element of . . . criminal violations of the Act."

taken.

3. **Defenses.** Protection from bodily harm is a defense. 16 U.S.C. § 1540(b)(3). Protection of property is not.
4. **Criminal Penalties.**
 - a. **Violations Involving Endangered Species.** The ESA imposes a Class A misdemeanor penalty of up to 1 year imprisonment, a \$100,000 fine, or both, for anyone who knowingly violates any provision relating to endangered species. ESA § 11(b)(1), 16 U.S.C. § 1540(b)(1); 18 U.S.C. § 3571. For individual defendants, Sentencing Guidelines base offense level and specific offense characteristics found at § 2Q2.1.
 - b. **For Violations Involving Threatened Species.** Anyone who knowingly violates any regulation relating to threatened species, is subject to a Class B misdemeanor penalty of up to 6 months imprisonment, a fine of up to \$25,000, or both. Defendants are not entitled to a jury trial for petty offense violations involving threatened species, even though fines exceeds amount specified in 18 U.S.C. § 19.

United States v. Clavette, 135 F.3d 1308 (9th Cir. 1998). Despite fact that violation of regulation pertaining to threatened species (grizzly bear) carries a maximum penalty of \$25,000, it is still a “petty offense,” for which there is no right to a jury trial.
 - c. **Other Criminal Remedies.** The ESA does not provide for a felony criminal penalty, but ESA violations are often incorporated as the “triggering,” or underlying offense within a felony Lacey Act charge. The Lacey Act provides a Class D felony penalty of up to 5 years imprisonment, fine of up to \$250,000 (for individuals, \$500,000 for organizations), or both, for knowingly importing, exporting, transporting, selling, receiving, acquiring or purchasing any wildlife, fish or plant taken, possessed, transported, or sold in violation of any U.S. law (including the ESA). See 16 U.S.C. §§ 3372 (prohibited acts) and 3373(d)(1) (felony provisions); 18 U.S.C. § 3571. Consequently, an ESA violation can often be prosecuted as a felony under the Lacey Act.
5. **Unit of Prosecution.** It is not settled whether offenses involving more than one animal or more than one protected species result in multiple liability. The "unit of prosecution" varies. By analyzing the other wildlife statutes, "taking" violations, for instance, may be prosecuted in a number of ways.
 - One count per day

- One count for all animals taken per day. **Rogers v. United States**, 367 F.2d 998 (8th Cir. 1966), cert. denied, 386 U.S. 943 (1967)
- One count per species per day
- One count per species taken per day. **United States v. FMC Corp.**, 572 F.2d 902 (2nd Cir. 1978)
- One count per animal. **United States v. Equity Corp.**, Cr. 75-51 (D. Utah Dec. 8, 1975); **United States v. Stuarco Oil Co.**, 73-CR-129 (D. Colo. Aug. 17, 1973)
- One count per act resulting in a violation
- One count per act (e.g., poisoning) resulting in a violation. **United States v. Corbin Farm Service**, 444 F. Supp. 510, 531 (E.D. Cal.), aff'd in part, 578 F.2d 259 (9th Cir. 1978)
- One count per year: **United States v. Tempotech Industries, Inc.**, 100 F.3d. 941 (Table), 1996 WL 14056 (2nd Cir. 1996) (in a Lacey Act prosecution, the court found that so long as method of aggregating offenses is reasonable, the government need not charge a defendant with the smallest unit of prosecution).

6. Civil Penalties. Up to \$25,000 for each violation. 16 U.S.C. § 1540(a).

United States v. Menendez, 48 F.3d 1401 (5th Cir. 1995) (discussing procedural issues surrounding imposition of administrative penalties).

United States v. Nguyen, 847 F. Supp. 496 (S.D. Miss. 1994).

In addition, the Secretary may modify, suspend, or revoke, inter alia, any permit or license to import or export fish or wildlife or any federal grazing permit held by anyone convicted of a criminal violation of the ESA and the government need not compensate that person for the loss of them. 16 U.S.C. § 1540(b)(2).

Underwater Exotics, Ltd. v. Secretary of the Interior, 1994 WL 80878 (D. D.C. 1994)(permit modification upon renewal upheld).

7. Civil Forfeiture. Provided for listed plants and animals and for equipment used in furtherance of an unlawful act.

16 U.S.C. § 1540(e)(5) (incorporating customs law for ESA seizure and forfeiture)

19 U.S.C. §§ 1581 et seq. (customs enforcement law, including seizure and forfeiture)

United States v. One Handbag of Crocodilus Species,

856 F. Supp. 128, 132-34 (E.D. N.Y. 1994).

United States v. 2,507 Live Canary Winged Parakeets, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988).

United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare, 636 F. Supp. 1281, 1283-87 (S.D. Fla. 1986).

Andrus v. One Leopard Skin and Skull, 485 F. Supp. 320 (D. Del. 1980) (property is not subject to ESA forfeiture if owner did not violate Act and did all possible to comply).

Delbay Pharmaceutical v. Dep't of Commerce, 409 F. Supp. 637 (D.D.C. 1976).

8. Injunctive Relief. May be sought by the Department of Justice against any person alleged to be in violation of any provisions of the Act or its regulations. 16 U.S.C. § 1540(e)(6);

United States v. Glenn-Colusa Irrigation District, 788 F. Supp. 1126 (E.D. Cal. 1992) Water district enjoined from pumping water from Sacramento River to protect the threatened winter-run chinook salmon.

VIII. Section 9 - CITES IMPLEMENTATION

- A. The ESA also serves as the domestic legislation which implements the **Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)**. T.I.A.S. 8249. Species listed by the 140-odd member nations are placed on one of three appendices and given a sliding scale of protection from Appendix I (greatest) to Appendix III (least). 50 C.F.R. § 23.23. Requirements on importation of species protected by CITES generally are found in 50 C.F.R. Part 23. The ESA provides a Class A misdemeanor sanction for anyone who violates the requirements of CITES. Specifically, ESA provides that it is unlawful to:

1. import fish, wildlife, or plant contrary to the Convention on International Trade in Endangered Species of Wild Fauna or Flora ("CITES") ESA § 9(c), 16 U.S.C. § 1538(c).

8. possess any fish, wildlife, or plants unlawfully imported. Section 9 (b)(1) (16 U.S.C. § 1538(b)(1)).

United States v. Winnie, 97 F.3d 975, 976 (7th Cir. 1996). For violations of the "possession" part of Section 1538(c), the five-year statute of limitations period does not begin to run until the day on which possession terminates, even if that is more than five years after the illegal importation.

B. Other Prohibitions Regarding Importation Of Wildlife

1. Unlawful to engage in business as an importer or exporter of fish or wildlife or as an importer of African elephant ivory without permission of the Secretary of the Interior. ESA § 9(d), 16 U.S.C. § 1538(d); 50 C.F.R. § 1491.
2. Unlawful to fail to file a wildlife declaration upon the importation or exportation of wildlife. ESA § 9(e), 16 U.S.C. § 1538(e); 50 C.F.R. §§ 14.61, 14.63.
3. Unlawful to import or export wildlife except at a designated Customs port of entry. ESA § 9(f), 16 U.S.C. § 1538(f); 50 C.F.R. § 14.11.

IX. SECTION 10: INCIDENTAL TAKE PERMITS AND HABITAT CONSERVATION PLANS (16 U.S.C. 1539)

A. Statutory/Regulatory Background: In the 1982 amendments to the ESA, Congress established Section 10 that allows for the "incidental take" of endangered and threatened species of wildlife by non-Federal entities. ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 17.22; see also, implementing regulations, 50 FR 39681-39691 (FWS); 55 FR 20603 (NMFS).

1. Under Section 10(a)(1)(B), the Secretary may, where appropriate, authorize the taking of federally listed wildlife or fish if such taking occurs incidentally during otherwise legal activities. This is usually done through an incidental take permit.
2. Section 10(a)(2)(A) requires an applicant for an incidental take permit to submit a "conservation

plan" that specifies, inter alia, an analysis of the impacts that are likely to result from the taking and the measures the permit applicant will undertake to minimize and mitigate such impacts.

3. Congress intended the Section 10 process to reduce conflicts between listed species and economic development activities and to provide a framework that would encourage "creative partnerships" between the public and private sectors, and state, municipal, and Federal agencies in the interests of endangered and threatened species.
4. HCPs can include conservation measures for candidate species, proposed species and other species not listed under the ESA.
5. The Secretary has established "low-effect HCPs," which apply to activities that are minor in scope and impact. Low-effect HCPs received expedited handling during the permit application processing phase. These HCPs involve minor or negligible effects on federally listed, proposed, or candidate species and their habitats or minor or negligible effects on other environmental values or resources.
6. Since late 1994 the FWS' "**no surprises**" policy has assured landowners that if "unforeseen circumstances" arise, the Services will not require the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water or other natural resources, so long as the landowner is in compliance with the HCP. Obtaining a "no surprises" assurance usually requires a landowner to undertake additional mitigation measures in the short term.

Spirit of the Sage Council v. Norton, ___ F.Supp.2d ___, 2003 WL 22927492 (D.D.C.) (No Surprises rule), appeal pending. Challenge to the "No Surprises" rule and FWS' "Permit Revocation Rule." The No Surprises rule is a 1998 rulemaking, jointly adopted by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, authorizing regulatory assurances to non-federal persons and entities who apply and qualify for an incidental take permit under section 10(a) of the Endangered Species Act. These permits are available to non-federal landowners who agree to mitigate impacts to listed species through a Habitat Conservation Plan, which must satisfy statutory screening criteria and other regulatory requirements,

including an assessment of environmental impacts. No Surprises assurances generally provide that, in the event that “unforeseen circumstances” should arise and pose adverse impacts to the species in a manner not contemplated, the Service will not seek unilaterally to modify the permit’s terms and conditions to require further commitments of land or financial resources in order to mitigate adverse impacts to ESA-listed species. The Permit Revocation Rule sets forth how the FWS’ pre-existing permit revocation authority would apply to permits issued under the No Surprises Rule.

The Court granted summary judgment for Plaintiffs, finding that: (1) the Permit Revocation Rule constituted a legislative rule requiring notice and comment; (2) a FWS 1997 notice did not provide adequate notice and comment; (3) a subsequent notice and comment period after issuance of the final Permit Revocation Rule did not cure the earlier deficient notice and comment; (4) the Permit Revocation Rule must be vacated; and (5) because the No Surprises Rule is “intertwined” with the Permit Revocation Rule, the No Surprises Rule must also be remanded.

7. FWS is available to make recommendations to property owners on ways to avoid and minimize impacts to listed species. If impacts to listed species can be avoided and minimized, a Section permit may be unnecessary. The FWS provides such technical assistance in accordance with guidelines and policy promulgated under Section 10 of the ESA and detailed in the Endangered Species Habitat Conservation Planning Handbook (Nov. 1996).
8. **Scientific or Enhancement Purposes**: Secretary may also permit any otherwise prohibited act, including takings, for scientific purposes or to enhance propagation or survival of affected species. 16 U.S.C. § 1539 (a)(1)(A); 50 C.F.R. § 17.22.

Strahan v. Center for Coastal Studies, No. 01-11061-GAO, (D. Mass., June 22, 2001). Court denied pro-se plaintiff’s motion for temporary restraining order to enjoin NMFS from proceeding with plan to disentangle endangered northern right whale. Court reasoned that NMFS held valid permit authorizing agency to take whale for “for scientific purposes or to enhance the propagation or survival” of the species.

B. Requirements for Obtaining Incidental Take Permit

1. **Conservation Plan**: Applicant for incidental take permit must develop and submit conservation plan that outlines:
 - a. impact that will likely result from taking;

- b. steps applicant will take to minimize and mitigate such impacts and funding available to implement such steps;
 - c. alternative actions applicants considered and reasons alternative are not being used. ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A).
2. **Basis for Decision:** The Secretary, after notice in the Federal Register and public comment, may grant permit if he finds that:
- a. taking will be incidental;
 - b. applicant will minimize and mitigate impacts of taking;
 - c. applicant will ensure adequate funding for conservation plan will be provided;
 - d. taking will not appreciably reduce likelihood of survival and recovery of species in the wild. ESA § 10(a)(2)(B), 16 U.S.C. § 1539(a)(2)(B).
3. **Cases Addressing Incidental Take Permit Requirements/Violations Constituting Takes**

National Ass'n of Homebuilders v. Norton, ___ F. Supp.2d ___, 2003 WL 23157770 (D.D.C. 2003) (Quino Checkerspot butterfly survey protocols). Dismissing challenge to FWS' survey protocols for Quino Checkerspot butterfly for lack of jurisdiction finding that the protocols did not constitute final agency action, the claims were not ripe for review and plaintiffs lack standing.

Fund for Animals v. Norton, ___ F. Supp.2d ___, 2003 WL 22940572 (D.D.C. 2003) Challenge to the U.S. Fish & Wildlife Service's permit program for sport hunters for the import of endangered Argali sheep trophies from Kyrgyzstan, Mongolia and Tajikistan, and to FWS' withdrawal of a proposed rule to list the species as endangered. The Court granted summary judgment for Defendant-Intervenors finding that Plaintiffs had failed to demonstrate standing. Specifically, the Court held that even if there were no import permits and even if the species was listed as endangered, the nations of Kyrgyzstan, Mongolia and Tajikistan were free to allow hunting, rendering Plaintiffs' alleged injuries nonredressable. Based on evidence filed by the Safari Club and other hunting-related intervenor groups, the Court also noted that there was evidence that the absence of legal U.S. hunting would decrease revenues to the foreign governments, and actually resulted in increasing the amount of Argali poaching.

Plum Creek Timber Co. v. Trout Unlimited, 255 F. Supp. 2d 1159 (D.

Idaho 2003). Action seeking declaratory judgment against party that sent 60-day notice of intent to sue. Action sought a declaration that a habitat conservation plan approved by FWS was valid and consistent with the ESA. The Court dismissed the complaint.

Spirit of the Sage Council v. Babbitt (D.D.C., 1:98CV01873 (EGS)) (*No Surprises*). Plaintiffs challenged the Services' so-called "No Surprises" rule, promulgated on February 23, 1998, which provides regulatory assurances to habitat conservation plan permittees that no additional land use restrictions or financial compensation will be required of them in the event of unforeseen circumstances. Plaintiffs allege that this assurance violates the standards of ESA sections 7 and 10.

Strahan v. Center for Coastal Studies, No. 01-11061-GAO, (D. Mass., June 22, 2001). Court denied pro-se plaintiff's motion for temporary restraining order to enjoin NMFS from proceeding with plan to disentangle endangered northern right whale. Court reasoned that NMFS held valid permit authorizing agency to take whale for "for scientific purposes or to enhance the propagation or survival" of the species.

National Wildlife Federation v. Babbitt, CIV-S-99-274 DFL JFM, 128 F.Supp.2d 1274 (E. D. Cal. Aug. 15, 2000) (Memorandum of Opinion and Order). Court invalidated U.S. Fish and Wildlife Service decision to issue incidental take permit allowing development in the Natomas Basin near Sacramento, California.

Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1488 (1999). Court of Appeals held that the ESA Section 10 incidental take permit exception to its "take" prohibition does not apply to, and thus except from liability, an activity performed as a mitigation measure upon which the permit is conditioned. The Court reasoned that Volusia County did not have the implied permission of FWS to "take" federally protected sea turtles incidentally through artificial beachfront lighting, based upon the County's implementation of mitigation measures specified in an incidental take permit for beach driving. Therefore, the Court concluded that both the ESA and the Service's regulations require incidental take permission to be express and activity-specific. **See also** **Loggerhead Turtle v. County Council of Volusia County**, 92 F.Supp.2d 1296 (M.D. Fla. Mar. 24, 2000) (upholding validity of incidental take permit authorizing a limited amount of beach driving and artificial beachfront lighting on county beaches despite fact that such activity disturbed turtles' nesting season).

Sierra Club v. Babbitt, 15 F.Supp.2d 1274 (S.D. Ala. 1998). This case

challenged two incidental take permits ("ITP") issued for construction of condominium developments on the southern coast of Alabama. After rejecting the jurisdictional arguments of the Government, the Court remanded the two ITPs back to FWS on ESA and NEPA grounds. The Court concluded that there was not sufficient basis in the administrative record to support the amount of offsite mitigation funding for these permits, and that there was insufficient information on Alabama beach mouse population to support a FONSI. The court established a demanding standard for FWS in approving HCPs and issuing ITPs under section 10.

Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985). The applicant must submit a comprehensive conservation plan. The Service then must scrutinize the plan and find, after affording opportunity for public comment, that: (1) the proposed taking of an endangered species will be "incidental" to an otherwise lawful activity; (2) the permit applicant will minimize and mitigate the impacts of the taking "to the maximum extent practicable"; (3) the applicant has insured adequate funding for its conservation plan; and (4) the taking will not appreciably reduce the likelihood of the survival of the species.

Southwest Diversified v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986). Permit to take endangered species did not give property interest protected by due process clause of Fifth Amendment prohibition against uncompensated takings.

C. **Minimizing Take to the “Maximum Extent Practicable”**

Sierra Club v. Gerber, 294 F.3d 173 (D.C.Cir. 2002). ESA § 10 requires FWS to find that the applicant would minimize the impacts of any incidental taking to the “maximum extent practicable.” Here FWS found that there was a “Reduced Impact Alternative” in a NEPA document. However, when developer rejected the alternative, FWS abandoned the alternative without further comment. Court found that FWS had a duty to independently evaluate alternative to find that it was not practicable.

In addition, ESA § 10(c) requires that “[i]nformation received by the [Service] as part of any [incidental take permit] application shall be available to the public as a matter of public record at every stage of the proceeding.” Court found that FWS had failed to provide the public with a map showing the location of potential habitat that applicant wanted to buy to mitigate for the effects of the action. Applicant had argued that disclosing this location would increase the price of the property

Center for Biological Diversity v. United States FWS, 202 F.Supp.2d 594 (W.D.Tex. 2002) Court finds that FWS did not have a duty to consider “Reduced Development Alternative” because mitigation was already sufficient to alleviate

impacts and the costs of the alternative would make “the project infeasible.” Further, HCP is not arbitrary merely because it does not meet recovery plan standards.

The dedicated employees of the United States Fish and Wildlife Service did their best to strike a reasonable balance between the mammon worshipers and the least of those among the species, notwithstanding the penurious resources we give Fish and Wildlife Service to safeguard us from ourselves. To the extent the Center for Biological Diversity would prefer more protection, the law and standard of review which the Court is bound to apply are on the side of the developers and shoppers. Counsel for [defendant developer] La Cantera hit a stand-up triple and the real estate magnates are winning thus far but

Mother Nature bats last.

She is a jealous manager of her players.

It is the top of the eighth.

Gerber v. Babbitt, 146 F.Supp.2d 1 (D.D.C., May 15, 2001). Court deferred to agency expertise in upholding FWS decision to issue incidental take permit for residential development within habitat of the Delmarva fox squirrel. Court upheld FWS’ determination that project applicant minimized and mitigated project impacts to the maximum extent practicable.

Sierra Club v. Norton, 207 F.Supp.2d 1342 (S.D. Ala.) court preliminarily enjoined developers finding that plaintiffs likely to succeed on claim that FWS prepared an inadequate EIS to support the issuance of an incidental take permit. Required plaintiffs to post a \$1,000.00 bond.

D. Species Reintroduction Programs

Wyoming Farm Bureau Federation v. Babbitt, 987 F.Supp. 1349 (D. Wyo. 1997), *rev’d* 199 F.3d 1224 (10th Cir. 2000). As number of wolves in Montana increases, wolves will naturally re-colonize Idaho and Yellowstone (and may be doing so already). As a recovery alternative, FWS established 2 nonessential experimental populations in Idaho and Yellowstone under 10(j). - Court finds that FWS violated 10(j) by introducing an experimental population within the species current range. FWS definition of “population” is a permissible construction of 10(j). However, court rejects FWS arguments that, there was not wholly separate geographic “population” in the reintroduction area. FWS may not treat all wolves within reintroduction area as nonessential. All overlapping animals must be accorded full protection. Court imposes a stay pending appeal.

United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998). Ninth Circuit upholds conviction of McKittrick for shooting a wolf despite Wyoming decision. Regulations creating experimental wolf population were valid.

FWS can import Canadian wolves to start experimental population. As to the “wholly separate geographically” problem, court finds that wolf is either an experimental wolf or (if the experimental population was not validly established) a fully protected wolf. In any event, reintroduction met the “wholly separate geographically requirement.” Sporadic sightings of lone wolves do not constitute an overlapping population. The Ninth Circuit specifically rejects analysis of Wyoming District Court in Wyoming Farm Bureau.

X. SECTION 11 - ENFORCEMENT RESPONSIBILITIES (16 U.S.C. § 1540)

A. Responsibilities of Commerce, Interior, and Justice:

1. Public enforcement, e.g., criminal, civil penalty, and forfeiture actions are the responsibility of the Departments of Justice, the Interior (FWS), and Commerce (NMFS). See also, 16 U.S.C. § 1540(e); 16 U.S.C. § 1532(15) (defining "Secretary" to be the Secretaries of the Interior and Commerce).
2. In addition, on occasion, the Coast Guard, the Customs Service, and the Department of Agriculture develop cases. See, 16 U.S.C. § 1540(e) (vesting enforcement authority in the Coast Guard along with the "Secretary").

XI. CONSTITUTIONAL ISSUES

A. FIFTH AMENDMENT

Tulare Lake Basin Water Storage District v. United States, ___ Fed. Cl. ___, 2003 WL 23111365 (Fed. Cl. 2003). The Court had previously found the United States liable for an Fifth Amendment taking of contractually conferred water as a result of restrictions imposed by biological opinions to protect delta smelt and winter run chinook salmon. After trial on damages, the Court awarded \$13,913,564 plus interest.

Morris v. United States, 58 Fed. Cl. 95 (Fed. Cl. 2003). Dismissing takings claim as unripe where affected party had not sought to obtain an incidental take permit from FWS for their logging activities.

Boise Cascade v. United States, 296 F.3d 1339 (Fed.Cir. 2002) Oregon timber operator was permanently enjoined from cutting down nest tree by federal district court because the harvest would likely result in an unpermitted violation of Section 9 of the ESA. While the permit application was pending, spotted owls permanently left the area, obviating the need for the permit. After the injunction was lifted, timber company filed a complaint in the Court of Federal Claims for a temporary taking. Based in part on the recent

Supreme Court ruling in **Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency**, 535 U.S. 302 (2002), the court dismissed the claims for a temporary taking finding that the mere imposition of a permitting requirement does not amount to a taking. Further the court found that the injunction was not a physical occupation type of taking.

Seiber v. United States, 53 Fed.Cl. 570 (Ct.Fed.Cl. 2002) Dismissed temporary taking claim as unripe although FWS had denied the permit. In its denial, FWS had indicated that there were several available alternatives which could be approved and therefore the denial was not final. Even if it had been ripe, however, the court found that plaintiff was not entitled to compensation.

Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (Fed. Cl., Apr. 30, 2001). Actions of NMFS and FWS imposing restrictions on plaintiffs' contractual water rights pursuant to the ESA are equivalent to physical invasion of property for which compensation is owed under the Fifth Amendment.

Croman Corp. v. United States, 49 Fed. Cl. 776 (Fed. Cl., July 12, 2001). Forest Service suspension of timber operations to conduct surveys for threatened marbled murrelets did not constitute a taking of private property without just compensation in violation of the 5th Amendment. Plaintiff's only property interest lay in its right to performance under the contract; sole remedy is for breach of contract.

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), cert. denied, 490 U.S. 1114 (1989). ESA protective regulations do not constitute a Fifth Amendment taking of property.

Southwest Diversified v. City of Brisbane, 652 F. Supp. 788 (N.D. Cal. 1986). Permit to take endangered species did not give property interest protected by due process clause of Fifth Amendment prohibition against uncompensated takings.

B. COMMERCE CLAUSE

1. POST-LOPEZ DECISIONS

GDF Realty Investments v. Norton, 326 F.3d 622 (5th Cir. 2003), pet for rehearing en banc pending. Rejecting Commerce Clause challenge to constitutionality of Endangered Species Act section 9 take prohibition as applied to six species of endangered cave invertebrates (bugs) found only in 2 counties in Texas.

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003), cert. pending. Rejecting Commerce Clause challenge to constitutionality of Endangered Species Act section 9 take prohibition as applied to the endangered Arroyo southwestern toad (found only in California) (petition for rehearing pending)

GDF Realty Investments, Ltd. v. Norton, 169 F.Supp.2d 648 (W.D. Tex., Aug. 30, 2001) (appeal pending). Court affirmed constitutionality of ESA enforcement provisions as they apply to several species of karst invertebrates that occur solely in Texas.

Rancho Viejo v. Norton, 2001 WL 1223502 (D.D.C., Aug. 20, 2001) (appeal pending). Court affirmed constitutionality of ESA enforcement provisions as they apply to southwestern arroyo toad, which occurs in California and Mexico.

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), cert. denied, 121 S.Ct. 1081 (2001). The Fourth Circuit rejected an argument by local governments that the Commerce Clause prevents the ESA from prohibiting “take” of endangered red wolves. The Court found that a regulation limiting take of red wolves on private land is a valid exercise of the Commerce Clause power, because the wolves substantially affect interstate commerce in several ways, including the promotion of tourism and scientific research. Court held that red wolf take regulation is a valid exercise of commerce clause power.

Shields and Schuehle v. Babbitt, Case No. MO-99-CA-040 (W.D. Tex., July 12, 2000) (appeal pending). Court rejected claim that the Endangered Species Act, as it would be applied if the plaintiffs were sued for “takes” of certain Edwards Aquifer species through excess groundwater pumping, amounts to an unconstitutional exercise of power under the Commerce Clause.

National Association of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998). The D.C. Circuit affirmed the Commerce Clause constitutionality of applying the ESA’s “take” provision to a single-state species, California’s Delhi Sands flower-loving fly. The Court held that the national interest in preserving “biodiversity,” as expressed in the ESA, allows Congress to act to preserve endangered species.

Building Industry Association v. Babbitt, 979 F.Supp. 893 (D.D.C. 1997). Plaintiffs challenged listing of four fairy shrimp species on commerce clause grounds claiming that intrastate, regional species that had no market value could not be regulated under the ESA because there was no commerce clause connection. The court upheld the regulation of the species on commerce

clause grounds finding that Congress intended to regulate the class of endangered species as a whole.

Sierra Club v. San Antonio, Case No. MO-96-CA-97 (W.D. Tex., Aug. 21, 1996). Court affirmed the Commerce Clause constitutionality of the Section 9 take prohibitions as applied to Edwards Aquifer species.

2. **PRE-LOPEZ DECISIONS**

Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff'd on other grounds, 639 F.3d 495 (9th Cir. 1981). Court upheld the application of the ESA to protect the endangered Palila bird. In rejecting a Tenth Amendment challenge in which the State of Hawaii asserted sovereignty over the species, the Court held that the ESA is a valid exercise of Congress' Commerce Clause authority. The Ninth Circuit affirmed the decision below, but did not address the Constitutional issue. See also **U.S. v. Bramble**, 103 F.3d 1475, 1481 (9th Cir. 1997) (relying on Palila to uphold constitutional validity of the Eagle Protection Act, 16 U.S.C. 668).

C. **FREEDOM OF RELIGION/NATIVE AMERICAN ISSUES**

1. **No ESA Exemptions For non-Alaskan Native Americans.** The ESA does not contain any exemption language pertaining to Native Americans in Hawaii or the contiguous 48 states. The ESA does carve out certain exemptions for Alaskan Natives (see 16 U.S.C. § 1539(e)(1)), which are beyond the scope of this outline. Several courts have addressed the issue of whether the ESA's prohibition on the taking of listed species, such as the bald eagle (recently downlisted to "threatened" status) violates reserved treaty rights. These cases include the following:

United States v. Dion, 476 U.S. 734, on remand 800 F.2d 771 (8th Cir. 1986). Held: the Bald and Golden Eagle Protection Act (BGEPA) abrogated any Indian treaty right to hunt bald eagles. Congress' action in 1962 amending the BGEPA to extend the ban to the golden eagle and authorizing the issuance of permits for Indian eagle hunting reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald and golden eagle, except pursuant to permit, is inconsistent with the need to preserve these species. Given abrogation of the treaty by the BGEPA, no treaty hunting right was revived under the ESA for the same conduct.

United States v. Dion, 752 F.2d 1261 (8th Cir. 1985), *rev'd*, 476 U.S. 734 (1986). Held: neither the ESA nor the BGEPA abrogated Yankton Sioux Indian treaty hunting rights regarding bald eagles and other protected birds and tribal members could hunt such birds for noncommercial purposes.

United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987). Held: the ESA abrogated Seminole Indian's treaty right to hunt protected endangered Florida panther on Seminole reservations; prohibitions against possession of Florida panther did not impose unconstitutional burden on Seminole Indian's free exercise rights, where use of panther parts was not shown to be critical or essential to the practice of a native religion. The court's conclusion that the Endangered Species Act applies to hunting by Indians on the Seminole reservations was "based on both the character of their hunting rights and on the Act's abrogation of those rights. On-reservation hunting rights are not absolute when a species such as the Florida panther is in danger of extinction. To the extent that evidence of congressional abrogation of these rights is required, that standard has been met. When Congress passed 'the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,' Tennessee Valley Authority, 437 U.S. 153, 180 (1978), and empowered the Secretary of the Interior to classify a species as "in danger of extinction," 16 U.S.C. S 1532(6), it could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers." *Id.* At 1492.

United States v. Nuesca, 945 F.2d 254 (9th Cir. 1991). Held: the ESA, containing no exemptions for native Hawaiians, does violate their equal protection rights, despite its provisions allowing native Alaskans to hunt and take listed species for "subsistence purposes." Strict scrutiny analysis does not apply here, because the ESA does not differentiate between aboriginal groups based on race, but rather, upon food supply and culture, and, under rational basis standard, differential treatment between Alaskan and Hawaiian natives is justified by the great importance of subsistence hunting to the lives and culture of some native Alaskans.

D. ABSTENTION DOCTRINE

Sierra Club v. San Antonio, 112 F.3d 789 (5th Cir. 1997), cert. denied, 522 U.S. 1089 (1998). Defendants appealed district court's grant of preliminary injunction regulating withdrawal of water from aquifer. Fifth Circuit held that abstention appeared to be manifestly warranted in light of comprehensive regulatory scheme of Texas' Edwards Aquifer Act, and thus, there was no substantial likelihood of success on merits and injunction was vacated.

XII. JUDICIAL REVIEW AND CITIZEN SUIT PROVISIONS - 16 U.S.C. § 1540(G)

A. Citizen Suit provision:

- 1.** The ESA authorizes private persons to bring suit against violators of the Act.

16 U.S.C. § 1540(g).

Bennett v. Spear, 520 U.S. 154 (1997). Under citizen suit provision, Section 1540(g)(1)(A)'s reference to any "violation" of the ESA cannot be interpreted to include the Secretary's "maladministration" of the Act. Violation does not include the Secretary's failure to perform his duties as administrator of the ESA.

2. 60-day notice must be provided to violator, including an agency, before citizen's suit can be initiated. Court interpretation of the 60-day requirement and compliance with that requirement has varied.
3. **Courts strictly construe 60-day notice requirement:**

Walt Moden v. U.S. Fish and Wildlife Service, 281 F. Supp2d 1193 (D. Ore. 2003). Challenge to FWS' denial of a petition to delist the Lost River and Shortnose Suckers, which occur in the Klamath Basin. The Court granted in part and denied in part each of the parties' motions for summary judgment. The Court dismissed a count of the complaint brought under the ESA citizen-suit provision because Plaintiffs' 60-day notice, which was inserted into their petition for delisting, was premature and thus invalid.

Strahan v. New England Aquarium, 25 Fed.Appx. 7, 2002 WL 77226 (1st Cir. 2002) (unpublished) Dismisses ESA suit because plaintiff only waited 28 days between submitting notice and filing lawsuit. Rejected plaintiff's claims that he had submitted prior notices of ongoing violation and found that a new notice and new 60 day period were required.

San Carlos Apache Tribe v. United States of America, Civ No. 99-255 TUC ACM (D.Az. Jan. 28 2002) (Amended Order) Dismissed plaintiffs claim that BIA had failed to consult over the operation of San Carlos dam because the prior notice did not provide notice of the specific claims at issue in the present litigation.

Kern County Farm Bureau v. Badgley, No. F02-5376 AWI DLB (E.D.Cal. Oct. 10, 2002) Plaintiffs submitted notice stating that they would sue for violation of a mandatory duty under Section 4 of the ESA if FWS issued a final rule listing the Buena Vista Lake shrew and endangered. Court dismissed subsequent suit finding that notice provided before a regulation is promulgated cannot be sufficient to challenge subsequent regulation.

Denison v. State of Oregon, 2002 WL 31478265 (D.Or. Sept. 11, 2002) Plaintiffs sues State of Oregon arguing that state is authorizing timber sales which result in unpermitted takes of northern spotted owls. Court refuses to

grant a preliminary injunction finding that for all but one challenged sale, plaintiff had failed to provide adequate 60 days written notice. Court deferred decision on the remaining sale.

Water Keeper Alliance v. United States Department of Defense, 271 F.3d 21 (1st Cir., Nov. 13, 2001). Court of appeals reversed district court ruling, 152 F.Supp.2d 163 (D.P.R., July 17, 2001), which granted motion to dismiss ESA claims based on 60-day notice requirement. While noting that 60-day notice requirement is strictly construed, court reasoned that notice provided by plaintiffs was adequate.

Friends of the Everglades v. U.S. E.P.A., No. 00-935 CIV-SEITZ/GARBER (S.D. Fla., Oct, 18, 2001). Court lacked jurisdiction to consider ESA claim where plaintiffs failed to file requisite 60-day notice of intent to sue. In dicta, court noted that EPA complied with ESA by obtaining “not likely to adversely affect” concurrence from FWS through informal consultation procedure.

Shenandoah Ecosystems Defense Group v. U.S. Forest Service, 144 F.Supp.2d 542 (W.D. Va., Mar. 14, 2001). Court dismissed ESA claim for lack of jurisdiction. Plaintiffs failed to file 60-day advance notice of their intent to bring ESA claim.

Hawaii County Green Party v. Clinton, 124 F.Supp.2d 1173 (D. Haw. Jul. 10, 2000). Court granted motion to dismiss case United States Navy’s development deployment of low frequency sonar defense system.

Idaho Steelhead and Salmon Unlimited v. United States Arm Corps of Engineers, No. 99-170-MA (D. Or. Jan. 5, 2000). Court granted motion to dismiss case challenging Corps of Engineers decision to relocate Caspian terns in Columbia River Estuary.

Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520-22 (9th Cir. 1998). A notice letter must alert the recipients to the actual violation alleged in a subsequently filed complaint, and insufficiency of such notice will be an absolute bar to jurisdiction.

Kanoa Inc. dba Body Glove Cruises v. Clinton, 1 F.Supp.2d 1088 (D. Haw. 1998). Court dismissed ESA claims for failure to provide requisite notice.

American Rivers v. NMFS, 126 F.3d 1118 (9th Cir. 1997). Notice of intent to sue to challenge prior BO and "and any revised or replacement biological opinion" failed to specifically identify objections to superseding BO and, thus, failed to satisfy jurisdictional requirement under ESA requiring 60 days notice before bringing citizens suit.

Virgin Islands Tree Boa v. Witt, 918 F. Supp. 879 (D.V.I. 1996), *aff'd* 82 F.3d 408 (3d Cir. 1996) (Table 96-7100). Plaintiffs failed to provide the requisite notice. Court denied as untimely plaintiffs' motion to amend caption to add individual who had submitted notice letter.

Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996). Sixty-day notice requirement is jurisdictional, purpose of which is to give the government and any alleged violators an opportunity to comply, and thus render a citizen suit unnecessary.

Building Industry Association of Southern California v. Lujan, 785 F. Supp. 1020 (D.D.C. 1995). Failure to comply with 60-day notice mandates dismissal, when there is a failure to comply. To claim federal question jurisdiction plaintiff must sue under the citizen suit provisions of the ESA and meet the ESA's requirements.

Lone Rock Timber Co. v. U.S. Dept. of Interior, 842 F.Supp. 4433 (D. Or. 1994). Sixty-day notice of intent to sue is jurisdictional and failure to comply is absolute bar to bringing action under statute.

Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991). Sixty-day notice requirement is mandatory, but is not jurisdictional in strict sense and may not be raised for first time on appeal to obtain reversal of adverse judgment on that basis.

Citizens Interested In Bull Run, Inc. v. Edrington, 781 F.Supp. 1502 (D. Or. 1991). Plaintiffs may not circumvent the notice requirement of the ESA by merely re-styling their claims to fit within the APA.

Humane Society v. Lujan, 768 F. Supp.360 (D.D.C. 1991). Compliance with 60-day notice requirement is mandatory and a party's "comment," submitted to an agency in the course of a rule-making, does not constitute the formal pre-suit notice required by ESA, no matter how vehemently it may have conveyed the party's intention to go to court if the rule ultimately adopted were not to its liking.

Maine Audubon Society v. Purslow, 907 F.2d 265 (1st Cir. 1990). Plaintiff's counsel sanctioned for bringing suit 1-day after notice provided.

Hallstrom v. Tillamook, 493 U.S. 1037 (1989). If party suing under RCRA's citizen suit provision fails to meet the notice and 60-day delay requirements, the action must be dismissed as barred by the terms of the statute. Supreme Court noted that the ESA notice provision would have compelled a similar

result.

Protect Our Eagles' Trees (POETs) v. City of Lawrence, Kansas, 715 F. Supp. 996 (D. Kan. 1989). Court lacked jurisdiction over claim by private association that destruction of trees constituting winter perches for bald eagles violated ESA as association had provided only 16 days notice of suit, rather than 60 days required under Act.

Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988). Letter sent to FWS persons with carbon copies to state and federal legislators and environmental groups, did not satisfy 60-day written notice requirement, even if letters specifically gave notice of violation or of intention to sue; notice had to be sent to Secretary of the Interior or Secretary of Commerce.

4. Courts liberally construing 60-day notice requirement:

Strahan v. Linnon, 967 F.Supp. 581 (D. Mass. 1997). History of litigation, coupled with plaintiff's zealous advocacy, pleadings provided defendants fair notice that plaintiff would challenge substance of related biological opinions under ESA, thus precluding relief on claim that plaintiff failed to comply with ESA's 60-day notice requirement.

Silver v. Babbitt, 924 F. Supp. 976 (D. Ariz. 1995). Filing of notice of intent to sue 60 days before filing citizens' suit against Bureau of Indian Affairs (BIA) was exception to general requirement for exhaustion of administrative remedies before seeking judicial relief; BIA appeal regulations expressly provided that BIA regulations did not apply if other regulation or statute provided different administrative appeal procedure for specific type of agency decision.

Forest Conservation Council v. Espy, 835 F. Supp. 1202 (D. Idaho 1993). Even though 60-day notice is jurisdictional court refuses to dismiss for lack of notice given unique circumstances of case and the fact that defendants would not be prejudiced.

Pacific Northwest Venison v. Smitch, 1992 WL 613294 (W.D. Wash. 1992). Dismissal of plaintiffs' ESA claim for lack of notice would be unjust; a 60-day delay would have eliminated any chance for plaintiffs to obtain relief in time to salvage breeding season. Defendants have not asserted a need for more time to prepare their case, and have provided evidence sufficient for a decision on the summary judgment motions.

Sierra Club v. Block, 614 F. Supp. 488 (D.D.C. 1985). Failure to comply with 60-day notice requirement did not render district court without

jurisdiction because group sent notice on June 7, FWS/FS replied on July 2 and 5, affirming agencies were not reconsidering their position. Defendant were not prejudiced by timing of filing complaint.

Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976). Failure to comply with 60-day notice requirements did not require dismissal of action, where there were only five or six experts in study of species involved in the world; habit, biology and other characteristics of species were fully developed at trial; and allowing defendants to further prepare for trial would produce no added evidence which would help court in its decision.

Libby Rod & Gun v. Poteat, 457 F. Supp. 1177 (D. Mont. 1978). The 60-day notice requirement pertains only to the "citizen lawsuit" provision of the Act. Plaintiff organizations claiming procedural ESA violations against agency, had right to bring action under general federal question statute without giving prior notice.

- B.** **APA Review - Final agency action** not covered by citizen suit provision is reviewable under the APA, including challenge to FWS's issuance of biological opinion.

Bennett v. Spear, 520 U.S. 154 (1997). "Two conditions must be satisfied for agency action to be "final":

1. The action must mark the "consummation" of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature.
2. The action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow."

Court held that issuance of biological opinion and incidental take statement are final agency action because they "alter the legal regime to which the action agency is subject," authorizing agency to take the endangered species if it complies with the prescribed conditions.

See RIPENESS/FINAL AGENCY ACTION/MOOTNESS Section Below

- C.** **Standing**

1. **Article III Standing:**

Bennett v. Spear, 520 U.S. 154 (1997). Injury may be produced by issuance of biological opinion, conferring prudential standing to sue wildlife agency. Court held that ESA citizen suit provision, which provides that "any person may commence a civil suit," negates the

traditional zone of interests test.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Plaintiff must demonstrate that he has suffered an “injury in fact,” an invasion of a judicially cognizable interests which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; that there be a “causal connection” between the injury and the conduct complained of: the injury must be “fairly traceable” to the challenged action of defendant, and not the result of the independent action of some third party not before the court; and that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

New York Coastal Partnership v. U.S. Department of Interior, 341 F.3d 112 (2d. Cir.). Affirming dismissal of ESA section 9 claims against federal agencies for lack of standing because plaintiffs had not identified any duty under the ESA requiring the federal agencies to act in a manner that would redress plaintiffs’ alleged injuries.

Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961 (9th Cir. 2003) Reversing district court and finding that environmental groups had adequately alleged and demonstrated procedural injury to establish standing and ripeness for an ESA section 7 challenge to USDA’s 2000 national forest plan development rule.

Alabama-Tombigbee Rivers Coalition v. Norton, 338 F.3d 1244 (11th Cir. 2003) (Alabama Sturgeon). Plaintiffs, a coalition of industries, agencies, and associations with business interests on Alabama waterways, challenged the listing of the Alabama sturgeon as an endangered species in May, 2000. Reversing District Court entry of judgment for defendants, finding that Plaintiffs had adequately demonstrated Article III standing to pursue their challenge to the listing rule.

American Society for the Prevention of Cruelty to Animals v. Ringling Brothers and Barnum and Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003). Finding former circus elephant handler had alleged sufficient present and imminent injury and redressability to establish standing to proceed with ESA citizen suit against circus for alleged ESA section 9 violations.

Cetacean Community v. Bush, 249 F.Supp.2d 1206 (D. Hawaii 2003), appeal pending. Challenge brought solely in the name of animal plaintiffs against the Department of Navy’s actions with respect to use

of sonar. The Court dismissed the action for lack of standing finding that animals lacked standing to sue under the ESA for violations of sections 7 and 9.

Alabama-Tombigbee Rivers Coalition v. Norton, No. 01-S-0194-S (S.D. Ala. July 30, 2002) Court dismissed challenge to listing of the Alabama sturgeon finding that industry plaintiffs did not have standing.

Southwest Center for Biological Diversity v. Clark, 90 F.Supp.2d 1300 (D. N.M. 1999). Individual who studied biology of spikedace and loach minnow had standing under ESA to seek designation of critical habitat at earliest possible time, even if he was not able to see or distinguish individual minnows in stream.

Nicholson v. United States, 113 F.3d 1242 (9th Cir. 1997) (Table), 1997 WL 222332. Appellants claim that FWS violated the ESA by basing a proposed rule designating critical habitat, which encompassed appellants' land, on an allegedly biased economic study. The district court held that appellants' claims were unripe and that they lacked standing. The Ninth Circuit affirmed.

National Assoc. of Home Builders v. Babbitt, 990 F. Supp. 1 (D.D.C. 1997). In case challenging FWS decision to list Texas cave invertebrates as endangered, court held that the plaintiffs in that action, trade associations representing Texas developers and builders, failed to demonstrate elements of constitutional standing.

Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993). Timber companies and trade association lack standing to sue for violations of the ESA concerning the Forest Service's Red-Cockaded Woodpecker preservation policy.

Pacific Rivers Council v. Robertson, 854 F. Supp. 713 (D. Or. 1993), *aff'd in part, rev'd in part*, **Pacific Rivers Council v. Thomas**, 30 F.3d 1050 (9th Cir. 1994). Environmental groups have standing to challenge Forest Service's alleged failure to consult NMFS about effects of land resource management plans on threatened salmon.

Forest Conservation Council v. Espy, 835 F.Supp. 1202 (D.Id. 1993). Timber company lacked standing to challenge Forest Service plan to pave a forest development road under the Endangered Species Act.

Pacific Northwest Generating Cooperative v. Brown, 38 F.3d 1058 (9th Cir. 1994). Power generating interests have standing to challenge

measures taken by Secretary of Commerce to protect listed salmon species on the Columbia River System.

2. Programmatic Consultation

Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) finds that jurisdiction under the APA is only granted for review of specific final agency actions. Plaintiffs cannot bring suit to seek to effectuate broad programmatic relief but must challenge specific actions and must demonstrate standing for each specific action.

National Wildlife Federation v. Caldera, 2002 WL 628649 (D.D.C. March 26, 2002) Plaintiffs seek to force the Corps and FWS “into a ‘consultation’ to design a program that would provide broad ‘systemic’ relief for the plight of the Florida panther. Plaintiffs argued that the specifically challenged permits are “really only examples of what plaintiffs see as rampant unlawfulness in the permitting program of the Corps and FWS.” The court found that these claims were barred by *Lujan*.

NRDC v. US Dep’t of Navy, No. 01-07781 CAS(RZx) (C.D.Cal. Sept. 17, 2002) Plaintiffs sought to force Navy to consult on its low frequency sonar “program.” Navy asserted that it had no program but merely had an office which attempted to match sonar researchers to available boats. They consulted on each research cruise but not on any overall “program.” The court found that plaintiffs programmatic challenge was barred by *Lujan*.

Washington Toxics Coalition v. EPA, No. 01-132C (July 2, 2002) (Order) Plaintiffs brought suit seeking to force EPA to consult on the effects of all of its registered pesticides on salmon. While the Court found that *Lujan* does not bar this type of programmatic challenge because plaintiff was in reality challenging 935 individual pesticide registrations. However, plaintiff had to demonstrate individualized standing for each of the 925 and could only demonstrate standing relating to 55 specific pesticides and court approved EPA’s schedule for consulting on those 55. Plaintiffs are now seeking injunctive relief limiting application of the pesticides pending the completion of consultation. There are currently two other similar suits against EPA and a third has been settled.

Hays County Water Planning Partnership v. Flowers, No. A 00 CA 826 SS (W.D. Tex., June. 25, 2001). Court denied motion to dismiss plaintiffs’ programmatic claims in this action challenging the Corps of Engineers’ authorization of wetland fills in the Barton Springs (Austin area) watershed under its nationwide permit program. Court held that the Corps’ decision not to perform a watershed-specific cumulative impact analysis prior to issuing

the nationwide permits constituted a reviewable, final agency action.

3. Prudential limitations: zone of interests.

Bennett v. Spear, 520 U.S. 154 (1997). Supreme Court overturned Ninth Circuit decision (63 F.3d 915 (9th Cir. 1995)), holding that standing is limited to persons alleging interests in conserving species. Supreme Court concluded that the ESA citizen suit provision that “any person may commence a civil suit” negates the zone of interests test.

D. Ripeness/Final Agency Action/Mootness

Rio Grande Silvery Minnow v. Keyes, 333 F.3d 1109 (10th Cir. 2003), **vacated**, ___ F.3d ___, 2004 WL 25310 (10th Cir. 2004) (Silvery Minnow). Finding appeal moot and vacating prior panel opinion.

The Ocean Conservancy v. NMFS, 2003 WL 23109904 (9th Cir. 2003) (unpublished). Dismissing as moot appeal of denial or preliminary injunction regarding NMFS issuance of a permit for scientific research into methods that might reduce endangered sea turtle bycatch during longline fishing.

Miccosukee Tribe of Indians v. United States, 259 F.Supp.2d 1237 (S.D. Fla.), **appeal pending**. Challenge to interim structural operating plan for water management in the Everglades. The Court dismissed the action as moot finding that the challenged plan had been superceded by an subsequent interim operating plan.

Sierra Club v. Norton, 74 Fed. Appx. 376, 2003 WL 22018886 (5th Cir.) (unpublished). Challenge under ESA section 7 to the National Park Service's Oil and Gas Management Plan for the Padre Island National Seashore and to NPS/FWS' informal consultation on NPS' permit to BNP Petroleum for specific wells in the Park. The Court affirmed the district court grant of summary judgment in favor the NPS holding that NPS was not required to consult on the non-binding Oil and Gas Management Plan because the plan did not constitute a final agency action requiring consultation under ESA section 7; and (2) NPS and FWS' conclusions that the specific well projects wells were not likely to adversely affect the endangered Kemp's ridley sea turtle, and therefore properly dealt with through informal consultation, were supported by the record.

Wyoming Outdoor Council v. Bosworth, 284 F.Supp.2d 81 (D.D.C. 2003). ESA section 7 challenge against the U.S. Forest Service and U.S. Bureau of Land Management related to the issuance of oil and gas leases under the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (“FOOGLRA”) in and near the Shoshone National Forest. Plaintiffs claimed that the agencies

improperly failed to consult on the leases and that the Forest Service improperly failed to -re-initiate consultation on a 1993 biological opinion. The Court granted summary judgment for the Federal agencies finding that: (1) Plaintiffs' claims concerning the failure of the agencies to consult on the leases were not ripe for review because the lessee's legal rights had not still not been determined and would not until BLM or the Forest Service approves an Application For A Permit to Drill on that lease ; and (2) that the Forest Service's decision not to re-initiate consultation was supported by the record.

Shields v. Norton, 289 F.3d 832 (5th Cir. 2002) Sierra Club sends 60 day notice of intent to sue individual water pumper in Texas for a Section 9 violation. Pumper preemptively sued alleging that the ESA exceeded Congress' power under the Commerce Clause. The district court found that the suit was ripe and upheld the constitutionality of the ESA. However, the Fifth Circuit reversed finding that the suit was never ripe because the 60 days notices "were not a sufficient threat of litigation."

Sierra Club v. US Dept of Energy, 287 F.3d 1256 (10th Cir. 2002) Sierra Club argues that DOE failed to consult when it issued an easement to build a road within the habitat of the Preble's Meadow jumping mouse. The DCT found that the claim was not ripe because the road was not yet built and several more authorizations remained to be obtained pursuant to *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). The 10th Circuit disagreed and found that NEPA claims and ESA claims could be brought before final authorization of the project.

Cascadia Wildlands Project v. US FWS, 219 F.Supp.2d 1142 (D.Or. 2002) In prior cases, the Ninth Circuit and the Supreme Court had stated that a biological opinion was final reviewable agency action because the incidental take statement acted as a type of permit altering the legal status quo. In this case, the district court found that a no jeopardy biological opinion was reviewable final agency action even though there was no incidental take statement.

Citizens for Better Forestry v. US Dep't of Agriculture, No. 01-0728 MJJ (N.D.Cal. Feb. 20, 2002) Plaintiffs argue that Forest Service should have consulted on its planning rule streamlining the timber sale approval process. Based on *Ohio Forestry*, district court finds that the case is not ripe because rules have yet to be applied to any actual sale.

Gordon v. Norton, No. 98-CV-1025-D (D. Wyo., Dec. 19, 2001) (appeal pending). Plaintiffs challenged FWS management of gray wolves in the Dunoir Valley of Wyoming and sought action by FWS to remove wolves from area of plaintiffs' property. Court held that plaintiffs failed to challenge a final agency action that

marked consummation of FWS decisionmaking process with respect to wolf pack.

Sierra Club v. U.S. E.P.A., 162 F.Supp.2d 406 (D. Md., Sept. 10, 2001). EPA's approval of state's water quality revisions and CWA § 303(d) lists were agency actions for which formal consultation and biological assessment were required under ESA. EPA ordered to complete ESA consultation with respect to Maryland's 1992 and 1995 water quality standard revisions and EPA's approval of Maryland's 1996 § 303(d) list.

Coalition for Sustainable Resources, Inc. v. United States Forest Service, 259 F.3d 1244 (10th Cir., Aug. 7, 2001). Plaintiffs alleged that Forest Service failed to implement particular forest management practices. Court held that alleged inaction was not sufficiently final for judicial review, so case was unripe.

San Juan Audubon Soc'y v. Veneman, 153 F.Supp.2d 1 (D.D.C., June 19, 2001). Court denied motion to dismiss for lack of subject matter jurisdiction, holding that U.S. Department of Agriculture's use of wildlife control devices (cyanide capsules) in certain areas to kill animals suspected of preying on livestock and to protect threatened or endangered animals was final agency action subject to APA judicial review. Court reasoned that plaintiffs were challenging the defendants' past failures to follow correct procedures and did not seek to stop placement of all wildlife control devices.

Hays County Water Planning Partnership v. Flowers, No. A 00 CA 826 SS (W.D. Tex., June. 25, 2001). Court denied motion to dismiss plaintiffs' programmatic claims in this action challenging the Corps of Engineers' authorization of wetland fills in the Barton Springs (Austin area) watershed under its nationwide permit program. Court held that the Corps' decision not to perform a watershed-specific cumulative impact analysis prior to issuing the nationwide permits constituted a reviewable, final agency action.

Wyoming Outdoor Council v. Dombeck, 148 F.Supp.2d 1 (D.D.C. Mar. 27, 2001). Court held that claims challenging alleged failure to consult on three oil and gas leases for drilling in the Shoshone National Forest were not ripe for review. Court reasoned that agency had completed only five of eight steps necessary in leasing process under the Federal onshore Oil and Gas Leasing Reform Act of 1987.

Sierra Club v. U.S. Department of Energy, 150 F.Supp.2d 1099 (D. Colo., Feb. 2, 2001). Court held that challenge to proposed expansion of gravel mining operation on federal land was unripe. Court reasoned that question of whether expansion of mining operation into threatened mouse habitat would violate the ESA could be better assessed after mining company obtained zoning approval.

Hells Canyon Preservation Council v. U.S. Forest Service, No. 00-755-HU (D.

Or. Jan. 30, 2001). Plaintiffs alleged that the failure to consult on the 1994 public and private regulations in the Hells Canyon National Recreation Area violated ESA Sections 7(a)(1) and 7(a)(2). Court held that initiation of consultation mooted a claim alleging failure to consult under Section 7(a)(2) and further noted that agency's 7(a)(1) actions are highly discretionary. See also order filed Mar. 30, 2001 (affirming magistrate's findings and recommendations as to ESA claim).

Environmental Protection Information Center v. Tuttle, 2001 WL 114422, No. C-00-0713 SC, (N.D. Cal. Jan. 22, 2001). Court held that State's adoption of Forest Practice Rules, which contain standards to be used in preparing and evaluating Timber Harvesting Plans, does not yield a ripe claim concerning alleged unlawful taking of coho salmon. Court reasoned that plaintiffs should challenge any resulting timber harvests on a case-by-case basis.

XIII. OTHER

A. Standard of Review

The Administrative Procedure Act, 5 U.S.C. § 501, et seq., provides that "final agency action" is judicially reviewable under the arbitrary and capricious standard.

1990). **Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy**, 898 F.2d 1410 (9th Cir.

State of Louisiana ex rel. Guste v. Verity, 853 F.2d 322 (5th Cir. 1988).

1987). **Environmental Coalition of Broward County v. Myers**, 831 F.2d 984 (11th Cir.

National Audubon Society v. Hester, 801 F.2d 405 (D.C. Cir. 1986).

Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985).

Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

B. FREEDOM OF INFORMATION ACT

Maine v. United States Department of the Interior, 124 F.Supp.2d 728 (D. Me. 2001). Names and addresses of individuals who offered public comments on agency's endangered species listing plan are exempt from disclosure under FOIA. See also 2001 WL 77892 (D. Me., Jan. 29, 2001) (in camera review); 2001 WL 98373 (D. Me., Feb. 5, 2001) (granting stay pending appeal).

C. FEDERAL ADVISORY COMMITTEE ACT

Idaho Farm Bureau v. Babbitt, 900 F. Supp. 1349 (D. Id. 1995). Plaintiffs' claim for injunctive relief to invalidate the final decision listing the mollusks under the FACA not granted because report was issued with participation by plaintiffs, and species listed when plaintiffs brought action.

Alabama-Tombigbee Rivers Coalition v. Dept. of Interior, 26 F.3d 1103 (11th Cir. 1994). Plaintiffs alleged that the defendants' listing of the Alabama sturgeon as an endangered species would adversely impact them economically. Just prior to release of a report on sturgeon by scientific panel structured under FACA, plaintiffs sought a TRO to stop the release of the report. FWS released the result findings supporting the listing. As a result of the FACA violations, the court permanently enjoined the defendants from using report in listing of sturgeon.

Northwest Forest Resource Council v. Espy, 846 F.Supp. 1009 (D.D.C. 1994). Forest Ecosystems Management Advisory Team work on presidential Pacific Northwest Forest Plan held to violate FACA.

Aluminum Co. of America v. NMFS, Civil No. 94-698-MA (D. Or. Dec. 7, 1994), aff'd, 92 F.3d 902 (9th Cir. 1996). Rejected claim of FACA violation during ESA consultation for meetings among sovereign federal, state, and tribal governmental representatives.

C. STATUTE OF LIMITATIONS

Strahan v. Linnon, 967 F. Supp. 581 (D. Mass. 1997). The six-year limitations statute governing actions against United States barred facial challenge to validity of regulation which was allegedly inconsistent with plain language of ESA, despite claim that limitations statute did not apply to regulations of continuing application; challenge to regulation, which stated that ESA section addressing interagency cooperation applied to actions in which there was discretionary federal involvement or control, was policy-based facial challenge, and thus, grounds for challenge should have been apparent within six-year period following promulgation of regulation.

D. INTERVENTION

Fund for Animals v. Norton, 322 F.3d 728 (D.C. Cir. 2003). Reversing district court denial of intervention to the government of Mongolia in citizen suit against FWS alleging that FWS violated the ESA in issuing permits to sport hunters to import Argali sheep trophies obtained in Mongolia, Kyrgyzstan and Tajikistan. The Court found that Mongolia had demonstrated Article III standing and met the requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a)(2).

E. RELIEF - Injunctive Standard

The ESA's citizen suit provision, 16 U.S.C. § 1540(g), allows private plaintiffs to enjoin private activities that are reasonably certain to harm a protected species.

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

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1981).

National Wildlife Fed'n v. Burlington Northern R.R., 23 F.3d 1508 (9th Cir. 1994) “In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties competing interests.” Instead, the “language, history and structure of the ESA demonstrate Congress’ determination that the balance of hardships and the public interest tips heavily in favor of protected species.”

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).

Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) - “remedy must be an injunction of the project pending compliance with the ESA for “substantial procedural violations of the ESA.”

Washington Toxics Coalition v. EPA, No. 01-132 (W.D. Wa. 2003) (Orders entered July 16 and August 8, 2003). Court had previously determined that EPA had committed substantial procedural violation of ESA section 7(a)(2) with respect to its ongoing approval of 54 pesticide ingredients and registration of pesticides containing those ingredients. The Court found that plaintiffs were entitled to injunctive relief, finding that: (1) the Ninth Circuit has held that agency actions may continue during the section 7(a)(2) consultation process so long as the actions are non-jeopardizing and will not result in a substantive violation of the ESA; (2) the action agency bears the burden to demonstrate that its ongoing actions are non-jeopardizing; (EPA had not met this burden; and (4) interim injunctive relief would be ordered including appropriate buffers. Final injunctive order is still pending.

Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995).

Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), **aff'g Pacific Rivers Council v. Robertson**, 854 F. Supp. 713 (D. Or. 1993). Injunctive relief appropriate for propose future actions constituting irreversible or irretrievable commitments of resources under ESA § 7(d).

Nat'l Wildlife Fed'n v. Burlington Northern RR, Inc., 23 F.3d 1508 (9th Cir. 1994). Federation failed to establish likelihood of irreparable future injury to grizzly bears from railroad's possible future grain spills so as to warrant preliminary

injunction.

Marbled Murrelet v. Babbitt, C93-1400-FMS (N.D. Cal. Sept. 1, 1993). Agency discretion on enforcement of Act is not judicially reviewable.

1. Injunctions Are Not Automatic - Must Still Show Imminent Irreparable Injury

National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp2d 1196 (D. Ore. 2003). Challenge to NMFS' biological opinion for operations of the Federal Columbia River Power System. The Court granted Plaintiffs' motion for summary judgment, holding that NMFS's biological opinion on the operation of the federal hydroelectric dams in the Columbia River basin was arbitrary because it relied on "speculative" future measures to avoid harm to the species. The Court declined to vacate the biological opinion, but remanded the opinion to NMFS and required a new opinion within one year.

Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, No. 02-2006 (N.D. Cal. 2003) (Order dated July 15, 2003), appeal pending, (Klamath),. Challenge to the National Marine Fisheries Service's (NMFS) 10-year biological opinion (BO) relating to Bureau of Reclamation (BOR) management of the Klamath Basin. The Court issued an order on summary judgment finding: (1) the phasing of the project and flow rates relied upon by NMFS in the reasonable and prudent alternative were supported by the record and consistent with the best available science; but (2) the RPA was invalid because it relied upon speculative future actions by third party states, Tribes and private parties to achieve long-term flow levels;(3) the incidental take statement was invalid because they did not adequately set forth the amount or extent of allowable take; and (4) the Court declined to grant the injunctive relief the Plaintiffs and Tribes sought, and left the 2002 biological opinion in place during the remand to the agency.

Southwest Center for Biological Diversity v. United States Forest Service, 307 F.3d 964 (9th Cir. 2002) The District Court found that the Forest Service was required to reinitiate consultation on a number of grazing permits in Arizona but declined to issue an injunction against grazing during that reconsultation. Plaintiffs cited *Thomas v. Peterson* and argued that an injunction was mandatory for procedural violations of this type. The Ninth Circuit disagreed and found that Thomas was only limited to "substantial procedural violations" and that this situation did not rise to that level. "[n]on-jeopardizing agency action may take place during the consultation process in

light of the protections of 7(d) where the action will not result in substantive violations of the act.”

Water Keeper Alliance v. United States Dep’t of Defense, 271 F.3d 21 (1st Cir. 2001) Plaintiffs argue that “a procedural violation of the ESA itself constitutes irreparable injury.” First Circuit disagrees and finds that the DCT was correct to require plaintiff to “show potential for irreparable harm ‘apart from the harm that they argue is inherent in a procedural violation of the ESA’s consultation requirements.’”

Furthermore, the court did not abuse its discretion when it determined that Water keeper’s assertions concerning irreparable harm stemming from the ‘death of even a single member of an endangered species’ were insufficient to justify granting injunctive relief. . . . In the absence of a more concrete showing of probable deaths during the interim period and of how these deaths may impact the species, the district court’s conclusion that Water Keeper has failed to show potential for irreparable harm was not an abuse of discretion. While these precedents direct us to give the endangerment of species . . . the utmost consideration, we do not think that they can blindly compel our decision in this case because the harm asserted by the Navy implicates national security and therefore deserves greater weight than the economic harm a tissue in Strahan [and by implication TVA v. Hill]

National Wilderness Institute v. U.S. Army Corps of Engineers, No. 01-273 (TFH) (D.D.C., May 22, 2001). Court denied motion for preliminary injunction to halt discharges of sediment and pollutants from the Washington Aqueduct into the Potomac River based on alleged ESA violations. Court noted that discharges had occurred for past ten years and held plaintiffs failed to demonstrate likelihood of imminent harm to the endangered shortnose sturgeon or the dwarf wedge mussel.

Gifford Pinchot Task Force v. United States Fish and Wildlife Service, No. C00-5462-FDB (W.D. Wash., July 12, 2001). Court denied motion for temporary restraining order to require FWS to withdraw Rogue Valley and South Coast Biological Opinion, which authorized timber sales in the consulted area for FY 1999 and 2000. The court held that FWS adequately analyzed the impact of the action on the northern spotted owl and its critical habitat in a manner consistent with the ESA.

2. **Bond**

Selkirk Conservation Alliance v. Forsgren, 01-1511-PA (D.Or. Sept. 17, 2002) District court denied plaintiffs request to enjoin timber sales. Ninth Circuit issued an injunction pending appeal and remanded to district court to determine whether a bond was required. District court finds that Sierra Club had net assets of approximately \$37 million, hundreds of employees and was

able to prosecute about 80-100 cases annually. Accordingly, court found that group would be required to pay \$100,000 bond. Ninth Circuit stayed this opinion but subsequently vacated its injunction and affirmed the district court's denial of injunctive relief.

Sierra Club v. Norton, 207 F.Supp.2d 1342 (S.D. Ala.) court preliminarily enjoined developers finding that plaintiffs likely to succeed on claim that FWS prepared an inadequate EIS to support the issuance of an incidental take permit. Required plaintiffs to post a \$1,000.00 bond.

3. Settlements with the Government

Save The Manatee Club v. Ballard, 215 F.Supp.2d 99 (Aug. 2002) DOI enters into a settlement agreement in which it agrees to issue a final rule concerning the protection of manatees throughout peninsular Florida by a date certain and specifically agrees to consider designating 17 areas as manatee sanctuaries in the rulemaking. DOI issues a rule which lists 2 of the 17 areas but "defers" a decision on the rest. Plaintiffs bring a motion to enforce the agreement alleging not only that DOI had to issue a final decision regarding the remaining 15 but seeking a court order requiring the actual designation of the 15. In numerous rulings, the DCT has indicated that DOI had an obligation to designate all 15 (not just to make a decision about all 15) and the court is now considering whether to hold DOI in contempt for failing to do so.

XIII. ATTORNEYS' FEES PROVISIONS

- A. **Attorneys' Fees.** The ESA provides for attorneys' fees to prevailing parties. 16 U.S.C. 1540(g)(4). Two 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 an award is appropriate." 16 U.S.C. § 1540(g)(4). Cases challenging the validity of the biological opinion can be compensable under the Equal Access to Justice Act in which "prevailing parties" can be awarded fees. 28 U.S.C. § 2412

Buckhannon Bd. and Care Home v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001). A party cannot be awarded fees as a "prevailing party" under the "catalyst theory" in case under statutory fee-shifting provision with prevailing party requirement.

Building Industry Legal Defense Foundation v. Norton, 259 F. Supp2d. 1081 (S.D. Cal. 2003). Challenge for allegedly improper "not prudent" critical habitat determinations for 8 California plant species. After briefing on attorneys fees, the Court found that plaintiffs, an industry group, had procedural standing to challenge a not prudent finding; but (2) denied fees in their entirety because plaintiff did not substantially contribute to the goals of the ESA.

Conservation Law Foundation v. Evans, 2003 WL 1559940 (D. Mass. 2003). Challenge to NMFS' alleged failure to issue regulations for the protection of right whales in response to right whale takings in the fisheries regulated by the agency. NMFS issued dynamic area management and seasonal area management regulations in December 2001 which resulted in the stipulated dismissal of the lawsuit. After briefing on attorneys fees, the Court found that the Supreme Court's decision in **Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources** did not apply to the ESA citizen suit provision and thus, the catalyst theory was still viable under the provision; but (2) plaintiffs total fee award should be reduced by 80% in light of the excessive hours billed by the Plaintiffs in relationship to the modesty of their successes.

Natural Resources Defense Council v. Norton, 2003 WL 22232895 (S.D.N.Y. 2003). ESA section 4 challenge to FWS' failure to timely issue a 12-month finding on a petition to list the Beluga sturgeon as endangered. Prior to the filing of Plaintiffs' lawsuit, FWS had advised plaintiffs that it had been working on the finding and that it intended to issue the required finding within two weeks. Plaintiffs nonetheless filed their lawsuit two days later. Subsequently, FWS issued the finding and after its publication in the Federal Register, the parties stipulated to dismissal of the case as moot. Plaintiffs then sought \$86,000 in attorneys' fees. The Court denied the request for fees in its entirety, finding that: (1) the Supreme Court's decision in **Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources** did not apply to the ESA citizen suit provision and thus, the catalyst theory was still viable under the provision; but (2) plaintiffs were not the catalyst as a factual matter and thus, fees were not appropriate.

Loggerhead Turtle v. County Council of Volusia County, Florida, 307 F.3d 1318 (11th Cir. 2002) Despite Buckhannon, catalyst theory is still an appropriate bases for awarding fees in ESA citizen suit case because citizen suit provision does not include "prevailing party" language.

EPIC v. PALCO, ____ F.Supp.2d.____, 2002 WL 31106453 (N.D.Cal.) Although court finds that Buckhannon does not apply to ESA claims, court finds that the plaintiffs were more than catalysts because they received actual relief.

Fed'n of Fly Fishers v. Daley, 200 F.Supp.2d 1181 (N.D.Cal. 2002) - Challenge to a decision not to list steelhead evolutionarily significant unit was an ESA based suit, not an APA based suit and therefore EAJA standards do not apply.

Center for Biological Diversity v. Norton, 262 F.3d 1077 (10th Cir., Aug. 21, 2001). Court held that group's lawsuit was not significant catalyst for Secretary's final action listing shiner as threatened species, as required for group to recover attorneys' fees under ESA. Court noted in dicta that Buckhannon is inapplicable to

ESA fee claims. Unlike the statute at issue in Buckhannon, the ESA contains no express requirement that the party seeking attorneys' fees be the "prevailing party."

Southwest Center for Biological Diversity v. Carroll, No. CV-99-2821 CM (RnBx) (C.D. Cal., Aug 31, 2001). Court held that Buckhannon reasoning does not preclude award under ESA fee provision. ESA permits fee award "whenever the court determines such award is appropriate" and, unlike fee provision at issue in Buckhannon, does not limit fee awards to prevailing parties.

Buckhannon Bd. and Care Home v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001). A party cannot be awarded fees as a prevailing party under the "catalyst theory" in case under statutory fee-shifting provision with prevailing party requirement.

American Canoe Ass'n v. U.S. E.P.A., 138 F.Supp.2d 722 (E.D. Va., Apr. 9, 2001). Prevailing plaintiffs are not entitled to attorneys' fees under Clean Water Act or ESA for unsuccessful claims that are unrelated to claims on which they succeeded. However, fee recovery is possible where unsuccessful claims arose from common core of operative facts and legal theories and plaintiffs effectively secured complete relief.

Loggerhead Turtle v. The County Council of Volusia County, Florida, No. 6:95-cv-587-Orl-22DAB (M.D. Fla., Mar. 23, 2001). Court ordered Volusia County to pay attorneys' fees under ESA. Although plaintiffs did not prevail on the merits of all claims, court found that plaintiffs' lawsuit was catalyst that prompted County to enact more stringent lighting regulations, which benefit endangered sea turtles.

XIV. SPECIFIC CASE CONTEXTS

A. Salmon Hydrosystem Cases

National Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp2d 1196 (D. Ore. 2003). Challenge to NMFS' biological opinion for operations of the Federal Columbia River Power System. The Court granted Plaintiffs' motion for summary judgment, holding that NMFS's biological opinion on the operation of the federal hydroelectric dams in the Columbia River basin was arbitrary because it relied on "speculative" future measures to avoid harm to the species. The Court declined to vacate the biological opinion, but remanded the opinion to NMFS and required a new opinion within one year.

Nat'l Wildlife Fed'n v. Corps, No. 99-442-FR (D.Or.) (pending) Court had previously found that Corps record of decision on how it was going to implement a previous hydrosystem biological opinion had been arbitrary and capricious because it had not adequately explained how the Corps intended to comply with the Clean

Water Act. After the Corps adopted NMFS's 2001 biological opinion, plaintiffs revised their suit to assert that the Corps has still failed to adequately explain compliance with the Clean Water Act and to seek substantial injunction relief. Summary judgment has been argued and the case is awaiting decision.

Public Utilities District No. 1 v. USA, No. C02-022-N-EJL (D.Idaho Oct. 18, 2002) Court dismisses plaintiffs challenge to Corps' operations of Lake Pend Oreille (Albeni Falls Dam) which was being conducted pursuant to the 2001 biological opinions on the operations of the Federal Columbia River Power System.

Nat'l Wildlife Fed'n v. NMFS, No. C02-2259L (W.D.Wash. Dec. 12, 2002) Court enjoins Corps 20 year dredging plan for failure to comply with NEPA and the ESA.

B. Grazing Cases

Forest Guardians v. Veneman, No. 01-138 (D.Ariz.). Challenge to the Forest Service's authorization and management of grazing in the eleven Southwestern National Forests. One count of the Complaint alleges that numerous "ongoing" three-year grazing consultations violate ESA Section 7 because they do not cover the full duration (usually ten years) of the grazing permit. The Court granted Plaintiff's motion for summary judgment on this count, holding that the Rescissions Act of 1995 did not curtail the Forest Service's discretion to alter the permits to meet the needs of listed species, therefore consultation was required on the full term of the permit. The Court ordered the Forest Service to reinitiate consultation on 29 allotments.

Southwest Center for Biological Diversity v. United States Forest Service, 307 F.3d 964 (9th Cir. 2002) Court refuses to enjoin grazing pending completion of consultation (see below under injunctions)

Forest Guardians v. United States Forest Service, No 00-612-TUC-RCC (D.Az. Oct. 16, 2002) Court finds that delay in implementing protective measures for Mexican spotted owl was a substantial change in the project requiring the Forest Service to reinitiate consultation on the Forest Plan.

Center for Biological Diversity v. US Forest Service, No. 00-679-TUC-RCC (D.Az. Oct. 21, 2002) Plaintiffs argue that Forest Service needs to consult on a number of grazing allotments. Court finds that mere initiation of consultation moots the claim and there is no need to wait until consultation is completed. Court follows *Southwest Center* case and declines to issue any injunctive relief against grazing pending completion of consultation.

C. Timber Cases

Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003) (Colville National Forest/ Stimson Lumber). The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the U.S. Fish & Wildlife Service and U.S. Forest Service, finding that the agencies complied with the ESA and NEPA in granting an easement and allowing attendant road construction to proceed in Colville National Forest in relation to timber harvests to be done in private in-holdings by Stimson Lumber Company. With respect to the ESA, the Court found: (1) FWS and USFS may rely on final Conservation Agreements in complying with their respective obligations under ESA section 7; (2) the Conservation Agreement represented the best available scientific information within the meaning of ESA section 7; and (3) FWS had discretion as to the method to be used in evaluating cumulative impacts and FWS acted reasonably in relying on the Conservation Agreement to the cumulative effects analysis here.

Scott Timber Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003). Claims contending U.S. Forest Service's suspension of timber contracts based on ESA concerns constituted a breach of contract. The Federal Circuit reversed the trial court's grant of summary judgment for U.S. Forest Service finding that the contracts at issue did not provide the U.S. Forest Service with implied authority to suspend the contracts based on ESA concerns. The Court also found material facts remained in dispute precluding summary judgment on the reasonableness of the suspensions.

Sierra Club v. Veneman, 273 F.Supp.2d 764 (E.D. Texas 2003). The court granted the Forest Service's motion to dissolve two longstanding injunctions. One, a 1988 permanent injunction, dictated certain habitat management actions to be taken by the Forest Service to benefit the endangered red-cockaded woodpecker, and required the Forest Service to prepare a plan for management of woodpecker habitat into the future, which was to be tendered to the court for approval. The Forest Service's efforts to comply with the injunction concerning preparation of a plan had been rejected by the district court on two occasions following de novo review. After the district court was twice reversed by the Court of Appeals with regard to the standard of review, the district court applied the standard of review under the APA and found that the plan met the requirements of the ESA.

Heartwood, Inc. v. United States Forest Service, No. 02-54 (E.D.Mo.) (Order dated August 1, 2003) (Eastwood 2 Timber Sale). Challenge alleging that the Forest Service and Fish and Wildlife Service had violated the ESA and NEPA in authorizing the Eastwood 2 Project (a timber sale) on the Mark Twain National Forest. On the ESA claims, the plaintiffs had argued that the Forest Service should have surveyed for Indiana bats on the precise sale property before allowing the sale to go forward. The Court granted summary judgment to the government, noting that the nearest bat hibernaculum was over 14 miles away and that the Forest Service had

done bat surveys in the general area (although not on the specific site) and found nothing.

Cascadia Wildlands Project v. US FWS, 219 F.Supp.2d 1142 (D.Or. 2002) Court remands biological opinion based on finding that FWS and Forest Service failed to demonstrate that the action was consistent with the aquatic conservation strategy of the Northwest Forest Plan. Similar to ruling in *Pacific Coast Fed'n of Fishermen's Ass'n v. NMFS*, 265 F.3d 1028 (9th Cir. 2001).

Gifford Pinchot Task Force v. US FWS, No. 00-5462 FDB (W.D.Wash. July 12, 2002) Plaintiffs challenged six biological opinions issued for forest sales within the range of the northern spotted owl. The court dismissed the challenges finding that the FWS could use “habitat-based accounting as its methodology for evaluating impact on the owls” and that the FWS was not required to obtain “a precise count of owls.”

Kentucky Heartwood v. US Forest Service, No. 01-398-KSF (E.D.Ky. Sept. 30, 2002). In prior opinion, court had thrown out a timber sale for failure to “place conservation above any of the agency’s competing interests.” *House v. US Forest Service*, 974 F.Supp. 1022 (E.D.Ky 1997). Court clarified that procedural compliance with the ESA satisfied this expansive mandate and upheld both individual timber sales and a broad sensitive species amendment.

Selkirk Conservation Alliance v. Forsgren, No. 01-1511-PA (D.Or. June 17 2002) Forest Service approves construction of road allowing timber company access to inholdings in Colville National Forest. Court rejects plaintiffs argument that Forest Service and FWS failed to analyze cumulative effects of other timber sales on listed species and declines to enjoin sales. Court found that likely elimination of Bull Trout in the LeClerc Creek watershed did not undermine FWS’s opinion. As to caribou, court found that they are only 30-35 left in the 48 contiguous states and that they were not fully utilizing the abundant amount of available habitat. “[i]t is unlikely that the caribou will require additional habitat anytime soon. Any habitat loss from the Stimson Project is therefore immaterial.” Ninth Circuit issues temporary injunction against sales but then vacates the injunction and upholds the district court opinion. Further, court found that likely elimination of Bull Trout in the LeClerc Creek watershed did not undermine FWS’s opinion.

D. Klamath

Pacific Coast Fed’n of Fishermen’s Ass’n v. Reclamation, No. 02-02006 SBA (N.D.Cal. May 28, 2002) Challenge to the National Marine Fisheries Service’s (NMFS) 10-year biological opinion (BO) relating to Bureau of Reclamation (BOR) management of the Klamath Basin. The Court issued an order on

summary judgment finding: (1) the phasing of the project and flow rates relied upon by NMFS in the reasonable and prudent alternative were supported by the record and consistent with the best available science; but (2) the RPA was invalid because it relied upon speculative future actions by third party states, Tribes and private parties to achieve long-term flow levels;(3) the incidental take statement was invalid because they did not adequately set forth the amount or extent of allowable take; and (4) the Court declined to grant the injunctive relief the Plaintiffs and Tribes sought, and left the 2002 biological opinion in place during the remand to the agency. See *PCFFA v. Reclamation*, 138 F.Supp.2d 1228 (N.D.Cal. 2001); *Kandra v. United States*, 145 F.Supp.2d 1192 (D.Or. 2001).

Kandra v. United States of America, 145 F.Supp.2d 1192 (D. Or., Apr. 30, 2001). Court rejected challenge to reasonable and prudent alternatives in biological opinion concerning operating plan for Klamath Reclamation Project. Court noted that agency has “wide latitude” to determine what is the “best scientific and commercial data available.” “[I]t is presumed that agencies have used the best data available unless those challenging agency actions can identify relevant data not considered by the agency.”