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The Reauthorization of the Endangered Species Act: A Hotly Contested Debate

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THE REAUTHORIZATION OF THE ENDANGERED SPECIES ACT: A HOTLY CONTESTED DEBATE

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I. INTRODUCTION

The Endangered Species Act (ESA) is the most comprehensive legislation Congress has ever passed for the protection of species of
plants and animals.\textsuperscript{1} Around the turn of the century, Congress began to recognize the devastating effects humans had on wildlife.\textsuperscript{2} Then, in the 1970s, on the heels of the environmental movement, Congress passed the current ESA legislation.\textsuperscript{3} This legislation has only one goal: to preserve plants and animals from extinction. The ESA requires that endangered and threatened species be identified and that these species, as well as their habitat, receive certain statutory protections.\textsuperscript{4}

The future of the ESA is uncertain. The ESA’s spending authorization expired on October 1, 1992.\textsuperscript{5} Attempts in the 102d and 103d Congresses to reauthorize the ESA failed.\textsuperscript{6} Congress has apparently felt no urgency to reauthorize the ESA because its protections remain operational as long as money is appropriated.\textsuperscript{7} Efforts were renewed in 1995 to reauthorize the ESA due, in part, to the first United States Supreme Court ruling on the ESA in twelve years.\textsuperscript{8} This opinion, \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon}, upheld the Secretary of the Interior’s interpretation of a taking of a protected species under the ESA.\textsuperscript{9} Advocates of private property rights opposed the decision’s broad interpretation, and have prompted several proposals to weaken the ESA’s power upon reauthorization.\textsuperscript{10} These proposals,

\begin{itemize}
\item 2. \textit{Richard Litell, Endangered and Other Protected Species: Federal Law and Regulation} 8 (1992) [hereinafter Litell]. In 1900 Congress passed the Lacey Act, which was the first federal law to protect species of wildlife. Ch. 553, §§ 1-5, 31 Stat. 187. The Act prohibited interstate transportation of animals which was in violation of state, federal, or foreign law. An amended version of this law is still in effect. 16 U.S.C. §§ 3371-3378 (1994).
\item 4. Id. at 26.
\item 6. See infra notes 193, 194, and 195.
\item 7. Spitzberg, \textit{supra} note 5, at 195.
\item 9. Id.
\item 10. Generally, advocates of private property rights include groups such as timber companies and mining companies, as well as private small landowners. Paul Rauber, \textit{An End to Evolution: The Extinction Lobby in Congress is Now Deciding Which Species Will Live and Which Will Die}, SIERRA, Jan. 1996, at 28. Many of these groups even filed amicus briefs in
\end{itemize}
if adopted, could substantially limit the scope of the ESA.\textsuperscript{11} In fact, an examination of legislative proposals for its reauthorization reveals that the ESA may face what it was designed to prevent — extinction.

Primarily, two groups have been active in the debate over the future of the ESA, private property rights advocates and environmentalists.\textsuperscript{12} The property rights advocates argue that the ESA is too broad and infringes upon the right of property owners to use their land as they please.\textsuperscript{13} In contrast, the environmentalists argue that the rules imposed by the ESA are based upon sound scientific principles, and that the law's continued existence is crucial to preserve species of plants and animals from extinction.\textsuperscript{14} The ESA protection has helped the bald eagle move from "endangered"\textsuperscript{15} to "threatened,"\textsuperscript{16} and has slowed the reduction of the number of grizzly bears.\textsuperscript{17} At the end of 1994, nine hundred nine species of plants and animals were listed as threatened or endangered under the ESA.\textsuperscript{18} Between 1968 and 1993, due to the protections of the ESA, over ninety-nine percent of the plants and animals listed by the Secretary as threatened or endangered

\textsuperscript{11} See infra Part III.C.1.
\textsuperscript{12} Other groups, such as scientists and physicians, have been active in the ESA debate, including the National Academy of Sciences and Physicians for Social Responsibilities. Patricia Byrnes, \textit{Congressional Year-End Report Card Not Good: Congressional Environmental Record for 1995}, \textit{Wilderness}, Dec. 22, 1995, at 4. Also, religious groups, such as the Evangelical Environmental Network, have expressed great concern about the moral implications of allowing species to become extinct. Pat Griffith, \textit{Evangelical Alternative to Christian Coalition}, \textit{Pittsburgh Post-Gazette}, Feb 2, 1996, at A7. This network even planned a one million dollar campaign to advocate reauthorization of a strong ESA. Id.
\textsuperscript{13} Linda Kanamine, \textit{Property Ruling Puts Conservation First}, \textit{USA Today}, June 30, 1995, at 8A.
\textsuperscript{15} An endangered species is one which is currently in danger of extinction. 16 U.S.C. § 1532(6) (1994).
\textsuperscript{16} A threatened species is one which is \textit{likely} to become an endangered species in the near future. 16 U.S.C. § 1532(20) (1994).
have avoided extinction. Thus, only seven of the plants and animals listed as endangered or threatened actually have become extinct.

Critics challenging the ESA offer many reasons, primarily economic based, for limiting or repealing the ESA. However, there are equally as many or more reasons to keep the ESA or to enact other powerful endangered species legislation. First, many endangered and threatened plant species provide ingredients for various types of medicine. In fact, more than forty percent of all medicines originate from plants and animals. For example, the Pacific yew tree produces taxol, a compound used in the treatment of cancer. Second, studies conducted on plants and animals provide invaluable information to biologists and other scientists. Third, studying listed species, especially indicator species, may reveal whether the earth's ecosystems

19. Id. The Secretary of the Interior shall publish a list of all species determined by him or the Secretary of Commerce to be endangered or threatened. 16 U.S.C. § 1533(c)(1) (1994). The Secretary of the Interior and the Secretary of Commerce are hereinafter collectively referred to as “the Secretary.”


21. Private property rights advocates, which include industries such as mining, timber, and agriculture argue that the ESA causes job loss, lost profits, and generally hurts the economy. Spitzberg, supra note 5, at 194.

22. ROHLF, supra note 3, at 12.

23. Id. at 13.


25. Id.


27. For example, one hundred years ago, the Ohio River basin contained over 100 species and subspecies of the freshwater mussel. Now almost half of these species are extinct, threatened, or diminishing due to pollution, introduction of non-native species, river dams, and loss of wetlands. This rate of extinction is more rapid than the natural extinction rate, due to human intervention. John Blankenship, Refuge: National Fish Hatchery Rescuing Ohio River Mussels Threatened by Imported European Species, THE REGISTER-TIMES, Sept. 24, 1995, at C15. Thus, freshwater mussels, as an indicator species, are important in studying water quality because of their sensitivity to changes in water quality. Recently, scientists in the Southeast have claimed that the mussels' "waning is a sign of serious problems in the whole freshwater aquatic ecosystem." John H. Cushman, Jr., Freshwater Mussels, With Few Friends, Facing Extinction, N.Y. TIMES, Oct. 3, 1995, at B9.
are healthy. \textsuperscript{28} Fourth, plants and animals are aesthetically pleasing. \textsuperscript{29} Fifth, conserving species from extinction can be a moral decision to protect species for future generations. \textsuperscript{30} Despite these benefits, environmentalists fear that the passage of proposed legislation in favor of private property rights and economic interests will, in effect, repeal the ESA and destroy years of work to save endangered species. \textsuperscript{31}

The purpose of this Note is three-fold. First, this Note will discuss the origin and development of the ESA. Second, this Note will discuss recent developments in the ESA, including case law and proposed legislation. Finally, proposals for reauthorization of the ESA will be analyzed in the context of the debate between supporters of a strong ESA and supporters of private property rights. Ultimately, this Note concludes that the ESA should be reauthorized in its present form with amendments to simplify its administrative procedures and to provide non-monetary incentives to property owners.

II. SELECTED PROVISIONS OF THE ENDANGERED SPECIES ACT

The very essence of the ESA is found in its statement of purposes. \textsuperscript{32} There Congress explained that the purpose of the ESA is to conserve endangered and threatened species as well as their ecosystems. \textsuperscript{33} Conserve, as defined in the ESA, means to use all methods necessary to bring a protected species to a point where the ESA’s protections are no longer needed. \textsuperscript{34} In fact, the United States Supreme Court found

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{28} See Patrick A. Parenteau, \textit{Who's Taking What? Property Rights, Endangered Species, and the Constitution}, 6 FORDHAM ENVTL. L. J. 619, 621 (1995) [hereinafter Parenteau] (stating that the once declining bald eagle was an indicator of “devastating effects of the continuing use of toxic pesticides on the food chain”).
\item \textsuperscript{29} Spitzberg, \textit{supra} note 5, at 197.
\item \textsuperscript{32} 16 U.S.C. § 1531(b) (1994).
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} 16 U.S.C. § 1532(3) (1994).
\end{enumerate}
\end{footnotesize}
that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."\(^{35}\)

The ESA was enacted in 1973 with overwhelming congressional support.\(^{36}\) The ESA was meant to replace legislation which was considered inadequate to protect plants and animals.\(^{37}\) Congress included provisions which empowered the Secretary of the Interior or the Secretary of Commerce to identify species in need of protection. Congress also added protections for identified endangered and threatened species and their habitats, which were to remain in force until the species were no longer classified as threatened or endangered. Such protections included prohibitions against hunting or harming an endangered or threatened species, and destroying or modifying a listed species's habitat.\(^{38}\) However, Congress also included provisions, such as incidental taking permits, which weakened protections for species, because of the ESA's alleged inhibitions of land development.\(^{39}\) The following sections of the ESA discussed in this Note illustrate pertinent sections of the ESA which set forth protections for endangered and threatened species, as well as concessions for private property owners. To identify species in need of protection, Congress included Section 4, which governs the identification of species and critical habitat, and requires the Secretary of the Interior to publish a list of the protected species and habitat.\(^{40}\) The next four ESA sections discussed in this Note grant protections to species and habitat. Section 5 allows the federal government to acquire land to protect listed species and habitat.\(^{41}\) Section 7 prohibits federal agencies from engaging in actions that could harm

\(^{35}\) Tennessee Valley Auth., 437 U.S. at 184.


\(^{38}\) For brevity, this Note will refer to endangered or threatened species of plants and animals as "listed species" or "protected species."

\(^{39}\) For example, Section 10 of the ESA provides for incidental takings. 16 U.S.C. § 1539(a)(1)(B) (1994).


protected species. Section 9 prohibits persons and the government from taking protected species. A federal regulation defines "harm" to a species. Then, Section 10 weakens the protection provided by Section 9 by allowing some incidental takings of protected species if certain guidelines are met and if the takings were not intended.

A. Section 4: Identification of Endangered and Threatened Species

Section 4 is a cornerstone of the ESA. In order to prevent the extinction of species, it provides that the Secretary of the Interior must create and maintain a listing of endangered and threatened species, as well as their critical habitats. The appropriate Secretary must also formulate recovery plans for such listed species. Only species listed as endangered or threatened are protected under the ESA. The Secretary must make his determination of whether a species is threatened or endangered based "solely on the basis of the best available scientific and commercial information . . . , without reference to possible economic or other impacts of such determination." An endangered species is currently defined as "any species which is in danger of extinction throughout all or a significant portion of its range . . . ." A threatened species is currently defined as "any species which is likely

44. 50 C.F.R. § 17.3 (1994).
48. 16 U.S.C. § 1533(f) (1994). Recovery plans are developed by the appropriate Secretary to promote conservation of the species. Species that are most likely to benefit from having a recovery plan receive priority, such as those species whose habitat is facing economic development. MARTY BERGOFFEN, ENDANGERED SPECIES ACT REAUTHORIZATION: A BIOCENTRIC APPROACH 36 (1995) [hereinafter BERGOFFEN].
49. 50 C.F.R. § 424.11(b) (1995). Factors that the Secretary considers are: destruction or modification of the species' habitat; overuse of commercial, recreational, scientific, or educational purposes; disease and predation; inadequacy of existing regulatory mechanisms; and any other factor affecting a species' existence. 16 U.S.C. § 1533(a)(1)(A)-(E) (1994).
to become an endangered species within the foreseeable future throughout all or a significant portion of its range.\(^{55}\)

In addition to protecting individual species of plants and animals, the ESA, in its statement of purposes, emphasizes the need to protect the ecosystems of endangered and threatened species.\(^{52}\) A listed species's habitat, called "critical habitat," is obviously essential to saving species from extinction. Critical habitat is defined as "the specific areas within the geographical area occupied by the species, at the time it is listed" and even "specific areas outside the geographical area" if this land is essential for the species to survive.\(^{53}\) In the original ESA, critical habitat was not defined nor was there a requirement for the Secretary to designate such habitat. As a result of the 1978 amendments to the ESA, when a new species is listed, the Secretary must designate critical habitat to the extent that such designation is prudently possible.\(^ {54}\) The appropriate Secretary then performs a balancing test where the benefits of excluding land in critical habitat are weighed against the benefits of including the land in critical habitat.\(^ {55}\) If the benefits of excluding the land outweigh the benefits of including the land, a certain portion of the land will be excluded from the designated critical habitat.\(^ {56}\) However, the Secretary is not to exclude an area if its exclusion will result in the extinction of a species.\(^ {57}\)

After the 1978 amendments to the ESA, the Secretary was required to consider economic impact when designating critical habitat for a listed species.\(^ {58}\) However, Congress nullified this provision in the 1982 amendments to the ESA because it recognized that the economic assessment requirement delayed new listings of endangered and

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52. The first purpose listed under the ESA's statement of purposes is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (1994).
56. Id.
threatened species. Between 1979 and 1992, only about 73 areas of land were added to the list of critical habitats, and many environmental groups have complained that the Secretary needs to identify critical habitat at a faster pace.

Besides listings and critical habitat designations, Section 4 also directs the Secretary to develop and implement recovery plans so that endangered and threatened species will survive. The Secretary only has to designate a plan if it will promote the conservation of the species. These plans are costly to administer and there are not enough funds to implement plans for all listed species. Both sides of the debate criticize the current Section 4. But environmentalists say that the listing procedures are too time-consuming and burdensome.

B. Section 5: Acquisition of Land

Section 5 authorizes the Secretary of the Interior to buy land to help preserve listed species. Funds to buy the land are made available under the Land and Water Conservation Fund Act of 1965, as amended. Notably, private property rights advocates such as those in the timber industry believe that this provision should be used more frequently by the federal government. Property rights advocates would prefer the federal government buy the land on which a protected species is located if the property owner's use of his or her land would destroy or modify the habitat. Thus, this group argues that the federal government should purchase an individual's land under Section 5 when

59. LITTELL, supra note 2, at 12.
60. Id. at 28 (citing M. BEAN, S. FITZGERALD, AND M. O'CONNELL, RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT 3 (World Wildlife Fund: Washington, 1991)).
61. 16 U.S.C. § 1533(f) (1994). This provision was added by the 1978 amendments to the ESA.
62. LITTELL, supra note 2, at 29 (footnote omitted). A Department of the Interior report from the early 1990s stated that $4.6 billion dollars would be needed to start recovery plans for all protected species. However, in 1991, only $8 million dollars was budgeted to this end. Id.
63. BERGOFFEN, supra note 48, at 40.
66. Sweet Home IV, 115 S. Ct. at 2412.
the individual is prevented from using the land because of its designation as a critical habitat.\textsuperscript{67}

Alternatively, environmentalists argue that Section 9\textsuperscript{68} prohibits harm to a species by destruction of its habitat and that the federal government should not have to buy land every time a species is threatened by a land owner's activity on critical habitat.\textsuperscript{69} The language of Section 5 does not affirmatively mandate the government to buy the lands. Instead Section 5 merely states that the government is "authorized to acquire" lands or waters.\textsuperscript{70} The tension between Section 5 and Section 9 is examined later in Part III of this Note.

C. Section 7: Prohibition of Certain Federal Agency Actions

Another important provision in the ESA is Section 7, which states that federal agencies must not jeopardize a protected species by its actions.\textsuperscript{71} Federal agency action is defined in the Code of Federal Regulations (C.F.R.), and includes granting easements or rights-of-way and actions taken to conserve species.\textsuperscript{72} Section 7 requires federal agencies to consult with the appropriate Secretary in order to ensure that their activities are not likely to (1) jeopardize listed endangered or threatened species or (2) destroy or adversely modify habitat of species.\textsuperscript{73} During formal consultation regarding listed species, the agency is prohibited from making an "irreversible or irretrievable commitment of resources" to a federal project until the consultation with the Secretary regarding the species is complete.\textsuperscript{74} Under this Section, federal agencies also have an affirmative duty to promote conservation of endangered and threatened species.\textsuperscript{75}

\begin{thebibliography}{9}
\bibitem{67} Id.
\bibitem{68} Section 9 expressly prohibits the "taking" of an endangered or threatened species.
\bibitem{69} \textit{Sweet Home IV}, 115 S. Ct. at 2412.
\bibitem{72} 50 C.F.R. § 402.02 (1995).
\bibitem{74} 16 U.S.C. § 1536(d) (1994).
\end{thebibliography}
Generally, if the Secretary ultimately finds that a federal agency's project will jeopardize a listed species, the Secretary will then suggest other alternatives. These alternatives must be ones which the Secretary believes to be reasonable and prudent which the agency can use to implement its activity without violating the ESA. In addition, there are exemptions to this rule. The Endangered Species Committee (the Committee) has the power to grant exemptions from the ESA. Notably, this provision was not included in the original Act. The Committee was established in response to the snail darter controversy at the Tellico dam site in the late 1970s. Although the Tennessee Valley Authority's Tellico Dam project was eighty percent complete when the rare snail darter was discovered in the Little Tennessee River, the Tennessee Valley Authority v. Hill decision affirmed the Sixth Circuit's injunction against construction of the Dam. As a result of intense lobbying efforts, however, Congress created a way out for the Tennessee Valley Authority by enacting legislation which established the Endangered Species Committee as a provision in the ESA. The Committee is empowered to grant exemptions to the ESA, but such exemptions are to be granted sparingly and only if there are "no reasonable and prudent alternatives to the agency action." Congress passed legislation to exempt the Tennessee Valley Authority from the ESA so it could finish the Tellico Dam project. In 1992, the Committee granted an exemption to loggers in Oregon so they could harvest trees located in the spotted owl habitat. Even though exemptions to Section 7 are sometimes granted, exemptions are always a source of controversy, especially when protection of species limits economic use of the land.

77. Id.
79. LitteI, supra note 2, at 75.
80. Tennessee Valley Auth., 437 U.S. at 195. The Sixth Circuit's opinion enjoining construction is found at 549 F.2d 1064 (1977).
83. LitteI, supra note 2, at 3.
D. Section 9: Prohibition of Taking a Species

Section 9 offers perhaps the strongest protection for species and habitat under the ESA because it prohibits a “taking” of an endangered or threatened species.\textsuperscript{85} However, because of currently proposed legislation, this provision is vulnerable.\textsuperscript{86} Section 9 makes it unlawful for any person subject to jurisdiction in the United States to “take any . . . species within the United States or the territorial sea of the United States”\textsuperscript{87} or to “violate any regulation pertaining to such species . . . listed pursuant to section 4 of this Act.”\textsuperscript{88} The term “take” is defined in Section 3 as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”\textsuperscript{89} Further definitions of the terms are codified in the C.F.R.\textsuperscript{90}

E. C.F.R. Section 17.3: Harm of a Species

In the current C.F.R., “harm” is defined as “an act which actually kills or injures wildlife. 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.”\textsuperscript{91} The definition of “harm” is significant in the ESA because if a property owner has been found to have “harmed” a protected species, then the landowner has “taken” a species under Section 9; thus the landowner is subject to fines and possibly imprisonment under Section 11 of the ESA.\textsuperscript{92} Thus, an interpretation of the

\textsuperscript{86} The early versions of endangered species legislation did not even include a prohibition against taking endangered and threatened species. Instead, this provision was added in 1973 to the original ESA.
\textsuperscript{88} 16 U.S.C. § 1538(a)(1)(G) (1994). Most of the provisions in Section 9 also apply to threatened species as a result of federal regulations. 50 C.F.R. §§ 17.31(a), 17.71(a) (1994).
\textsuperscript{90} 50 C.F.R. § 17.3 (1994).
\textsuperscript{91} Id.
\textsuperscript{92} 16 U.S.C. § 1540 (1994). Penalties under this Section include civil penalties of up to $25,000 and criminal penalties of up to $50,000.
term “harm” is essential before a property owner can be deemed to have violated Section 9 of the ESA.

The current definition of “harm” in Section 17.3 is an indirect result of federal litigation. Under C.F.R. Section 17.3, the original definition of “harm” was “an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering.” The definition of “harm” also included “significant environmental modification or degradation.”\textsuperscript{93}

In 1978, Section 17.3 was challenged in \textit{Palila v. Hawaii Department of Land and Natural Resources} (\textit{Palila I}).\textsuperscript{94} In \textit{Palila I}, the Sierra Club and other environmental groups sued the state of Hawaii seeking to force it to protect the palila bird.\textsuperscript{95} The state had allowed feral sheep and goats for sport hunting on the land where the palila lived, and these animals ate seedlings of the mamane tree upon which the palila depended for survival.\textsuperscript{96} The Hawaii Department of Land and Natural Resources was ordered by the Hawaii District Court to remove the goats and sheep from the palila’s habitat. Because the grazing by the feral sheep and goats reduced the palila’s ability to survive, the Ninth Circuit Court of Appeals affirmed the Hawaii District Court’s holding that there was a “taking” caused by the state’s failure to prevent the feral sheep and goats from damaging the palila’s habitat.\textsuperscript{97}

The \textit{Palila I} and \textit{II} courts did not distinguish between a mere habitat modification and a “taking,” so the Secretary amended Section 17.3 in 1981 and redefined the term “harm” to its present form.\textsuperscript{98} Thereafter, the amended version of Section 17.3 was challenged.\textsuperscript{99} In

\textsuperscript{93} 50 C.F.R. § 17.3 (superseded).
\textsuperscript{94} Palila v. Hawaii Dep’t of Land & Natural Resources, 471 F. Supp. 985 (D. Haw. 1979) [hereinafter \textit{Palila I}].
\textsuperscript{95} Id. at 987.
\textsuperscript{96} Id. at 990.
\textsuperscript{97} Palila v. Hawaii Dep’t of Land & Natural Resources, 639 F.2d 495, 496 (9th Cir. 1981) [hereinafter \textit{Palila II}].
\textsuperscript{98} ROHLF, supra note 3, at 63.
In this case, evidence of the effects of a different species of sheep on the palila bird was introduced. In 1984, the plaintiffs continued the suit against the state by moving to amend the original complaint in order to add that the state allowed mouflon sheep to “harm” the palila bird’s habitat, alleging that the state’s failure to act amounted to a taking. Noting that the amended version of Section 17.3 emphasized direct injury to a species, and not just injury to a species’ habitat, the state argued that there could not be a taking since the palila birds were not directly affected by the state’s failure to keep the sheep and goats under control. However, the Palila III Court found that the state had caused “harm” under Section 17.3 because destruction to the palila’s habitat would cause harm to the palila birds. The Ninth Circuit Court of Appeals in Palila IV affirmed that harm does include habitat modifications which threaten a listed species with extinction in the future. The issue of “harm” seemed to be settled by this Ninth Circuit opinion until the D.C. Circuit issued an opinion reaching the opposite conclusion.

F. Section 10: Incidental Taking of a Species

Although Section 9 and C.F.R. Section 17.3 provide a broad prohibition against “takings” of species, Section 10 weakens them by allowing incidental takings of species in some situations where compliance with the statute is otherwise followed. These provisions were added to the 1982 amendments to the ESA when Congress recognized that certain exemptions had to be made to accommodate some economic development while still promoting conservation of species.

100. Id. at 788.
101. Id.
102. Id. at 789.
104. Palila v. Hawaii Dep’t of Land & Natural Resources, 852 F.2d 1106, 1110 (9th Cir. 1988) [hereinafter Palila IV].
107. Incidental takings for nonfederal projects are codified at 16 U.S.C. § 1539(a)(1)(B)
tion 10 allows takings by federal agencies for federal projects and takings by private land owners, such as for private development of land.\(^{108}\) Before an incidental taking can legally occur, the Secretary must issue a permit.\(^{109}\) The incidental take permit will only be issued if the “taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”\(^{110}\) The taking cannot appreciably impair the likelihood of survival or recovery of a protected species.\(^{111}\) Then, before a landowner can destroy or modify a habitat under this incidental taking provision, he must devise a conservation plan.\(^{112}\) In the plan, the landowner must show how the activity will impact the species, what he will do to minimize adverse impact to species, what funding is available to him to minimize and mitigate adverse effects, what alternative actions the landowner could have taken and why these actions were not used to complete the project.\(^{113}\)

III. RECENT DEVELOPMENTS IN THE ENDANGERED SPECIES ACT

A. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon

Oregon, and corporations in the Northwest, became outraged when the Fish and Wildlife Service restricted timber harvesting in the area.115 The restrictions resulted from the presence of the threatened northern spotted owl and the endangered red-cockaded woodpecker.116 Timber companies were prohibited from cutting timber on land that the Fish and Wildlife Service labeled as essential to the habitat of the spotted owl and red-cockaded woodpecker.117 Specifically, the plaintiffs were affected by federal regulations which set forth what actions were considered “harm” under the ESA.118 The Fish and Wildlife Service used what were called “owl guidelines.”119 Under these guidelines, owners of timberland would be subject to prosecution under Section 9 if they did not refrain from timbering on “1,000 to 3,960 acres around each spotted owl nest site.”120 These guidelines, the plaintiffs argued, prevented owners of timber companies from using their land as they pleased, which resulted in lay offs, a reduction in timber supply, and workers “being unable to support their families.”121 Consequently, the Oregon group sued the Secretary of the Interior and the Director of Fish and Wildlife Service in the District of Columbia District Court.122

The issue at trial was whether the Secretary of the Interior had properly interpreted the term “harm” as including “significant habitat modification or degradation” that “actually kills or injures wildlife.”123 The district court held that Congress intended that “harm” be interpreted broadly to include habitat modification.124 Significantly, the court emphasized that Congress knew that the Palila I decision had upheld the Secretary’s regulation defining “take” when it was amending the

116. Id. at 282.
118. Id. at 3.
119. Id. at 4.
120. Id.
121. Id. at 5.
122. Sweet Home I, 806 F. Supp. at 279.
123. Id. at 282.
124. Id. at 287.
Act in 1982, and yet Congress did not take the opportunity to change the definition of “take,” which would in turn affect the meaning of the term “harm.” The district court granted summary judgment to the defendants and dismissed the complaint.

The District of Columbia’s Circuit Court of Appeals affirmed the decision initially, but, on rehearing en banc, the panel reversed its decision. The panel members decided that the statutory context indicated that “harm” was not to be read broadly under the doctrine of noscitur a sociis. They felt the term “harm” only applied to direct force against a listed species, relying in part on a Ninth Circuit opinion which held that the term “harass” had a narrow meaning. Finally, the Circuit Court reasoned that the 1982 amendment, providing for incidental takings, did not change the 1973 ESA’s meaning of “take.” Much to the dismay of environmentalists, the D.C. Circuit Court held that the Secretary’s interpretation of C.F.R. Section 17.3, which included habitat modifications in the term “harm,” was invalid.

This decision was quite controversial because it directly contradicted the Ninth Circuit’s decision. Thus, because of the circuit split on the issue of the Secretary’s definition of “harm,” the U.S. Supreme Court granted certiorari.

125. Id. at 283.
126. Id. at 287.
127. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993) [hereinafter Sweet Home II].
129. This doctrine means that “a word is known by the company it keeps.” Id. at 1465.
130. Sweet Home III, 17 F.3d at 1465 (citing United States v. Hayashi, 5 F.3d 1278, 1282 (1993)).
131. Id.
132. Id. at 1472.
133. The Ninth Circuit held, in Palila IV, that harm does include habitat modifications which threaten a listed species with extinction in the future. See supra note 104.
The issue on appeal to the U.S. Supreme Court was whether the Secretary of the Interior’s interpretation of 50 C.F.R. Section 17.3, defining “harm,” was reasonable. Section 9 prohibits any takings of a protected species. Under Section 3, a taking is defined in part as “harm” to a protected species. Section 3 is supplemented by the definition of “harm” in 50 C.F.R. Section 17.3, which was promulgated by the Secretary of the Interior and defines harm as “significant habitat modification or degradation where it actually kills or injures wildlife.” The Court’s analysis focused on the Secretary’s interpretation of “harm” in Section 17.3. Specifically, the Court had to decide whether the Secretary’s interpretation of the statute was reasonable.

Generally, the Sweet Home group argued that the definition of “harm” as interpreted by the Secretary was too broad and should not include habitat modification or degradation because the definition would be outside Congress’s intended scope of the regulation. They instead asserted that the regulation only encompassed direct injury to species. Otherwise, they argued, the statute would reach activities that do not cause actual injury to wildlife. Also, the respondents contended that Section 5 should be used to purchase land to primarily protect habitat instead of using the taking prohibition under Section 9. Finally, the respondents asserted that the text and structure of the ESA supported their position.

Alternately, the government advocated that the Secretary’s interpretation of “harm” was reasonable. The government argued that the term “harm” should include habitat modification or degradation that does kill or injure wildlife. The heart of the government’s argument was that

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135. See supra note 87 and accompanying text.
137. 50 C.F.R. § 17.3 (1994).
139. *Id.* at 2413.
140. *Id.* at 2414.
141. *Id.* at 2412.
142. *Sweet Home* IV, 115 S. Ct. at 2412.
143. *Id.*
the regulation was meant to be interpreted broadly based on the text of the ESA and its legislative history.\textsuperscript{144}

In the 6-3 decision, the majority of the Court sided with the government and held that the Secretary did not exceed his congressional authority when he included the phrase, "significant habitat modification or degradation that actually kills or injures wildlife" in the definition of "harm."\textsuperscript{145} Justice Stevens delivered the majority decision, joined by Justices Kennedy, Souter, Ginsburg, and Bryer.\textsuperscript{146} In order to justify its position, the majority considered the text of the ESA, legislative history, and the 1982 amendments to the ESA.\textsuperscript{147}

First, the Court explained the dilemma, stating that the respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume . . . that those activities will have the effect, even though unintended of detrimentally changing the natural habitat of both listed species, and that, as a consequence, members of those species will be killed or injured.\textsuperscript{148}

Here the majority set forth the respondents' view that to protect habitat, the Secretary of the Interior should use Section 5 of the ESA to purchase lands which species need to survive if the land is needed for economic purposes.\textsuperscript{149} The Court then juxtaposed the Secretary's view that Section 9, which prohibits takings, creates a duty for respondents not to "harm" protected species, including their habitat, unless they

\textsuperscript{144} Id. at 2413.
\textsuperscript{145} Id. at 2418.
\textsuperscript{146} Justice O'Connor concurred with the majority, only arguing that the Ninth Circuit decided the Palila II case wrongfully. She still felt, however, that the regulation was valid. Id. at 2418. Justice Scalia, along with Justices Rehnquist and Thomas, disagreed with the majority's reasoning and authored a detailed dissent, where he wrote that "the Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin." Id. at 2421. Neither the concurring opinion nor the dissenting opinion are discussed in this Note.
\textsuperscript{147} Sweet Home IV, 115 S. Ct. at 2412.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
first get a Section 10 incidental take permit. The Court, later in the opinion, rejected the respondents' argument that Section 5, (the provision for the federal government to buy land for species protection), and Section 7, (the provision that directs federal agencies to avoid destroying or modifying habitat), should not change the outcome of this case. The Court explained that each provision in the ESA has a different purpose and, though some provisions overlap, they only bolster the ESA's goal of protecting species from extinction. Further, the majority said that it was unnecessary to decide the exact statutory definition of "harm" because the ESA vests the Secretary with the power to make a reasonable interpretation of the term.

The majority sided with the Secretary and agreed that the Secretary was reasonable in including significant habitat modification or destruction in the definition of "harm" in the regulation and cited the text of the ESA in support of that conclusion. The Court advanced three arguments where the actual language of the ESA supported the Secretary's interpretation. First, the Court looked at an ordinary definition of the term "harm," which was to cause hurt, damage, or injury. The ordinary definition is not limited to direct injury, so the Court said the definition "naturally" includes habitat modification that causes injury or death to protected species. Unless the term includes indirect and direct harm, then it would have no independent meaning from the other terms in Section 3 that also define harm, such as "harass" and "wound."

Second, the Court reiterated the Act's "broad purpose" to protect species from the type of harm that Congress anticipated when it passed the Act. The Court here cited Section 2, where a listed purpose of the ESA was to conserve ecosystems of endangered and threatened

150. Id.
151. Sweet Home IV, 115 S. Ct. at 2415.
152. Id. at 2416.
153. Id.
154. Id.
155. Id.
156. Sweet Home IV, 115 S. Ct. at 2413.
157. Id.
158. Id. at 2413.
species.\textsuperscript{159} The Court cited \textit{Tennessee Valley Authority v. Hill}, the famous snail darter case, in which the Court explained that the ESA had a broad purpose, with a goal to “halt and reverse the trend toward species extinction, whatever the cost.”\textsuperscript{160}

Third, the Court used the 1982 amendments by Congress to support its conclusion that “take” includes indirect and direct harm.\textsuperscript{161} The 1982 amendments introduced an incidental takings provision for when an indirect harm would be caused to a species.\textsuperscript{162} The Court said this provision “strongly suggests that Congress understood [it] to prohibit indirect as well as deliberate takings.”\textsuperscript{163} This incidental takings provision was intended only for indirect acts against protected species, not for direct actions against a species.\textsuperscript{164} Therefore, both indirect and direct acts were impermissible; otherwise, a permit would not be needed to perform an indirect harm against a species.\textsuperscript{165} If a person or agency could request an incidental takings permit to avoid penalties under Section 9 for directly injuring a listed species, then the provision would have “little more than . . . [an] absurd purpose.”\textsuperscript{166} The Court agreed with the Secretary’s interpretation that only if action against a species is unintended, may an incidental taking permit be granted.\textsuperscript{167}

Further support for the Court’s conclusion that the Secretary’s definition of “harm” was a reasonable interpretation was found in the legislative history of the ESA.\textsuperscript{168} Committee reports indicated that Congress intended for “take” to be interpreted broadly.\textsuperscript{169} In point of fact, the Senate Report said that “take” was to be defined “in the broadest possible manner to include every conceivable way in which a

\begin{itemize}
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Section 10 of the ESA provides for incidental take permits. See \textit{supra} notes 110 and 111.
\item \textsuperscript{163} \textit{Sweet Home IV}, 115 S. Ct. at 2414.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} \textit{Sweet Home IV}, 115 S. Ct. at 2414.
\item \textsuperscript{169} Id.
\end{itemize}
person can ‘take or attempt to ‘take’ any fish or wildlife.’”\textsuperscript{170} Though the two ESA bills, Senate Bill 1592 and Senate Bill 1983, did not originally include the term “harm,” the term “harm” was added by amendments.\textsuperscript{171} Therefore, the Court summarily rejected the respondents’ argument that the lack of debate meant that the definition should be a narrow one.\textsuperscript{172} In fact, the Court said that “harm” was an obviously broad term for which the Senate went out of its way to add to the definition of take by way of amendment.\textsuperscript{173} Respondents even attempted to argue that because the Senate removed language from the definition of “take” which included “‘the destruction, modification or curtailment of habitat or range [of protected species,’”’ the term “harm” should not include habitat destruction. However, the Court saw no special significance in the respondents’ argument.

Finally, the legislative history for the 1982 amendments expressed that a Section 10 incidental taking is a known taking, and not an incidental one that could occur in a hunting of a species.\textsuperscript{174} The Court stated that Congress was aware of and supported the necessity of habitat modification because both the House and Senate Reports based their permit process on a state habitat response program to incidental takings.\textsuperscript{175}

In concluding the opinion, the Court stressed the Interior Secretary’s broad power in interpreting the ESA, citing \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{176} In reference to Secretary of the Interior, the Court decreed that it was “especially reluctant to substitute . . . [its] view of wise policy for his.”\textsuperscript{177} Therefore, the Court reversed the D.C. Circuit and averred that though this was a complex issue, the Secretary had properly interpreted the

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 2417.
\textsuperscript{173} \textit{Sweet Home IV}, 115 S. Ct. at 2416.
\textsuperscript{174} Id. at 2417.
\textsuperscript{175} Id. at 2418.
\textsuperscript{177} \textit{Sweet Home IV}, 115 S. Ct. at 2418.
term "harm" to include significant habitat modification and destruction.\textsuperscript{178}

\textbf{B. Impacts of and Reactions to Babbitt v. Sweet Home}

The impact of this decision was far reaching. The \textit{Babbitt v. Sweet Home} opinion from the D.C. Circuit Court had held that "harm" did not include modification or destruction to a protected species's habitat if the habitat was located on private land, regardless of whether the species could be killed or injured.\textsuperscript{179} The United States Supreme Court, however, sided with the environmentalists and held that even on private land, "harm" does include habitat modification or destruction that could injure or kill a protected species.\textsuperscript{180} This decision is consistent with the Court's prior ESA decision in \textit{Tennessee Valley Authority v. Hill}, which said that the major threat to an endangered or threatened species's survival is destruction of its habitat.\textsuperscript{181} The Court thus seemed to recognize the scientific importance of habitat protection when the majority wrote that respondents had wanted the Court to disregard the Secretary's interpretation of "harm" in "every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat. Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of 'harm' is reasonable."\textsuperscript{182}

Most environmental groups reacted favorably to the \textit{Sweet Home IV} decision.\textsuperscript{183} The Sierra Club's President, Robbie Cox, said, "The Supreme Court decision, coupled with the recently released report by the National Academy of Sciences, confirms that the Endangered Species Act is both legally and scientifically sound."\textsuperscript{184}

\begin{itemize}
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{Sweet Home III}, 17 F.3d at 1463.
  \item \textsuperscript{180} \textit{Sweet Home IV}, 115 S. Ct. at 2407.
  \item \textsuperscript{181} \textit{Tennessee Valley Auth.}, 437 U.S. at 179.
  \item \textsuperscript{182} \textit{Sweet Home IV}, 115 S. Ct. at 2414.
  \item \textsuperscript{183} \textit{Species Act: Supreme Court Upholds Broad Federal Authority}, Greenwire, June 30, 1995, \textit{available in LEXIS}, Envirn Library, Curnws File.
  \item \textsuperscript{184} \textit{Id.}
\end{itemize}
the debate, Bruce Babbitt, Secretary of the Department of the Interior, hailed the decision, saying that it showed the law had been interpreted with "common-sense." However, he also expressed to the media that the ESA needed to be more flexible and "user-friendly to landowners."

On the other side of the debate, private property rights advocates had plenty of complaints about the Sweet Home IV decision. Rob Gordon of the property rights advocacy group, National Wilderness Institute, warned that the decision "sends the warning to each and every landowner that having endangered species or habitat suitable for them means losing control of your property. This pits people against wildlife—and we know . . . that wildlife will lose in such a confrontation."

Soon after the decision was handed down, the confrontation was renewed. Republicans in the House circulated a "dear colleague" letter saying that "it is 'absolutely essential' that Congress pass a revised act." The 104th Congress heeded the advice and several new bills were introduced along with renewed consideration of bills already introduced in Congress.

C. Proposed Legislation

Though the Sweet Home IV case was seemingly a huge victory for environmentalists, the decision prompted dozens of property rights advocates to pressure Congress to enact legislation limiting the impact of the decision. There are two groups of bills which will be discussed in this Note, reauthorization bills and property rights bills. Several reauthorization bills and property rights bills in the 104th Congress seek to provide private property owners with more rights, in line with a renewed private property rights movement in the United States. For

185. Id.
186. Id.
187. Id.
189. Indeed, Justice O'Connor's remark in Sweet Home IV that "Congress may, of course, see fit to revisit this issue" proved to be true. Sweet Home IV, 115 S. Ct. at 2421.
example, some of the bills seek to provide compensation to property owners whose land was affected or "taken" by implementation of the ESA. 190 However, a couple of the reauthorization bills leave out these property rights entitlements and attempt to focus on the ESA’s goal of species conservation. 191

Although Congress slated the ESA for reauthorization in 1992, it has not acted on the matter yet. Since 1991, many bills have affected the ESA reauthorization process. 192 However, in the 102d Congress, there was no definite action taken. 193 In the 103d Congress, several bills focused on economic factors and attacked the ESA’s emphasis on species protection. 194 During the 103d Congress, the issue did not receive enough time to even get one ESA bill reported out of committee. 195 After years of pushing aside ESA reauthorization, legislators revitalized the issue after the Sweet Home IV case. 196

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190. See infra notes 208 and 240.

191. See infra note 253 and accompanying text.


194. One bill introduced in the 103d Congress was Representative Richard Pombo’s bill, H.R. 3978, entitled the “Endangered Species Management Act of 1994.” Among its provisions was a requirement to pay property owners for any loss in property value due to ESA implementation, a requirement for the Secretary to list only species which were in the national interest, and a requirement that critical habitat had to be “occupied at the time of listing.” Other bills introduced in the 103d Congress included H.R. 2043, 103d Cong., 2d Sess. (1994); H.R. 1490, 103d Cong., 2d Sess. (1994); S. 1521, 103d Cong., 2d Sess. (1994); S. 921, 103d Cong., 2d Sess. (1994). BERGOFFEN, supra note 48, at 53, 58, 63.


196. For Congress to overrule Sweet Home IV would not be unusual. Congress has “overruled, criticized, or circumvented” court decisions concerning endangered species issues before and likely will again in the future. LITTELL, supra note 2, at 13-14 (footnote omitted).
1. Reauthorization Bills

In the 104th Congress, several bills were introduced for reauthorization of the ESA. They ranged from bills that radically weakened the protections for species to bills that moderately changed the ESA. The most controversial provisions were ones that (1) modified the definitions of threatened species, endangered species, and critical habitat; (2) overruled the Sweet Home IV holding that a taking of a species encompasses habitat modification or degradation that injures a species; (3) compensated a private landowner for diminishing his use of land; (4) provided incentives for landowners to comply with the ESA; (5) eliminated the ESA’s requirement in Section 7 that federal agencies consult with the Secretary before pursuing action that will take a species; (6) emphasized more exemptions from takings if conservation plans were followed; (7) eliminated the ESA goal of conserving all species; and (8) created more burdensome and complex procedures for species protection.197

The bill with the most media coverage for reauthorization of the ESA was the “Endangered Species Conservation and Management Act of 1995”198 (Young-Pombo Bill). The Young-Pombo Bill, sponsored by Representatives Don Young and Richard Pombo, was introduced in the House on September 7, 1995, and on the same day, it was referred to the House Agriculture Committee and the House Resources Committee.199 The House Resources Committee approved it on October 12, 1995, and voted 27 to 17 to send it to the House floor.200 The House

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199. 141 CONG. REC. H8683 (daily ed. Sept. 7, 1995). Representative Young is a Republican from Alaska and Representative Pombo is a Republican from California. In February, 1995, Don Young took over the House Resources Committee from liberal California democrat, George Miller. Jane Kay, On a Mission: Property-Rights Advocate Finds Congress Niche, CHI. TR., Nov. 18, 1995, at A17. Mr. Young then appointed Mr. Pombo to head a task force on reauthorization of the ESA. Id.

200. Bob Benenson, House Panel Votes to Restrict Endangered Species Act, 40 CONG.
Resources Committee ordered the Young-Pombo Bill reported on October 13, 1995 with amendments. As of March 22, 1996, it had 126 co-sponsors.

Despite the Young-Pombo Bill’s support in the House, supporters of a strong ESA opposed it for many reasons. Environmentalists opposed portions of the Young-Pombo Bill which negatively affected a species’s critical habitat. One provision said that the Secretary does not have to include land that is not necessary for the implementation of any listed conservation objectives, regardless if it would help a species recover. Additionally, the Secretary must submit critical habitat proposals to the Department of Labor Statistics so it is allowed an opportunity to comment on critical habitat proposals, thereby factoring in economic considerations. Habitat protections would be achieved chiefly by the adoption of a “National Biodiversity Reserve System,” however, the ESA would not be allowed to circumvent hunting, fishing, and mining laws on the land set aside for the biodiversity reserve. Thus, conservation would not be the primary purpose of the land — only an afterthought.

Another revision of the ESA in the Young-Pombo Bill which environmentalists opposed was the inclusion of private property owners’ entitlements. The Young-Pombo Bill stated that if any agency action under the ESA diminishes the value of any portion of property by twenty percent or more, then the government will pay compensation to the property owner. If the value diminishes by

204. H.R. 2275 § 504. Conservation objectives are included in a conservation plan which must be published in final form within eighteen months of listing. The "conservation plan" is important in this bill because if a person’s actions are consistent with the plan, then the person has not violated the ESA Section 9 taking provision. Id. § 502.
205. Id.
206. Id. § 601.
more than fifty percent, then the government will, if the property owner requests, pay the fair market value of the property before the diminution occurred, in a buy-out of the property.\textsuperscript{209} The opponents of the Young-Pombo Bill said this entitlement was too broad because it would compensate a property owner when the value of any portion of the property diminishes by just twenty percent in contrast to the current remedy under the takings clause of the United States Constitution, which compensates a property owner only when there is a loss of all viable use of the property.\textsuperscript{210}

A third inflammatory provision to environmentalists from the original Young-Pombo Bill affected the definition of a “taking.” The Young-Pombo Bill, before amended, defined “take” as including only direct actions that would actually kill or injure a particular member of a protected species, leaving out of the definition habitat destruction.\textsuperscript{211} This provision directly overturned Sweet Home’s holding which held that habitat destruction or modification that would result in the extinction of a species was a “taking” under the ESA’s Section 9.\textsuperscript{212} Environmentalists attest that habitat protections are essential to the survival of a species and without them, avoiding species extinction is virtually impossible.\textsuperscript{213}

Next, environmentalists criticized the Young-Pombo Bill for weakening endangered and threatened wildlife’s protections by federal agencies.\textsuperscript{214} The ESA’s Section 7 requirement that federal agencies must consult with the Secretary of the Interior before pursuing actions that could adversely affect protected species would no longer be mandatory.\textsuperscript{215} This provision would not be consistent with Tennessee Valley

\textsuperscript{209} Id.
\textsuperscript{215} H.R. 2275 § 401. The bill says that the federal agency “may initiate consultation with the Secretary to receive guidance.” Id.
Authority v. Hill, which mandated that actions of federal agencies be checked so that they will not unlawfully interfere with the purpose of the ESA. Federal agencies would only have to consult with the Secretary if the action would "significantly diminish[] the likelihood of the survival of the species by significantly reducing the numbers or distribution of the entire species."217

Finally, environmentalists opposed the provision in the Young-Pombo Bill which would eliminate the ESA's goal to conserve all species. Instead of requiring the Secretary to try to prevent extinction of all endangered and threatened species, the Secretary would be able to choose which species will be allowed full protections, (such as protection of habitat) and which species will only be allowed protections against direct harm, (such as hunting). The different options (conservation objectives) available to the Secretary would be: (1) recovery of the species (2) a certain level of conservation which is determined with economic factors (3) only a prohibition against direct harm to particular members of the species or (4) other options not less than a prohibition against direct harm. Environmentalists objected to these measures because they would give the Secretary discretionary power to decide which listed species should be protected from extinction and which will be allowed to become extinct. The current ESA requires that the Secretary try to save all listed species from extinction.

The Young-Pombo Bill was amended on October 12, 1995. Representative Jack Metcalf's amendment was adopted so that federal law cannot prohibit a taking of a non-threatened species that "threatens the viability of a species listed as threatened or endangered." An-

217. *Id.*
220. *Id.*
223. *Id.*
other amendment adopted was by Representative John Shadegg in which federal agencies that perform activities to protect species cannot allow the activity to "take precedence over the primary missions of those agencies."\textsuperscript{224} Also regarding the term "take," the Young-Pombo Bill passed by the Committee changed it to include "an action that proximately and foreseeably kills or physically injures an identifiable member of an endangered species."\textsuperscript{225} Environmentalists, however, continued to oppose the Young-Pombo Bill. \textsuperscript{226}

When the Young-Pombo Bill was introduced, there were varying reactions. More than one hundred thirty members of Congress signed what was known as the "Vento letter," written by Congressman Bruce Vento, which condemned it as being "too extreme."\textsuperscript{227} Bruce Babbitt, Secretary of the Interior released a public statement that the Young-Pombo Bill "would effectively repeal the ESA."\textsuperscript{228} President Clinton threatened veto for the Young-Pombo Bill if it was presented for his signature.\textsuperscript{229} Even the House Speaker, Newt Gingrich, had doubts about the broad reach of the Young-Pombo Bill.\textsuperscript{230} On the other hand, private property rights advocates supported the Young-Pombo Bill. W. Henson Moore, president of the American Forest and Paper Association, commented that it was a "balanced, common sense approach' to reforming [the] ESA by encouraging private landowners to 'become full partners in the recovery process.'"\textsuperscript{231}

\textsuperscript{224}  Id.
\textsuperscript{225}  This language comes from a later version of the bill dated October 27, 1995. H.R. 2275 § 202.
\textsuperscript{228}  In fact, Bruce Babbitt, Secretary of the Interior, has commented that if Noah had operated under the Young-Pombo bill, "he wouldn't have needed an ark. He could have fit all the animals he was allowed to save in a canoe." Brian Broderick & Saundra Grays, Endangered Species: Reform Bill Aims to Help Landowners; Babbitt Says Measure Guts ESA Protections, Daily Environment Report, Sept 8, 1995, available in Westlaw, File No. 1995 DEN 174 412.
\textsuperscript{229}  Benenson, supra note 200, at 3136.
\textsuperscript{231}  Brian Broderick & Saundra Grays, Endangered Species: Reform Bill Aims to Help
Other extreme proposals for reauthorization have been proposed.232 One was the "Endangered Species Conservation Act of 1995" (Kemphthorne Bill), which was introduced by Senator Dirk Kemphthorne on October 26, 1995, and referred to the Senate Environment and Public Works Committee.233

Many provisions in the Kemphthorne Bill are extreme.234 First of all, the Kemphthorne Bill changes many definitions in the ESA which environmentalists oppose. The term "critical habitat" is amended from the ESA so that habitat includes the geographic area where species are currently located as long as the area is essential to conservation of the species for seven human generations.235 Furthermore, "take" is changed to "proximately and foreseeably physically injure, kill, or reduce to possession an identifiable member of the species; and . . . includes proximately and foreseeably modifying habitat of the species so as to affect a member of the species in the manner described."236 This provision could be read to contradict the Sweet Home IV decision. In Sweet Home IV, the Court found that habitat destruction is a viola-

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235. S. 1364 § 3. For the current ESA provision on critical habitat, see supra note 53, and accompanying text.

236. S. 1364 § 3.
tion of the ESA even when direct injury to a particular animal could not be shown.\textsuperscript{237} The definitions of "endangered species" and "threatened species" are changed so that species (without ESA protection) would only be characterized as endangered or threatened if the species would likely become extinct or threatened within current human generational lifetimes.\textsuperscript{238} These revised definitions seem to be arbitrary definitions, whereas the current definitions do not limit listing by human generational lifetimes.\textsuperscript{239}

Another provision unfavorable to environmentalists is the entitlement to property owners whose land use or value is diminished by ESA implementation.\textsuperscript{240} The Kempthorne Bill advocates compensation for diminishment of property value of land affected by the ESA.\textsuperscript{241} The property owner would be entitled to compensation no matter how small the loss of value.\textsuperscript{242}

An additional unfavorable point for environmentalists is ecosystems protection. This goal is not included in the Kempthorne Bill's statement of purposes.\textsuperscript{243} The Kempthorne Bill places much emphasis on economic interests rather than on conservation of species.\textsuperscript{244} In its definition section, the Kempthorne Bill changes the term "conserve" so that it means to "use all methods and procedures to attain the conservation objective and to implement the conservation plan,"\textsuperscript{245} as opposed to the current definition which mandates using all methods to bring the species to a point where ESA protections are no longer needed. The Kempthorne Bill would take away the Secretary's requirement to maintain all species at the highest possible level for recovery; in-

\begin{itemize}
\item \textsuperscript{237} Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995).
\item \textsuperscript{238} S. 1364 § 4.
\item \textsuperscript{239} For the current ESA provisions, see supra notes 50 and 51 and accompanying text.
\item \textsuperscript{240} S. 1364 § 20.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id. § 2.
\item \textsuperscript{244} S. 1364 § 2. Its policy was to "equally consider the conservation of listed species, preservation of economic growth, maintenance of a strong tax base, and protection against the diminishment of the use and value of private property." Id.
\item \textsuperscript{245} Id. § 3.
\end{itemize}
stead it would allow him to use priority standards to extend more conservation efforts for certain species based on their “relative contribution to biodiversity, [and] the degree and immediacy of threat of extinction,” thereby no longer requiring the Secretary to try to conserve species to what Kempthorne called “an impossibly high standard.”

Finally, the Kempthorne Bill contains provisions which would make protections for species more burdensome and complex. For example, the ESA listing process would become more complex. Also, a new bureaucracy, the Endangered Species Commission, would be created to analyze listing and conservation objectives in accordance with economic impacts; the conservation objectives would be set by assessment teams made up of four members who are scientists and seven members appointed by state and local governments.

On a less radical effort at reauthorization, a moderate bill was introduced in the 104th Congress. The “Endangered Natural Legacy Protection Act of 1995” (Gilchrest Bill), was proposed by Representative Wayne T. Gilchrest on September 21, 1995. The Gilchrest Bill was referred to the House Government Reform and Oversight Committee and the House Resources Committee. However, with only fif-

248. Id. § 5.
250. 141 CONG. REC. H9452 (daily ed. Sept. 21, 1995).
251. Id.
teen co-sponsors, it was defeated by the House Resources Committee by a vote of 17 to 28.\footnote{252}{Benenson, supra note 200, at 3136.}

The Gilchrest Bill was not nearly as extreme as the Young-Pombo Bill or the Kempthorne Bill. The Gilchrest Bill placed more emphasis on conservation and recovery of species. It stated that "ecosystems . . . are crucial to . . . survival."\footnote{253}{H.R. 2374 § 2.} However, it is unfavorable to environmentalists in that it does change the definition of "critical habitat" to include only areas "within the geographical area designated in a recovery plan," whereas the current ESA designates an area where the species is occupying the land.\footnote{254}{Id. § 4 (emphasis added).}

Incentives included in the Gilchrest Bill were community assistance programs to help provide information to property owners, cooperative agreements, a species reserve program, excellence awards, and land exchange programs.\footnote{255}{Id. § 8.} These incentives sought to minimize adverse social and economic considerations in programs to conserve protected species.\footnote{256}{Id.} The Gilchrest Bill did not include a takings compensation provision as an incentive.

Economic impact was not a major focus in the Gilchrest Bill. Conservation plans and agreements only required that actions must be taken to "minimize adverse social or economic impacts (if any) resulting from implementation of the [conservation] agreement."\footnote{257}{Id. § 5.} The Gilchrest Bill focused more on improvements, such as its improvement of recovery plans with a goal to achieve recovery of species.\footnote{258}{Id. § 7.} Due to its focus on conserving species, Representative Gilchrest's Bill had "the most support from environmentalists."\footnote{259}{House Panel OK's Overhauled ESA, E&P Environment, Oct. 27, 1995, available in LEXIS, Envim Library, Cmws File.}

In summary of the reauthorization bills, even the most moderate bills proposed decrease protections to endangered and threatened spe-
cies. The Young-Pombo Bill, the Gorton Bill, and the Kempthorne Bill are the most extreme bills proposed and would dramatically change the ESA by eliminating many protections for endangered and threatened species. Environmentalists generally advocate supporting none of the bills proposed, in hopes of obtaining a more "green" approach to ESA reauthorization.260 During the fall of 1995, the bill which had the best chance of passing through Congress was the controversial Young-Pombo Bill because of its large number of co-sponsors, but it did not reach the floor.261 Of course, legislators and environmentalists have considered the possibility that Congress will not take action in the 104th Congress, instead saving this controversial topic for the 1996 elections.

2. Private Property Rights Bills

Also essential in studying the reauthorization process in the 104th Congress are the private property rights bills. The remedies provided in these bills to private property owners for their diminished use of their land far exceed the private property rights which are provided in the Fifth Amendment to the United States Constitution. If legal implementation of the ESA causes a diminution of value in a property owner's land, the property owner would have the right to ask the government for compensation. For example, if an endangered species is found upon the property owner's land and the property owner is prevented under the ESA from using the land because it would cause a taking under Section 9, the property owner could legally request money from the government to compensate him for having to comply with the ESA. This is a novel concept because the landowner has a pre-existing duty to obey the law as set forth in the ESA. In reality, these bills would


261. Even if H.R. 2275, the Young-Pombo Bill, did reach the floor it would likely not pass due to reports that "the full House is . . . less sympathetic than the Resources Committee to Western members' interests in developing natural resources" and the fact that "the full House has shown an increased willingness recently to join with Democrats in challenging Republican leadership efforts to reduce environmental regulation." Benenson, supra note 200, at 3136.
actually require the government to pay private property owners to obey the law.

A powerful private property rights bill which passed the House on March 3, 1995, by a vote of 277 to 141 is H.R. 9, the "Job Creation and Enhancement Act of 1995."262 One division of H.R. 9, the "Private Property Protection Act of 1995," would compensate landowners when property is diminished by twenty percent due to federal regulations that limit land use, such as the ESA.263 It would also require the government to buy at fair market value any property with its value diminished by more than fifty percent.264

A second private property rights bill is the "Omnibus Property Rights Act of 1995" (S. 605), sponsored by Robert Dole, which was introduced on March 23, 1995, and referred to the Senate Judiciary Committee.265 The Senate Judiciary Committee approved S. 605 in a vote of 10 to 7, mostly on party lines, on December 21, 1995, and it was reported on December 22, 1995.266 One controversial provision in S. 605 is a takings compensation for a diminishing of property value by thirty-three and one-third percent or more due to a government action.267 Opponents say S. 605 would decrease environmental protections and create unwarranted claims for money.268 President Clinton has said he will veto S. 605 or similar legislation.269 Demo-


263. Id. § 203.

264. Id.


269. President Clinton wrote to Senate Judiciary Committee Chairman Orrin Hatch on December 13, 1995, about the bill, informing him that it "'creates a system of rewards for the least responsible and potentially most dangerous uses of property.'" Property Rights:
crats argue S. 605 exceeds interpretations by federal courts of the United States Constitution’s takings clause. Reactions from environmental groups show that environmentalists agree with the Democrats on this issue, as evidenced by the Wilderness Society’s comment that, “the bill ‘undermines decades of court decisions defining a taking.’”

Passage of a private property rights bill could have detrimental effects on implementation of the ESA. Senator Orrin Hatch has said that passage of the private property rights bill, S. 605, would “‘encourage agencies to avoid taking actions that would cause property owners to seek compensation.’” However, if the federal government knows that it may have to pay landowners millions of dollars, this could cause federal agencies not to take all possible measures to protect endangered and threatened species. These private property rights bills were proposed partly because of horror stories of ESA “takings” of private landowners’ land. However, this legislation will be considered despite that no federal court has found implementation of the ESA to cause an unconstitutional taking under the Fifth Amendment.

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272. *Id.*

273. *The Endangered Species Coalition has collected and researched dozens of “horror stories” about the ESA and “takings.” The group advocates that such horror stories should be verified by the United States Fish & Wildlife Service, the National Wildlife Federation, or the Endangered Species Coalition. Often the whole story has not been circulated, causing mistaken impressions of how the ESA is implemented. Endangered Species Act: The Rest of the Story. The Allegations and Responses. (Aug. 1995) (unpublished document, on file with the Endangered Species Coalition and the author).*

274. *Parenteau, supra note 28, at 622.*
IV. PROPOSAL FOR ENDANGERED SPECIES ACT REAUTHORIZATION

Any proposal for reauthorization of the ESA must inevitably include a balancing of interests between private property rights advocates and environmentalists.276 The proposal should follow the intent of Congress when implementing the original ESA in 1973, so that it will conserve species.277 Unfortunately, most of the current proposals in Congress change the very nature of the ESA.278

Upon reauthorization, the main framework of the ESA should remain essentially the same because the law works to conserve endangered and threatened species, without unduly compromising economic development.279 However, some provisions should be added to make

276. For other insights regarding ESA reauthorization in general, see William J. Snape & Heather L. Weiner, Recipe for Reauthorization of the Endangered Species Act, 5 DUKE ENVT. L. & POL’Y F. 61 (1995); Laura Spitzberg, The Reauthorization of the Endangered Species Act, 13 TEMP. ENVT. L. & TECH. J. 193 (1994); Craig R. Baldauf, Searching For a Place to Call Home: Courts, Congress, and Common Killers Conspire to Drive Endangered Species Into Extinction, WAKE FOREST L. REV. 847 (1995); and generally the April 1994 issue of Environmental Law, which showcased several articles on issues of reauthorization of the ESA at a time when the ESA had been in effect for twenty-one years.

277. The proponents of the current proposed legislation argue that “for all the expense and disruption caused by the law over the past 22 years, fewer than two dozen plants and animals have recovered sufficiently to be taken off the list.” Administrators of the ESA state that the “more fundamental purpose of the law . . . is to prevent extinction,” because many species are listed when they are already in too critical a condition to fully recover. Tom Kenworthy, Interior Report Says Species Act Works; Law to Protect Endangered Plants, Animals is Under Attack on the Hill, WASH. POST, Oct. 31, 1995, at A11.

278. “Michael Bean, an endangered species expert at the Environmental Defense Fund, called the proposed changes so broad that they could hinder protection for such creatures as the sea turtle, whooping crane, bald eagle, and the Rocky Mountain gray wolf.” House GOP Targets Species Protections; Balance Would Shift to Property Rights, WASH. POST, Sept. 8, 1995, at A1. However, at the time of this writing, negotiations and drafting were underway by various legislators, such as Representatives Gilchrest and Saxton, Representatives Young and Pombo, and Senator Kempthorne in hopes of creating a proposal which could proceed through Congress. Washington Update, 28 NAT’L J. 825 (1996).

the ESA stronger and more efficient. By 1990, as many as forty-one percent of the almost six hundred protected species at that time were "either stable or increasing in number." 280 Though this number may not seem extraordinary high, when species are listed, they are decli-
ing, "many precipitously." 281 Private property rights advocates argue that the ESA should be weakened because it inhibits development. However, most projects are allowed to proceed. 282 In fact, from 1989 through 1993, "only eighteen projects were formally terminated, less than one percent of formal consultations." 283 The ESA accomplishes its purpose to conserve using techniques that the National Academy of Science Report in 1995 called "scientifically sound." 284

Most of the current proposals for reauthorization would defeat the ESA's goal to conserve species. For instance, the Kempthorne Bill would change several definitions in the ESA. 285 The definitions of endangered and threatened species should remain the same because they are based on scientific principles and are not arbitrary like the proposed definitions in the more extreme bills. Additionally, the definition of "harm" as interpreted by the United States Supreme Court in Sweet Home IV should not be weakened, as the original Young-Pombo bill proposed. A National Academy of Sciences Report issued in 1995


280. Spitzberg, supra note 5, at 203.

281. BERGOFFEN, supra note 48, at 50 n.280. Also, consider the successes of the ESA when examining the amount of money spent on the ESA which has been approximately sixty-nine million dollars a year, a figure which also happens to be the amount of money for two miles of interstate highway. Kerry L. Sigler, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: An Invitation to Extinguish the Endangered Species Act, 23 N. KY. L. REV. 113, 125 (1995) (citing 141 CONG. REC. S12002-01, S12009 (daily ed. Aug. 9, 1995) (statement of Senator Chafee)).

282. See Spitzberg, supra note 5, at 227; see also Doubts on Tying Job Loss to Laws on Environment, N.Y. TIMES, March 18, 1996, at A10.

283. Kubasek, supra note 279, at 339.


285. See supra notes 235, 236, 238 and accompanying text.
says that habitat protection is "absolutely crucial to species survival."286

A proposal not at all crucial to species survival is the takings compensation proposal. Passage of the private property rights bills such as S. 605 and H.R. 9 would create a "two-tier system of laws" according to Senator Joseph Biden; he explained that the result would be that one group would comply with the ESA willingly and without compensation, and the other group would have to be paid to comply.287 Takings protections already exist in the Fifth Amendment of the United States Constitution when the property owner ceases to have full use of his property.288 Provisions in the Young-Pombo Bill, the Kempthorne Bill, and the private property rights bills that pay a landowner for every diminution of value in property caused by the ESA would likely be burdensome, costly, and restrictive on the governments' implementation of the ESA in conserving listed species.289

However, just because a proposal eliminates some burdensome procedures does not mean that it is automatically good for the ESA. A proposal that would weaken the admittedly burdensome procedures in ESA's Section 7 prohibition against federal agencies pursuing activities that jeopardize listed species would not be in the ESA's best interests. Section 7 is an integral part of the ESA. Weakening this provision would adversely affect protected species.290 Section 7 should remain virtually the same, with possibly some improvements to include more public participation in deciding if federal agencies have in fact jeopardized a protected species.291

288. U.S. CONST. amend. V.
289. Virtually every law causes some degree of diminishment of a person's property value. However, the government cannot pay every person affected by the ESA to obey the ESA. If this happened, then government would cease to exist. Robert F. Kennedy, Jr., Address at the West Virginia University Festival of Ideas (Jan. 29, 1996).
290. BERGOFFEN, supra note 48, at 66.
291. Id.
One proposal that should be included in the reauthorization of the ESA is an incentive program, other than takings compensation, for landowners affected by the ESA. Incentives would encourage property owners to comply with the ESA, while also accomplishing protection of listed species. Tax credits could take the place of takings compensation. They would cause less strain on the appropriations needed to run the ESA fully. If the government has to spend money buying out property owners, the government could become lax in enforcement to avoid large pay-outs. A government exchange for land provision included in a couple of the bills also seems to be a win-win provision to obtain land for critical habitat, instead of relying solely on the ESA’s Section 5 land acquisition provision.

Finally, other provisions which need to be added to the reauthorization of the ESA are those which would make the administration of the ESA less slow and cumbersome. For example, the listing procedure is currently quite prolonged. Many of the proposals, such as the Gilchrest Bill, contained more streamlined approaches to paperwork. However, some proposals, such as the Kempthorne Bill, created more bureaucracy by establishing commissions for extensive peer review. The best solution would be a clear and easy planning process for making conservation plans and agreements, also taking into account a proactive view of species, instead of a reactive one.

In sum, the primary goal of the ESA must be to continue to conserve species from extinction. Otherwise the ESA has no meaning. Some aspects of the ESA do not need to be changed, such as the definitions of endangered and threatened species. Additions to improve

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292. Spitzberg, supra note 5, at 195, 228.
293. Id. at 228.
294. For example, H.R. 2374, the Gilchrest Bill, provides that “consistent with existing law, the Secretary . . . [is] encouraged to undertake exchanges of land within the jurisdiction of . . . [the] Secretary . . . for private lands for purposes of furthering the goals of this act.” H.R. 2374, § 8.
295. Parenteau, supra note 28, at 635.
296. During a twenty-year period, from the beginning of the ESA in 1973 to 1993, the Secretary listed an average of only twenty-six species per year. Further, a 1992 report said that for over two years, one hundred five species were “warranted but precluded” from being listed. Oliver O. Houck, The Endangered Species Act and its Implementation by the U.S. Deps. of Interior and Commerce, 64 U. COLO. L. REV. 227 (1993).
the ESA would not be difficult to implement. Incentive programs and more streamlined procedures should be appreciated by both sides of the debate. However, controversial provisions such as the takings compensation are not necessary to accomplish the ESA’s goal. Furthermore, an idea to lessen the protection of species from federal agency action under Section 7 is contrary to the ESA’s goal.

V. Conclusion

The ESA is the best chance that endangered and threatened species have to avoid extinction. Fortunately, for wildlife in the United States, the ESA has only one goal, which is to conserve endangered and threatened species. However, the ESA, while attempting to protect species, is itself endangered. The ESA, being overdue for reauthorization by Congress, could be drastically changed by recent proposals to accomplish reauthorization. The very essence of the ESA could be lost.297

Efforts were renewed by environmentalists and private property rights advocates alike to reauthorize the ESA after the United States Supreme Court decided the Sweet Home IV case in 1995 in favor of environmentalists. The reasons for supporting a bill that would promote a strong ESA are numerous. No one can argue that the value of benefits obtained from species, such as ingredients for medicines, and opportunities for the study of the environment’s health, are immeasurable.

297. At least one budget bill for 1996, H.R. 1977, 104th Cong., 1st Sess., which President Clinton vetoed and the House failed to override, contained alarming riders which “include a moratorium on new listings and critical habitat designations under the Endangered Species Act unless the act is reauthorized.” 142 CONG. REC. H120 (daily ed. Jan. 4, 1996). However, a defense supplemental spending bill, H.R. 889, Pub. L. No. 104-6, passed in April 1995, included a moratorium on listing new species which was still in effect at the time of this writing. Efforts to override the moratorium and table an amendment to reduce funding for listings failed by a vote of 51 to 49 during discussions of H.R. 3019, 104th Cong. 2nd Sess. (1996). 142 CONG. REC. S1933 (daily ed. March 13, 1996). Reports say that up to 237 species continue to await listing procedures and are in jeopardy of extinction. Jill Y. Miller, Congressional Inaction May Make 237 Species Extinct, SUN-SENTINEL, March 3, 1996, at A1. Therefore, Congress needs to quickly resolve the conflict between private property rights advocates and supporters of a strong ESA, in order to avoid unnecessary extinction of species.
Passage of some proposals for the ESA that are being considered would implement a costly entitlement program to pay landowners not to injure or kill a species, though ESA Section 9 expressly prohibits activities having this effect on species.

Like most legislation, the ESA has administrative problems. The procedures are often burdensome to both property owners and environmentalists. However, the ESA works toward accomplishing its goal to conserve species without undue limitation of economic development. A report which was compiled to study economic growth in the Pacific Northwest wherein lies all the controversy about the protected spotted owl, stated that "environmental protection helps, not hinders, the region’s economic growth."298

Despite all of the ESA’s opposition, there have been amazing successes. American alligators, peregrine falcons, gray whales, and brown pelicans have been taken from the lists.299 As Bruce Babbitt, Secretary of the Interior, summed up the tension between the competing interests in this hotly contested debate concerning the nation’s future, "'[t]he challenge . . . is to find ways to strengthen the ESA, to continue to grope for compromise, and to insist that we will find ways to live lightly on the land.'"300

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298. This report was endorsed by thirty-five Northwest academic economists. Also, the report indicated that economic growth in this area “has more than doubled the national average for the period 1988 to 1994.” Economics: Environmental Protection Helps Region’s Growth, Economists Conclude, Daily Environment Report, Jan. 5, 1996, available in Westlaw, File No. 1996 DEN 4 d13.

299. Ginsberg, supra note 114, at 10478.

300. Spitzberg, supra note 5, at 229 (quoting Bruce Babbitt, The Future Environmental Agenda for the United States, 64 U. COLO. L. REV. 513, 516 (1993)).

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