



NATURAL RESOURCES DEFENSE COUNCIL v.  
UNITED STATES DEPARTMENT OF INTERIOR:  
MAKING CRITICAL HABITAT CRITICAL?

By  
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Although species of plants and animals have been vanishing since the emergence of life on Earth, the current rate of extinction is nearly one species per day.<sup>1</sup> This rate surpasses that of most periods in Earth's history,<sup>2</sup> and greatly exceeds the rate at which evolution replaces extinct species.<sup>3</sup> Moreover, scientists predict that this rate will continue to increase so that we will see hundreds of extinctions per day early in the twenty-first century.<sup>4</sup>

Recognizing that human land use and associated habitat modification<sup>5</sup> posed the greatest threat to species survival, Congress passed the Endangered

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<sup>1</sup> See James Salzman, *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 311 (1990) (citing NORMAN MYERS, *THE SINKING ARK* 31 (1979) (asserting extinction rate approaching one species per day). Estimates of terrestrial species extinctions range from a low of one to two species per day to a high of one every four minutes. See *Marine Biodiversity: Hearing Before the Subcomm. on Oceanography, Great Lakes and the Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 38, 41 (1991) (testimony of National Oceanic and Atmospheric Administration to Congress in 1991).

<sup>2</sup> See Holly Doremus, Comment, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 267 (1991) (asserting that except for few documented periods of mass extinction, present extinction rates are higher than ever); see also U.S. Congress, Office of Technology Assessment, *Technologies To Maintain Biological Diversity*, OTA-F-330 at 63-64 (1987) (hereinafter "*Technologies*") (changing geological or climatic conditions caused few periods of mass extinctions); G. Jon Roush, *The Disintegrating Web: The Causes and Consequences of Extinction*, THE NATURE CONSERVANCY MAG., Nov.-Dec. 1989, at 4-5 (accelerating trend of extinctions unequalled in Earth's history).

<sup>3</sup> See *Technologies*, *supra* note 2, at 4 (deducing that rate of loss is greater than rate of new species evolution); see also Doremus, *supra* note 2, at 267.

<sup>4</sup> See Roush, *supra* note 2, at 5 (predicting several hundred extinctions per day).

<sup>5</sup> See Doremus, *supra* note 2, at 267 (asserting greatest threat to species is human land use and habitat modification); see also COUNCIL ON ENVIRONMENTAL QUALITY, *THE 11TH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* 43 (1980) (modifying habitat is greatest threat to biological diversity).

Species Act (ESA) in 1973 to protect endangered and threatened species.<sup>6</sup> The ESA prohibits not only actions that threaten listed species, but also actions that jeopardize the habitat critical to the survival of these species.<sup>7</sup> While the ESA's protection of critical habitat is one of the statute's strongest enforcement tools, the United States Fish & Wildlife Service (FWS) has not designated critical habitat for nearly eighty percent of endangered species.<sup>8</sup> However, a recent Ninth Circuit Court of Appeals decision suggests a changing trend.<sup>9</sup>

In *Natural Resources Defense Council v. United States Department of the Interior* (hereinafter "NRDC"),<sup>10</sup> the Ninth Circuit Court of Appeals held that the administrative record before the court did not justify the FWS's decision to forego designation of critical habitat for the coastal California gnatcatcher.<sup>11</sup> The FWS refused to designate critical habitat based on its belief that such designation was not "prudent."<sup>12</sup> According to the FWS, critical habitat designation would increase the threat to the gnatcatcher.<sup>13</sup> Further, the FWS asserted, designation was not "prudent" because private individuals owned eighty percent of the gnatcatcher habitat.<sup>14</sup> The court found that the FWS erred on two grounds.<sup>15</sup> First, the court found that the FWS's allegations of increased threat to the gnatcatcher did not justify its decision refusing to designate any critical habitat.<sup>16</sup> Second,

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<sup>6</sup> See 16 U.S.C. § 1531 (1997) (declaring purposes and policy of ESA are to conserve endangered and threatened species).

<sup>7</sup> See *id.* § 1531(b) (stating that purposes of ESA include conserving ecosystems upon which endangered species and threatened species depend). The ESA defines critical habitat as those areas necessary for the conservation of the species which may require special protection. See *id.* § 1532(5)(A).

<sup>8</sup> See Salzman, *supra* note 1, at 312 (declaring critical habitats are never designated for 80% of endangered species).

<sup>9</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1123 (9th Cir. 1997) (finding FWS violated Endangered Species Act by failing to designate critical habitat).

<sup>10</sup> *Id.*

<sup>11</sup> See *id.* The Ninth Circuit also held that the FWS's decision was ripe for review, and the ESA does not authorize nondesignation merely because a state protection program would allegedly be more beneficial than designating critical habitat pursuant to the ESA. *Id.* However, this Note will not address these holdings as they are beyond the scope of the Note.

In 1993, the FWS listed the coastal California gnatcatcher as a threatened species under the ESA. See 58 Fed. Reg. 16742, 16742 (1993).

<sup>12</sup> See NRDC, *supra* note 9, at 1124-26.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 1125.

the court found that the fact that private individuals owned eighty percent of the gnatcatcher habitat did not excuse the FWS from designating critical habitat.<sup>17</sup>

This Note examines the Ninth Circuit's decision in *NRDC* and the effect it is likely to have on the interpretation by both agencies and courts of the ESA. Part I discusses the background of the ESA, critical habitat designation, and relevant case law. Part II describes the facts of *NRDC*, and briefly discusses the majority's holding and rationale. Part III analyzes the Ninth Circuit's decision, and ultimately concludes that the decision comports with both the ESA and congressional intent.

## I. BACKGROUND

Understanding the decision in *NRDC* requires understanding the political, social, and legal environment surrounding the ESA. This section first discusses the history behind the ESA. Next, it describes two crucial elements of the ESA—listing a species and designating critical habitat. Finally, this section discusses judicial interpretation of critical habitat and the “prudent” exception.

### A. *The Endangered Species Act*

The environmental movement of the late 1960s and early 1970s spurred Congress to enact several statutes addressing the protection of species.<sup>18</sup> In 1966, Congress enacted the Endangered Species Preservation Act,<sup>19</sup> the first signifi-

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<sup>17</sup> See *id.* at 1126. Section 7 of the ESA requires only federal agencies to consult with the Secretary to insure their actions do not jeopardize an endangered species or modify its habitat. See 16 U.S.C. § 1536(a)(2) (1997). Private individuals are thus exempt from section 7's consultation requirement. *Id.* For this reason, designating critical habitat would have almost no impact on the 80% of gnatcatcher habitat owned by private individuals. *Id.* However, because section 7 applies to actions “authorized, funded, or carried out” by federal agencies, designating critical habitat may affect non-federal lands where a federal nexus exists. See *id.* For example, where federal funds for a road realignment and airport expansion necessitate Federal Highway Administration and Federal Aviation Administration involvement, a federal connection exists. See Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Plant *Thlaspi Californicum* From Coastal Northern California, 63 Fed. Reg. 7112, 7115 (1998) (describing situation where federal nexus exists).

<sup>18</sup> See Salzman, *supra* note 1, at 312 (stating that environmental movement of late 1960s and early 1970s swept in era of environmental protection); see also Doremus, *supra* note 2, at 295-97 (discussing shortcomings of 1966 Act and 1969 Act).

<sup>19</sup> See Pub. L. No. 89-669, 80 Stat. 926 (codified at 16 U.S.C. §§ 668aa to cc-6) (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903).

cant statute addressing species protection.<sup>20</sup> Three years later, Congress strengthened wildlife protection when it passed the Endangered Species Conservation Act of 1969.<sup>21</sup> However, these statutes only protected species in danger of worldwide extinction, not species threatened with extinction solely in the United States.<sup>22</sup> Moreover, neither statute precluded the taking<sup>23</sup> of endangered species nor required federal agencies to preserve such species.<sup>24</sup> Thus, these statutes had little effect on the preservation of endangered species.<sup>25</sup>

Due to the inadequacies of these first attempts at species protection, Congress overwhelmingly passed the Endangered Species Act in 1973, which repealed the 1966 and 1969 laws.<sup>26</sup> By imposing upon federal agencies substantive conservation requirements for species within the United States, the ESA provides greater species protection than prior statutes.<sup>27</sup> The ESA increases species protection through its listing, consultation and critical habitat designation requirements.<sup>28</sup>

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<sup>20</sup> See Salzman, *supra* note 1, at 312 (describing ESA as most comprehensive species protection program); see also Doremus, *supra* note 2, at 295 (describing ESA as sweeping, broad-reaching regulation).

<sup>21</sup> See Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903). The 1969 Act strengthened species protection by prohibiting the import of endangered or threatened species into the United States and expanding the types of species eligible for protection. See Doremus, *supra* note 2, at 296 (explaining that Act expanded authority of Secretary to include invertebrates and reptiles, and prohibited importing listed species).

<sup>22</sup> See Pub. L. No. 89-669, 80 Stat. 926 (codified at 16 U.S.C. §§ 668aa to cc-6) (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903); Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903); see also Salzman, *supra* note 1, at 312 (asserting that only species threatened worldwide qualified for protection under statutes).

<sup>23</sup> See 16 U.S.C. § 1532(19) (1997). For purposes of the ESA, 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. *Id.*

<sup>24</sup> See Pub. L. No. 89-669, 80 Stat. 926 (codified at 16 U.S.C. §§ 668aa to cc-6) (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903); Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed by Endangered Species Act of 1973, Pub. L. No. 93-205, § 14, 87 Stat. 884, 903); see also Salzman, *supra* note 1, at 312 (stating 1966 and 1969 Acts did not prohibit takings nor mandate preservation programs).

<sup>25</sup> See Salzman, *supra* note 1, at 313 (asserting that dissatisfaction with ineffectiveness of protection led to Congress enacting ESA); see also Doremus, *supra* note 2, at 297-98 (discussing shortcomings of 1966 Act and 1969 Act).

<sup>26</sup> See 119 CONG. REC. 25,694, 42,915 (1973); see also Salzman, *supra* note 1, at 313 (stating that Senate unanimously passed ESA and House passed ESA with four dissenting votes).

<sup>27</sup> See 16 U.S.C. § 1536 (1997). For instance, section 7 of the ESA requires agencies to develop programs to conserve endangered and threatened species. *Id.* Section 7 further requires that federal agencies ensure that any actions taken by them do not threaten a listed species or its habitat. *Id.*

<sup>28</sup> See *id.* § 1533 (describing determination of endangered species, consultation, publication and revision of endangered and threatened species and critical habitat).

### 1. Listing a Species

The listing of a species as endangered or threatened is the first step in providing ESA protection.<sup>29</sup> Only the Secretary of the Interior or the Secretary of Commerce (collectively, "Secretary") has the authority to list a species of plant or animal as either endangered or threatened.<sup>30</sup> The Secretary must make listing determinations based exclusively on the best available commercial and scientific information.<sup>31</sup> However, the ESA prohibits the Secretary from considering any economic impact resulting from the listing decision.<sup>32</sup> Consequently, the Secretary must base the listing decision entirely on a biological appraisal of the species' status,<sup>33</sup> and cannot weigh economic evidence.<sup>34</sup>

Most importantly, the listing of a species triggers the ESA's section 7 protections for that species.<sup>35</sup> Section 7 requires federal agencies to take affirmative

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<sup>29</sup> See *id.* (listing species as endangered or threatened). The Secretary determines whether a species is endangered or threatened based on the five following factors: (A) the present or threatened destruction of its habitat or range; (B) overutilization of the species for commercial or other purposes; (C) disease or other predation; (D) inadequacy of existing regulatory mechanisms; (E) other factors affecting its continued existence. See *id.*; see also H.R. REP. NO. 95-1625, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455 (declaring that listing species as endangered or threatened activates ESA protections); Salzman, *supra* note 1, at 314 (stating that species gain ESA protection after listing).

<sup>30</sup> See 16 U.S.C. § 1533(a)(1) (1997) (granting authority to Secretary to list species as endangered or threatened). Since its enactment, Congress has amended the ESA several times, with the most significant changes occurring in 1978 and 1982. See *id.* § 1533(a)(3); see also Salzman, *supra* note 1, at 320-23 (examining 1978 and 1982 ESA amendments). In 1978, Congress clarified that the ESA required the Secretary "to the maximum extent prudent" to designate critical habitat at the time the Secretary proposed a species for listing. See 16 U.S.C. § 1533(a)(3); Salzman, *supra* note 1, at 320-23. In 1982, Congress amended the language to allow the Secretary to defer designating critical habitat if the habitat is not "determinable." See 16 U.S.C. § 1533(a)(3); Salzman, *supra* note 1, at 320-23.

For purposes of the ESA, the term "Secretary" means the Secretary of the Interior, the Secretary of Commerce, or in some circumstances, the Secretary of Agriculture. See 16 U.S.C. § 1532(15) (defining term "Secretary"); see also *id.* § 1532(16) (defining term "species"); *id.* § 1533(a) (granting authority to Secretary to determine endangered or threatened species).

<sup>31</sup> See 16 U.S.C. § 1533(b)(1)(A) (declaring that Secretary must base listing determinations solely on best available scientific and commercial information, after taking into account any state or foreign nation conservation efforts).

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*; see also Salzman, *supra* note 1, at 323 (asserting that ESA now requires Secretary to base listing decisions solely on biological considerations).

<sup>34</sup> See 16 U.S.C. § 1533(b)(1)(A).

<sup>35</sup> See *id.* § 1536(a)(2) (describing federal agency obligations under section 7 of ESA). Section 7(a)(2) states that each Federal agency shall consult with the Secretary to insure that any agency action is unlikely to jeopardize the listed species. *Id.*

steps to conserve endangered and threatened species.<sup>36</sup> In addition, federal agencies must consult with the Secretary to ensure that agency actions are “not likely to jeopardize”<sup>37</sup> endangered or threatened species, or destroy or adversely modify<sup>38</sup> critical habitat.<sup>39</sup> By prohibiting agencies from jeopardizing a species or adversely affecting its critical habitat, the Secretary can provide a powerful safety net for species.<sup>40</sup> However, unless the Secretary actually designates critical habitat as required under section 4 of the ESA, the prohibition against critical habitat modification is meaningless.<sup>41</sup>

## 2. Critical Habitat

Section 4 of the ESA requires the Secretary to designate critical habitat for a listed species.<sup>42</sup> The ESA defines critical habitat as those areas that the Secretary finds essential to species conservation.<sup>43</sup> However, under this definition,

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<sup>36</sup> See *id.* § 1536(a)(1) (describing mandated conservation programs). Section 7(a)(1) states that federal agencies shall consult with the Secretary to further the purposes of the ESA by implementing conservation programs for endangered and threatened species. *Id.*

Recall that unless a federal nexus exists, private individuals are exempt from section 7’s consultation requirement. See *supra* note 17 and accompanying text (discussing applicability of section 7 to private individuals).

<sup>37</sup> See 16 U.S.C. § 1536(a)(2). “[J]eopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. See 50 C.F.R. § 402.02 (1997).

<sup>38</sup> See 16 U.S.C. § 1536(a)(2). “[D]estruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. See 50 C.F.R. § 402.02.

<sup>39</sup> See 16 U.S.C. § 1536(a)(2). Section 7(a)(2) states that unless Congress grants an exemption, the agency shall consult with the Secretary to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize any endangered species or threatened species or destroy or adversely modify the species critical habitat. *Id.* Section 7 is commonly referred to as the “consultation requirement.” *Id.*

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service share responsibilities for administering the ESA. 50 C.F.R. § 402.01(b) (1997). For non-marine species, federal agencies consult with the FWS. *Id.*

<sup>40</sup> See Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 297 (1993) (asserting that Interior’s definition of critical habitat effectively eliminates most objective and powerful requirement of section 7); see also *supra* notes 35-39 and accompanying text (discussing jeopardy and adverse modification).

<sup>41</sup> See 16 U.S.C. § 1533(a)(3) (describing section 4’s critical habitat designation requirement).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* § 1532(5)(A) (defining term “critical habitat”). The ESA defines conservation as the use of all procedures to bring any endangered or threatened species to the point at which it no longer needs protection. *Id.* § 1532(3) (defining terms “conserve,” “conservation,” “conserving”). These procedures include

critical habitat does not necessarily include sufficient habitat to ensure long-term species survival.<sup>44</sup> Rather, critical habitat need include only those areas necessary to prevent short-term jeopardy.<sup>45</sup>

Unlike in the listing process, critical habitat designation requires the Secretary to consider both economics and science.<sup>46</sup> In effect, before designating critical habitat, the Secretary performs a cost-benefit analysis.<sup>47</sup> This cost-benefit analysis transforms the decision from one of science to one of social policy.<sup>48</sup> For example, when designating critical habitat will result in the loss of jobs, the Secretary considers such economic impact from a social policy perspective, rather than simply a biological viewpoint.<sup>49</sup> Furthermore, unless the failure to designate critical habitat will result in the extinction of the species, the Secretary may exclude any habitat if the benefits of exclusion outweigh the benefits of designation.<sup>50</sup> Thus, because the Secretary considers economic impact in the critical habitat decision, but not in the listing decision, the Secretary has greater discretion in the critical habitat designation decision.<sup>51</sup>

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research, census, law enforcement, habitat acquisition and maintenance, transplantation, and in extraordinary cases, regulated taking of the species. *Id.*

<sup>44</sup> See *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991) (stating that critical habitat includes only amount of habitat needed to avoid short-term jeopardy, not amount needed to ensure long-term survival).

<sup>45</sup> See *id.*

<sup>46</sup> See 16 U.S.C. § 1533(b)(2) (describing economic impact consideration). Thus, designating critical habitat is actually a two-stage process. See *id.* In the first stage the FWS determines which areas are critical to species conservation. See *id.* § 1532(5)(A). In the second stage the FWS performs a cost-benefit analysis, taking into account the economic impacts of designating critical habitat. See *Trinity County Concerned Citizens v. Babbitt*, No. CIV.A.92-1194, 1993 WL 650393, at \*1 (D.D.C. Sept. 20, 1993) (describing two-step approach to designating critical habitat).

<sup>47</sup> See 16 U.S.C. § 1533(b)(2) (designating critical habitat after considering economic impact, and weighing benefits against risks); see also Salzman, *supra* note 1, at 320 (asserting that cost-benefit requirement in critical habitat decision changed critical habitat designation from purely biological assessment to social policy decision).

<sup>48</sup> See 16 U.S.C. § 1533(b)(2); see also Salzman, *supra* note 1, at 320 (contending that critical habitat designation is now a social policy decision).

<sup>49</sup> See *Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Southwestern Willow Flycatcher*, 62 Fed. Reg. 39129, 39137 (1997) (asserting that FWS measures economic effects of critical habitat designation by changes in regional jobs, household income, and national income); see also Salzman, *supra* note 1, at 320 (contending that critical habitat designation is now social policy decision).

<sup>50</sup> See 16 U.S.C. § 1533(b)(2) (describing weighing of benefits).

<sup>51</sup> See *supra* notes 29-50 and accompanying text (discussing Secretary's discretion in listing and critical habitat decisions). Simply allowing the Secretary to consider the economic impact of the critical habitat decision gives the Secretary greater discretion. See 16 U.S.C. § 1533(b)(2).

In part because critical habitat designation is one of the most potent enforcement provisions of the ESA,<sup>52</sup> it is also one of the most controversial provisions of the Act.<sup>53</sup> Government officials, environmentalists, local developers, and community leaders have all criticized this process.<sup>54</sup> Environmentalists contend that the ESA provides insufficient protection for species.<sup>55</sup> Developers and community leaders claim that the ESA hinders development and growth.<sup>56</sup> Government bureaucrats believe that the extensive economic analysis required for designation, and the resultant delays, unnecessarily encumber government action and decision-making.<sup>57</sup> Thus, depending on a person's perspective, critical habitat designation either goes too far in protecting threatened or endangered species, or not far enough.<sup>58</sup> Although this debate may never be resolved, Congress understood the significance of critical habitat designation when it passed the ESA.<sup>59</sup>

In 1973, the 93rd Congress recognized loss of species habitat as the most important factor leading to species extinction.<sup>60</sup> The congressional record suggests that Congress intended that the Secretary would always designate critical

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<sup>52</sup> See H.R. REP. NO. 95-1625, at 7 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9457 (asserting that section 4 has become one of most significant portions of ESA); see also Salzman, *supra* note 1, at 312 (stating that critical habitat is among strongest enforcement provisions of ESA).

<sup>53</sup> See H.R. REP. NO. 95-1625, at 7 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455 (declaring small section has become one of most significant portions of entire statute); see also Major David N. Diner, *The Army and The Endangered Species Act: Who's Endangering Whom?*, 143 MIL. L. REV. 161, 178 (1994) (noting commercial, political, and economic interests apply intense pressure on FWS not to designate critical habitat); Doremus, *supra* note 2, at 301 (explaining that designating critical habitat has become controversial feature of ESA); Salzman, *supra* note 1, at 335-38 (discussing reasons behind hostility toward critical habitat designation); Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 30 NAT. RESOURCES J. 1027, 1049 (1993) (explaining that FWS experiences significant public pressure not to designate critical habitat).

<sup>54</sup> See Salzman, *supra* note 1, at 335 (stating that critical habitat designation is criticized by government officials, environmentalists, and local interests).

<sup>55</sup> *Id.* at 335 (asserting critical habitat does not provide enough protection); see also Diner, *supra* note 53, at 178 (stating that environmental groups pressure FWS to designate critical habitat to protect habitat as much as to protect species).

<sup>56</sup> See Salzman, *supra* note 1, at 335-36 (stating that critical habitat designation creates hostile opposition by locals).

<sup>57</sup> *Id.* at 335 (claiming that designating critical habitat infuriates bureaucrats with its economic analysis and delays).

<sup>58</sup> See *id.*

<sup>59</sup> See 124 CONG. REC. 21,575 (1978) (statement of Senator Jake Garn asserting that critical habitat designation is more important than listing species); see also Houck, *supra* note 40, at 296 (discussing importance Congress placed on critical habitat).

<sup>60</sup> See H.R. REP. NO. 95-1625, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455 (declaring that major cause for extinction of species worldwide is habitat loss).

habitat for endangered or threatened species, abstaining only in certain rare circumstances.<sup>61</sup> Yet, despite congressional intent, agencies under the authority of the Secretary have declined to designate critical habitat for nearly eighty percent of the endangered or threatened species in the United States.<sup>62</sup> In nearly all of these cases, the agencies reasoned that designating habitat would not be “prudent.”<sup>63</sup>

### 3. The “Prudent” Exception to Designating Critical Habitat

While section 4’s requirement to designate critical habitat appears rigid, the statutory language provides the Secretary with significant flexibility.<sup>64</sup> The Secretary must only designate critical habitat “to the maximum extent prudent and determinable.”<sup>65</sup> Yet, the ESA does not define the term “prudent.”<sup>66</sup> To fill this gap, the FWS promulgated regulations defining critical habitat designation as not “prudent” when at least one of two situations exist.<sup>67</sup> First, designation is

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<sup>61</sup> See H.R. REP. NO. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (declaring that committee intends that in most situations Secretary will designate critical habitat and that only in rare circumstances would specifying critical habitat not be beneficial to species).

<sup>62</sup> See Salzman, *supra* note 1, at 332 (stating that, based on data from 50 C.F.R. §§ 17.11-.12 (1988), only 22% of listed species in United States have critical habitats specified).

<sup>63</sup> See Federal Register listings from July 25, 1980 through November 17, 1988; see also Salzman, *supra* note 1, at 332 (stating that from 1980 to 1988, FWS declined to designate critical habitat for 320 species, giving explanation of not prudent in 317 of 320 cases); Houck, *supra* note 40, at 307 (stating that FWS has expanded prudent exception and made routine practice of not designating critical habitat); Jean M. Emery, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973, 984 (1996) (stating that study from 1980 to 1992 found that of 494 cases in which FWS refused to designate critical habitat, FWS employed “not prudent” exception 476 times); see also Diner, *supra* note 53, at 177-78 (noting that while “prudent and determinable” exceptions should be rare, FWS has only designated critical habitat for 20% of listed species and percentage is steadily declining).

<sup>64</sup> See 16 U.S.C. § 1533 (1997). For example, under 16 U.S.C. § 1533(b)(2), if the Secretary decides that the costs outweigh the benefits to the species, she has the authority not to designate critical habitat, unless the species would become extinct. See *id.*

<sup>65</sup> See 16 U.S.C. § 1533(a)(3) (stating that Secretary shall designate critical habitat to maximum extent prudent and determinable).

<sup>66</sup> See 16 U.S.C. § 1532 (defining numerous terms, but not prudent, for purposes of the ESA).

<sup>67</sup> See 50 C.F.R. § 424.12(a)(1)(i)-(ii) (1997) (describing situations where it is not prudent to designate critical habitat). According to the regulations, critical habitat designation is not prudent when human activity threatens the species and identification of critical habitat can be expected to increase the threat, or when critical habitat designation would not benefit the species. *Id.*

The Secretary has delegated the designation authority under the ESA to the FWS and the National Marine Fisheries Service. See 48 Fed. Reg. 29,990, 29,990 (1983) (delegating authority to conduct consultations to FWS and NMFS); 50 C.F.R. § 402.01(b) (stating that FWS and NMFS have responsibility for

not prudent when identifying critical habitat increases the threat to the species by a “taking”<sup>68</sup> or other human activity.<sup>69</sup> Second, designation is not “prudent” when the species would not benefit by such designation.<sup>70</sup> Applying these exceptions broadly, the FWS has often avoided designating critical habitat.<sup>71</sup> In effect, the FWS has rendered one of the ESA’s strongest and most objective protections, the critical habitat designation, impotent.<sup>72</sup> Courts have had few opportunities to address the FWS’s application of the “prudent” exception.<sup>73</sup>

### *B. Judicial Interpretation of Critical Habitat and the “Prudent” Exception*

Two factors have limited judicial interpretation of FWS application of the prudent exception. First, because courts review FWS actions in accordance with the Administrative Procedures Act (APA), the courts employ a narrow scope of review.<sup>74</sup> Second, parties have litigated only a handful of cases addressing the exception, and none of these cases has made it to the United States Supreme Court.<sup>75</sup>

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administering ESA); *see also* Building Industry Association of Superior California v. Babbitt, No. CIV.A.95-0726 PLF, 1997 WL 59302, at \*1-\*2 (D.D.C. July 25, 1997) (stating that through FWS, Secretary shall determine whether to list species).

<sup>68</sup> See 16 U.S.C. § 1538(a)(1). Section 9 of the ESA prohibits any “taking” of an endangered species. *See id.* For purposes of the ESA, 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).

<sup>69</sup> See 50 C.F.R. § 424.12(a)(1)(i) (describing increased threat exception).

<sup>70</sup> See 50 C.F.R. § 424.12(a)(1)(ii) (describing no benefit exception).

<sup>71</sup> See *supra* note 63 and accompanying text (describing extent to which FWS refuses to designate critical habitat).

<sup>72</sup> See Houck, *supra* note 40, at 297 (asserting that most objective and powerful requirement of section 7, critical habitat modification proscription, has effectively been eliminated).

<sup>73</sup> See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 117 (D.D.C. 1995) (finding critical habitat designation for grizzly bear not prudent because development of recovery zones made designation redundant); *see also* *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991) (finding FWS abused its discretion by failing to designate critical habitat concurrently with listing of owl, but based decision on “determinable” not “prudent” language).

<sup>74</sup> See 5 U.S.C. § 706 (1997) (describing scope of review under APA); *Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (citing *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985) (confirming that APA governs judicial review of ESA decisions, and describing requirements for reversal)).

<sup>75</sup> See *Fund for Animals*, 903 F. Supp. at 117 (finding critical habitat designation for grizzly bear not prudent because development of recovery zones made designation redundant); *see also* *Northern Spotted Owl*, 758 F. Supp. at 629 (finding FWS abused its discretion by failing to designate critical habitat concurrently with listing of owl, but based decision on “determinable” not “prudent” language).

### 1. Standard of Review

The APA requires that courts uphold administrative decisions, including decisions not to designate critical habitat, unless the court determines that the agency decision was arbitrary, capricious, an abuse of discretion, or in violation of the law.<sup>76</sup> In other words, the court may not substitute its own judgment for that of the FWS.<sup>77</sup> Under this standard, the court merely inquires whether the FWS considered the relevant factors and sufficiently explained the reasoning supporting its decision.<sup>78</sup>

However, although the courts afford a high degree of deference to an agency's statutory interpretation and resulting decision,<sup>79</sup> if an agency interpretation runs contrary to congressional intent, the court must reject it.<sup>80</sup> As such, the judiciary serves as the final authority on statutory construction.<sup>81</sup> Because an agency need only provide a rational explanation for its decision not to designate critical habitat, plaintiffs challenge few FWS decisions, and courts rarely overturn these FWS decisions.<sup>82</sup> For example, *Fund for Animals v. Babbitt* demonstrates the courts' great deference to FWS decision-making.<sup>83</sup>

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<sup>76</sup> See 5 U.S.C. § 706(2)(A) (1997) (stating that court must uphold administrative decisions unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); see also *Connor v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (applying APA standard of review).

<sup>77</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agreeing that court may not replace agency judgment with its own); see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (stating court may not substitute its interpretation of statute for reasonable agency construction).

<sup>78</sup> See *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) (citing *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)) (asserting that relevant inquiry is agency consideration of relevant factors and explanation of choice).

<sup>79</sup> See *Rainson Co. v. Federal Energy Regulatory Comm'n*, 106 F.3d 269, 272 (9th Cir. 1997) (stating that where congressional intent is not explicit, court should defer to agency interpretation). See also *Pyramid Lake*, 898 F.2d at 1414 (accorded considerable weight to agency's construction of laws).

<sup>80</sup> See *Chevron*, 467 U.S. at 842-43 and n.9 (requiring agency and court to give effect to intent of Congress).

<sup>81</sup> See *id.*

<sup>82</sup> See, e.g., *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (finding FWS decision not arbitrary or capricious); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 117 (D.D.C. 1995) (upholding FWS decision declining to designate critical habitat); *Trinity County Concerned Citizens v. Babbitt*, No. CIV.A.92-1194, 1993 WL 650393, at \*6 (D.D.C. Sept. 20, 1993) (affirming FWS decision designating critical habitat). But see *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991) (finding that FWS abused its discretion in refusing to designate critical habitat).

<sup>83</sup> See *Fund for Animals*, 903 F. Supp. at 116 (illustrating deference courts give to FWS decisions).

## 2. Relevant Case Law

Prior to *NRDC*,<sup>84</sup> only one court had directly addressed the prudent exception.<sup>85</sup> In *Fund for Animals v. Babbitt*,<sup>86</sup> a federal district court upheld the FWS's refusal to designate critical habitat for the grizzly bear.<sup>87</sup> In support of its position, the FWS reasoned that the previous development of recovery zones for the conservation of grizzly bear habitat made designating critical habitat redundant, and therefore not prudent.<sup>88</sup> The FWS further claimed that designating critical habitat would not benefit the grizzly bear because such action would likely eliminate the current regulations, which arguably benefited the grizzly bear.<sup>89</sup> The court found that the FWS adequately explained the facts and policy concerns it relied upon, and its decision was not arbitrary, capricious, or wholly irrational.<sup>90</sup> However, unlike the court in *Fund for Animals*, the Ninth Circuit Court of Appeals refused to defer to the FWS's decision in *NRDC*.<sup>91</sup>

## II. NATURAL RESOURCES DEFENSE COUNCIL V. DEPARTMENT OF INTERIOR

### A. The Setting

The coastal California gnatcatcher (*Poliophtila californica*) is a small, long-tailed member of the thrush family unique to coastal southern California and northern Baja California.<sup>92</sup> The gnatcatcher nests in a type of coastal sage scrub that is declining due to agricultural and urban development.<sup>93</sup> Of the approxi-

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<sup>84</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997).

<sup>85</sup> See *Fund for Animals*, 903 F. Supp. at 116-17 (discussing prudent exception).

<sup>86</sup> See *id.* at 117 (upholding FWS decision not to designate critical habitat).

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* The FWS argued that since the Interagency Grizzly Bear Guidelines require federal agencies to consult with the FWS before taking action in the recovery zones, and the FWS must ensure biological nonjeopardy, designating critical habitat would have been redundant. *Id.* The court accepted this reasoning and allowed the FWS to invoke the prudent exception. *Id.*

<sup>89</sup> *Id.* The FWS explained that designating critical habitat for the highest priority management area would de-emphasize, dilute, or entirely eliminate grizzly bear protection in lower priority areas. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997).

<sup>92</sup> See *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Coastal California Gnatcatcher*, 58 Fed. Reg. 16742, 16742 (1993) (describing coastal California gnatcatcher).

<sup>93</sup> *Id.*

mately 400,000 acres of gnatcatcher habitat in the United States, only 80,000 are publicly owned.<sup>94</sup> As of 1993, approximately five thousand coastal California gnatcatchers existed in the United States.<sup>95</sup>

In March of 1993, the FWS listed the coastal California gnatcatcher as a threatened species under the ESA.<sup>96</sup> At the time of the gnatcatcher's listing, the FWS found that coastal sage scrub habitat loss seriously threatened the future existence of the coastal California gnatcatcher.<sup>97</sup> Nevertheless, the FWS concluded that critical habitat designation would not be prudent under section 4 of the ESA for two reasons.<sup>98</sup>

First, the FWS concluded that publicly identifying critical habitat would increase the risk that landowners might deliberately destroy gnatcatcher habitat to prevent designation of their land as critical habitat.<sup>99</sup> Second, the FWS determined that designating critical habitat would not protect the gnatcatcher because most gnatcatcher habitat exists on private land to which section 7's consultation requirement does not apply.<sup>100</sup> Because section 7's consultation requirement applies only to federal agencies, private individuals do not have to consult with the Secretary to ensure their actions do not jeopardize a listed species or modify its habitat.<sup>101</sup> Environmental groups and private individuals contested these FWS conclusions in *NRDC*, challenging the FWS's failure to designate critical habitat in their suit against the FWS.<sup>102</sup>

### *B. The Holding and Rationale*

On appeal, the Ninth Circuit found that the FWS failed to discharge its statutory obligation to designate critical habitat for the coastal California gnat-

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<sup>94</sup> See *id.* at 16743 (discussing amount of gnatcatcher habitat publicly owned).

<sup>95</sup> See *id.* at 16743 (estimating 2562 pairs of coastal California gnatcatchers survive in United States, all in California).

<sup>96</sup> See *id.* at 16742 (determining that gnatcatcher is threatened species under ESA).

<sup>97</sup> See *id.* at 16748 (finding habitat loss is significant threat to gnatcatcher).

<sup>98</sup> See *id.* at 16756 (concluding both exceptions under 50 C.F.R. § 424.12(a)(1) apply).

<sup>99</sup> See *id.* (finding that publishing critical habitat descriptions and maps would make gnatcatcher more vulnerable).

<sup>100</sup> See *id.* (concluding that designation would not benefit gnatcatcher because section 7 would not provide additional protection).

<sup>101</sup> See 16 U.S.C. § 1536(a)(2) (1997) (describing section 7's consultation requirement).

<sup>102</sup> See *id.* Plaintiffs included representatives from the Natural Resources Defense Council, the National Audubon Society, and biologist Elisabeth Brown. *Id.* at 1122. Defendants included various FWS officials, the Secretary of the Interior, and the United States Department of the Interior. *Id.* at 1121.

catcher when it listed the species as threatened.<sup>103</sup> The court concluded that designating critical habitat for the gnatcatcher would be prudent and was therefore mandated.<sup>104</sup> Further, the court determined that based on the administrative record, the FWS failed to sufficiently consider the pertinent factors and explain its rationale.<sup>105</sup> Applicable law requires the FWS to fully consider the relevant factors and explain its reasoning.<sup>106</sup> Thus, the court found improper the FWS's reliance on the prudent exception to section 4 of the ESA.<sup>107</sup>

The court also determined that the FWS could not invoke either the "increased threat" or "no benefit" exceptions to designating critical habitat as required under section 4 of the ESA.<sup>108</sup> The court reasoned that under the increased threat exception, the FWS failed to consider all of the relevant factors.<sup>109</sup> Based on the ESA and FWS regulations, the court asserted that the FWS may decline to designate critical habitat only when the possible adverse consequences outweigh the benefits.<sup>110</sup> Because the record did not indicate that the FWS bal-

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<sup>103</sup> See *id.* at 1127.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at 1125-26.

<sup>106</sup> See *Resources Ltd., Inc. v. Robertson*, 35 F3d 1300, 1304 (9th Cir. 1993) (requiring agency to consider relevant factors and articulate rational connection between facts found and choice made).

<sup>107</sup> See *NRDC*, 113 F2d at 1121-22, 1125-26 (finding FWS's use of section 4's "increased threat" and "no benefit" exceptions improper).

<sup>108</sup> See *id.*; see also 50 C.F.R. § 424.12(a)(1) (1997) (describing increased threat exception and no benefit exceptions to designating critical habitat under ESA § 4); 16 U.S.C. § 1533(a)(3) (1997).

<sup>109</sup> See *NRDC*, 113 F2d at 1125.

<sup>110</sup> See 16 U.S.C. § 1533(b)(2) (allowing exclusion of area if detriment outweighs benefits). See also 49 Fed. Reg. 38900, 38903 (1984) (declaring FWS will forgo habitat designation for prudent reasons only when negative consequences outweigh benefits).

The court's recital of section 4(b)(2) is not completely accurate. See 16 U.S.C. § 1533(b)(2). The second sentence of section 4(b)(2) states that the Secretary "may exclude any area from critical habitat" if he determines that the benefits of exclusion outweigh the benefits of designation. *Id.* The court inserts the term "only" in its opinion, stating that the Secretary "may only exclude portions of habitat" from designation after balancing the costs and benefits. See *NRDC*, 113 F3d at 1125. While technically incorrect, this inadvertent insertion does not detract from the thrust of the court's argument. *Id.* The court is merely using the balancing test example to demonstrate that the FWS did not adequately explain its decision nor "consider all the relevant factors" as required. See *Resources Ltd., Inc. v. Robertson*, 35 F3d 1300, 1304 (9th Cir. 1993) (requiring agency to consider relevant factors and articulate rational connection between facts found and choice made). As such, this misstatement is not essential to the court's decision. See *NRDC*, 113 F3d at 1125.

Moreover, other courts have similarly interpreted the statute. See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 n.8 (D.D.C. 1995). In *Fund for Animals*, the court asserted that the ESA required the FWS to designate critical habitat unless the benefits of nondesignation outweigh the benefits of designation. *Id.*

anced the positive and negative effects of designation, the Ninth Circuit concluded that the FWS failed to consider all relevant factors.<sup>111</sup>

Similarly, the Ninth Circuit rejected the “no benefit” exception raised by the FWS for two reasons.<sup>112</sup> First, the court found that legislative history revealed that Congress intended the prudent exception to apply only in extraordinarily rare circumstances, and the FWS’s application of the exception contravened this intent.<sup>113</sup> Second, the FWS failed to explain how designating 80,000 publicly-owned acres of land as critical habitat would not benefit the species.<sup>114</sup> For these reasons, the court found the FWS’s actions arbitrary, capricious, and contrary to the law.<sup>115</sup>

### III. ANALYSIS

#### A. *The Ninth Circuit’s Decision*

The Ninth Circuit properly determined that the FWS’s decision not to designate critical habitat violated the ESA, the FWS regulations, and congressional intent.<sup>116</sup> Applying the appropriate standard of review, the court found that the administrative record did not support the FWS’s decision.<sup>117</sup> Further, in choosing not to defer to the FWS, the court properly interpreted and applied the prudent exception in section 4 of the ESA.<sup>118</sup> Accordingly, the Ninth Circuit correctly held that the FWS could not refuse to designate critical habitat under either the “increased threat” or “no benefit” exceptions as described in the federal regulations.<sup>119</sup>

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<sup>111</sup> See *NRDC*, 113 F.3d at 1125.

<sup>112</sup> See *id.* at 1125-26.

<sup>113</sup> See *id.* at 1126 (expanding prudent exception to cover only situations where designated habitat includes majority of species’ habitat is contrary to congressional intent).

<sup>114</sup> See *id.* The Ninth Circuit asserted that the FWS argument failed to state rational connection between the facts and its decision because the FWS does not explain why designating public land as critical habitat would not benefit gnatcatcher. *Id.*

<sup>115</sup> See *id.* at 1127 (reversing district court’s contrary finding).

<sup>116</sup> See *id.* at 1125-27 (explaining effect of FWS regulations and ESA’s legislative history).

<sup>117</sup> See *id.* at 1123-25 (discussing standard of review and inadequacy of final listing).

<sup>118</sup> See *id.* at 1124-26 (describing rationale for interpreting prudent exception).

<sup>119</sup> See *id.* at 1125-26 (finding district court’s application of prudent exceptions improper); see also 50 C.F.R. § 424.12(a)(1) (explaining increased threat and no benefit exceptions).

### 1. Increased Threat to Species

The FWS claimed that public identification of critical habitat would increase the risk that landowners might deliberately destroy gnatcatcher habitat.<sup>120</sup> The administrative record referred to eleven incidents involving destruction of approximately 1000 acres of coastal sage scrub vegetation.<sup>121</sup> In two of these eleven incidents, destruction of the gnatcatcher habitat occurred shortly after the FWS notified local authorities of the presence of gnatcatchers at a proposed development site.<sup>122</sup> Based on these findings, the FWS concluded that designating critical habitat would make the gnatcatcher more vulnerable to such unlawful takings.<sup>123</sup> In effect, the FWS reasoned that designating critical habitat would actually decrease the gnatcatcher's chances of survival.<sup>124</sup>

The Ninth Circuit properly found that the FWS's reasoning failed to weigh the benefits against the risks of designation as expressly required under section 4(b)(2) of the ESA.<sup>125</sup> Section 4(b)(2) allows the Secretary to limit the area designated as critical habitat.<sup>126</sup> Under this section, if the risks associated with designating a certain area as critical habitat outweigh the benefits, then the Secretary need not specify that area as critical habitat.<sup>127</sup> In *NRDC*, the record provided no indication that the FWS weighed the risks against the benefits.<sup>128</sup> The FWS customarily assesses the risks and benefits and includes an explanation in its decision.<sup>129</sup> Therefore, because it never weighed the benefits of designation

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<sup>120</sup> See *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Coastal California Gnatcatcher*, 58 Fed. Reg. 16742, 16756 (1993) (describing why identifying critical habitats would lead to destruction of habitat).

<sup>121</sup> See *id.* at 16753 (citing 11 cases of habitat destruction to illustrate ineffectiveness of existing regulatory measures).

<sup>122</sup> See *id.* (stating habitat destruction occurred soon after FWS advised local regulatory agency that draft environmental review did not disclose gnatcatcher presence onsite and summarizing findings regarding critical habitat).

<sup>123</sup> See *id.* (explaining why publishing maps and descriptions of critical habitat would increase gnatcatcher vulnerability); see also 16 U.S.C. § 1538(a)(1) (1997) (describing illegal conduct under section 9 of ESA); 16 U.S.C. § 1532(19) (giving definition of "take" under ESA).

<sup>124</sup> See 58 Fed. Reg. 16742, 16756 (1993).

<sup>125</sup> See 16 U.S.C. § 1533(b)(2); see also *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1125 (9th Cir. 1997).

<sup>126</sup> See 16 U.S.C. § 1533(b)(2) (describing when Secretary may exclude areas from critical habitat).

<sup>127</sup> See *id.* However, limits exist on this authority. *Id.* The Secretary must designate critical habitat if she determines that the species will otherwise become extinct. See 16 U.S.C. § 1533(b)(2).

<sup>128</sup> See *NRDC*, 113 F.3d at 1125.

<sup>129</sup> See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 116 (D.D.C. 1995) (describing FWS's explicit balancing of benefits of designation against risks). In that case, the FWS compared the benefits of the conserva-

against the risks, the FWS failed to consider all the relevant factors as required by law.<sup>130</sup>

The court also found the FWS's own regulations relevant.<sup>131</sup> These regulations provide that the FWS will forgo habitat designation as a matter of prudence only when the potential negative consequences outweigh the benefits.<sup>132</sup> This regulatory language explicitly imposes a balancing test.<sup>133</sup> By failing to perform any balancing, the FWS appears to have ignored its own regulations.<sup>134</sup> This is unusual because the FWS ordinarily uses a balancing test derived from

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tion plans already in place with the benefits expected from designating critical habitat. *Id.* Moreover, the FWS explained that designating critical habitat would eliminate many of the benefits resulting from the conservation plans. *Id.*; see also *Trinity County Concerned Citizens v. Babbitt*, No. CIV.A.92-1194, 1993 WL 650393, at \*3 (D.D.C. Sept. 20, 1993) (stating that FWS proposed regulation included detailed summary of balancing process used by FWS).

<sup>130</sup> See *NRDC*, 113 F.3d at 1125 (citing *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (explaining appropriate standard of review)).

<sup>131</sup> See *NRDC*, 113 F.3d at 1125 (emphasizing that FWS's own regulations require balancing test).

<sup>132</sup> See *id.* (citing 49 Fed. Reg. 38900, 38903 (1984)).

The similarity between the balancing test set out in section 4(b)(2) of the ESA and the balancing test endorsed in the FWS regulation is notable. See 16 U.S.C. § 1533(b)(2) (1997); 49 Fed. Reg. 38900, 38903 (1984). Both tests plainly weigh the benefits of designation against the benefits of exclusion. See 16 U.S.C. § 1533(b)(2); 49 Fed. Reg. at 38903. The FWS regulation states that the FWS will employ a balancing test before invoking the prudent exception to designating critical habitat. See 49 Fed. Reg. at 38903. On the other hand, the balancing test outlined in the ESA is in section 4(b) entitled "Basis for determinations," whereas the prudent language is in section 4(a) entitled "Generally." See 16 U.S.C. §§ 1533(a), (b). Judge O'Scannlain asserts in his dissent that the balancing test in section 4(b)(2) does not pertain to the prudent language in section 4(a). See *NRDC*, 113 F.3d at 1128 (stating that "outweigh" in section 4(b) does not address the prudence exception in 4(a)). O'Scannlain's argument lacks merit. *Id.*

Despite the balancing test's location in the subsection following the prudent language, the balancing test applies to the prudent language. See 16 U.S.C. §§ 1533(a), (b). The prudent language describes to what degree the Secretary shall designate critical habitat—to the maximum extent prudent. See 16 U.S.C. § 1533(a). The balancing test explains on what basis the determination not to designate critical habitat may be made. See 16 U.S.C. § 1533(b). These two subsections are not incompatible. See 16 U.S.C. §§ 1533(a), (b). To the contrary, the Secretary must interpret them together. *Id.* To suggest that the balancing test does not apply to the prudent language is illogical. *Id.* The balancing test applies when the Secretary decides not to designate critical habitat; and the Secretary must designate critical habitat to the maximum extent prudent. *Id.*

<sup>133</sup> See 49 Fed. Reg. at 38903 (declaring FWS will forgo habitat designation for prudent reasons only when negative consequences outweigh benefits).

<sup>134</sup> See *id.*; see also *Trinity County Concerned Citizens v. Babbitt*, No. CIV.A.92-1194, 1993 WL 650393, at \*3 (D.D.C. Sept. 20, 1993) (stating that FWS proposed regulation included detailed summary of balancing process used by FWS). *But see* *Diner*, *supra* note 53, at 177 (suggesting that because implementing regulations (50 C.F.R. § 424.12) do not mention any balancing of benefits required under section 1533(b)(2) of ESA, balancing test does not apply to FWS regulations interpreting "prudent and determinable" language). Major *Diner*'s argument fails to consider 49 Fed. Reg. 38900, which explicitly states that in interpreting section 424.12, the FWS will balance the risks and benefits of designating critical habitat. 49 Fed. Reg. at 38903.

its regulations.<sup>135</sup> While this error may not have been sufficient to reverse the district court, the FWS regulations strongly suggest that a mandatory balancing test exists.<sup>136</sup>

## 2. No Benefit to the Gnatcatcher

The FWS also claimed that designating critical habitat would not appreciably benefit the gnatcatcher<sup>137</sup> because most gnatcatcher habitat is on private land, to which section 7's consultation requirement does not apply.<sup>138</sup> The FWS's interpretation of the no benefit exception would effectively limit designation to only those situations in which designation protects a majority of species habitat.<sup>139</sup> As the court noted, this interpretation would transform the prudence test from one that merely must benefit the species to one that must benefit most of the species.<sup>140</sup> Congress intended that in most situations the Secretary would designate critical habitat concurrently with listing a species.<sup>141</sup> Congress did not intend the Secretary to refuse to designate critical habitat whenever designation would not benefit the majority of the species.<sup>142</sup> Thus, the FWS's interpretation flagrantly contravenes congressional intent and legislative history.<sup>143</sup> Consequently, the Ninth Circuit properly rejected the FWS's interpretation.<sup>144</sup>

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<sup>135</sup> See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 116 (D.D.C. 1995) (describing FWS's explicit balancing of benefits of designation against risks); *Trinity County*, 1993 WL 650393, at \*3 (stating that FWS proposed regulation included detailed summary of balancing process used by FWS).

<sup>136</sup> See *NRDC*, 113 F.3d at 1125 (emphasizing that FWS's own regulations require balancing test).

<sup>137</sup> See *id.* at 1125 (citing Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Coastal California Gnatcatcher, 58 Fed. Reg. 16742, 16756 (1993)).

<sup>138</sup> See 58 Fed. Reg. 16742, 16756 (1993). The FWS argued that designation would not appreciably benefit the gnatcatcher because section 7 consultation would not apply to the majority of land-use activities occurring within the critical habitat. *Id.*

<sup>139</sup> See *NRDC*, 113 F.3d at 1125-26 (describing FWS's overly expansive statutory construction as contrary to congressional intent).

<sup>140</sup> *Id.*

<sup>141</sup> See H.R. REP. NO. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (stating that Congress intended Secretary to designate critical habitat in most situations, and only rarely would designation not benefit species).

<sup>142</sup> See *id.*

<sup>143</sup> See H.R. REP. NO. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (stating that Congress intended Secretary to designate critical habitat in most situations, and only rarely would designation not benefit the species); *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (concurring that legislative history indicates failure to designate critical habitat allowed only under rare circumstances); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (asserting that legislative history leaves little doubt that, absent extraordinary circumstances, designating critical habitat must coincide with listing decision).

<sup>144</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)

Moreover, while a majority of the gnatcatcher habitat exists on private land, 80,000 acres of the gnatcatcher's critical habitat is located on public land.<sup>145</sup> Designating the public land as critical habitat would be beneficial to the gnatcatcher within the plain meaning of the regulations, and prudent within the clear meaning of the statute.<sup>146</sup> In other situations where the listed species' habitat was on both private and public land, the FWS either designated only the public land as critical habitat or designated both the public and private land as critical habitat.<sup>147</sup> Accordingly, the court properly concluded that the FWS's reasoning for invoking the no benefit exception failed to adequately explain its decision not to designate critical habitat.<sup>148</sup>

### 3. Legislative Purposes and Intent

Congressional intent and the purposes of the ESA further support the Ninth Circuit's decision. The congressional findings and purposes of the ESA are far-reaching, as explained in the introductory provisions of the ESA.<sup>149</sup> Additionally, substantial legislative history exists to help explain Congress' intent when enacting the ESA.<sup>150</sup>

#### a. Purposes

Section 2 of the ESA explicitly clarifies the purposes of the Endangered Species Act.<sup>151</sup> These purposes include developing conservation programs for

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(stating that court and agency must give effect to the unambiguously expressed congressional intent).

<sup>145</sup>See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997); *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Coastal California Gnatcatcher*, 58 Fed. Reg. 16742, 16743 (1984) (stating that 21% (81,992 of 393,655 acres) of gnatcatcher habitat is publicly owned).

<sup>146</sup>See *NRDC*, 113 F.3d at 1126.

<sup>147</sup>See *Trinity County Concerned Citizens v. Babbitt*, No. CIV.A.92-1194, 1993 WL 650393, at \*1 (D.D.C. Sept. 20, 1993) (stating that of 11 million acres of habitat, FWS designated as critical habitat only 6.9 million acres of federal lands); *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Silver Rice Rat*, 58 Fed. Reg. 46030, 46030 (1993) (designating as critical habitat both federal and private lands). Even where a species' critical habitat was located entirely on private lands, the FWS designated that land as critical habitat. See *Endangered and Threatened Wildlife and Plants; Final Rule to Determine *Eriogonum Pelinophilum* To Be an Endangered Species and To Designate Its Critical Habitat*, 49 Fed. Reg. 28562, 28563 (1984).

<sup>148</sup>See *NRDC*, 113 F.3d at 1126.

<sup>149</sup>See 16 U.S.C. §§ 1531(a),(b) (1997) (describing congressional findings and purposes of ESA).

<sup>150</sup>See *infra* notes 1656-72 and accompanying text (discussing congressional intent).

<sup>151</sup>See 16 U.S.C. § 1531(b) (describing purposes of ESA).

endangered and threatened species,<sup>152</sup> as well as authorizing federal agencies to conserve the ecosystems upon which endangered and threatened species rely.<sup>153</sup> A conservation program that fails to protect the habitat and ecosystem upon which a species depends does little to protect the species and ensure its survival.<sup>154</sup> Thus, if federal agencies can easily avoid designating critical habitat, they will thwart these basic purposes of the ESA.<sup>155</sup> The Ninth Circuit's decision supports the ESA's implicit rationale and helps to protect critical ecosystems.<sup>156</sup>

Section 4 of the ESA states that concurrently with listing a species as endangered or threatened, the Secretary shall designate critical habitat to the "maximum extent prudent."<sup>157</sup> Congress did not choose this strong language indiscriminately.<sup>158</sup> Congress chose this language to reflect its intent that the Secretary would designate critical habitat in all but rare circumstances.<sup>159</sup> By selecting this language Congress sought to ensure the protection of critical habitat, and thus endangered species.<sup>160</sup>

Allowing the FWS regulations to define the prudent exception so that the FWS may refuse to designate critical habitat for nearly eighty percent of endangered species undermines the purposes of the ESA.<sup>161</sup> By requiring at least a "rational connection"<sup>162</sup> between an agency's decision and the facts, the Ninth

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<sup>152</sup> *Id.*

<sup>153</sup> *See id.*; see also Katherine Simmons Yagerman, *Protecting Critical Habitat under the Federal Endangered Species Act*, 20 ENVTL. L. 811, 827 (1990) (citing H.R. REP. NO. 95-1625, at 16 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9466 (stating that ultimate goal of ESA is to conserve ecosystems upon which all species, not just endangered or threatened species, depend)).

<sup>154</sup> *See* 16 U.S.C. § 1531(b).

<sup>155</sup> *See id.*

<sup>156</sup> *See id.* (describing purposes of ESA).

<sup>157</sup> *See id.* § 1533(a)(3) (describing requirement to designate critical habitat); *supra* notes 42-63 and accompanying text (discussing critical habitat designation).

If Congress had wanted to relax the critical habitat designation requirement, it could have done so easily by removing the words "maximum extent." *See* 16 U.S.C. § 1533(a)(3). Congress could merely have written that the Secretary shall designate critical habitat where prudent and determinable. *Id.* However, Congress instead chose to use the explicit language "to the maximum extent prudent." *Id.*

<sup>158</sup> *See* 16 U.S.C. § 1533(a)(3).

<sup>159</sup> *See id.*

<sup>160</sup> *See infra* notes 165-72 and accompanying text (discussing congressional intent).

<sup>161</sup> *See* *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1123 (9th Cir. 1997) (finding FWS violated Endangered Species Act by failing to designate critical habitat). Without critical habitat designation, ecosystems will not be conserved and endangered species will continue to become extinct. *Id.* Such a result is contrary to the purposes of the ESA. *See* Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 30 NAT. RESOURCES J. 1027, 1050 (1993) (stating that FWS interpretation and implementation of "prudent and determinable" clause contradicts ESA's emphasis on critical habitat designation and protection). To elimi-

Circuit correctly limited the prudent exception.<sup>163</sup> Moreover, legislative history and case law compellingly point to the use of the prudent exception only in rare circumstances.<sup>164</sup>

### *b. Congressional Intent*

When Congress enacted the ESA, it made the crucial assumption that loss of habitat causes most extinctions.<sup>165</sup> Moreover, the legislative history of the ESA indicates that Congress intended that in most situations the Secretary would designate critical habitat concurrently with listing a species.<sup>166</sup> However, as evidenced by the lower court decision in *NRDC*, the Secretary does not always follow this mandate.<sup>167</sup> Only in rare circumstances would designating critical habitat not benefit the species.<sup>168</sup> Furthermore, many commentators and ESA scholars have acknowledged the importance that Congress assigned to critical habitat protection.<sup>169</sup>

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nate the apparent contradiction, Andrew A. Smith et al. suggest replacing the ESA language "to the maximum extent prudent and determinable" with "unless such designation significantly increases the jeopardy of a listed species." *Id.* Such a rewording, they claim, would help eliminate the FWS's use of the "not prudent" exception as an excuse for failing to designate critical habitat. *Id.*

<sup>162</sup> See *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (requiring agency to consider relevant factors and articulate rational connection between facts found and choice made). See also *NRDC*, 113 F.3d at 1125.

<sup>163</sup> See *NRDC*, 113 F.3d at 1126 (rejecting FWS's reasoning, thereby limiting prudent exception).

<sup>164</sup> See *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (stating legislative history is clear that Secretary must designate critical habitat absent extraordinary circumstances); *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (failing to designate critical habitat permitted only under rare circumstances); see also *infra* notes 165-72 and accompanying text (discussing legislative history and case law).

<sup>165</sup> See 124 CONG. REC. 21,575 (1978) (statement of Sen. Jake Garn asserting that critical habitat designation is more important than listing species); see also Houck, *supra* note 40, at 296.

<sup>166</sup> See H.R. REP. NO. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467. The House Report explicitly stated the committee's intent. *Id.* The intent was that in most situations the Secretary will designate critical habitat at the same time she lists a species as either endangered or threatened. *Id.* The committee further intended that only in rare circumstances would the specification of critical habitat not benefit the species. *Id.*; see also Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 30 NAT. RESOURCES J. 1027, 1049 (1993) (stating that although Congress intended FWS to exercise "prudent" exception sparingly, FWS has invoked it with regularity).

<sup>167</sup> See *NRDC*, 113 F.3d at 1121.

<sup>168</sup> See H.R. REP. NO. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467.

<sup>169</sup> See Houck, *supra* note 40, at 296-97 (discussing importance of habitat conservation). Habitat conservation was so important to Congress that it prohibited actions destroying or modifying habitat as well as actions which jeopardize a listed species; see *id.* at n.134; see also Yagerman, *supra* note 153, at 827 (describing importance Congress placed on protecting habitat).

Courts have also recognized the importance that Congress placed on critical habitat.<sup>170</sup> For example, one district court in Washington held that the legislative history of the ESA left “little room for doubt” that, except in extraordinary circumstances, the Secretary should designate critical habitat at the same time she lists a species as threatened or endangered.<sup>171</sup> Moreover, in 1985, the Ninth Circuit held that the Secretary may only decline to designate critical habitat in rare circumstances.<sup>172</sup> In addition to the judicial interpretation, the amendments to the ESA also support a limited use of the prudent exception.<sup>173</sup>

Congress has provided explicit exclusions from the requirement to designate critical habitat when such exceptions were needed.<sup>174</sup> For example, in 1978 Congress amended the ESA to require the Secretary to designate critical habitat concurrently with listing a species.<sup>175</sup> However, for those species listed prior to 1978, but without critical habitat yet specified, the 1978 amendment did not require the Secretary to designate critical habitat to the “maximum extent prudent.”<sup>176</sup> Rather, the amendment stated merely that the Secretary “may” designate critical habitat for these species.<sup>177</sup> This language stands in sharp contrast to the language applicable to species listed after 1978.<sup>178</sup> For these species, the language declares that the Secretary “shall” designate critical habitat to the “maximum extent prudent.”<sup>179</sup> By choosing the term “may” as opposed to “shall” and omitting the “maximum extent prudent” language, Congress intended to give the Secretary broad discretion when deciding whether to designate critical habitat for the species already listed.<sup>180</sup> Furthermore, by choosing the “maximum extent prudent” language for future listings, Congress intended that the Secre-

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<sup>170</sup> See *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (acknowledging that legislative history placed great importance on designating critical habitat); *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (conceding that Secretary must designate critical habitat except in unusual circumstances).

<sup>171</sup> See *Northern Spotted Owl*, 758 F. Supp. at 626.

<sup>172</sup> See *Enos*, 769 F.2d at 1371.

<sup>173</sup> See 16 U.S.C. §§ 1532(5)(B), 1533(a)(3) (1997); see also *infra* notes 165-72 and accompanying text.

<sup>174</sup> See 16 U.S.C. § 1532(5)(B) (stating that Secretary may establish critical habitat for earlier listed species).

<sup>175</sup> See *id.*; *id.* § 1533(a)(3) (requiring designation of critical habitat concurrently with listing); see also *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 104 (D.D.C. 1995) (excusing species already listed from habitat designation requirement).

<sup>176</sup> See 16 U.S.C. § 1532(5)(B).

<sup>177</sup> *Id.*

<sup>178</sup> See *id.* § 1533(a)(3) (specifying that Secretary shall designate critical habitat to maximum extent prudent).

<sup>179</sup> *Id.*

<sup>180</sup> See *id.* § 1532(5)(B); *id.* § 1533(a)(3).

tary would have only limited discretion in designation.<sup>181</sup> Accordingly, by providing the limited exclusion for species already listed, Congress intended that in most instances, the Secretary would designate critical habitat.<sup>182</sup>

The prevalent trend of secretarial refusal to designate critical habitat<sup>183</sup> appears at odds with congressional intent.<sup>184</sup> If Congress intended that the Secretary designate critical habitat in all but rare circumstances, the Secretary has ignored congressional intent.<sup>185</sup> The rare and exceptional event occurs when the Secretary designates critical habitat.<sup>186</sup> At a minimum, the Ninth Circuit's decision interrupted the trend of ignoring congressional will.<sup>187</sup> Moreover, by holding that this is not one of the rare circumstances in which the Secretary may refuse to designate critical habitat, the Ninth Circuit appropriately deferred to the FWS's decision.

#### 4. Proper Deference to Agency Decisions

The Ninth Circuit correctly noted that generally courts must substantially defer to an agency's statutory interpretation.<sup>188</sup> A court must accept a reasonable agency interpretation based on an admissible construction of the statute.<sup>189</sup> However, the judiciary, as the ultimate authority on such issues, must reject

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<sup>181</sup> See *id.* § 1533(a)(3).

<sup>182</sup> See *supra* notes 165-72 and accompanying text (discussing congressional intent).

<sup>183</sup> See Salzman, *supra* note 1, at 312 (declaring Secretary never designates critical habitats for 80% of endangered species); see also *Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Southwestern Willow Flycatcher*, 62 Fed. Reg. 39129, 39131 (1997) (admitting that Service has refused to designate critical habitat in most situations based on theory that designation would not provide any net conservation benefit).

<sup>184</sup> See *supra* notes 165-72 and accompanying text (discussing congressional intent).

<sup>185</sup> See Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 30 NAT. RESOURCES J. 1027, 1049 (1993) (noting FWS has refused to designate critical habitat with regularity).

<sup>186</sup> See *id.*; see also Salzman, *supra* note 1, at 312 (concluding that Secretary does not designate habitat in most situations).

<sup>187</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

<sup>188</sup> See *Rainsong Co. v. Federal Energy Regulatory Comm'n*, 106 F.3d 269, 271-72 (9th Cir. 1997) (discussing deference to agency's interpretation of statutory provision or regulation). The Supreme Court has stated that when a challenge to an agency construction of a statutory provision centers on the wisdom of the agency's policy, then the challenge must fail. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>189</sup> See *Chevron*, 467 U.S. at 844 (proscribing substitution of court's statutory interpretation for reasonable construction by agency). In one respect, the decision in *NRDC* turns on whether the FWS's interpretation of the ESA was reasonable. See *NRDC*, 113 F.3d at 1126. If the Department of Interior appealed in *NRDC*

interpretations contrary to clear congressional intent.<sup>190</sup> Because the FWS's interpretation of the ESA is contrary to congressional intent, the court in *NRDC* correctly chose not to defer to the FWS.<sup>191</sup> Moreover, this level of deference is entirely consistent with *Fund for Animals*, the only case which had directly addressed the prudent exception prior to *NRDC*.<sup>192</sup>

In *Fund for Animals*, the court deferred to the FWS's decision not to designate critical habitat because significant recovery zones and management plans were already in place.<sup>193</sup> However, the situation in *NRDC* is significantly different from that in *Fund for Animals*.<sup>194</sup> Unlike *Fund for Animals*, there was no recovery plan, or any substantive protection of any kind for the gnatcatcher in *NRDC*.<sup>195</sup> The court's deference in *Fund for Animals* is justified because the ESA requires the Secretary to consider conservation efforts being made to protect a species when determining whether to designate critical habitat.<sup>196</sup> In *Fund for Animals*, the previous development of recovery zones for the conservation of grizzly bear habitat made designating critical habitat redundant.<sup>197</sup> Conversely, in *NRDC* no such conservation effort existed.<sup>198</sup> Therefore, because no gnatcatcher conservation programs existed, the FWS's decision not to designate critical habitat was unwarranted.<sup>199</sup> Thus, *NRDC* is easily distinguishable from *Fund for Animals*. Thus, the Ninth Circuit's decision in *NRDC* was clearly justified in

and the United States Supreme Court granted certiorari, the decision could be reversed because of the degree of deference afforded to agency decisions. See *Chevron*, 467 U.S. at 844.

Commentators, viewing this as a relinquishment of the judicial duty, have attacked this high level of deference. See Timothy Dyk, *The Supreme Court's Role in Shaping Administrative Law*, 17 ADMIN. L. NEWS 1, 13 (1991). These commentators base such a view on the belief that the Constitution and the Administrative Procedures Act require courts, and not agencies, to construe statutes. *Id.*

<sup>190</sup> See *Chevron*, 467 U.S. at 843 n.9 (stating that courts are final authority on statutory interpretation and must reject clearly contrary administrative constructions).

<sup>191</sup> See *NRDC*, 113 F.3d at 1126; see also *supra* notes 165-72 and accompanying text (discussing congressional intent).

<sup>192</sup> See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 104 (D.D.C. 1995); see also *supra* notes 85-90 and accompanying text (discussing *Fund for Animals*).

<sup>193</sup> See *Fund for Animals*, 903 F. Supp. at 117 (explaining that recovery zones were for habitat conservation). The FWS developed the recovery plans to conserve grizzly bear habitat. *Id.* Furthermore, according to the FWS, the protection afforded by the plans was comparable to that of critical habitat. *Id.*

<sup>194</sup> See *NRDC*, 113 F.3d at 1121; *Fund for Animals*, 903 F. Supp. 96.

<sup>195</sup> See 58 Fed. Reg. 16742, 16752-54 (1993) (stating that city/local protection does not exist); *Id.* at 16752 (declaring that no current regulatory mechanisms exist to protect gnatcatcher and its habitat).

<sup>196</sup> See 16 U.S.C. § 1533(b)(1)(A) (1997) (describing consideration of other existing conservation efforts).

<sup>197</sup> See *Fund for Animals*, 903 F. Supp. at 116-17 (discussing conservation efforts and prudent exception).

<sup>198</sup> See 58 Fed. Reg. at 16752-55 (discussing inadequate conservation plans).

<sup>199</sup> See *id.*

many ways. However, the court neglected to address several alternative points which may strengthen the court's ultimate holding.<sup>200</sup>

### 5. *Alternative Considerations*

The Ninth Circuit could also have taken advantage of the opportunity that NRDC provided to send a strong message emphasizing the importance of designating critical habitat.<sup>201</sup> For example, the Ninth Circuit could have strengthened its position by examining the term "prudent."<sup>202</sup> Further, the court could have addressed the apparent unlawfulness of the FWS regulations relating to critical habitat designation.<sup>203</sup>

#### *a. Plain Meaning of Prudent*

To further support its position, the Ninth Circuit could have examined the plain meaning of the term "prudent,"<sup>204</sup> which the ESA does not define.<sup>205</sup> The FWS regulations similarly fail to define "prudent."<sup>206</sup> Rather than providing a definition, the FWS regulations merely describe two situations in which designation of critical habitat would not be prudent.<sup>207</sup> When Congress fails to provide explicit statutory guidance with respect to the definition of terms, federal agencies such as the FWS sometimes misconstrues those terms, contrary to clear congressional intent.<sup>208</sup> The FWS definition of prudent falls into this category.

The common definition of the term prudent is "judicious or wisely cautious in practical affairs" or "characterized by or proceeding from such caution and good judgment."<sup>209</sup> The important concept common to each of these defini-

<sup>200</sup> See *infra* notes 204-15 and accompanying text (discussing plain meaning argument and FWS regulations).

<sup>201</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997).

<sup>202</sup> See 16 U.S.C. § 1533(a)(3) (1997) (stating that Secretary shall designate critical habitat to maximum extent prudent and determinable).

<sup>203</sup> See *infra* notes 216-32 and accompanying text (discussing possibly illegal regulations).

<sup>204</sup> See 16 U.S.C. § 1533(a)(3) (stating that Secretary shall designate critical habitat to maximum extent prudent and determinable).

<sup>205</sup> See 16 U.S.C. § 1532 (defining numerous terms, but not prudent, for purposes of ESA).

<sup>206</sup> See 50 C.F.R. § 424.12(a)(1)(i)-(ii) (1997) (describing situations where it is not prudent to designate critical habitat).

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* notes 165-72 and accompanying text (discussing congressional intent).

<sup>209</sup> THE RANDOM HOUSE DICTIONARY 720 (1980).

tions is "caution."<sup>210</sup> It follows that, with respect to designating critical habitat, the cautious response would be to protect the species, which in turn includes designating critical habitat.<sup>211</sup> As a result, this response would not only require federal agencies to comply with the habitat modification proscription under section 7 of the ESA, but would guarantee at least some protected gnatcatcher habitat.<sup>212</sup> Thus, although the Ninth Circuit did not examine this issue, the plain meaning of the term prudent appears to support its decision.<sup>213</sup> The court should have explained what "prudent" means with respect to designating critical habitat.<sup>214</sup> Had the Ninth Circuit done this, agencies such as the FWS would have clear guidance and could avoid misconstruing undefined terms.<sup>215</sup>

### *b. Validity of Regulations*

The Ninth Circuit also missed an opportunity to address the lawfulness of the FWS regulations.<sup>216</sup> Although the plaintiffs in this case did not contest the validity of the regulations, the court should have asserted that the FWS regulations were unlawful.<sup>217</sup> Specifically, the court should have argued that the FWS regulations which define "adverse modification" and "jeopardy" effectively remove any independent meaning from the term critical habitat.<sup>218</sup>

The FWS regulations define both "adverse modification" and "jeopardy" with respect to the survival and recovery of the species.<sup>219</sup> Thus, any federal

<sup>210</sup>*Id.*

<sup>211</sup> See 16 U.S.C. § 1533(a)(3)(A) (1997) (describing critical habitat designation).

<sup>212</sup> See 16 U.S.C. § 1536(a) (describing section 7's consultation requirement).

<sup>213</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

<sup>214</sup> See 16 U.S.C. § 1532 (1997) (defining numerous terms, but not prudent, for purposes of the ESA).

<sup>215</sup> See *supra* notes 165-72 and accompanying text (discussing congressional intent and effects of regulatory definition of "prudent").

<sup>216</sup> See John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 568-71 (1994) (arguing that, contrary to congressional intent, regulations undermine, if not dismantle, ESA requirements).

<sup>217</sup> See *id.*; see also Houck, *supra* note 40, at 298-300. In *NRDC*, because the district court granted summary judgment to the defendants, the Ninth Circuit reviewed the decision *de novo*. See *NRDC*, 113 F.3d at 1123. Moreover, while an appellate court generally will not consider arguments that the litigants do not present, where justice or public policy requires, the court may raise issues *sua sponte*. See *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961); see also 28 U.S.C. § 2106 (1998) (providing that appellate courts may modify, reverse, or remand decisions as justice requires).

<sup>218</sup> See John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 568-71 (1994).

<sup>219</sup> See 50 C.F.R. § 402.02 (1997). The regulations define "destruction or adverse modification" as an alter-

action which meets the habitat modification standard under section 7 nearly always meets the jeopardy standard.<sup>220</sup> By equating adverse modification with jeopardy, the regulations effectively remove any independent meaning from the term critical habitat.<sup>221</sup> Normally, when interpreting a statute, a court or agency must give full effect to all its language.<sup>222</sup> The FWS regulations violate this well-accepted principle of statutory construction.<sup>223</sup>

The Ninth Circuit also could have argued that, although the ESA definition of critical habitat demands greater protection, the regulations currently reduce critical habitat to a point where species are on the brink of extinction.<sup>224</sup> The ESA defines critical habitat as those areas "essential to the conservation" of the species.<sup>225</sup> Further, the ESA defines conservation as employing all procedures necessary for the recovery of the species.<sup>226</sup> However, under the FWS regulations, a federal action will only adversely modify critical habitat if it appreciably diminishes the value of the habitat for both the survival and recovery of the species.<sup>227</sup> Such a definition disregards the ESA's definition of conservation, which requires agencies to use all necessary procedures for the recovery of the species.<sup>228</sup> Because the FWS regulations substantially restrict the definition of critical habitat and frustrate the intent of the ESA, the regulations are unlawful.<sup>229</sup>

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ation which appreciably diminishes the value of critical habitat for both the survival and recovery of a species. *Id.* The regulations define "jeopardize the continued existence of" as an action expected to appreciably reduce the likelihood of both the recovery and survival of a species. *Id.*

<sup>220</sup> See 16 U.S.C. § 1536(a)(2) (1997) (describing jeopardy proscription and critical habitat modification proscription). Because federal actions meeting the habitat modification standard nearly always satisfy the jeopardy standard, the existence of designated critical habitat does not affect the outcome of section 7 consultation. See 62 Fed. Reg. 39129, 39131-32 (1997). Recognizing this, the FWS has determined that designating critical habitat rarely provides any additional species protection and is therefore not prudent. See *id.*

<sup>221</sup> See Kunich, *supra* note 218, at 570. Legal scholars argue that designating critical habitat may be legally redundant due to the ESA definition of critical habitat. See Andrew A. Smith et al., *The Endangered Species Act at Twenty: An Analytical Survey of Federal Endangered Species Protection*, 30 NAT. RESOURCES J. 1027, 1050-51 (1993). Thus, the section 7 mandate requiring federal agencies not to destroy or modify critical habitat essentially duplicates the mandate not to jeopardize a species' continued existence. *Id.* at 1051.

<sup>222</sup> See Kunich, *supra* note 218, at 570-71.

<sup>223</sup> *Id.*

<sup>224</sup> See Houck, *supra* note 40, at 300.

<sup>225</sup> See 16 U.S.C. § 1532(5)(A) (1997) (defining critical habitat).

<sup>226</sup> See *id.* § 1532(3) (defining conservation).

<sup>227</sup> See 50 C.F.R. § 402.02 (1997) (defining destruction or adverse modification).

<sup>228</sup> See 16 U.S.C. § 1532(3) (defining term conservation).

<sup>229</sup> See *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979). To ascertain whether a regulation properly carries out the congressional mandate, courts must determine whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. *Id.*

Thus, although the plaintiffs failed to raise the claim that the regulations were unlawful, the court should have done so on its own accord.<sup>230</sup> The Ninth Circuit lost an opportunity to correct a serious incongruity between the FWS regulations and the ESA.<sup>231</sup> In failing to raise this argument, the court is essentially perpetuating the FWS's unlawful practice of refusing to designate critical habitat for prudential reasons.<sup>232</sup>

### *B. Effect of the Ninth Circuit's Decision*

Currently, it is unclear whether the court's decision will have any substantive effect on future decisions regarding critical habitat designation. However, in at least one subsequent decision, a court applied reasoning similar to the Ninth Circuit's in *NRDC*.<sup>233</sup> In *Building Industry Association of Superior California v. Babbitt*,<sup>234</sup> a district court found that the FWS did not adequately support its decision refusing to designate critical habitat for the fairy shrimp.<sup>235</sup> The FWS decided that designating critical habitat, and publishing maps of that habitat would make the fairy shrimp more vulnerable to incidents of vandalism.<sup>236</sup> Therefore, the FWS invoked the "prudent" exception and chose not to designate critical habitat.<sup>237</sup> The court held that the single incident of vandalism cited in the administrative record did not support the application of the prudent exception.<sup>238</sup> Furthermore, the court stated that the mere fact that someone destroyed habitat did not preclude designating critical habitat.<sup>239</sup>

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<sup>230</sup> See *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997).

<sup>231</sup> See John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 568-71 (1994) (arguing that, contrary to congressional intent, regulations undermine, if not dismantle, ESA requirements).

<sup>232</sup> See *supra* notes 61-62 and accompanying text (discussing nondesignation trend).

<sup>233</sup> See *Building Industry Association of Superior California v. Babbitt*, No. CIV.A.95-0726 PLF, 1997 WL 59302, \*1 (D.D.C. July 25, 1997).

<sup>234</sup> No. CIV.A.95-0726 PLF, 1997 WL 59302 (D.D.C. July 25, 1997).

<sup>235</sup> See *id.* at \*11-\*12. Fairy shrimp are small crustaceans found primarily in California's Central Valley. *Id.* The shrimp live in seasonal wetlands called "vernal pools" which dry up in the summer and reappear during the winter and spring. *Id.*

<sup>236</sup> *Id.* at \*11 (explaining fear that publication of habitat maps would increase danger to fairy shrimp).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* The court found the FWS's reasoning wholly insufficient and unsupported. *Id.* The court stated that a single unsupported incident of vandalism cannot overcome the strong presumption that critical habitat will be designated at the same time a species is listed. *Id.*

<sup>239</sup> *Id.* (finding that more than destruction of habitat required before justifying use of prudent exception).

The *Building Industry* reasoning strongly supports the decision in *NRDC*.<sup>240</sup> Both courts held that isolated incidents of vandalism, with no proven relationship to designating critical habitat, would not support the FWS's use of the prudent exception.<sup>241</sup> While *Building Industry* did not cite to *NRDC*, it suggests a developing trend in which courts will hold the FWS to higher standards.<sup>242</sup> Moreover, these decisions put the FWS on notice that unsupported determinations failing to designate critical habitat will be overturned.<sup>243</sup> If such a trend is developing, it will encourage the FWS to comply with congressional intent and the purposes of the ESA.<sup>244</sup>

#### IV. CONCLUSION

In reversing the district court decision, the Ninth Circuit did little more than uphold congressional will.<sup>245</sup> Congress intended to protect critical habitat at least as forcefully as the protection of species themselves.<sup>246</sup> The FWS promulgated and interpreted regulations which expanded an extremely limited exception to the ESA.<sup>247</sup> This practice, as the Ninth Circuit correctly found in *NRDC*, violated the law.<sup>248</sup> Moreover, while courts traditionally give great deference to the expert opinion of a federal agency, when that opinion contradicts congressional intent, a court must reject it.<sup>249</sup>

Congress passed the ESA to protect other species from mankind's encroachment.<sup>250</sup> Yet, almost twenty-five years later, the rate of species extinction continues to rise, primarily due to the lack of species habitat protection.<sup>251</sup> The Ninth

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<sup>240</sup> See *id.*

<sup>241</sup> See *id.*; *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (requiring more than vandalism before invoking prudent exception).

<sup>242</sup> See *Building Industry Association*, 1997 WL 59302, at \*11-\*12.

<sup>243</sup> See *NRDC*, 113 F.3d at 1126; *Building Industry Association*, 1997 WL 59302, at \*11-\*12.

<sup>244</sup> See *supra* notes 165-72 and accompanying text (discussing congressional intent); *supra* notes 151-55 and accompanying text (discussing purposes of ESA).

<sup>245</sup> See *id.* (discussing congressional intent).

<sup>246</sup> See *id.*

<sup>247</sup> See 50 C.F.R. § 424.12(a)(1)(i)-(ii) (1997) (describing situations where it is not prudent to designate critical habitat).

<sup>248</sup> See *NRDC*, 113 F.3d at 1126.

<sup>249</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 and n.9 (1984) (requiring agency and court to give effect to congressional intent).

<sup>250</sup> See 16 U.S.C. § 1531 (1997) (declaring purposes and policy of ESA are to conserve endangered and threatened species).

<sup>251</sup> See *supra* notes 1-4 and accompanying text (explaining why rate of extinction continues to rise).

Circuit's decision in *NRDC* takes one step toward reversing the trend of federal agencies choosing not to designate critical habitat.<sup>252</sup> At least within the Ninth Circuit, the FWS is on notice that the court will take a hard look at any decision not to designate critical habitat.<sup>253</sup>

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<sup>252</sup> See *NRDC*, 113 F3d at 1126.

<sup>253</sup> *Id.*