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Designation of Critical Habitat on Department of Defense Installations – A Changing Landscape.

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Designation of Critical Habitat on Department of Defense Installations – A Changing Landscape.

The United States military must train to be an effective fighting force, a force capable of defending our nation and our national security interest abroad. Sometimes, military training missions take place in areas inhabited by endangered or threatened species.[1] This situation becomes a serious issue if statutory protections for threatened and endangered species prevent our military forces from adequately training – degrading their capabilities in a wartime environment.[2]

In response, the Department of Defense (DoD) has developed Integrated Natural Resources Management Plans (INRMPs) for each military installation with significant natural resources - aiming for sustainable natural resources management while ensuring no net loss in the capability of installation lands to support the military mission. The use of INRMPs also enables DoD installations to avoid critical habitat designation by the United States Fish and Wildlife Service (FWS) due to FWS interpretation of the Endangered Species Act (ESA). Currently, if the DoD installation has an INRMP in place, the FWS may find that installation does not meet the FWS definition of critical habitat because the installation has adequate special management considerations already

[1] For example, the gnatcatcher on Camp Pendleton in California and the Sonoran Pronghorn on Barry M. Goldwater range in Arizona.

[2] The end result translates into mistakes on the battlefield, mistakes that ultimately lead to loss of life. Pilots must train to ensure that when they release their bombs, they hit intended targets and limit innocent civilian casualties. Infantry have to train in every type of environment to meet unknown challenges at home and around the world. Nowhere has the importance of training been more evident then the recent conflicts in Iraq, Somalia and Bosnia-Herzegovina; and yes, the immediate threat of terrorism at home. At the same time, the military has to balance the military needs with the desire to protect the environment and all species of life for generations to come.

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in place. A recent Federal District Court decision, *Center for Biological Diversity, et al. v. Gale Norton, Secretary of the Department of Interior*, 240 F. Supp. 2d 1090 (2003), has undermined the FWS critical habitat designation policy and may have a direct impact on DoD. If FWS follows the holding in *Biological Diversity*, DoD installations with habitat that supports or could support endangered or threatened species may be designated as critical habitat, even if the military installation has an INRMP.

Which leads us to the overall question to be analyzed in this thesis: How does the Department of Defense prevent the possible designation of critical habitat on military installations in light of the recent court decision in *Biological Diversity,* which held that the existence of other habitat protections does not relieve FWS from designating critical habitat?

Some background information will provide a better understanding of the challenge facing DoD in trying to prevent the designation of critical habitat on military installations. The first section of this paper covers the Endangered Species Act[3] as it relates to listing threatened and endangered species and designating critical habitat, followed by a brief discussion of why there is a lack of critical habitat designations. The next section explains how DoD installations protect threatened and endangered species through the Integrated Natural Resources Management Plans (INRMP) under the Sikes Act.[4] Section 2 and section 3 contain an analysis of the court's reasoning in *Biological Diversity* and DoD's reaction through current legislation to prevent the possible designation of critical

[3] 16 U.S.C. 1531 et seq.
[4] 16 U.S.C. 670a.

habitat on military installations. The final section explains alternative approaches in resolving the dilemma created by the need to protect threatened and endangered species and the training needs of our military.

The Endangered Species Act

The purpose of ESA is to prevent the extinction of the species by preserving and protecting the habitat upon which they depend.[5] It was enacted in 1973, with major amendments in 1978 and 1982. Section 4 of the ESA requires the implementing agency to determine and list endangered and threatened species,[6] and "to the maximum extent

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[5] The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section. 16 U.S.C. 1531(b).

[6] § 1533. Determination of endangered species and threatened species (a) Generally:
(1)The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.
(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970 [5 USCS § 903note]-- A) in any case in which the Secretary of Commerce determines that such species should-- (i) be listed as an endangered species or a threatened species, or (ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section; (B)in any case in which the Secretary of Commerce determines that such species should-- (i) be removed from any list published pursuant to subsection (c) of this section, or (ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and (C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.
(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable-- (A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and (B) may, from time-to-time thereafter as appropriate, revise such designation. 16 U.S.C. 1533(a)(1999).

prudent and determinable," to concurrently designate "critical habitat" for the species.[7] Section 7 requires all federal agencies consult with the Secretary (usually the Secretary of Interior)[8] before undertaking or funding an action to ensure that the action does not (1) "jeopardize the continued existence of any endangered species or threatened species," or (2) "result in the destruction or adverse modification of [its critical] habitat..."[9] The term "jeopardy standard" is often used to refer to Section 7 (1) – "jeopardize the continued existence of an endangered species." Section 9 " makes it "unlawful for any person subject to the jurisdiction of the United States" from "taking"[10] endangered species,[11] which the courts have interpreted to include destroying habitat if it results in the death of the species.[12]

The Endangered Species Act has been amended several times, but these core provisions have remained intact, subject to changing interpretative regulations by the implementing agencies.[13]

As originally enacted, the ESA required federal agencies to refrain from destroying or adversely modifying endangered and threatened species' "critical habitat." The term

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[7] *Id.* at §1533(a)(3).
[8] The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970 [5 USCS § 903 note]; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture. 16 U.S.C 1532 (15).
[9] 16 U.S.C. 1536(a)(2) (1999).
[10] The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. 1532 (19).
[11] 16 U.S.C. 1538(a)(1)(1999).
[12] See *Babbitt v. Sweet Home Chapter for a Great Or.*, 515 U.S. 687, 687 (1995).
[13] Sean O'Conner, *Comment: The Rio Grande Silvery Minnow and the Endangered Species Act*, 73 U. Col. L. Rev. 673, at 691.

"critical habitat" was not defined in the Act. FWS published regulations in the Federal Register in 1975 defining critical habitat as:

> "Any air, land, or water area ... and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species ... . The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air."[14]

The critical habitat determination was originally based solely on scientific factors. Economics was not included as a factor to be considered. This distinction would prove significant and eventually lead to the 1978 amendment to the Endangered Species Act.

1978 and 1982 Amendments to the Endangered Species Act

In 1978, the U. S. Supreme Court, in *Tennessee Valley Authority v. Hill*, enjoined the construction of the nearly completed Tellico Dam near Knoxville, Tennessee, because the dam would have flooded the critical habitat of the tiny snail darter and eradicated it's only known population.[15] The court did not consider economic impacts in its analysis because economic impacts were not a consideration in the original definition of critical

[14] 50 C.F.R. 402.02 (1978).
[15] *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

habitat.[16] The court clearly stated the role of economic impacts by viewing the value of endangered species as incalculable:

> One might dispute the applicability of these examples to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But ... the Endangered Species Act ... [does not provide] federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable."[17]

In the aftermath of *Hill*, Congress amended the ESA in 1978 by defining critical habitat as:

> "specific areas within the geographical area occupied by the species ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and ... specific areas outside the geographical area occupied by the species ... upon the determination by the Secretary that such areas are essential for the conservation of the

[16] *Supra*, note 14.
[17] *Id.* at 187.

species."[18]

However, the most significant change was the requirement to consider economic impact:

> "In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will not result in the extinction of the species."[19]

In addition to changing the critical habitat definition, Congress created the Endangered Species Committee[20] with the authority to grant an exemption from "jeopardy" restrictions on federal actions that conflict with listed species. The committee reviews any application submitted to it under 16 U.S.C. 1536(e) and determines whether or not to grant the exemption from the "jeopardy" requirements of 16 U.S.C. 1536(e)(a)(2)[21] for the action set forth in the application.[22]

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[18] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 375166 (1978) (codified as amended in scattered sections of 16 U.S.C.), 2(2) (adding subsection (5) to 3 of ESA).
[19] *Id.* at 11(7) (adding subsection (b)(2) to 4 of ESA).
[20] The Committee is composed of the Secretary of Agriculture; the Secretary of the Army; the Chairman of the Council of Economic Advisors; the Administrator of the Environmental Protection Agency; the Secretary of the Interior; the Administrator of the National Oceanic and Atmospheric Administration; and one individual from each affected State, appointed by the President of the United States. See 16 U.S.C. 1536(e)(3).
[21] "(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened

The committee is known as the "God Squad."[23] Despite the committee's power, it has only been called on three times to decide on exemptions. In the Tellico and Grayrocks Dam (whooping crane) cases, the committee did not absolve the federal projects from section 7 compliance.[24] However, the committee did exempt some federal timber sales from restrictions based on the endangered northern spotted owl. In the end, these exemptions had no effect because the government later dropped its request for exemptions. Although the "God Squad" has been used very little, it does provide one alternative for deciding the difficult cases.

The 1982 ESA Amendment was passed to ensure the designation of critical habitat did not delay listing endangered or threatened species.[25] The economic analysis that is required for designating critical habitat usually takes more time than the purely biological analysis used for listing endangered or threatened species, delaying species from making the list.[26] So Congress allowed FWS to extend the designation of critical habitat for one year, if the critical habitat was not determinable[27] at the time the species was listed.[28]

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species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C. 1536(a)(2)(2003).

[22] 16 U.S.C. 1536(e)(2)(2003).

[23] O'Conner, at 692.

[24] See George Cameron Coggins et al., Federal Public Land and Resources Law 870 (4th ed. 2001).

[25] See H.R. Rep. No. 97-567, at 11-12 (1982).

[26] O'Conner, at 695.

[27] "Not determinable" defined "as a situation where (1) information required for the analysis was lacking, and/or (2) the biological needs of the species were not well enough known to determine the boundaries of the necessary habitat." Criteria for Designating Critical Habitat, 50 C.F.R. 424.12(a)(2) (2000).

[28] Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982), 2(a)(2). "(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is

The amendment also provided the Secretary the discretion not to designate critical habitat if the designation was "not prudent."[29] In addition, time deadlines for listing and designation decisions were imposed in response to what Congress saw as the Administration's gross malfeasance in implementing the Act.[30] In the two years prior to the act, FWS had listed only two species and no critical habitat was designated for any species.[31]

Listing Endangered and Threatened and Species

Endangered and threatened species determinations are based solely on "the best scientific and commercial data available."[32] This language explicitly prohibits the consideration of economic impacts in determining whether a species is endangered or threatened.[33] The listing process starts one of two ways – the Secretary[34] initiates the review[35] or an

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endangered or threatened, unless the Secretary deems that--(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or (ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than **one additional year** [emphasis added], but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent **prudent** [emphasis added], such habitat. 16 U.S.C. 1536(a)(2)(2003).

[29] *Id.* See also H.R. Rep. No. 97-567, at 11-12 (1982).

[30] *Id.*

[31] *Id.*

[32] Jason M. Patlis, *Article: The Endangered Species Act: Thirty Years of Politics, Money, and Science: Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 Tul. Envtl. L.J. 257 (2003). The addition of the word "solely" is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The Committee strongly believes that economic considerations have no relevance to determinations regarding the status of the species and intends that economic analysis requirements ... not apply. H.R. Rep. No. 97-567, at 20 (1982).

[33] *Id.*

[34] 16 U.S.C. 1532(15), *supra,* at note 8.

[35] The Secretary may undertake his own reviews to determine whether the species is endangered or threatened, without the imposition of any mandatory deadlines. 16 U.S.C. 1533(a) and 16 U.S.C. 1533(b)(1).

"interested party" petitions the Secretary to initiate the review.[36] The Secretary must demonstrate the species is "in danger of extinction throughout all or a significant portion of its range" to justify that the species is endangered[37] and that it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" to justify that the species is threatened.[38] The determination to list a species must be made after conducting a status review, and after taking into account efforts undertaken by states or foreign governments to protect the species.[39]

If the Secretary receives a petition from an "interested person," the Secretary has ninety days to make a finding "as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted."[40] There is some discretion allowed for the Secretary. [41] The Secretary has twelve months after

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[36] "(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register. 16 U.S.C. 1533(b)(3)(A).

[37] 16 U.S.C. 1532(6).

[38] 16 U.S.C. 1532(19).

[39] 16 U.S.C. 1533(b)(1)(A). The factors upon which the determination can be made are identified in ESA section 4(a)(1), and include present or threatened habitat destruction or modification, over utilization of the species itself, disease or predation, inadequacy of existing regulatory mechanisms, or other natural or man-made factors. The Secretary must take into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of the State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas. See 16 U.S.C. 1533(a).

[40] 16 U.S.C. 1533(b)(3)(A).

[41] First, the finding is made "to the maximum extent practicable," through which Congress recognized that the Services' limited resources may be spent on higher priorities. However, a recent case limited the discretion that the Secretary has in delaying a finding, in light of subsequent nondiscretionary deadlines that rely on it. Second, the Secretary has a means to easily dismiss frivolous or unsubstantiated petitions, although he or she has traditionally taken a broad position and entertained petitions even if they do not present a strong case. The standard used by the Secretary is that of a reasonable person. Also known as a "90-day finding," the Secretary's decision must be published in the Federal Register. If the Secretary finds that the petition does present substantial information, the Service promptly begins a status review of the species. See Patlis, *supra* at note 32.

petition to take action on the petition.[42] If the Secretary decides action is not warranted, the process ends. If the Secretary decides the action is warranted, the Secretary must publish a proposed determination. However, the Secretary can find that the action is warranted, but precluded by pending proposals.[43] In this case, the species is added to a list of candidate species published in the Federal Register of those species whose determination as endangered or threatened is warranted but precluded by other pending proposals.[44]

Once a proposed rule is published, the Secretary must comply with public notice-and-comment procedures that are more rigorous than the generic procedures provided in the Administrative Procedures Act.[45] The Secretary must make a decision on the proposed rule within one year of the date of the Federal Register notice of the proposed determination.[46] The decision can be one of three possibilities: (1) it can be a final regulation to implement the determination or revision, (2) it can be a notice that the proposed regulation is being withdrawn if the Secretary concludes that there is "not sufficient evidence to justify the action proposed by the regulation," or (3) it can be a

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[42] 16 U.S.C. 1533(b)(3)(B).
[43] *Id.*
[44] 16 U.S.C. 1533(b)(3). This "warranted but precluded" finding is contingent on the Secretary making expeditious progress with respect to other listings and delistings. A petition that is "warranted but precluded" returns to the hopper, and is treated as a resubmitted petition to list or delist, but for which there is already substantial information to warrant the action. In other words, the Secretary has one year from the "warranted but precluded" finding to reach a new decision on whether to issue a proposed rule, deny the petition, or make another "warranted but precluded" finding. The Secretary must monitor the status candidate species and use the emergency listing authority pursuant to ESA section 4(b)(7) as necessary. *Id.* and see Patlis, *supra* at note 10 at 276-7.
[45] See 5 U.S.C. 553(b)-(c) (2002). In addition to the Federal Register notice, the Secretary must give actual notice of the proposed regulation to the relevant state agencies, and to each county, where the species is believed to be found. He must also give notice to professional scientific organizations, publish a summary in a newspaper of general circulation in the area in which the species is believed to be found, and hold at least one public hearing if so requested within forty-five days of the proposal. See 16 U.S.C. 1533(b)(5).
[46] 16 U.S.C. 1533(b)(6)(A).

notice extending the one-year period by six more months "if there is substantial disagreement regarding the sufficiency or accuracy of the available data."[47]

Once the determination whether a species is endangered or threatened is made, it must be memorialized by formally adding the name of the species onto the List of Endangered Species or List of Threatened Species, as published by the Secretary of the Interior.[48] The determination prescribed by section 4(a) of the ESA and the listing, prescribed by section 4(c), are two different requirements that require two separate actions by the Secretary.

Designating Critical Habitat

When a species is proposed for listing as endangered or threatened under the Endangered Species Act, the FWS must consider whether there are areas occupied by the species that have biological or physical features essential to the species survival and may require special management and protection. Critical habitat may also include an area not occupied by the species but that will be needed for its recovery. The process for designating critical habitat follows the same process and same deadlines as listing determinations, with a few exceptions.[49] The most important difference is the additional

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[47] *Id.*

[48] 16 U.S.C. 1533(c)(1). "The Secretary of the Interior shall publish in the Federal Register a list of species determined by him or the Secretary of Commerce to be endangered species and a list of species determined by him or the Secretary of Commerce to be threatened species." *Id.*

[49] See generally Jason M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn't*, 20 Stan. Envtl. L. J. 133 (2001).

requirement to consider the economic effects of designating an area as critical habitat. Economic effects are not a consideration in the listing process.

The area designated by the Secretary as "critical habitat" is published as a proposed Federal regulation in the Federal Register. The final boundaries of the critical habitat area are published in the Federal Register after considering public comments on the proposed critical habitat area. The final regulation designating critical habitat must be published concurrently with the final regulation for the listing determination.[50] There are two exceptions to this requirement. First, the Secretary can publish the listing determination faster than required if "it is essential to the conservation of such species."[51] Second, the Secretary may invoke a one-year extension if he or she finds that critical habitat "is not then determinable."[52] The Secretary must publish a designation "based on such data as may be available at that time" and "to the maximum extent prudent" at the end of the extension.[53]

If critical habitat is designated for an endangered or threatened species, federal agencies will be required to consult with FWS on actions they carry out, fund, or authorize to ensure that their actions will not destroy or adversely modify critical habitat. For DoD,

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[50] 16 U.S.C. 633(b)(6)(C): A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that-- (i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or (ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.
[51] *Id.*
[52] *Id.*
[53] *Id.*

designation of critical habitat on a military installation could impact mission readiness by additional limitations placed on military use of land designated as critical habitat, whether or not the species are actually present. Otherwise, the installation would only have to consult with FWS if a proposed DoD action may affect endangered or threatened species present on the installation.[54]

Lack of Critical Habitat Designations

According to the latest FWS figures, there are 1263 threatened and endangered species in the United States, but only 152 of the species have designated critical habitat areas.[55] So why haven't more critical habitat areas been designated?

One major reason is the lack of Congressional funding to carry out the mandatory deadlines for listing endangered and threatened species and designating critical habitat.[56] The funding problems are further compounded by the inundation of new listing and designation petitions to the FWS, which trigger the deadlines, and have resulted in

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[54] The Section 7 process begins by the agency initiating the "informal consultation" with FWS or MNFS as appropriate. If adverse effects (of the proposed action) to the listed species are avoidable or can be avoided through modification, then consultation is concluded. If adverse effects are unavoidable, then formal consultation is required to evaluate the effects and FWS issues a "Biological Opinion (BO)." If the BO concludes the action is not likely to jeopardize the species or destroy or adversely modify critical habitat, then FWS will provide an "incidental take" statement, which anticipates the amount of take that may occur incidental to the project – exempting agency from a Section 9 violation for the specified amount of take. If the BO concludes the action is likely to jeopardize the continued existence of the species or destroy or adversely modify designated critical habitat, then it provides reasonable and prudent alternatives to the proposed action that will avoid jeopardy or adverse modification or critical habitat destruction. *The Military and the Endangered Species Act, Interagency Cooperation*, USDoD 7 USFWS (Sep 2001).

[55] *Threatened and Endangered Species System, Summary of Listed Species, Species and Recovery Plans as of 04/30/2003*, USFWS.

[56] Jason M. Patlis, *Article: The Endangered Species Act: Thirty Years of Politics, Money, and Science: Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 Tul. Envtl. L.J. 257 (2003).

litigation to ensure enforcement of those deadlines.[57] The limited funds are further diverted, not only to pay the increased cost of litigation-driven listings and designations, but also pay the additional costs of litigation challenging the merits of FWS' listing decisions driven by court-imposed deadlines.[58]

FWS and NMFS were further hampered by a year long moratorium which curtailed their ability to meet the requirements mandated by ESA.[59] The moratorium was included as a rider on a supplemental appropriations and rescissions bill for the Department of Defense in 1995.[60] During the moratorium, the petitions for listings and designations piled up and the FWS could do nothing until the moratorium was lifted in 1996.[61] The resulting backlog was tremendous and petitioners began suing on missed deadlines.[62] The courts imposed new schedules beyond the statutory deadlines, which created an additional drain on FWS' funds to meet the new deadlines.[63]

The overall budgetary impact on FWS led the agency to assign a relatively low priority to designating critical habitat.[64] FWS believed that a more effective use of limited staff and funding was to place imperiled species on the List of Endangered and Threatened

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[57] *Id.* at 259.
[58] *Id.*
[59] *Id.*
[60] Introduced by Senator Kay Bailey Hutchison, it imposed a moratorium on all new ESA listings and designations by the FWS. *Id.* at 287. See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86 (1995) (appropriating funds to the Department of Interior and related agencies).
[61] *Id.* at 261.
[62] *Id.*
[63] With no discretion afforded the FWS under the ESA, courts had no choice but to rule against the FWS and to impose court-ordered schedules. These new schedules gave the FWS some breathing room beyond the statutory deadlines, but would put them in a position of contempt if they were to miss the court-imposed deadlines. *Id.*
[64] *Id.*

Species.[65] Additionally, FWS had determined critical habitat designation usually affords little extra protection to most species, and in some cases it can result in harm to the species.[66] This harm may be due to negative public sentiment to the designation, to inaccuracies in the initial area designated, and a misconception among other Federal agencies that if an area is outside of the designated critical habitat area, then it is of no value to the species.[67]

One of the main reasons that FWS believes that critical habitat designation usually affords little extra protection to the species is because the level of protection provided in critical habitat is very similar to that already provided to species by Section 7's "jeopardy standard." Federal agencies are required to consult with FWS to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species..."[68] To jeopardize the continued existence of a species [the jeopardy standard] means to engage in an action that reasonably would be expected, directly or indirectly, reduce the reproduction, numbers, or distribution of the species.[69] According to FWS, the adverse modification of critical habitat consultation standard, by definition, is nearly identical to

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[65] *Id.*
[66] *Critical Habitat, What is it?*, USFWS (Feb. 2002).
[67] *Id.*
[68] 16 U.S.C. 1536(a)(2): Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.
[69] 50 C.F.R. § 402.02 (1999).

the jeopardy standard. The destruction or adverse modification of critical habitat means a direct alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.[70]

Another reason critical habitat designation may afford little extra protection to the species is due to prohibition in ESA Section 9 making it unlawful for "any person" to "take" species listed as endangered or threatened.[71] This prohibition applies to any person subject to the jurisdiction of the United States; therefore it applies to private property owners.[72] and state and local governmental entities.[73] The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.[74] Moreover, the term "take" has been defined and interpreted broadly, encompassing habitat modification adverse to listed species.[75] Overall, Section 9 may provide greater protection to endangered and threatened species than Section 7's consultation requirements for federal agencies under the jeopardy standard. Section 7 applies only to federal agencies[76], whereas Section 9 applies to any person subject to the

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[70] The court in *Sierra Club v. USFWS*, 245 F. 3rd 434, 442 (5th Cir. 2001) held that "the recovery and survival of a species" was too high of a standard – should be "recovery or survival of a species."

[71] "(a) Generally. (1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to-- (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; ..." 16 U.S.C. 1538(a)(1)

[72] Shi-Ling Hsu, *ARTICLE: A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis*, 26 Harv. Envtl. L. Rev. 33, 50 (2002). *See generally* Babbitt v. Sweet Home Chapter of Comtys for a Great Or., 515 U.S. 687 (1995) (Scalia, J., dissenting).

[73] *Id. See also* Palila v. Haw. Dept of Land & Natural Res., 471 F. Supp. 985, 996 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

[74] 16 U.S.C. 1532(19). "Harm," in turn, has been interpreted to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2000). Hsu, *at* 50.

[75] Hsu, at 50.

[76] Even though Section 7 consultation requirements only applies to federal agencies, significant impacts are pushed down to non-federal entities due to the federal nexus.

jurisdiction of the United States.[77] The "take" prohibition could be used to prohibit landowners from engaging in otherwise lawful land uses (e.g. logging, agriculture, and development) without the designation of critical habitat.[78] "For example, the logging of old-growth forest that is home to a northern spotted owl, which is designated as threatened under the ESA, may constitute a "take" and may thus be prohibited under the ESA."[79] However, critical habitat designation may impact more area because it may include areas not occupied by the species, but needed for its recovery.

The US Fish and Wildlife Service's policy that critical habitat designation is not prudent for most species and is an expensive regulatory process that duplicates the protections already provided by the jeopardy standard[80] has come under attack by numerous successful lawsuits, and the courts have ordered FWS to designate critical habitat for many threatened and endangered species.[81] There are many reasons for the success of

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[77] The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States. 16 U.S.C. 1532 (13).

[78] Hsu, at 50.

[79] *Id.* "Similarly, developing single-family homes on land that is habitat for the endangered golden-cheeked warbler may constitute a "take" in that it adversely modifies habitat for the species and is thus also prohibited. In an extreme case, the ESA could completely prohibit a land use for which a property is uniquely suited and valuable. For example, a property with a stand of trees may be extremely valuable for logging purposes, while no other activities would yield value to the landowner. Similarly, a vacant lot of land in a developing residential area could be extremely valuable if developed but valueless if development is prohibited." *Id.*

[80] Feldman and Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, at 90 (NR & E Fall 2001).

[81] In *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp.2d 1280, 1288 (D. Haw. 1998), the court held that the FWS failed to articulate a rational basis for not designating critical habitat for the 245 plant issues at issue and found that the FWS' actions were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. In *Natural Resources Defense Council ("NRDC") v. United States Department of Interior*, 113 F.3d 1121, 1126-27 (9th Cir. 1997), FWS, in defense of its decision not to designate critical habitat for the endangered gnatcatcher, argued that a "far superior" state-run protection program adequately protected the habitat. In dismissing this argument, the Ninth Circuit held, "Neither the [Endangered Species] Act nor the implementing regulations sanctions nondesignation of habitat when designation would

citizen lawsuits. The Endangered Species Act (ESA) is not ambiguous about the requirement to designate critical habitat and the courts have been able to describe substantive protections for listed species that are lost if critical habitat are not designated.[82] Even FWS has stated that areas currently unoccupied by the species, but which are needed for the species' recovery, are protected by the prohibition against adverse modification of critical habitat and not the jeopardy standard.[83]

The emphasis on designating critical habitat could impact Department of Defense installations. So far, DoD has been able to balance the ESA requirements (e.g., designation of critical habitat, consultation requirements, jeopardy standard, "taking" prohibitions) with the need to adequately train our troops through the Sikes Act. The Sikes Act requires each military installation with significant natural resources to implement an Integrated Resources Management Plans (INRMPs). For now, FWS has excluded military installations from critical habitat designation if the installation has an appropriate INRMP in place.[84]

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be merely *less* beneficial to the species than another type of protection." The court explained, "the [state-run] alternative cannot be viewed as a functional substitute for critical habitat designation. Critical habitat designation triggers mandatory consultation requirements for federal agency actions involving critical habitat." In *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000), the District Court of New Mexico further explained the importance of designating critical habitat to the conservation of an endangered or threatened species. Designation of critical habitat is given the same priority under the ESA as the listing of an endangered or threatened species. *Id.* at 1169. It is of such a priority that the ESA "compels the designation despite other methods of protecting the species the Secretary [through FWS] might consider more beneficial." *Id.* (citing NRDC at 1127).

[82] *Center for Biological Diversity, et al. v. Gale Norton, Secretary of the Department of Interior*, 240 F. Supp. 2d 1090, 1102 (2003). "without designated critical habitat, FWS cannot explain in reasonable detail the degree to which the jeopardy and adverse modification prongs overlap … designation establishes a uniform protection plan prior to consultation. In the absence of such designation, the determination of the importance of a species' environment will be made piecemeal … may create an inconsistent and shortsighted recovery plan. … designation of critical habitat plays a critical role in identifying those areas in which a § 7 consultation will be triggered."

[83] See *Critical Habitat*, supra note 66.

[84] "We [FWS] consult with the military on the development and implementation of INRMPs for installations with listed species. We believe that bases that have completed and approved INRMPs that

The Sikes Act and Integrated Natural Resources Management Plans

The Sikes Act was approved on September 15, 1960 – thirteen years before the Endangered Species Act.[85] It provides for cooperation by the Departments of the Interior and Defense with State agencies in planning, development and maintenance of fish and wildlife resources on military reservations throughout the United States.[86]

The Sikes Act has undergone several minor amendments since its passage in 1960.[87] However, the 1997 amendments resulted in a fundamental change in the Sikes Act. Prior to 1997, the Sikes Act "only authorized, rather than required", the Secretary of Defense to carry out a program of planning for, and the development, maintenance, and

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address the needs of the species generally do not meet the definition of critical habitat discussed above, as they require no additional special management or protection. Therefore, we [FWS] do not include these areas in critical habitat designations if they meet the following three criteria: (1) A current INRMP must be complete and provide a conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would not meet the definition of critical habitat." 65 Fed Reg 63680, 63688.

[85] 16 U.S.C. 670a-670o, 74 Stat. 1052. Historical overview: Prior to 1949, natural resources personnel at Eglin AFB generated funds for restocking and conservation efforts by charging fees for hunting and fishing permits. This practice came under fire from the Comptroller General because no legislation authorized the base to retain the fees collected. The Sikes Bill of 1949 ratified this practice and directed the Secretary of the Air Force to adopt suitable regulations for fish and game management in accordance with a general plan to be worked out with the Secretary of the Interior. Pub. L. No. 81-345, 63 Stat. 671 (1949). The Sikes Act of 1960 expanded the scope of the 1949 Sikes Bill to include all domestic military reservations. The 1960 Act provided for cooperation by the Departments of the Interior and Defense with State agencies in planning, development and maintenance of fish and wildlife resources on military reservations throughout the United States. See Teresa K. Hollingsworth, *The Sikes Act Improvement Act of 1997: Examining the Changes For The Department of Defense*, 46 A.F. L. Rev. 109, 112 (1999).

[86] 16 U.S.C. 670a-670o, 74 Stat. 1052.

[87] In 1968 amended to authorize funds and to expand the program to include the enhancement of wildlife habitat and the development of outdoor recreation facilities; 1974, mandated that the scope of the plans include fish and wildlife habitat management, range rehabilitation, and the control of off-road vehicle traffic; 1982, expanded the scope of the Act to specifically include all species of fish, wildlife, and plants considered endangered or threatened; 1986, imposed multiple-use management principles on the DoD, while recognizing the "paramount importance" of the military mission. *Supra* Hollingsworth, at Note 70.

coordination of, wildlife, fish, and game conservation and rehabilitation in each military reservation in accordance with a cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate state agency designated by the state in which the reservation is located.[88] The Sikes Act Improvement Act of 1997 "requires" DoD and its military services (i.e., Army, Air Force, Navy and Marine Corps) to prepare and implement INRMPs for each military installation with significant natural resources.[89] INRMPs aim for sustainable natural resources management while ensuring no net loss in the capability of installation lands to support the military mission. DoD and each military service have implementing instructions for compliance with the Sikes Act, ESA, and other natural resources laws and regulations.[90]

INRMPs are planning documents that allow DoD installations to implement landscape-level management of their natural resources while coordinating with various stakeholders.[91] A basic INRMP includes: 1) a description of the installation, its history and its current mission; 2) management goals and associated timeframes; 3) recommended projects and estimated costs; 4) discussion on how military mission and

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[88] 16 U.S.C. 670a (1985) (amended 1997).

[89] 670a. Cooperative plan for conservation and rehabilitation (a) Authority of Secretary of Defense. (1) Program. (A) In general. The Secretary of Defense shall carry out a program to provide for the conservation and rehabilitation of natural resources on military installations. (B) Integrated natural resources management plan. To facilitate the program, the Secretary of each military department shall prepare and implement an integrated natural resources management plan for each military installation in the United States under the jurisdiction of the Secretary, unless the Secretary determines that the absence of significant natural resources on a particular installation makes preparation of such a plan inappropriate. 16 USCS § 670a(1) (2003).

[90] *The Military and the Endangered Species Act, Interagency Cooperation*, US DoD and USFWS (Sept. 2001).

[91] *Integrated Natural Resources Management Plans*, US DoD & USFWS (March 2002). Stakeholders may include managers of military operations and training activities, environmental managers, master planning staff, Federal and state agencies, agriculture lessees, recreational groups, environmental and conservation groups, cultural resource managers, Native American tribal interests, installation pest management professionals, neighboring land owners, local government planning groups, and scientists with expertise relevant to installation ecosystems. *Id.*

training requirements are supported while protecting the environment; 5) legal requirements and biological needs of the natural resource; 6) the role of the installation's natural resources in the context of the surrounding ecosystem; and 7) input from the FWS, State fish and wildlife agency, and the general public.[92]

INRMPs are extremely important management tools that ensure military operations and natural resources conservation are integrated and consistent with steward requirements.[93] They also provide a framework for the use and conservation of natural resources on lands and waters under DoD control.[94] While primarily used by installation natural resources managers, the INRMP provides installation planners with baseline information necessary for the development of installation master plans and Geographic Information Systems.[95] The INRMP serves as the principal information source for preparing environmental assessments or environmental impact statements for new construction, military operations, and other proposed installation actions.[96] In addition, INRMPs provide the basis for formulating the natural resources budget.[97] Each plan balances the ecosystem-wide management of natural resources with mission requirements and other land use activities affecting those resources.[98]

The Secretary of each military department is ultimately responsible for preparing INRMPs for their installations; in cooperation with the Secretary of the Interior (through

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[92] *Id.*
[93] *Overview of the Division of Federal Program Act*, USFWS.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

the USFWS), and the head of each appropriate State fish and wildlife agency in which the military installation is located.[99] The resulting plan for the military installation reflects the mutual agreement of the parties concerning conservation, protection, and management of fish and wildlife resources. The Secretaries of the military departments carry out the program consistent with the use of military installations to ensure the preparedness of the Armed Forces, to provide for (a) the conservation and rehabilitation of natural resources on military installations; (b) the sustainable multipurpose use of the resources, which includes hunting, fishing, trapping, and nonconsumptive uses; and (C) public access to military installations to facilitate the use of the installation, subject to safety requirements and military security.[100]

One of the benefits to developing and implementing a INRMP, is that bases that have completed and approved INRMPs that address the needs of endangered and threatened species generally do not meet the definition of critical habitat and do not require additional special management or protection.[101] FWS does not include these areas in critical habitat designations if they meet the following three criteria:

> "(1) A current INRMP must be complete and provide a conservation benefit to the species; (2) the plan must provide assurances that the

[99] (2) Cooperative preparation. The Secretary of a military department shall prepare each integrated natural resources management plan for which the Secretary is responsible in cooperation with the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, and the head of each appropriate State fish and wildlife agency for the State in which the military installation concerned is located. Consistent with paragraph (4), the resulting plan for the military installation shall reflect the mutual agreement of the parties concerning conservation, protection, and management of fish and wildlife resources. 16 USCS § 670a(2) (2003).
[100] 16 U.S.C. 670a(a)(2), (3) (2003).
[101] 68 Fed. Reg. 37276, 299 (2003); and 65 Fed, Reg. 63680, 63688 (2000); see also *The Military and the Endangered Species Act, Interagency Cooperation*, supra note 54.

conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, by providing for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would not meet the definition of critical habitat."[102]

Many installations have completed and approved INRMPs in place that meet the criteria outlined above and do not require additional special management or protection; therefore, excluded from critical habitat designation. For example, the FWS excluded Beale and Travis Air Force Bases from critical habitat designation for vernal pool crustaceans (including the fairy shrimp) and 11 vernal pool plants, finding INRMPs to functionally equivalent to critical habitat designation.[103] Other examples in which FWS has excluded critical habitat designation on military installations with appropriate INRMPs include F. E. Warren AFB in Cheyenne, Wyoming, protecting the Preble's Meadow Jumping mouse; and the Marine Corps Air Base in Miramar, California, protecting the Coastal California Gnatcatcher.[104]

A recent decision by the U.S. District Court of Arizona, *Biological Diversity v. Norton*, may eventually change the way DoD avoids critical habitat designation on military reservations through its' use of INRMPs.

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[102] *Id.*
[103] 68 Fed. Reg. 46684, 46750-51 (2003).
[104] 68 Fed. Reg. 37276, 37299-301 (2003) and 65 Fed. Reg. 63680, 63688 (2000).

Critical Habitat Redefined – *Biological Diversity v. Norton*?

The main issue in *Biological Diversity v. Norton* was the United States Fish and Wildlife Service's (FWS) interpretation of the ESA's definition of "critical habitat."[105] In *Biological Diversity*, environmental groups sued the Secretary of the Interior alleging that the FWS' designation of critical habitat for the Mexican spotted owl was in violation of the Endangered Species Act and the Administrative Procedure Act[106] and sought to enjoin FWS from excluding from the spotted owl's critical habitat nearly 9 million acres of federal and tribal lands in Arizona and New Mexico. The court held that the exclusion of federal and tribal lands was a violation of the ESA and APA. The court found two significant flaws in FWS' interpretation of ESA's definition of "critical habitat" – first, their determination to designate an area as critical habitat turning on whether or not adequate management or protections are already in place; and second, their improper statutory construction of ESA's critical habitat definition.

USFWS' Interpretation of ESA's Definition of Critical Habitat

The Endangered Species Act, 16 U.S.C.S. § 1531 et seq., defines "critical habitat," in relevant part, as follows: the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of 16 U.S.C.S. § 1533, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or

[105] See *Center for Biological Diversity*, supra note 82, at 1096.
[106] 5 U.S.C. §§ 551 et seq., 701 et seq.

protection.[107] The FWS has interpreted the "critical habitat" definition not to include areas that have "adequate management or protections already in place.[108] The court stated that "the defendant and FWS had been repeatedly told by the federal courts that the existence of other habitat protections did not relieve Defendant from designating critical habitat."[109]

According to the court, the flaw in FWS' interpretation of the definition of critical habitat is that the determination to designate an area as critical habitat can turn on whether or not adequate management or protections [referred to as "special management" by the court] are already in place.[110] The court was clear in stating that the determination should not turn on whether or not adequate management or protections are in place, but should turn on whether or not the habitat is critical to the survival of an endangered or threatened

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[107] 16 U.S.C. 1352(5)(A)(i).

[108] 66 Fed. Reg. 8530, 8537. The FWS interpretation in a final rule as follows: "Special management considerations or protection is a term that originates in the definition of critical habitat. Additional special management is not required if adequate management or protection is already in place. Adequate special management considerations or protection is provided by a legally operative plan/ agreement that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long-term conservation of the species. We use the following three criteria to determine if a plan provides adequate special management or protection: (1) A current plan/ agreement must be complete and provide sufficient conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, i.e., provide for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would no longer meet the definition of critical habitat." *Id.*

[109] *Id.*

[110] Whether habitat does or does not *require* special management by Defendant or FWS is not determinative on whether or not that habitat is "critical" to an endangered or threatened species. What is determinative is whether or not the habitat is "essential to the conservation of the species" and special management of that habitat is possibly necessary. 16 U.S.C. § 1532(5)(A)(i). Thus, the fact that a particular habitat does, in fact, require special management is demonstrative evidence that the habitat is "critical." Defendant, on the other hand, takes the position that if a habitat is actually under "adequate" management, then that habitat is per se *not* "critical." This makes no sense. A habitat would not be subject to special management and protection if it were not essential to the conservation of the species. The fact that a habitat is already under some sort of management for its conservation is absolute proof that such habitat is critical." *Id.* at 1099. The court interpreted "may" in "may require special management" as an auxiliary word which expresses possibility. "a plain reading of the definition of "critical habitat" means land essential to the conservation of a species for which special management or protection is possible." *Id.* at 1098.

species.[111] The court went on to state that "a habitat would not be subject to special management and protection if it were not essential to the conservation of the species. The fact that a habitat is already under some sort of management for its conservation is absolute proof that such habitat is critical."[112]

For DoD, the court's analysis and holding demonstrates that an INRMP in place at a military installation might be viewed by this court as proof that the habitat is critical and therefore essential to the conservation of the species – opening the door to critical habitat designation.

Administrative Procedures Act Violation - Improper Statutory Construction

The court in *Biological Diversity* also held that FWS improperly interpreted ESA's definition of critical habitat by adding words to an unambiguous statute. FWS' interpretation of ESA's definition of "critical habitat" states that:

> "Special management considerations or protection is a term that originates in the definition of critical habitat. **Additional** [emphasis added] special management is not required if adequate management or protection is already in place."[113]

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[111] *Id.*
[112] *Id.*
[113] See *Critical Habitat*, supra note 66.

The court held that the term "additional" is impermissible and contrary to law because there is nothing in ESA §1532, or its' implementing regulations, to support the inclusion of "additional" in ESA's definition of critical habitat.[114]

The defendant tried to argue that the phrase, "special management considerations or protection," is ambiguous under ESA's definition of critical habitat, therefore the court is required to show deference to the agency definition.[115] The court disagreed and used the defendant's own definition of the phrase to show it was clear and unambiguous. FWS definition of "special management considerations or protection" included "**any** [emphasis added] methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species."[116] The term "any' is all-inclusive and "clearly and unambiguously contemplates the use of more than one method of protection for any particular habitat."[117]

The court also found that the Defendant's interpretation of the "special management considerations or protection" definition also ran contrary to one of the enunciated policies

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[114] See *Center for Biological Diversity*, supra note 82, at 1099. Also see *U.S. v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002) (It is a canon of statutory construction that words should not be added to or read into a statute).

[115] See *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, at 842-43, 847-48 (1984). Under *Chevron,* a two-step analysis is employed when reviewing an agency's statutory interpretation: First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute.

[116] *Id.*, 50 C.F.R. 424.02(j).

[117] *Id.*

of the ESA.[118] It is the first policy of the ESA "that **all** [emphasis added] Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."[119] "The stated purpose is not for *some* agencies and departments to conserve endangered species; *all* must do so. Thus, *any* and every protective method or procedure should be employed to further that purpose. There is no ambiguity."[120] The court held that ESA's "critical habitat" definition was unambiguous and FWS' "tortured construction of it [was] impermissible and contrary to law" and "entitled to no deference.[121]

The holding and analysis in *Biological Diversity* presents a unique challenge for DoD. DoD installations have avoided critical habitat designation by the FWS because of their INRMPs. In the past, if the DoD installation had an appropriate INRMP in place, it did not meet the FWS definition of critical habitat because the installation had adequate special management considerations or protections already in place. If FWS follows the holding in *Biological Diversity*, DoD installations with endangered or threatened species might be designated as critical habitat.[122] A military base's INRMP would be an additional layer of protection for endangered and threatened species, but no longer a substitute for designation of critical habitat. If the exclusion were removed, thousands of

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[118] *Center for Biological Diversity*, supra note 82, at 1099.
[119] 16 U.S.C. §1531(c)(1). "Congress intended that all Federal agencies and departments utilize their authorities to, among other things, conserve the habitats of listed species. This purpose would be thwarted, however, if such agencies and departments, particularly FWS, were barred from doing so merely because another department or agency had its own protections in place." *Center for Biological Diversity*, supra note 71, at 1100.
[120] See *Center for Biological Diversity*, supra note 82, at 1100.
[121] *Id.*
[122] *See* notes 103,104, examples of several military installations that could be affected.

acres at military installations would be affected – potentially impacting military training areas across the United States.

DoD's Reaction to *Center for Biological Diversity v. Norton*

The courts may force FWS to include formally excluded DoD installations in critical habitat designations due to the impact of *Biological Diversity*. To avoid the ramifications to military training readiness, DoD has introduced legislation into Congress to "provide for the management of critical habitat of endangered species and threatened species on military installations in a manner compatible with the demands of military readiness, to ensure that the application of other resource laws on military installations is compatible with military readiness, and for other purposes.[123] The relevant text of the Senate and House bills state:

> "... The Secretary may not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines that such plan addresses special management considerations or protection (as those terms are used in section 3(5)(A)(i)). (B) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section). (C)

[123] 2003 H.R. 1235.

Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species ..."[124]

"... The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines that such plan addresses special management considerations or protection (as those terms are used in section 3(5)(A)(i)) ..."[125]

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[124] *Id.,* "... This Act may be cited as the "Encroachment on Military Bases Prevention Act". SEC. 2. MILITARY READINESS AND THE CONSERVATION OF PROTECTED SPECIES. (a) Limitation on Designation of Critical Habitat. Section 4(a) of the Endangered Species Act of 1973 (16 U.S.C. 1533(a)) is amended by adding at the end the following new paragraph: (4)(A) The Secretary may not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a) if the Secretary determines that such plan addresses special management considerations or protection (as those terms are used in section 3(5)(A)(i)). (B) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section). (C) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species." (b) Consideration of Effects of Designation of Critical Habitat. Section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. (b)(2)) is amended by inserting "the impact on national security," after "the economic impact ..."

[125] 2003 H. R. 1835. "... A BILL To amend the Endangered Species Act of 1973 to limit designation as critical habitat of areas owned or controlled by the Department of Defense, and for other purposes. ... This Act may be cited as the "National Security Readiness Act of 2003". SEC. 2. MILITARY READINESS AND THE CONSERVATION OF PROTECTED SPECIES. (a) Policy Regarding Duties of Federal Departments and Agencies. Section 2(c)(1) of the Endangered Species Act of 1973 (16 U.S.C. 1531(c)(1)) by inserting after "threatened species" the following: "insofar as is practicable and consistent with their primary purposes (b) Designation of Critical Habitat. Section 4(a)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(a)(3)) is amended by striking "prudent and determinable" and inserting "necessary" (c) Limitation on Designation of Critical Habitat. Section 4(a)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533 (a)(3)) is amended--(1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively; (2) by inserting "(A)" after "(3)"; and (3) by adding at the end the following: (B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a) if the Secretary determines that such plan addresses special management considerations or protection (as those terms are used in section 3(5)(A)(i)). (ii) Nothing in this paragraph affects the requirement to consult under section 7(a)(2) with respect to an agency action (as that term is defined in that section). (iii) Nothing in this paragraph

"... The completion of an Integrated Natural Resources Management Plan, pursuant to the Sikes Act Improvement Act (16 U.S.C. 670a), for lands or other geographical areas owned or controlled by the Department, or designated for its use, that addresses endangered or threatened species and their habitat, provides the 'special management considerations or protection' required ..."[126]

The current legislative proposal does not change the Endangered Species Act to follow the reasoning in *Biological Diversity* – that critical habitat must be designated, and habitat already under some sort of management for its conservation is absolute proof that such habitat is "critical" and should be designated as critical habitat. Instead, the proposal is a legislative remedy to prevent military programs with appropriate INRMPs from being designated critical habitat designation. No matter how effectively DoD

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affects the obligation of the Department of Defense to comply with section 9, including the prohibition preventing extinction and taking of endangered species and threatened species. (d) Consideration of Effects of Designation of Critical Habitat. Section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1533 (b)(2)) is amended by inserting "the impact on national security," after "the economic impact" ... "

[126] 2003 S. 747: "This act may be cited as the National Defense Authorization Act for Fiscal Year 2004 ... The purpose of this chapter is to (1) protect the lives and well-being of citizens of the United States and preserve their freedoms, economic prosperity, and environmental heritage by ensuring military readiness; (2) ensure military readiness by addressing problems created by encroachment on military readiness activities and lands, marine areas, and airspace reserved, withdrawn, or designated for a military use; (3) reaffirm the principle that such lands, marine areas, and airspace exist to ensure military preparedness; (4) shield military readiness activities and lands, marine areas, and airspace reserved, withdrawn, or designated for a military use, including land, sea, and air training and operating areas, from encroachment, while ensuring that the Department of Defense fulfills its environmental stewardship responsibilities; (5) manage such lands, marine areas, and airspace for other purposes to the extent the non-military purpose does not reduce capability to support military readiness activities; (6) re-establish the appropriate balance between military readiness and environmental stewardship; and (7) establish a framework to ensure long-term sustainability of military ranges. ... SEC. 2017. MILITARY READINESS AND THE CONSERVATION OF PROTECTED SPECIES (a) The completion of an Integrated Natural Resources Management Plan pursuant to the Sikes Act Improvement Act (16 U.S.C. 670a) for lands or other geographical areas owned or controlled by the Department, or designated for its use, that addresses endangered or threatened species and their habitat, provides the 'special management considerations or protection' required (b) This section does not remove the requirement for agency consultation under section 7(a)(2) of the Endangered Species Act (16 U.S.C. 1536 (a)(2)..."

protects ETS and ETS' habitat through comprehensive INRMP programs, the INRMP programs may be overshadowed by the perception the military has found a way to get around the critical habitat designation. Is there a better way?

Alternative Approaches

DoD should look beyond the current constraints of the ESA to find fresh alternatives to the current policy which seeks only the exclusion of critical habitat designations as described further in the "relevant impact" approach that follows below. Instead, DoD should approach the problem directly by allowing designation of all critical habitat; but setting aside those areas vital to the national security of the United States, with less stringent ESA requirements; and reducing areas designated critical habitat by introducing legislation removing areas from critical habitat designation not inhabited by the endangered and threatened species.

Relevant Impact

FWS may exclude an area from critical habitat designation if, after considering "the economic impact, and any other relevant impact," it determines that the benefits of excluding the area outweigh the benefits of designating that area as critical habitat.[127] The language of this provision specifically provides that the FWS can consider economic and any other relevant impacts when weighing the relative benefits of a critical habitat

[127] 16 U.S.C. 1533(b)(2).

designation.[128] In *Biological Diversity*, FWS had excluded the lands of the San Carlos Apache in their final rule because "the designation of critical habitat would be expected to adversely impact our working relationship with the Tribe and we believe that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Our working relationships with the Tribe has (sic) been extremely beneficial in implementing natural resource programs of mutual interest."[129] The court found that it was certainly reasonable and a permissible construction of the statute to consider a positive working relationship relevant, particularly when that relationship results in the implementation of beneficial natural resource programs, including species preservation. The court deferred to FWS' determination that its working relationship with the San Carlos Apache is a relevant impact under 16 U.S.C. § 1533(b)(2).[130]

However, the court determined that San Carlos Apache plan was incomplete and violated the Administrate Procedures Act (APA).[131] Unfortunately, the same analysis might be applied to FWS' previous exclusion of Camp Pendleton from the gnatcatcher critical habitat designation because, like the San Carlos Apache Plan, Camp Pendleton had not completed their INRMP.[132]

The importance of the court's analysis of the San Carlos Apache Plan is the possibility that an "impact analysis" may be one way to avoid the additional regulatory and

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[128] See *Center for Biological Diversity*, supra note 82, at 1104.
[129] *Id.* and 66 Fed. Reg. 8530, 8545.
[130] *Id.* at 1104.
[131] *Id.* at 1107.
[132] 65 Fed. Reg. 63680, 63690 (2000).

economic burdens caused by a critical habitat designation. The affected DoD military installation would have to prove to FWS that the agency had an adequate INRMP in place, complied with the Administrative Procedures Act, and the benefits of excluding the area outweighed the benefits of designating that area as critical habitat. An "economic and military impact analysis" may enable the agency to avoid the impacts critical habitat designation. However, the military installation would still be required to comply with Section 7's consultation requirements and Section 9's "takings" prohibitions for threatened and endangered species on their installations. Therefore, the "relevant impact" approach is only a partial solution to DoD's long-term needs to ensure our military forces are adequately trained while complying with the ESA. Also, this approach is similar to the proposed DoD legislation, in that it precludes critical habitat designation rather than designating habitat that is critical to a species survival.

Critical Training Areas

FWS should not be limited in their ability to designate critical habitat as required by the ESA. In order to follow the holding in *Biological Diversity*, a change in the legislative definition of critical habitat would need to occur to ensure "all" critical habitats are designated that are essential to every endangered and threatened species survival – regardless if approved INRMPs, other management plans or "relevant impacts" are present. FWS could still approve comprehensive INRMPS for DoD installations to meet the consultation requirements required by critical habitat designations. However, there

are many areas on DoD installations that are so vital to military readiness, that total compliance with the ESA can prevent our military forces from adequately training and adversely affect military readiness.

DoD installations have proven to be good stewards of the environment, sometimes to their detriment. For example, the Western Snowy Plover nesting increased 300 percent under Navy stewardship at Naval Amphibious Base (NAB) at Coronado since 1996, but when the area was designated a critical habitat for the bird in 1999, the NAB lost use of over 80 percent of its training beaches.[133]

The DoD is already obligated under the Sikes Act to develop Integrated Natural Resource Management Plans (INRMP) for lands under military control. These INRMPs address management of natural resources in the context of the military mission for which the lands were placed under the control of the military services. The INRMPs are prepared in cooperation with FWS and state agencies, to provide for species conservation and recovery, while still allowing the military to test, train, and support military readiness. It is a delicate balance, but one that should not be disrupted because the land has or has not been designated critical habitat.

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[133] *Statement of H. T. Johnson, Assistant Secretary of the Navy, (Installations and Environment) before the House Armed Services Committee Subcommittee on Military Readiness U.S. House of Representatives*, (March 14, 2002). The potential impact of critical habitat designation on the use of military lands for military training is also apparent at the Marine Corps Air Station, Miramar and the Marine Corps Base, Camp Pendleton. In the spring of 2000, the FWS proposed designating 16,000 acres (more than half) of the Miramar location and 57 percent (126,000 acres) of Camp Pendleton for critical habitat. At Miramar, the Marines were able to convince FWS that the INRMP provided sufficient species protections; therefore, no formal critical habitat designation was made. At Camp Pendleton, FWS determined that the harm to military readiness was greater than the value of critical habitat designation, and scaled back its designation. The decisions are being challenged in court and may be impacted if the courts follow the guidance in *Biological Diversity v. Norton* and similar court decisions.

DoD already has Congressional authority to protect our military readiness. If the critical habitat designation interferes with military readiness, the statute provides the Secretary of Defense the ability to exempt any agency action if necessary for reasons of national security.[134] Instead of trying to prevent DoD installations from being designated as critical habitat, they should embrace the idea and use special management considerations and protections for threatened and endangered species through their INRMP programs. Inevitably there will be conflicts between "critical habitat" and mission requirements. Instead of tackling these issues on a case-by-case basis, the Secretary of Defense should designate "critical training areas vital to the national security of the United States" or "CTAs."[135] If an agency action is required in a CTA and the area is designated as "critical habitat" or "could jeopardize the survival of an endangered or threatened species," then the agency action is exempt from the ESA requirements. At a minimum, the action should be exempt from the "take" requirements and any other requirements that would inhibit training in CTAs.[136] The exemption for CTAs could also be written into the "take" definition. Although exempt, the DoD would still be obligated under the Sikes Act to develop INRMPs for lands under military control. The CTA exemption

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[134] 16 U.S.C. 1536(j): Exemption for national security reasons. Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security. This exemption has never been used by the Secretary of Defense. The possibility of its use may be enough to bring about agreements.

[135] Not all DoD real estate is so vital to the United States' security that it should be designated as CTAs. Vital may be defined to mean "essential." A CTA is vital if its loss as a training area significantly affected the national security of the United States. For example, the 1.65 million acre Barry M. Goldwater Range in Arizona is mostly used for flight training operations in the overlying airspace. Aerial gunnery and bombing is restricted to less than 6 percent of the area. Although the entire area is essential for military training, only the small percentage that could affect endangered and threatened species, the bombing range, should be designated as a CTA. However, if an endangered and threatened species (e.g, bird) affects flying operations vital to the national security of the United States, then the area may be larger.

[136] See *supra* notes 10 and 11. The ESA forbids the import, export, or interstate or foreign sale of endangered and threatened animals and plants without a special permit. It also makes "take" illegal – forbidding the killing, harming, harassing, pursuing, or removing the species from the wild. *Id.*

should require as much protection to the listed species and their habitat as possible through the INRMP, while allowing military training to continue. For example, the rules should require avoidance of known habitat if possible and relocation of ETS or other habitat if it interferes with the mission that is vital to the security of the United States.[137] Any rulemaking should follow the Administrative Procedures Act and the exemption should be written in such a way to prevent citizen suits from interfering with military training for national security interest. The best way to designate CTAs may be through the National Environmental Policy Act (NEPA). The NEPA process is a proven method for addressing all environmental concerns, ensuring coordination with FWS, and providing a forum for public input and concerns.[138] The NEPA process does not prevent a federal agency from taking a specific action, only ensures that the agency carefully considers the environmental impacts of the proposed action and any reasonable alternatives.

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[137] An example of "avoidance" is demonstrated at Luke AFB in Arizona. The endangered Sonoran Pronghorn on the Barry M. Goldwater military range sometimes venture onto the active bombing area. To prevent an "incidental take," biologists from the base visually verify there are no pronghorn in the area before every bombing run. Even if the area was designated a CTA, the practice should still continue as long as it does not interfere with required mission training.

[138] 42 U.S.C. 4321, *et seq.* NEPA is the national charter for environmental planning. It declares a national policy, which encourages harmony between humans and their environment and promotes efforts to prevent or eliminate damage to that environment. It also establishes an analytical process for Federal agency decision-making. The analytical process established by NEPA requires that for Federal actions having the potential to significantly impact the environment, agencies must: 1) identify and analyze environmental consequences of proposed Federal actions in comparable detail to economic and operational analyses; 2) assess reasonable alternatives to agency proposed actions; 3) document the environmental analysis and findings; and 4) make environmental information available to public officials and citizens before agency decisions are made. NEPA also establishes the Council of Environmental Quality (CEQ). The CEQ is an executive council, which is responsible for overseeing the NEPA process and for reporting to the President and Congress on the status, condition, and management, of the Nation's environment. CEQ is also responsible for developing the "*Regulations for Implementing the Procedural Provisions of NEPA*" (40 CFR 1500-1508). The CEQ regulations require agencies to categorize each of their actions as normally requiring one of the following levels of environmental analysis and documentation: 1) categorical exclusion (applied to those actions that do not normally have the potential for significant impacts and do not require a detailed level of environmental analysis such as an environmental assessment (EA) or environmental impact statement (EIS)); 2) EA (an intermediate level of environmental analysis and are conducted when an action does not fit an existing CE or its potential for significant impacts are unknown.); 3) EIS (the most detailed level of environmental analysis, and they are conducted for actions that will have significant impacts.). www.uscg.mil/systems/gse/nepaview.

Potential or Actual Critical Habitat?

One of the major shortcomings of the critical habitat designation is that the area designated as critical habitat includes areas occupied not only by endangered or threatened species, but also areas not occupied by the species. The triggering requirement is that the area has biological or physical features essential to the species survival. Designating areas not occupied by endangered or threatened species as critical habitat is a difficult process because the species may never use the area. The lumping together of occupied and unoccupied areas prevents the application of different standards and requirements based on the potential occupation of a species.

The solution is to create two distinct critical habitat designations – Potential Critical Habitat and Actual Critical Habitat. Actual Critical Habitat is the area occupied by threatened and endangered species that has biological or physical features essential to the species survival. Potential Critical Habitat is the area not occupied by threatened and endangered species but has biological or physical features essential to the species survival. Separate designations provide the flexibility to balance economic impacts while protecting threatened and endangered species. When ESA was first enacted, the Act required FWS to concurrently designate critical habitat at the same time they listed the endangered or threatened species. As discussed previously, FWS were not able to comply due to funding and the time involved in determining critical habitat, especially trying to determine areas not inhabited by the threatened and endangered species, but

essential to their survival. By separating critical habitat designation into Actual Critical Habitat and Potential Critical Habitat, FWS should be able to designate Actual Critical Habitat at the same time they list the endangered and threatened species – the original intent of the ESA.[139] The more challenging designation of Potential Critical Habitat would still need more time and funds to accomplish due to its complexity and scientific uncertainty.

Another major benefit in separating Potential Critical Habitat from Actual Critical Habitat is the ability to allow market forces the freedom to choose alternative methods to replace Potential Critical Habitat when the area is needed for purposes that destroy Potential Critical Habitat. The Clean Water Act provides the best example of alternative methods through restoration[140] and mitigation banking[141] of wetlands. Recently, FWS

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[139] A species' physical locations and range are normally known prior to their listing as endangered or threatened. It is determination of the future growth and needs of the species that creates uncertainty and controversy.

[140] Wetland restoration is an essential tool in the campaign to protect, improve, and increase wetlands. Wetlands that have been filled and drained retain their characteristic soil and hydrology, allowing their natural functions to be reclaimed. Restoration is a complex process that requires planning, implementation, monitoring, and management. It involves renewing natural and historical wetlands that have been lost or degraded and reclaiming their functions and values as vital ecosystems. Restoring our lost and degraded wetlands to their natural state is essential to ensure the health of America's watershed. E.P.A River Corridor and Wetland Reservation Web Page, www.epa.gov/owow/wetland/restore.

[141] The mitigation banking concept: Potential development often threatens existing wetlands. Our regulatory agencies prefer that the wetlands be kept undisturbed. Where avoidance is not practical, wetland substitution, or replacement, at another site often provides a sound solution for the need to preserve wetland habitats. Up until now the landowner had just two options: 1) Mitigate the impacted wetlands on-site. The landowner could mitigate the lost wetlands on the same site but at a potential loss of expensive real estate value. 2) Mitigate the impacted wetlands off-site. The landowner could purchase another piece of property and construct compensatory wetlands. The downside of this option is the requirement to construct, monitor, and maintain the created wetlands to standards set by the regulatory agencies, as well as to repair and replant the site if the standards are not met over a minimum five-year period. This can be costly in terms of human resources, time, and money. An emerging concept called mitigation banking offers a new alternative that simplifies the process for the development community. Preserves, called mitigation banks, are large areas of constructed, restored, or preserved wetlands set aside for the express purpose of providing compensatory mitigation for impacts to habitat. A bank is authorized to sell the habitat values created on the preserve. These values, known as credits, are sold to landowners who need to substitute wetlands for those lost to development where avoidance or on-site mitigation is not feasible. Wildlands Inc. Website, *The Mitigation Banking Concept*, www. Wildlandsinc.com/banks/mit_concept.htm.

issued guidance for the establishment, use, and operation of conservation banks.[142] The main concept behind wetland mitigation banking is similar to that of conservation banking with a few slight differences.[143] The goal is to offset adverse impact to a species and functions to preserve existing habitat with long-term conservation value to mitigate loss of other isolated and fragmented habitat that has no long-term value to the species.[144] Obviously, use of conservation banking for Actual Critical Habitat should be the exception, not the rule. Transferring endangered and threatened species to new habitat may further endanger the species. The transfer should only be accomplished if necessary for the species survival or for some other extraordinary reason (e.g., CTA, Congressionally approved dam).

For DoD installations not occupied by endangered and threatened species, but the installation property has physical or biological features essential to the survival of the species, the "potential critical habitat" designation could provide relief from the effects of the "critical habitat designation" required today through use of the aforementioned benefits.

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[142] *Guidance for the Establishment, Use, and Operation of Conservation Banks*, Fish and Wildlife Service Memorandum, May 2, 2003.

[143] *Id.* A conservation bank is a parcel of land containing natural resource values that are conserved and managed in perpetuity for listed species and used to offset impacts to the comparable resource values on non-bank lands occurring elsewhere. The bank is specifically managed and protected by the banker or designee for its natural resource values. The values of the natural resources are translated into quantified ``credits." The bank owner sells habitat ``credits" to parties that need to compensate for the environmental impacts of their activities. A conservation bank is a free-market enterprise that offers landowners economic incentives to protect natural resources, saves developers time and money by providing them with certainty of pre-approved compensation lands, and provides long-term protection of habitat. Conservation banking creates a collaborative incentive based approach where habitat for listed species is treated as an asset rather than a liability. 68 Fed. Reg. 24753.

[144] *Id.*

Conclusion

FWS will continue facing court challenges like *Biological Diversity* if FWS continues to exclude military installations from critical habitat designation if the installation has an appropriate INRMP in place. If FWS follows the holding in *Biological Diversity*, DoD's best approach to prevent the designation of critical habitat on military installations is only through congressional action to change the Endangered Species Act. Otherwise, millions of dollars of taxpayers' money in unnecessary litigation costs and multiple conservation programs will continue to be wasted in critical habitat designation litigation. In order to protect threatened and endangered species and ensure our military forces are trained and ready to protect our great nation, Congress should enact unambiguous legislation that does not continuously end up bogged down in the courts. Legislation should be enacted establishing the process for designating "critical training areas" as described above. In addition, legislation should be enacted changing the Endangered Species Act to maximize the benefits created by splitting critical habitat designation into "actual critical habitat' and "potential critical habitat" designations.

One further note, Congress should provide adequate funds to FWS and to any other agencies required to set up critical habitat management plans. By not adequately funding the program leads to higher litigation cost because of public suits forcing FWS to designate critical habitat, as required under the law. Instead of wasting money in litigation costs, it would be better spent in a "common-sense" program that protects our threatened and endangered species while allowing economic growth and ensuring our

military forces are properly trained to defend our nation and our national security interest abroad.