



Endangered Species Committee Newsletter

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HOUSE PASSES NEW ENDANGERED SPECIES LEGISLATION

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Rep. Richard Pombo (R-CA), chairman of the House Resources Committee, formally introduced H.R. 3824, the Threatened and Endangered Species Recovery Act of 2005 (TESRA), on Monday, Sept. 19, 2005. TESRA was passed by the House Resources Committee by a vote of 26-12. TESRA was then passed by the full House by a vote of 229-193 on Sept. 29, 2005. Thirty-six Democrats joined 193 Republicans in voting for TESRA. TESRA would make a number of significant changes to the current Endangered Species Act (ESA), including the repeal of critical habitat, the transfer of the ESA program away from NOAA Fisheries, and the requirement for private property compensation.

Critical Habitat

TESRA would repeal critical habitat. The bill would eliminate the requirement to designate critical habitat from section 4 of the ESA, and remove the requirement to analyze the effect of actions on critical habitat from section 7. Areas already designated as critical habitat would be treated as areas identified in a recovery plan that have “special value to the conservation of the species,” until the recovery plan for that species is revised, or developed, as the case may be.

Best Available Science

TESRA would require the secretary to promulgate regulations within one year regarding what constitutes the best available scientific data. The regulations are to establish criteria that would comply with Office of Management and Budget guidance for compliance with the Data Quality Act, would include any empirical data, and would include sources that had been peer reviewed.

Listing Program

TESRA would require an economic analysis of the impacts and benefits of a species listing; the requirement to conduct an economic analysis would not be a basis for extending statutory deadlines for listing, nor would it alter the factors to be considered in making the listing decision.

Recovery Planning

TESRA would require recovery plans to be completed within two years of the listing of a species. For species already listed, TESRA would require prioritization and a schedule that would have recovery plans completed for all listed species within 10 years.

Recovery plans would be required to identify “areas” that are of “special value to the conservation of the species.” The Committee Report notes that “[t]his requirement for plan contents ensures that attention will continue to be paid to the covered species’ habitat

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Sean Skaggs, Editor

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needs, even with the deletion of the current ESA’s critical habitat provisions.”

Cooperative Agreements—Increased Role for States

TESRA would greatly expand the cooperative agreement provision of the ESA by authorizing state-prepared, species-specific management plans that would receive incidental take authorization through a section 7 consultation. The incidental take authorization could include coverage for private landowners who enroll under the state management plan. Cooperative Agreements would also be authorized for candidate or other “at risk” species. TESRA would authorize the secretary to enter into Cooperative Agreements with tribes in the same manner as states.

Section 7 Consultation Program

Alternative Consultation Procedures

TESRA would explicitly authorize alternative consultation procedures, including the informal consultation process created by the 1986 regulations, as well as counterpart regulations, such as those recently promulgated for pesticides and National Fire Plan activities. Alternative consultation procedures would not be allowed to deviate from the jeopardy standard, and would be required to be developed through notice and comment rulemaking.

Assessment of Baseline in the Context of Jeopardy

TESRA would require that the jeopardy analysis be limited to considering the effect of an action distinct from a baseline of all effects upon the species that have occurred or are occurring prior to the action under consultation.

The Committee Report describes the basis for this provision as follows:

Any analysis under ESA section 7(a) shall consider only the effects of the proposed agency action

under review that are distinct from the baseline of effects on the relevant species that have occurred or are continuing to occur as a result of past human activities or natural events. The ESA section 7(a) analysis is to determine the incremental effects of a proposed Federal agency action. Federal actions such as the ongoing operation of existing facilities cannot be expected to compensate for past activities or events in many cases occurring long before the ESA was originally enacted. Thus, this section provides that a jeopardy finding under the ESA section 7(a) as amended would have to be based only on the incremental effects of the proposed action and not on pre-existing conditions.

Safe Harbor and Candidate Conservation Agreements

TESRA would replace Safe Harbor and Candidate Conservation Agreements with Species Recovery Agreements and Species Conservation Contract Agreements, respectively.

Species Recovery Agreements

The secretary would be authorized to enter into voluntary agreements with landowners who agree to carry out activities that protect or restore habitat. Agreements must be for a minimum of five years. Priority is to be given to agreements that include “areas of special value to the conservation of the species” identified in a recovery plan.

Species Conservation Contract Agreements

The secretary would be authorized to enter into voluntary agreements to carry out conservation practices that benefit listed, proposed, and candidate, or other sensitive, species. Agreements must be at least 10 years in duration, and could be for 10, 20 or 30 years.

TESRA provides that Species Recovery Agreements or Species Conservation Contract Agreements “will be deemed to meet the requirements of Section 10(a)(1)

and be granted incidental take authorization for activities identified in such agreements.”

The Committee Report indicates that the new agreements are intended to replace the existing Safe Harbor and Candidate Conservation Agreements:

The two landowner incentive programs are intended to provide alternative mechanisms to those contained in current programs. . . . The programs established in this bill are not intended to be additive. They, instead, are expected to provide a wider array of alternatives for landowners who would otherwise have made use of the existing programs. The new programs simply provide standards and procedures that landowners already inclined to enter a landowner incentive program may find better tailored to their needs.

HCP Program

No Surprises

TESRA would codify No Surprises assurances in the same form as is currently in the U.S. Fish & Wildlife Service regulations.

The 5 Point HCP Policy

TESRA would incorporate the current 5 Point HCP Policy into the Habitat Conservation Plan (HCP) section 10 permit application and issuance criteria. The public comment period for HCPs would be changed from 30 days to 45 days.

Exemption of HCPs from Future Section 7 Consultations

TESRA would provide that section 7 does not apply to agency actions that may affect any species that is covered by a section 10 permit, if the action is consistent with the permit. This exemption would also apply to the new Safe Harbor and Candidate Conservation Agreements with Assurances (CCAA) programs.

Transfer of Functions Away from NOAA Fisheries

TESRA would require the president, within one year, to transfer to the secretary of the Interior all duties of the secretary of Commerce under the ESA. Prior decisions by the secretary of Commerce under the ESA are unaffected by TESRA, except they are to be treated as decisions of the secretary of the Interior.

Section 9 Determinations

TESRA would allow a landowner to request a written determination from the secretary regarding whether a proposed use of the property that is lawful under state and local law would violate the section 9 prohibition against the unauthorized take of listed wildlife. The secretary would be required to respond to the request within 180 days. If the secretary does not respond within the time period, the proposed use is deemed to be in compliance with section 9 (*i.e.*, the proposed use would be deemed to not cause illegal take of listed species). This provision would not apply to agency actions that are subject to section 7 consultation.

Private Property Compensation

TESRA would require the secretary to compensate property owners who forgo use of their property following a written determination from the secretary that a proposed use would not comply with section 9.

The landowner must request compensation within 180 days of receiving the written section 9 determination. The landowner is not eligible for compensation unless the proposed use would be lawful under state and local law. The landowner is to receive fair market value of the use that was proposed. Fair market value is to be determined by two appraisers. The secretary is required to promulgate regulations regarding the selection of appraisers within one year of enactment of TESRA.

Survey of BLM and Forest Service Lands for Inclusion in Wildlife Refuges

TESRA would require the secretary to assess all Bureau of Land Management (BLM) and Forest

Service lands to determine if any are important to the recovery of any listed species and to make recommendations to Congress within two years of enactment of TESRA regarding transfer of such lands to the Wildlife Refuge System.

LIKE TO WRITE?

The Endangered Species Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Sean Skaggs at 619/858-4707 or sskaggs@emslp.com.

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WATER USERS PURSUE COMPENSATION UNDER FIFTH AMENDMENT FOR ESA RESTRICTIONS IMPOSED ON WATER DELIVERIES

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Last December, after suffering a defeat in the Court of Claims, the federal government agreed to pay the Tulare Lake Basin Water Storage District and other state water contractors \$16.7 million to settle a lawsuit challenging as unconstitutional reductions in water deliveries imposed by federal and state agencies during the 1992-1994 water years. *Tulare Lake Basin Water Storage District v. United States*. In *Tulare*, several state water contractors claimed that restrictions imposed on operations of the Central Valley Project (CVP) and State Water Project (SWP) to protect winter-run chinook salmon and delta smelt—two species of fish listed under the federal Endangered Species Act (ESA)—had significantly curtailed deliveries of water from the California Department of Water Resources, and thus effected a “taking” of that water without the payment of just compensation as required by the Fifth Amendment to the U.S. Constitution. The Court of Claims agreed and ruled that the federal government was liable for “taking” those water rights. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (Apr. 30, 2001).

The Fifth Amendment proclaims, “nor shall private property be taken for public use, without just compensation.” Although initially crafted to compel the federal government to pay just compensation whenever it appropriates private property for a public purpose (e.g., for a highway), the Fifth Amendment has been extended to require just compensation when the property owner is forced, through government action, to submit to a “permanent physical occupation,” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or when government regulation of private property “goes too far.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Because the ESA can and does result in significant limitations on the use of property, such use limitations

have been the subject of intense litigation over whether a taking has occurred. To date, these lawsuits have been unanimously unsuccessful for various reasons: (1) the endangered species restrictions burdened only a fraction of the property and not the whole parcel, *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004) (logging prohibited on only 40 of 200 acres); (2) restrictions on logging to protect nesting spotted owls did not amount to a “physical occupation” by the government, *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002); and (3) the plaintiff failed to apply for an incidental take permit, and thus the landowner’s takings claim was not ripe. *Morris v. U.S.*, Case No. 04-5029 (Fed. Cir. 2004). Where owners of real property have failed in their efforts to receive just compensation for ESA-related use restrictions, the water contractors in *Tulare* succeeded.

In *Tulare*, the federal Bureau of Reclamation and California Department of Water Resources consulted with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the “wildlife agencies”) concerning coordinated operations of the federal CVP and state-owned SWP and its impacts on winter-run chinook salmon and delta smelt. The wildlife agencies concluded that operations of the CVP and the SWP would jeopardize the continued existence of the species and consequently proposed restrictions on the time and manner of pumping water out of the delta. In response, the state contended that it had no other choice but to curtail pumping during the 1992-1994 water years, which in turn limited deliveries to state water contractors like the Tulare Lake Basin Water Storage District and Kern County Water Agency. The state water contractors sued the federal government in the Court of Claims to obtain compensation for the reductions in their water deliveries.

The federal defendants in *Tulare* urged that the property rights at issue were tenuous at best—the state water contracts, for example, had broad shortage provisions and water in California is subject to reasonable use and the public trust doctrine. Despite these arguments, Judge John Wiese ruled on April 30, 2001, that a taking had indeed occurred. Likening the reduction in water deliveries to a “physical occupation,” Judge Wiese reasoned that, “In the

context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs’ sole entitlement is the use of the water.” In the damages phase of the trial, the court ordered the federal government to pay \$14 million plus prejudgment interest for the undelivered water (with interest and attorneys’ fees, the total judgment amounted to \$26 million). *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246 (Dec. 31, 2003).

Rather than face uncertain prospects on appeal, the federal government settled the case on Dec. 21, 2004, for \$16.7 million. The decision to settle generated substantial controversy; before the settlement was approved, the state of California requested that the federal government appeal the case and refer the state law question (namely, the court’s characterization of state water law and attendant property rights) to the California Supreme Court. The settlement has since been subject to praise by water users as the government living up to its responsibilities, and subject to criticism from non-profit organizations and the state of California as a court-sanctioned raiding of the public fisc based on a flawed interpretation of state water law and the physical occupation rule in takings jurisprudence.

In explaining the settlement, administration officials emphasized the unique circumstances in *Tulare*, as well as their fear that appealing Judge Wiese’s decision with such bad facts would result in bad precedent. (Absent final judgment and an appellate ruling, *Tulare* has no binding precedential effect.) But the trial court’s ruling and subsequent settlement are already having a significant effect on the court docket and the fate of future cases. Since liability was determined in the *Tulare* case, at least three similar takings cases have been filed in the Court of Claims, and another case has reached the U.S. Supreme Court.

In June, the U.S. Supreme Court rejected on procedural grounds similar claims brought by individual water users under a breach of contract theory. *Orff v. United States*, Case No. 03-1566 (June 23, 2005). Originally filed in 1993, *Orff* concerned a 1963 contract entered between Westlands Water District

and the Bureau of Reclamation (Bureau) for delivery of approximately 900,000 acre-feet of water annually from the CVP to local farmers within Westland’s contract area. During the 1993-1994 water year, the Bureau reduced Westlands’ contractual delivery by 50 percent because of federal restrictions imposed to protect delta smelt and winter-run Chinook salmon, the same species at issue in *Tulare*. Westlands and other water districts filed suit in U.S. District Court, Eastern District of California, requesting administrative relief under the National Environmental Policy Act and the ESA, as well as damages for breach of contract and compensation under the Fifth Amendment. Several individual farmers and farming entities intervened and, after Westlands settled the case and the district court dismissed several claims, the farmers continued to pursue the breach of contract claim as “third party beneficiaries.” In a unanimous opinion, the Supreme Court denied the farmers’ claims on the basis that, under federal reclamation law, the Bureau of Reclamation had not waived its sovereign immunity from suit for breach of contract in district court. The farmers have since filed a motion to transfer the matter to the Court of Claims that, if granted, would add *Orff* to the growing list of endangered species and water rights cases now pending in that court.

At least three additional cases are pending in the Court of Claims seeking compensation for species-related restrictions on water (*Stockton East Water District v. United States*; *Klamath Irrigation District v. United States*; and *Casitas Municipal Water District v. United States*). The *Stockton East* and *Klamath* cases are set to test the legal theories set forth in *Tulare* as applied to federal water contracts, as opposed to state contracts. *Casitas*, on the other hand, concerns water rights held by the Casitas Municipal Water District, rather than water rights held by the Bureau of Reclamation as was the case in *Orff*, *Stockton East* and *Klamath*. Consequently, *Casitas* may represent the best opportunity to determine whether the legal theories in *Tulare* will ultimately prevail.

Author’s note: On Sept. 1, 2005, subsequent to the preparation of this article, the Court of Claims issued a decision in *Klamath Irrigation District v. United*

States. In its decision, the court rejected plaintiffs' takings claims on the basis that those claims were entirely subsumed by their separate breach of contract claims. And while the court was not deciding the breach of contract claims, it stated that the plaintiffs face an "uphill battle," as those contracts had broad shortage provisions and the federal government, under the sovereign acts doctrine, could likely enforce the ESA without any liability whatever. The court also criticized the holding in *Tulare*, stating that it "appears to be wrong on some counts, incomplete in others and, distinguishable, at all events," as it "awarded just compensation for the taking of interests that may well not exist under state law."

FEDERAL COLUMBIA RIVER POWER SYSTEM LITIGATION UPDATE

Tom Wilmoth
Fennemore Craig

This past summer, the Ninth Circuit Court of Appeals affirmed a preliminary injunction requiring Federal agencies to pass large quantities of water through the spill gates of four dams on the Snake River and one dam on the Columbia River during the summer of 2005 to support listed salmon species. *National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 418 F.3d 971 (9th Cir. 2005), *amended and superseded by* 422 F.3d 782. The ruling was the court's latest in what it characterized as "part of the modern cycle of life in the Columbia River System."

The suit focused on the ability of fall juvenile Chinook salmon and steelhead to navigate multiple dams in the Federal Columbia River Power System (FCRPS) on the way to the Pacific. The fish often suffer a high mortality rate as a result of that effort, particularly if passed through the dams' turbines. The dams are operated by the Army Corps of Engineers and the Bureau of Reclamation and deliver water and power to customers throughout the Northwest. The power generated by the dams is managed by the Bonneville Power Administration. The Endangered Species Act (ESA) requires the federal agencies to consult with the

National Marine Fisheries Service ("NMFS" or "NOAA Fisheries"), under Section 7 of the ESA, 16 U.S.C. § 1536, to ensure operations do not violate the substantive protections afforded the salmon species under the ESA.

By way of background, in *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003), the district court invalidated a biological opinion issued by NMFS in 2000 regarding the FCRPS and remanded that opinion to allow NMFS to reconsider the conclusions drawn therein. In response, NMFS issued a new biological opinion on Nov. 30, 2004, which formed the basis of the agencies' challenged operations in the summer of 2005. NMFS assessed the impact of the agencies' discretionary actions against an environmental baseline that included non-discretionary operations and past and present impacts from discretionary operations. The plaintiffs challenged this basic analytical framework as well as other NMFS findings as violating the ESA and the consultation regulations at 50 C.F.R. Part 402.

The district court granted summary judgment against NMFS, concluding that the agency's segregation of discretionary and non-discretionary action when formulating its baseline was improper. The court further found that the agency failed to aggregate the impacts of all past, ongoing and cumulative operations when making its jeopardy determination. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1278878 (D. Or. May 26, 2005). The court also applied the Ninth Circuit's ruling in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004), to conclude that the agency did not properly evaluate the impact of operations on critical habitat because it did not account for impacts to habitat needed solely for recovery. Finally, in what appears to be the first reported case applying *Gifford Pinchot Task Force* directly to the "jeopardy" standard, the district court found the agency's jeopardy analysis failed to address the impact of operations on recovery, in addition to survival. The district court invalidated the 2004 biological opinion, but retained jurisdiction to address remand of that opinion in the fall. Accordingly, the district court made clear that its order was non-final and unappealable.

Nevertheless, based on the grant of summary judgment, plaintiffs sought a preliminary injunction requiring the United States to spill water from the FCRPS, which the district court granted. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1398223 (D. Or. Jun 10, 2005). The district court ordered the United States to: (1) provide spill from June 20, 2005, through Aug. 31, 2005, of all water in excess of that required for station service, on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental and Ice Harbor Dams on the lower Snake River; and (2) provide spill from July 1, 2005, through Aug. 31, 2005, of all flows above 50,000 cubic feet per second, on a 24-hour basis, at the McNary Dam on the Columbia River. The United States filed an emergency motion to stay the injunction pending appeal, which was denied. An expedited hearing on the preliminary injunction appeal, however, was ordered, and oral argument was held July 13, 2005.

Reviewing for an “abuse of discretion,” the court affirmed the district court’s injunction. The Court reiterated its now familiar principle that injunctions under the ESA are reviewed under a truncated standard based on Congress’ removal of courts’ traditional equitable discretion to balance the parties’ competing interests. The court, accordingly, concluded that the district court did not err by failing to consider the significant economic harms posed by its injunction. The court employed a “very deferential” standard to the district court’s findings of fact regarding impacts to the species. According to the court: “One of the important factual findings made by the district court was that the federal operation of the Columbia and Snake River dams ‘strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made.’” Although the record below was “replete with differing opinions by various experts,” the court explained that mere differences do not demonstrate “clear error” by the district court.

Having determined the district court did not use an incorrect legal standard and did not make clearly erroneous factual findings, the court proceeded to determine whether the district court abused its

discretion in granting the preliminary injunction. According to the court, the district court’s preliminary injunction order was premised on its earlier finding that the agencies had violated both the substantive and procedural requirements of Section 7, so the only question was what interim remedy was appropriate to redress those ESA violations. In light of the district court’s invalidation of the biological opinion upon which the agencies’ summer operations were premised, and its finding that continuation of the status quo could result in irreparable harm to a threatened species, the court found its precedent “indicates that the issuance of an injunction is appropriate.”

On Oct. 7, 2005, the Oregon District Court remanded NMFS’ biological opinion back to the agency for revision consistent with that court’s May 25, 2005 Order. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 2488447 (D. Or. Oct. 7, 2005). The court has required NMFS to complete remand proceedings by October 2006. The court made clear that the action agencies would need to consider breaching the lower Snake River dams if all else fails to protect the species, warning “[s]plicing on the dams will not avoid breaching the dams. Cooperation and assistance may.”

**ABA Section of Environment,
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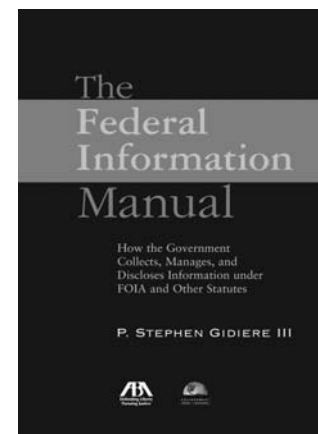
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SUPREME COURT REFUSES TO HEAR COMMERCE CLAUSE CHALLENGE TO ENDANGERED SPECIES ACT

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Klein & Bell LLP**

For the second time in a little more than a year, the Supreme Court has rejected a petition to hear a challenge to the constitutionality of the Endangered Species Act (ESA). On June 13, the Court declined to review a decision by the Fifth Circuit Court of Appeals in *GDF Realty Investments v. Norton*, a case that involved six species of “cave bugs” that are found only in two neighboring Texas counties. The decision to deny certiorari in the case likely marks the end (at least for now) of persistent efforts to get the Supreme Court to address the question of whether or not the ESA’s prohibition against “taking” listed species, as applied to wholly intrastate species, exceeds Congress’s power to regulate interstate commerce. The issue is particularly significant because more than half of the 1,264 species protected by the ESA are found only in one state.

Property rights advocates generally believed that *GDF Realty* would benefit from the most compelling facts of the recent cases to challenge the ESA on Commerce Clause grounds. The case was filed by landowners who alleged that they have been unable to develop an approximately 215-acre tract west of Austin because some of the six species of listed insects were present in caves on the property. However, both the district court and the Fifth Circuit ruled against the landowners.

The appellate court acknowledged that the six species themselves had no impact on interstate commerce, but nonetheless found the application of the take prohibition to be constitutional because protection of the cave bugs was essential to the ESA’s larger regulatory program. The court reasoned that because the aggregated takings of all endangered species regulated by the ESA could substantially affect interstate commerce, the regulation of activities that could harm the cave bugs was a permissible exercise of Congressional authority.

The decision to seek certiorari was no doubt influenced by a strong dissent to the Fifth Circuit’s denial of GDF’s petition for rehearing en banc, which was joined by six of the 15 judges on the appellate court. The dissenting judges agreed with GDF’s contention that the court of appeals had misapplied the Supreme Court’s decisions in *United States v. Lopez* (1995, gun-free school zones) and *United States v. Morrison* (2000, Violence Against Women Act). These cases seemed to mark the beginning of a retreat from decades of liberal construction of congressional authority under the Commerce Clause. However, once the Supreme Court announced its ruling upholding federal authority to regulate the cultivation of marijuana for medical use in states where it is otherwise legal (*Gonzales v. Raich*), the decision to reject the GDF petition was all but a foregone conclusion. Nevertheless, two days after the Court issued its decision in *Raich*, the GDF petitioners filed a supplemental brief that attempted to distinguish the two cases.

“Neither of the factors that foreclosed the Commerce Clause challenge in *Raich*—the ‘undisputed magnitude of the commercial market for [the subject of the regulation]’ and the ‘findings in the [statute] that the intrastate activity has a substantial effect on interstate commerce—is present here,” said the petitioners. As compared to marijuana, the cave bugs “are not a commodity and there is no national market in them.” The Court, following its custom, did not comment on its decision to deny GDF’s petition.

On at least one level, a decision to hear the case would have been somewhat of a surprise, since there is not a true split among the circuits on the issue. There is, however, a disagreement among the circuits as to the rationale for upholding the ESA under the Commerce Clause. In March 2004, the Supreme Court declined to review *Rancho Viejo v. Norton*, in which the D.C. Circuit held that the object of ESA regulation is not endangered species, but rather the commercial activity that threatens them, which is within the authority of Congress to regulate under the Commerce Clause.

The decisions by the D.C. and Fifth Circuits in these two cases (and the Supreme Court’s refusal to hear

them) will likely discourage further efforts to attack the ESA on Commerce Clause grounds in the near future. Depending on how lower courts refine the interpretation of *Lopez* and *Morrison*, however, based on the recent decision in *Raich*, the issue may surface again.

**D.C. CIRCUIT UPHOLDS AGENCY USE OF
ENDANGERED SPECIES SURVEY
PROTOCOLS—NATIONAL ASSOCIATION
OF HOMEBUILDERS, ET. AL. V. NORTON,
2005 U.S. APP. LEXIS 13506**

**Justin S. Tade
Office of the Solicitor
U.S. Department of the Interior**

In 1999 and 2000, the U.S. Fish and Wildlife Service (Service) published recommended survey protocols for the endangered quino checkerspot butterfly (QCB), which is found in portions of Riverside and San Diego counties, California, and northwestern Baja California, Mexico. These voluntary protocols were recommended by the Service for landowners to use in surveying for QCB before undertaking actions that might result in an illegal “take” of the species in violation of section 9 of the Endangered Species Act (ESA). Notices of Availability of the recommended survey protocols were published in the Federal Register, but the agency did not undertake notice and comment rulemaking. The National Association of Homebuilders sued the Service alleging that the protocols constituted a “rule” subject to the notice and comment provisions of the Administrative Procedures Act. *National Association of Homebuilders, et. al. v. Norton*, 298 F. Supp. 2d 68 (D.D.C. 2003). The district court ruled that the survey protocols do not constitute “final agency action,” and the court therefore did not have subject matter jurisdiction to hear the claim. The court also found that plaintiff’s claims were not ripe because there was no evidence that any member of the plaintiff’s organization had yet to suffer injury as a result of the Service’s use of the protocols; Homebuilders appealed the district court’s ruling. The D.C. Circuit Court of Appeals affirmed the district

court decision on July 8, 2005. *National Association of Homebuilders, et. al. v. Norton*, 2005 U.S. App. LEXIS 13506.

The D.C. Circuit applied the two-part test established by *Bennett v. Spear*, 520 U.S. 154 (1997), to determine when an agency action is reviewable under the Administrative Procedure Act as “final.” First, “the action under review must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *Bennett*, 520 U.S. at 177-78. Second, the action must “be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Id.* The court found that the survey protocols marked the consummation of a decision-making process; accordingly, its focus was on the second prong of the test established in *Bennett*.

In a unanimous decision, the court emphasized the voluntary nature of the protocols; if the practical effect of the Service’s protocols did not result in a certain change in the legal obligations of a party, the action is not final for the purpose of judicial review. The court noted that the federal government had not brought any enforcement action against a landowner for failing to comply with the protocols, stating: “Thus, in the absence of any record evidence to the contrary, it appears that the scope of a landowner’s liability under section nine of the ESA remains exactly as it was before the Protocols’ publication: a complete prohibition on “take” of any endangered species.”

Finally, the court found unavailing Homebuilders’ argument that the protocols exerted a coercive effect on local governments, which in turn regulated builders. Homebuilders pointed out that local permitting agencies had adopted the survey protocols to guard against their own potential liability under section 9 of the ESA. The court found insufficient evidence in the administrative record to support a finding that the protocols had the “practical effect of binding interested parties to their terms.”

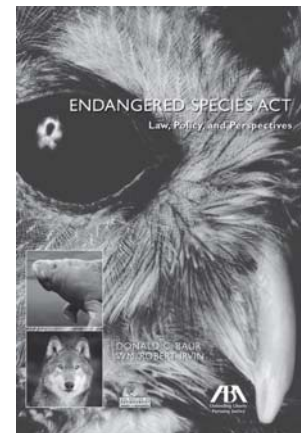
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