

The National Agricultural
Law Center



University of Arkansas
System Division of Agriculture

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

The Future of Livestock Grazing and the Endangered Species Act

by

Harold S. Shepherd

Originally published in JOURNAL OF ENVIRONMENTAL LAW AND LITIGATION
21 J. ENVTL. L. & LITIG. 383 (2006)

www.NationalAgLawCenter.org

HAROLD S. SHEPHERD*

**The Future of Livestock Grazing and the
Endangered Species Act****

I. Law and Science on the Range	387	R
II. ESA Standards and Procedures	389	R
A. Listing Species	389	R
B. Critical Habitat	392	R
C. Section 7 Consultation	392	R
1. The Consultation Process	393	R
2. Irreversible or Irretrievable Commitment of Resources	399	R
3. Violations of RPAs and Terms and Conditions	400	R
4. Essential Fish-Habitat Consultation.....	404	R
5. Section 9 Take	405	R
6. Citizen Suits	407	R
III. The ESA Lawsuit	408	R
A. Nature of Action	408	R
B. Jurisdiction and Venue	408	R
C. Parties	410	R
D. Standing	411	R
E. Temporary Restraining Orders and Preliminary Injunctions	412	R
1. Relative Harm to the Parties	413	R
2. Likelihood of Success on the Merits	414	R
3. Likelihood of Irreparable Harm	416	R
4. Whether the Public Interest Favors Granting Immediate Injunctive Relief	416	R
IV. The Administrative Procedure Act	417	R

* The Center for Tribal Water Advocacy, PO Box 1637, Pendleton, OR 97801, (541) 276-1624, waterlaw@uci.net.

** Presented to the Second Annual Conference on Tribal Water Law at the University of Oregon School of Law, October 21-22, 2005.

384 J. ENVTL. LAW AND LITIGATION [Vol. 21, 383

A.	APA Challenges to Livestock-Grazing		
	Decisions	417	R
B.	Final Agency Action	422	R
C.	Exhaustion of Administrative Remedies	424	R
D.	Ripeness	424	R
V.	On-the-Ground Application of the ESA	425	R
	A. Sage Grouse	425	R
	B. Petition to Protect Sage Grouse	426	R
	C. The Columbia River Mainstem Biological Opinion	429	R
	D. John Day Wild and Scenic River	432	R
	E. The ESA and Instream Flows on Federal Lands	435	R
VI.	The Future of the ESA	438	R
VII.	Conclusion	441	R

In the spring of 2004, Secretary of the Interior Gale Norton traveled to Portland, Oregon, for an Earth Day press event at the Oregon Zoo where she “announced” a deal to preserve 23,000 acres of native grasslands near Boardman, in Eastern Oregon.¹ Norton announced that under the deal, a section of the country’s largest dairy farm would be set aside for conservation of four rare prairie species.²

Under this agreement, “Threemile Canyon Farm, owned by R.D. Offutt Co., the Fargo, N.D. agricultural-development giant and world’s largest potato producer, is paying the Nature Conservancy \$130,000 annually to monitor the protected land.”³ This will “protect the burrowing Washington ground squirrel, which has lost most of its sage brush and clump grass habitat to agriculture,”⁴ causing it to be listed as endangered under Oregon law⁵

¹ Andrew Kramer, Associated Press, *Interior Secretary Announces Deal for Boardman Dairy*, DEMOCRAT-HERALD (Albany, Or.), Apr. 25, 2004, at A4; Press Release, WaterWatch Oregon, Conservationists Blast Gale Norton’s Endangered Species “Green Wash,” (Apr. 24, 2004), available at <http://www.waterwatch.org/Press/Releases/Norton%20%204-24-04.htm>.

² Kramer, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ See OREGON DEP’T OF FISH & WILDLIFE, OREGON THREATENED AND ENDANGERED SPECIES LIST, available at http://www.dfw.state.or.us/wildlife/diversity/threatened_endangered.asp.

and to become a candidate for listing under the federal Endangered Species Act⁶ (ESA).

The ground squirrel “inhabits a sliver of prairie on the now mostly plowed-under, but once-vast, Boardman Grasslands, a rolling plain east of the Cascade Mountains previously dominated by antelopes and wolves and dotted with sage and clump grasses.”⁷ Norton called the agreement “the wave of the future and a model of private and public cooperation” for its protection of property owners from future liability in exchange for concessions to set aside habitat if a candidate species on their property is listed as endangered.⁸ Norton said, “‘The agreement serves as a model of how the U.S. Fish and Wildlife Service can work with states, local communities and private partners to enhance the habitat for and protection of endangered species.’”⁹

In reality, however, the foundation of the deal was laid four years earlier when Offutt agreed to settle legal challenges brought by environmental groups.¹⁰ Offutt wanted to develop the property, once a rocket-engine testing area for the Boeing Co., into a massive farm, but made the concessions Norton discussed at the press event, in response to the hard work of conservation groups and protections afforded by the ESA.¹¹

In response to the press event, WaterWatch said it was ironic that Norton praised the agreement made possible by the Act, because the Bush administration had opposed listing additional species.¹²

The contradictions arising out of Norton’s speech on the Washington ground squirrel lie at the center of a much larger debate over the future of livestock grazing on federal lands in the West. On one side of this issue, many livestock interests, government land-managers, and scientists maintain that grazing is not only compatible with protection of western rangelands but actually improves ecosystems and wildlife habitat. According to grazing

⁶ U.S. FISH & WILDLIFE SERV., THREATENED AND ENDANGERED SPECIES SYSTEM (TESS) (2006), available at http://ecos.fws.gov/tess_public/SpeciesReport.do?listingType=C (naming species that are candidates for listing). The ESA is found at 16 U.S.C. §§ 1531-1544 (2006).

⁷ Kramer, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ See *id.*; see also Craig Scott, *Water Watch Suit Partially Resolved*, EAST OREGONIAN (Pendleton, Or.), Sept. 9, 2000, at 3A (providing background on the lawsuit).

¹¹ Kramer, *supra* note 1.

¹² Press Release, WaterWatch Oregon, *supra* note 1.

advocates, for example, a scientific panel set up in 1994 by the National Academy of Sciences “reported it was not possible to determine if the range was stable, deteriorating or improving” because “[t]he studies do not exist.”¹³

In addition, recent studies in peer-reviewed journals such as *BioScience*, *Conservation Biology*, and *Environmental Science and Policy* conclude that cattle ranches are often “crucial puzzle pieces holding together an increasingly fragmented landscape.”¹⁴ According to such studies, when ranches are sold and subsequently subdivided into “ranchettes” of forty acres or less for residential purposes, “invasive species move in along with people and their pets, and fewer native species can live on the land.”¹⁵ In addition, a study conducted by Colorado State University in Fort Collins found that ranches have at least as many species of birds, carnivores, and plants as similar areas protected as wildlife refuges, and that ranches provide a better habitat for wildlife than ranchettes, which have fewer native and more invasive species.¹⁶

On the other hand, repeated scientific studies have illustrated the devastating effects that livestock grazing can have on listed species.¹⁷ As a result, many conservationists maintain that grazing supporters are missing the point by comparing current reduced stocking-rates and/or newer grazing systems with older, more destructive techniques. Conservationists also contend that grazing supporters simply fail to acknowledge that the best means of recovery for rangelands is to remove livestock permanently or severely reduce their numbers for degraded areas.¹⁸

As with many environmental controversies, this debate has found its way into federal court opinions representing the range

¹³ Ed Marston, *Cow-Free Crowd Ignores Science Sprawl*, HIGH COUNTRY NEWS, Dec. 9, 2002, at 6.

¹⁴ Jon Christensen, *Conservationists See Room for Grazing on the Landscape*, OREGONIAN (Portland, Or.), Sept. 15, 2002, at A19.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ For example, in 1994, the Forest Service reported that livestock grazing was a major cause of species endangerment in the United States. CURTIS H. FLATHER ET AL., U.S. FOREST SERV., SPECIES ENDANGERMENT PATTERNS IN THE UNITED STATES 12, 22-23 (1994).

¹⁸ See, e.g., Joy Belsky et al., *What the River Once Was, Livestock Destruction of Waters and Wetlands*, in GEORGE WUERTHNER & MOLLIE MATTESON, WELFARE RANCHING, THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST 179, 179-80 (2002).

of scientific and legal interpretations, including the application of the ESA to riparian-habitat grazing practices. Congress' recent scrutiny of the ESA highlights the significant role the controversy over livestock grazing on public lands has played in the future of the Act and federal rangeland-management practices.¹⁹

This Article examines the successes and failures of applying the ESA and related laws and policies in protecting federal rangelands from abusive livestock grazing, as well as the consequences the controversy may pose for the ESA and public-lands grazing itself. Specifically, this Article discusses (1) a summary of the legal and scientific standards affecting rangeland and riparian resources; (2) ESA standards and procedures; (3) ESA litigation; (4) on-the-ground examples of ESA species and habitat protection; (5) application of the Administrative Procedures Act (APA) to ESA riparian-grazing cases, including final actions, parties, standing, and ripeness; and (6) the future of the ESA and current legislative efforts to gut the Act. The Article concludes by assessing how attacks on the Act may actually lead to reforms of livestock grazing on federal lands.

I

LAW AND SCIENCE ON THE RANGE

Whether the ESA and other laws require federal agencies to exclude grazing from riparian areas in order to protect the unique and fragile characteristics of river habitats is a fundamental component of the controversy over grazing on publicly owned rangeland. The ESA is most often wielded by conservationists attempting to protect riparian areas from abuse. These areas are typically narrow strips of green growth found on either side of streams and rivers that wind through vast areas of desert, prairie, and forest landscapes throughout the West.

Teeming with life (compared to the often-harsh surrounding desert environments), experts believe that "the riparian/stream ecosystem is the single most productive type of wildlife habitat,

¹⁹ See Brodie Farquhar, *Pombo Takes on the Endangered Species Act*, HIGH COUNTRY NEWS, Oct. 17, 2005, at 3 (discussing the House of Representatives' recent approval of Representative Pombo's Threatened and Endangered Species Recovery Act, which called for the elimination of "critical habitat," among other controversial changes).

benefiting the greatest number of species.”²⁰ Riparian zones provide a classic example of what scientists call “the ecological principals of edge effect.”²¹ Such areas provide “living conditions for a greater variety of wildlife than any other types of habitat found in California, the Great Basin of southeast Oregon, the Southwest, the Great Plains, and perhaps the entire North American continent,”²² and are “the most productive and possibly the most sensitive of North American habitats and should be managed accordingly.”²³

Riparian vegetation is also a critical element in the protection of anadromous and resident fish species because it “provides shade, preventing adverse water temperature fluctuations.”²⁴ The roots of “trees, shrubs, and herbaceous vegetation stabilize streambanks, providing cover in the form of overhanging banks,” and “[s]treamside vegetation acts as a ‘filter’ to prevent sediment debris from man’s activities from entering the stream.”²⁵ Finally, riparian vegetation affects “the food chain of the ecosystem by shading the stream and providing organic detritus and insects for the stream organisms.”²⁶

Although the existence and quality of streamside vegetation indirectly affects the quality of habitat for anadromous and resident coldwater fish,²⁷ and it is generally accepted that livestock grazing has been a key factor in the substantial degradation of western riparian areas since the early 1900s,²⁸ the desire to protect these areas frequently conflicts with their use for livestock grazing and other commodity production. More importantly, federal courts routinely require more than just the significance of riparian areas for ecological sustainability to enforce protection standards. Judicial decisions related to livestock grazing, therefore, usually turn on the data and scientific literature.

²⁰ J. Boone Kauffman & W.C. Krueger, *Livestock Impacts on Riparian Ecosystems and Streamside Management Implications . . . A Review*, 37 J. RANGE MGMT. 430, 431 (1984).

²¹ *Id.*

²² *Id.*

²³ J. Boone Kauffman et al., *Effects of Late Season Cattle Grazing on Riparian Plant Communities*, 36 J. RANGE MGMT. 685, 685 (1983).

²⁴ Kauffman & Krueger, *supra* note 20, at 431.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See A.J. Belsky et al., *Survey of Livestock Influences on Stream and Riparian Ecosystems in the Western United States*, 54 J. SOIL & WATER CONS. 419, 419 (1999).

II

ESA STANDARDS AND PROCEDURES

Several legal theories potentially apply once a claimant challenges a grazing action under the ESA in either an administrative or judicial forum; they are summarized in the following sections.

A. *Listing Species*

To determine whether a species warrants listing as “endangered”²⁹ or “threatened”³⁰ under the ESA, the Secretary of the Interior or Commerce must consider (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) over-utilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.³¹ Federal courts interpret this criteria rather strictly. Listing agencies, for example, may not consider proposed or future regulatory mechanisms as a basis for not listing a species,³² and listing decisions may be made solely on the basis of the best scientific and commercial data available.³³

Any “interested person” may request that a species be listed by filing a petition³⁴ that initiates rule-making procedures under the federal Administrative Procedure Act.³⁵ The petition must include (1) the action sought, (2) the species’ common and scientific names, (3) a narrative description of why the action is needed, (4) a description of the species’ status throughout a significant portion of its range, and (5) scientific documentation

²⁹ An “endangered” species is “in danger of extinction throughout all or a significant portion of its range.” Endangered Species Act, 16 U.S.C. § 1532(6) (2006).

³⁰ A “threatened” species “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

³¹ *Id.* § 1533(a)(1); see also David E. Filippi & Greg D. Corbin, *Federal and Oregon Endangered Species Acts*, in ENVIRONMENTAL AND NATURAL RESOURCES LAW, OR. ST. B. CONTINUING LEGAL EDUC. 43-3 to -4 (Donald H. Pyle et al. eds., 2006).

³² Filippi & Corbin, *supra* note 31, at 43-5 (citing Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998)).

³³ *Id.* (citing 16 U.S.C. § 1533(b)(1)(A)).

³⁴ *Id.* (citing 16 U.S.C. § 1533(b)(3)(A)).

³⁵ *Id.* at 43-6 (citing Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.) (2006)). Section 553 of the APA specifically addresses notice and comment rulemaking.

supporting the petition.³⁶ Once the petition is filed, the Secretary has ninety days to determine whether it “presents substantial scientific or commercial information” indicating that listing may be appropriate.³⁷

If listing may be appropriate, the Secretary has twelve months from the petition’s filing to determine whether the action in question is not warranted,³⁸ is warranted,³⁹ or is warranted but precluded by the listing agency’s need to process other pending petitions.⁴⁰ Preclusion is appropriate as long as the agency is making expeditious progress toward action on other petitions.⁴¹ A finding that the petition action is not warranted is a final agency action subject to judicial review, as is a finding that the action is warranted but precluded.⁴² If the agency is unable to make a determination as to whether the action is warranted, it has another twelve months to revisit the issue and make such determination.⁴³

After determining that an action is warranted, the Secretary must publish a notice in the Federal Register and provide a sixty-day public-comment period.⁴⁴ Such comment period may be extended for “good cause.”⁴⁵ The notice must include a summary of the data the agency used in reaching its decision, an analysis linking the data to the proposed rule, and a summary of the factors affecting the species.⁴⁶ Within twelve months of publication, the agency must make a decision on the proposed listing.⁴⁷ Specifically, it must publish the final rule, withdraw the proposed rule if the evidence does not justify the proposed action, or extend the deadline for no more than six months when substantial

³⁶ Filippi & Corbin, *supra* note 31, at 43-6 (citing 50 C.F.R. § 424.14(b)(2)(i)-(iv) (2006)).

³⁷ *Id.* (quoting 16 U.S.C. § 1533(b)(3)(A)). A decision that the action requested is not warranted is considered final agency action subject to judicial review under the APA. *See id.* (citing 16 U.S.C. § 1533(b)(3)(C)(ii)).

³⁸ 16 U.S.C. § 1533(b)(3)(B)(i).

³⁹ *Id.* § 1533(b)(3)(B)(ii).

⁴⁰ *Id.* § 1533(b)(3)(B)(iii).

⁴¹ Filippi & Corbin, *supra* note 31, at 43-7 (citing 16 U.S.C. § 1533(b)(3)(B)(iii)).

⁴² *See id.* (citing 16 U.S.C. § 1533(b)(3)(C)(ii)).

⁴³ 16 U.S.C. § 1533(b)(3)(D)(ii).

⁴⁴ Filippi & Corbin, *supra* note 31, at 43-7 (citing 16 U.S.C. § (b)(5)(A)(i)).

⁴⁵ *Id.* (quoting 50 C.F.R. § 424.16(c)(2) (2006)).

⁴⁶ *Id.* (citing 50 C.F.R. § 424.16(b)).

⁴⁷ *Id.* (citing 50 C.F.R. § 424.17(a)(1)).

R**R**

disagreement exists over the sufficiency or accuracy of the information relied upon by the agency.⁴⁸

The Ninth Circuit recently concluded that the time limit for making initial listing determinations under 16 U.S.C. § 1533(b)(3)(A) cannot be interpreted independently of the one-year limitation imposed for final determination under subsection (b)(3)(B).⁴⁹ The U.S. Fish and Wildlife Service (USFWS) argued in *Badgley* that the subsection (b)(3)(A) requirement of initial listing determinations within ninety days “[t]o the maximum extent practicable” means if it is not practicable to complete the determination within such time, the finding may be delayed indefinitely.⁵⁰ The court held, however, that “[t]he Service’s interpretation would render subsection (b)(3)(B) inoperative,” and found that “[t]he only way to give effect to *both* deadline provisions is to apply the twelve-month deadline to both the initial and final determinations.”⁵¹ The court reasoned that “[i]f the final determination must be made within twelve months, the only logical conclusion is that the initial one must be made within that time as well.”⁵²

An important basis for the court’s decision was that the Service’s allegedly wrongful delay was “capable of repetition yet evading review” because, in listing determination cases, once litigation is filed to compel the agency to make a decision, “disputes are routinely too short in duration to receive full judicial review.”⁵³ In addition, the plaintiffs’ litigation history with the USFWS and pending petitions filed indicated they would litigate the extent of the agency’s discretion to delay making a twelve-month finding, thereby fulfilling the second requirement of the repetition/evasion exception to the mootness doctrine.⁵⁴

⁴⁸ *Id.* (citing 50 C.F.R. § 424.17(a)(1)); *see also* *Env’tl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995) (finding that the duty to publish or withdraw the rule within the twelve- or eighteen-month time frame is mandatory and not subject to agency discretion); Filippi & Corbin, *supra* note 31, at 43-7 to -8 (discussing *Babbitt* and additional case law related to this issue). R

⁴⁹ Filippi & Corbin, *supra* note 31 at 43-3 (2006 Supp.) (citing *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1178 (9th Cir. 2002)). R

⁵⁰ *Badgley*, 309 F.3d at 1175.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1774.

⁵⁴ *Id.*

B. Critical Habitat

At the same time a species is listed, the listing agency must, “to the maximum extent prudent and determinable,” and based on the “best scientific data available,” designate critical habitat.⁵⁵ “Critical habitat” means specific habitat consisting of physical or biological features that are essential to the conservation of the species and may require special management considerations, and that is either within the species’ geographical area at the time the species is listed, or outside such geographical area if the Secretary determines it is appropriate.⁵⁶

Unlike listing decisions, critical-habitat determinations must address “the economic impact . . . and any other relevant impact” of such measures.⁵⁷ Recent actions by the Bush administration have significantly affected the federal government’s ability to enforce protection of critical habitat under ESA regulations. Specifically, while regulatory rule adjustments, required by recent court decisions mandating much more specific analysis of economic impacts, were being made through the public rule-making process, the administration abandoned a federal policy of maintaining critical-habitat protection for nineteen salmon and steel-head species located on the West Coast through a legal settlement with development interests.⁵⁸ The settlement removes critical-habitat protection now enjoyed by such species in “150 watersheds, river segments, bays and estuaries in Washington, Oregon, California and Idaho.”⁵⁹

By agreeing to repeat the economic analysis when there is nothing wrong with the first one, the administration’s actions may create a dangerous precedent. This aggressive approach to overturning critical-habitat designations has wide-ranging implications not only for the species involved in the settlement, but for many other listed species as well.

C. Section 7 Consultation

Section 7 of the ESA requires all federal agencies,

⁵⁵ Filippi & Corbin, *supra* note 31, at 43-9 (citing Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A), (b)(2) (2006)).

⁵⁶ *Id.* (citing 16 U.S.C. § 1532(5)(A)).

⁵⁷ 16 U.S.C. § 1533(b)(2).

⁵⁸ Cat Lazaroff, *Some Salmon Stand to Lose Habitat Protection*, ENVT. NEWS. SERV., Mar. 12, 2002, available at <http://www.ens-newswire.com/ens/mar2002/2002-03-11-07.asp>.

⁵⁹ *Id.*

in consultation with and with the assistance of the Secretary, [to] insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.⁶⁰

To assist federal agencies in complying with this mandate, they must consult with the National Marine Fisheries Service (NOAA Fisheries) or the USFWS (the consulting agency) whenever their actions may affect a listed anadromous species.⁶¹

1. *The Consultation Process*

Whenever a federal agency's activities are discretionary, it must "review its actions at the earliest possible time" to determine whether they are likely to jeopardize the continued existence of a listed species or adversely modify critical habitat.⁶² If the agency determines that the proposed action "may affect" a listed species, it must formally consult with the USFWS and/or the NOAA Fisheries, depending on the species affected.⁶³

To determine whether consultation is required, "the first step is to find out whether listed species or critical habitat are present in the action area."⁶⁴ In the case of major construction activities, the action agency *must* request assistance from the consulting agency unless it is already aware of whether listed species or critical habitat are present.⁶⁵ "Major construction activity" means a construction activity or other undertaking with similar physical impact that would be characterized as "a major Federal action significantly affecting the quality of the human environment," re-

⁶⁰ Filippi & Corbin, *supra* note 31, at 43-14 (quoting 16 U.S.C. § 1536(a)(2)).

R

⁶¹ See 16 U.S.C. § 1536(a)(3).

⁶² Filippi & Corbin, *supra* note 31, at 43-15 (citing 50 C.F.R. § 402.14(a) (2006)); USFWS & NOAA FISHERIES, ENDANGERED SPECIES ACT CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING SECTION 7 CONSULTATIONS AND CONFERENCES, at 4-1 (1998), available at <http://www.fws.gov/Endangered/consultations/s7hndbk/ch4.pdf> [hereinafter CONSULTATION HANDBOOK]. See *infra* Part II(C)(5) for a discussion on "Incidental Take."

R

⁶³ Filippi & Corbin, *supra* note 31, at 43-15 to -16 (citing Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999)).

R

⁶⁴ *Id.* at 43-16 (citing 50 C.F.R. § 402.12(c)).

⁶⁵ *Id.* (citing 50 C.F.R. § 402.12(c)).

quiring the production of an Environmental Impact Statement under the National Environmental Policy Act (NEPA).⁶⁶

To this end,

[t]he Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.⁶⁷

If such species or habitat are present and if the proposed action is “likely to adversely affect listed species or critical habitat,” the agency usually must enter into formal consultation⁶⁸ and must prepare a biological assessment to assist in making the determination.⁶⁹ Any conclusion regarding impacts to listed species or critical habitat may only be reached as a result of the preparation of a biological assessment under section 402.12 or as a result of informal consultation with the appropriate service under section 402.13 “with the written concurrence of the Director.”⁷⁰

For actions that “may affect” listed species or critical habitat but are not major construction activities, however, the action agency may independently analyze the effects of the action or initiate an informal consultation with the appropriate fish agency in lieu of preparing a biological assessment.⁷¹ In such cases, if the agency determines that the action will have no effect, it may terminate consultation.⁷²

Unlike formal consultation, informal consultation is voluntary and generally determines whether a formal process is required through discussion and correspondence between the action agency and the FWS or NOAA Fisheries.⁷³ During informal

⁶⁶ *Id.* (citing National Environmental Protection Act, 42 U.S.C. § 4332(2)(C) (2006) (requiring a statement of environmental impact (quoting 50 C.F.R. § 402.02)).

⁶⁷ 50 C.F.R. § 402.12.

⁶⁸ *See* 50 C.F.R. § 402.14(a)-(b).

⁶⁹ Filippi & Corbin, *supra* note 31, at 43-17 (citing 50 C.F.R. § 402.12(k)). The failure to conduct a biological assessment in such cases results in a substantive violation of the ESA. *Id.* (citing *Thomas v. Peterson*, 753 F.2d 754, 763-65 (9th Cir. 1985) (holding that the failure to prepare biological assessment justified injunction against Forest Service road construction project)).

⁷⁰ 50 C.F.R. § 402.14(b).

⁷¹ Filippi & Corbin, *supra* note 31, at 43-16.

⁷² CONSULTATION HANDBOOK, *supra* note 62, at 3-3.

⁷³ Filippi & Corbin, *supra* note 31, at 43-16; *see also* CONSULTATION HANDBOOK, *supra* note 62, at 3-3.

R

R

R

R

R

consultation, “if the action agency concludes . . . that the action is ‘not likely to adversely affect’ listed species or critical habitat, and the consulting agency concurs, consultation is concluded.”⁷⁴

In livestock-grazing cases, “the grazing permit program produces significant impacts on individual locales.”⁷⁵ Therefore, the action agency typically issues a letter to the consulting agency along with the biological assessment, requesting formal consultation regarding the potential effects of the proposed grazing activity on a species and its designated critical habitat.⁷⁶ The letter and/or assessment must describe (1) the action and the action area; (2) the listed species and critical habitat present; (3) the potential effects based on the “best scientific and commercial data available,” including its cumulative effects; and (4) any relevant reports or other information.⁷⁷ A typical Bureau of Land Management (BLM) biological assessment, for example, will conclude that some livestock-grazing allotments “may affect,”⁷⁸ and that grazing on other allotments is “[n]ot [l]ikely to [a]dversely [a]ffect,” listed species or their habitat.⁷⁹

While there are few specific standards or criteria regarding an assessment’s content, federal courts have provided some guidance. NOAA Fisheries and USFWS regulations limit the discussion of biological assessments to the document’s uses. First, assessments can help determine whether a formal consultation or a conference is required under section 402.14 or section 402.10, respectively. Once the biological assessment is completed, the action agency must submit it to the agency director for review.⁸⁰ If the director concurs that there are no listed species or critical habitat present, then formal consultation is not required.⁸¹ If the biological assessment indicates that the action is not likely to

⁷⁴ Filippi & Corbin, *supra* note 31, at 43-16 (quoting 50 C.F.R. § 402.13(a)). The agency may make such a conclusion “only if ALL of the reasonably expected effects of the proposed action will be beneficial, insignificant, or discountable.” CONSULTATION HANDBOOK, *supra* note 62, at 4-1.

⁷⁵ Natural Res. Def. Council, Inc. v. Morton, 388 F. Supp. 829, 834 (D.D.C. 1974).

⁷⁶ See, e.g., Letter from Harry Cosgriffe, Area Manager, Cent. Or. Res. Area, Bureau of Land Mgmt., to Theodore Meyers, NOAA Fisheries (June 5, 2000) (on file with author); BUREAU OF LAND MANAGEMENT, PRINEVILLE DISTRICT, FINAL BIOLOGICAL ASSESSMENT FOR STEELHEAD TROUT AND ITS HABITAT IN THE JOHN DAY RIVER BASIN (2000) [hereinafter 2000 BiOp, JOHN DAY RIVER BASIN].

⁷⁷ Filippi & Corbin, *supra* note 31, at 43-17 (citing 50 C.F.R. § 402.14(c)).

⁷⁸ See, e.g., Cosgriffe, *supra* note 76.

⁷⁹ 2000 BiOp, JOHN DAY RIVER BASIN, *supra* note 76, at F4.

⁸⁰ 50 C.F.R. § 402.12(j).

⁸¹ See *id.* § 402.12(k)(1).

R

R

R

R

R

jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the director concurs, then a conference is not required.⁸²

The regulations also allow the director to use the results of the biological assessment (1) to determine whether to request that the federal agency initiate formal consultation or a conference, (2) to formulate a biological opinion, or (3) to formulate a preliminary biological opinion.⁸³

In *Forest Guardians v. United States Forest Service*, the New Mexico Federal District Court ruled that the Forest Service violated the ESA and National Forest Management Act for failing to fully consider the effects of grazing on endangered wildlife on the Copper Creek allotment in New Mexico's Gila National Forest.⁸⁴ Specifically, Judge Armijo held that the Forest Service's practice of refusing to analyze the full impacts of ten-year grazing permits on threatened and endangered species was a violation of the ESA.⁸⁵ The Forest Service preferred to analyze only a three-year term, a period much less likely to show the long-term adverse environmental impacts of grazing.⁸⁶

The USFWS or NOAA Fisheries is required to conclude formal consultation within ninety days of initiation,⁸⁷ and, when an applicant is involved, consultation cannot be extended for more than sixty days without the applicant's consent.⁸⁸ Within forty-five days of completing consultation, the consulting agency must issue a "biological opinion" (BiOp),⁸⁹ which lists the agency's conclusions as to whether the effects of the proposed action are

⁸² *Id.*

⁸³ *Id.* § 402.12(k)(2).

⁸⁴ No. 01-504, slip op. at 32, 39-40 (D.N.M. 2002).

⁸⁵ *Id.* at 32, 39.

⁸⁶ *See id.* at 32. The court additionally concluded that the Forest Service was not excused from compliance with the ESA or National Forest Management Act under a 1995 federal budget law called the Rescissions Act. *Id.* at 27-32; *see also* Emergency Supplemental Appropriations for Additional Disaster Assistance, for Antiterrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City and Rescissions Act, Pub. L. No. 104-19, § 504, 19 Stat. 194, 212-13 (1995). Contrary to the Forest Service's claims, the Rescissions Act merely grants an extension of time for the completion of the analyses required by environmental laws, not an exemption. *Forest Guardians*, No. 01-504, slip op. at 31-32.

⁸⁷ 50 C.F.R. § 402.14(e).

⁸⁸ *Id.*

⁸⁹ Filippi & Corbin, *supra* note 31, at 14-17 (citing 16 U.S.C. § 1536(b)(3)(A) (2006); 50 C.F.R. § 402.14(e)).

“likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.”⁹⁰ In the typical livestock-grazing action, the consulting agency may concur that some of the allotments in question “may affect, but not likely to adversely affect,” and some are “likely to adversely affect” listed species.⁹¹

The consulting agency must consider the “cumulative effects” of the proposed action on the listed species or critical habitat,⁹² as well as including an analysis of each specific action relative to overall implementation across a broad geographic scope.⁹³ “‘Cumulative effects’ are those effects of future state or private activities, not involving federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation.”⁹⁴ In livestock-grazing actions, for example, NOAA Fisheries may concur with the BLM’s determination that the grazing is not likely to adversely affect listed anadromous species because the allotments, located along the water body in question, effect migratory habitat only.⁹⁵

In *Pacific Coast Federation of Fisherman’s Associations v. National Marine Fisheries Service*, environmental organizations brought an ESA action against NOAA Fisheries challenging the Agency’s conclusions regarding proposed timber sales in spotted owl habitat.⁹⁶ NOAA Fisheries determined that the sales were consistent with the Northwest Forest Plan for protection of Oregon Coast coho salmon and Umpqua River cutthroat trout at the

⁹⁰ *Id.* (citing 50 C.F.R. § 402.12(h)(3)).

⁹¹ *See, e.g.*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAT’L MARINE FISHERIES SERV., BIOLOGICAL OPINION, EFFECTS OF LIVESTOCK GRAZING ALLOTMENTS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT IN THE JOHN DAY RIVER BASIN, OREGON FOR 2000 AND 2001, at 1 (2001), available at http://seahorse.nmfs.noaa.gov/pls/pcts-pub/sxn7.pcts_upload.download?p_file=F23356/200000944_livestock_grazing_01-17-2001.pdf [hereinafter 2001 BiOp, JOHN DAY RIVER BASIN].

⁹² Filippi & Corbin, *supra* note 31, at 43-17 (citing 50 C.F.R. § 402.14(g)(3)).

⁹³ *See Pac. Coast Fed’n of Fisherman’s Ass’ns v. Nat’l Marine Fisheries Serv.*, 253 F.3d 1137, 1145 (9th Cir. 2001).

⁹⁴ 50 C.F.R. §§ 402.02, 402.14(g)(3).

⁹⁵ *See, e.g.*, Letter from William Stelle, Junior Reg’l Adm’r, NOAA Fisheries, to Harry R. Cosgriffe, Area Manager, Cent. Or. Res. Area, Bureau of Land Mgmt. (June 28, 2000) [hereinafter NOAA Fisheries 2000 Concurrence letter] (concurring, in regards to a Section 7 Informal Consultation on Ongoing and Proposed Actions in the Central Oregon Resource Area, Prineville District, BLM, John Day River Basin, that grazing allotments were not likely to adversely affect species that used them solely for migratory purposes) (on file with author).

⁹⁶ 253 F.3d at 1140.

watershed level, and that any degradation that could not be measured at the watershed level was consistent with the Plan and, therefore, warranted a “no jeopardy” finding.⁹⁷

The issue in *Pacific Coast Federation* was whether in “a 128 acre project represent[ing] only 1% to 0.1% of a watershed, any degradation would be perceptible at the watershed level . . . [and] whether any effect was given to the cumulative degradation.”⁹⁸ Rejecting the federal government’s claim, the court held, “[I]t does not follow that [NOAA Fisheries] is free to ignore site degradations because they are too small to affect the accomplishment of that goal at the watershed scale.”⁹⁹ In addition, the court determined that NOAA Fisheries’ failure to account for the cumulative impacts of individual timber sales violated federal law.¹⁰⁰

Significantly, in reaching its conclusion the court also stated, “If the effects of individual projects are diluted to insignificance and not aggregated, then [plaintiffs are] correct in asserting that [NOAA Fisheries’] assessment of [Aquatic Conservation Strategy] consistency at the watershed level is tantamount to assuming that no project will ever lead to jeopardy of a listed species.”¹⁰¹ General reluctance to acknowledge localized impacts of grazing activity was recently illustrated in a USFWS BiOp regarding BLM management of the John Day Wild and Scenic River in Eastern Oregon.¹⁰² The opinion concluded that livestock-grazing activities in the planning area “are too limited in scale and scope to affect the majority of occupied bull trout habitats and the 141 identified subpopulations within the [Distinct Population Segment],” and while “[p]roject related impacts to streambank vegetation and banks may occur from grazing and dispersed recreation, [these] are likely to be localized.”¹⁰³

Once it is determined that the federal land managers will authorize grazing in critical habitat, if the consulting agency determines that such grazing is likely to jeopardize listed species or to

⁹⁷ See *id.* at 1144.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.* at 1145.

¹⁰¹ *Id.*

¹⁰² STATE SUPERVISOR/DEPUTY STATE SUPERVISOR, FISH & WILDLIFE SERV., OR. STATE OFFICE, FORMAL CONSULTATION FOR ONGOING ACTIVITIES ON THE NORTH FORK JOHN DAY RIVER (2001).

¹⁰³ *Id.* at 33.

cause the destruction or adverse modification of critical habitat, it must suggest “reasonable and prudent alternatives” (RPAs) to the federal action.¹⁰⁴ The RPAs must not violate the Act’s prohibition on jeopardizing listed species or result in the destruction or adverse modification of habitat, and they must allow the action agency to avoid jeopardy of the species in question.¹⁰⁵

2. *Irreversible or Irretrievable Commitment of Resources*

After the action agency initiates consultation, section 7(d) of the Act prohibits making any “irreversible or irretrievable commitment of resources” that has the effect of foreclosing alternatives to proposed actions.¹⁰⁶ The Ninth Circuit states that “the purpose of section 7(d) is to ‘maintain the status quo’ during the consultation process.”¹⁰⁷

According to NOAA Fisheries regulations, an action under section 7 “means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . . Examples include, but are not limited to . . . actions directly or indirectly causing modifications to the land, water, or air.”¹⁰⁸ Further, all effects of the action must be considered,¹⁰⁹ including “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.”¹¹⁰

In *Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation*, for example, although the Bureau of Reclamation initiated formal consultation, the court prohibited it from taking action that would impact water that may have been necessary to protect the threatened coho salmon and its critical habitat from jeopardy.¹¹¹ “[O]nce that water is diverted to other uses, it may not be recaptured,” the court reasoned, “[n]or can

¹⁰⁴ 16 U.S.C. § 1536(b)(3)(A); see also Filippi & Corbin, *supra* note 31, at 43-18.

¹⁰⁵ 16 U.S.C. § 1536(b)(3)(A).

¹⁰⁶ Filippi & Corbin, *supra* note 31, at 43-18 (citing 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09).

¹⁰⁷ *Id.* (2006) (quoting Lane County Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992)).

¹⁰⁸ 50 C.F.R. § 402.02.

¹⁰⁹ 16 U.S.C. § 1536(d).

¹¹⁰ 50 C.F.R. § 402.02.

¹¹¹ 138 F. Supp. 2d 1228, 1248-50 (N.D. Cal. 2001).

the effect on the coho salmon or its critical habitat be undone if the proposed flows are too low.”¹¹²

Additionally, federal agencies retain the authority to protect listed species from any activity that potentially impacts such species, when such activity is discretionary, even if it involves amending existing contracts, leases, or permits. For example, the Ninth Circuit determined that the United States has the power to allocate water managed under federal reclamation projects to meet the needs of endangered species¹¹³ and does not violate contracts with resource-use interests by following the mandate of the ESA and other federal laws.¹¹⁴ Further, the government must amend its contracts and change standard practices when it retains any level of discretionary authority over management of federal actions.¹¹⁵

3. *Violations of RPAs and Terms and Conditions*

Section 7 violations may also occur if the action agency does not carry out directives under RPAs or the “terms and conditions” provided by the fish and wildlife agency.¹¹⁶ If NOAA Fisheries, for example, provides as part of RPAs or terms and conditions in a BiOp that stubble height for livestock-grazing allotments must be six inches, and the land-management agency determines in a Final Environmental Impact Statement (FEIS) or management plan that the stubble height could be lower, then the agency is likely in violation of section 7.

If a BiOp bases its jeopardy finding upon guidelines such as PACFISH,¹¹⁷ it must analyze the project’s consistency with those

¹¹² *Id.* at 1249 (citing *Lane County*, 958 F.2d at 295 (“[T]imber sales constitute *per se* irreversible and irretrievable commitments of resources under section 7(d).”)).

¹¹³ *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984).

¹¹⁴ *O’Neill v. United States*, 50 F.3d 677, 689 (9th Cir. 1995).

¹¹⁵ *Rio Grande Silvery Minnow v. Keys*, No. 99-1320, 2002 WL 32813602, at *17, *20 (D.N.M. Apr. 19, 2002).

¹¹⁶ *See* 16 U.S.C. § 1536(b)(3)(A) (2006); *see also id.* § 1536(b)(4)(C)(iv). Terms and conditions include, but are “not limited to, reporting requirements[] that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under [RPAs].” *Id.* § 1536(b)(4)(C)(iv).

¹¹⁷ *See* U.S. DEP’T OF AGRICULTURE ET AL., DECISION NOTICE/DECISION RECORD, FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL ASSESSMENT, FOR THE INTERIM STRATEGIES FOR MANAGING ANADROMOUS FISH-PRODUCING WATERSHEDS IN EASTERN OREGON AND WASHINGTON, IDAHO, AND PORTIONS OF CALIFORNIA (1995) [hereinafter PACFISH]. PACFISH is an interim land-manage-

guidelines.¹¹⁸ As a result, an Environmental Impact Statement affecting a livestock-grazing planning unit in the Northwest, for example, often must include an analysis of watershed conditions as required by NOAA fisheries.¹¹⁹ An FEIS in the Northwest often must also adequately disclose the Riparian Management Objectives for bank stability and substrate, required by NOAA BiOps for Long Range Management Plans as amended by PACFISH.¹²⁰ Further, Northwestern NOAA Fisheries BiOps typically require action agencies to “[c]onsistently implement grazing-related standards and guidelines listed in PACFISH to achieve Riparian Management Objectives regarding bank stability, water temperature, large woody material, lower bank angle, and width/depth ratio; as well as other aquatic habitat parameters which may be affected by livestock grazing.”¹²¹

When an FEIS addresses a planning area on federal lands in the Northwest affecting threatened steelhead as well as threatened and endangered plant species, stubble height standards must typically be greater than six inches in order to protect critical habitats for threatened, endangered, or sensitive species, and a six-inch minimum stubble height for areas susceptible to bank damage.¹²² Further, an FEIS must disclose and analyze existing consistency with, and effects of, the alternatives on the eight PACFISH ecological goals, including maintenance restoration of habitat complexity, water quality, channel integrity and other biotic and abiotic aspects of watersheds, streams, and habi-

ment plan which establishes fish-habitat conservation areas along rivers and streams as well as goals for protecting the species in these habitat areas. See Press Release, Nat'l Marine Fisheries Serv., NMFS Releases “PacFish” Biological Opinion Aimed at Streamlining Pacific Northwest Salmon Protection (Feb. 8, 1995), available at <http://www.publicaffairs.noaa.gov/pr95/feb95/pacfish.html>.

¹¹⁸ *Nez Perce Tribe v. NOAA Fisheries*, No. 04-299-C-EJL, slip op. at 11 (D. Idaho Sept. 21, 2005). Similarly, “the lack of anything more than generalized conclusions regarding a modeling . . . [and] accounting, or lack thereof, for the sediment impact from [federal management] activities violates the requirements of NEPA.” *Id.* at 9. This conclusion is based on the fact that “the lack of a discussion of the model’s consideration of relevant variables precludes the ability of others to test the accuracy or reliability of the model.” *Id.*

¹¹⁹ See STATE SUPERVISOR/DEPUTY STATE SUPERVISOR, *supra* note 102, at 26.

¹²⁰ PACFISH, *supra* note 117, app. C, at 4-5; see also *id.* app. J, at 3. (containing NMFS’s BiOp for PACFISH and listing PACFISH’s Riparian Management Objectives).

¹²¹ See, e.g., 2001 BiOp, JOHN DAY RIVER BASIN, *supra* note 91, at 43.

¹²² WARREN P. CLARY & BERT F. WEBSTER, U.S. DEPT. OF AGRIC., MANAGING GRAZING OF RIPARIAN AREAS IN THE INTERMOUNTAIN REGION, GENERAL TECHNICAL REPORT INT-263, at 3 (1989).

R

R

tats.¹²³ Progress toward these goals is necessary to provide consistency with basin-wide efforts, and a consistent analysis aids in a determination of jeopardy and adverse modification of habitats.¹²⁴ Issuance of livestock grazing leases, in just about every case, would trigger the PACFISH mandate to “[m]odify grazing practices (e.g., accessibility of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent attainment of [RMOs].”¹²⁵ Unless so modified, therefore, and since habitat for salmonids and other aquatic species on many federal grazing allotments already substantially violate PACFISH RMOs, any level of continued livestock grazing affecting riparian areas on such allotments will “retard or prevent” attainment of such RMOs would violate the PACFISH mandate.¹²⁶

The description of “incidental take” in the BiOp also cannot be overly vague. In *Ariz. Cattlemen’s Ass’n v. U.S. Fish and Wildlife Serv.*, the district courts had previously set aside the government’s incidental take statements as arbitrary and capricious due to insufficient evidence of take.¹²⁷ The Ninth Circuit found that such statements must be predicated on a finding of actual incidental take and clear terms and conditions.¹²⁸ Moreover, Bi-Ops must consider baseline and cumulative effects in livestock-grazing-related consultation.¹²⁹ The environmental analysis must

¹²³ PACFISH, *supra* note 117, app. C, at 3-4.

¹²⁴ *See id.* app. J, at 15, 18-19.

¹²⁵ *See id.*, app. C, at 12.

¹²⁶ *See id.*; *see also id.* app. J, at 19-20 (acknowledging that livestock grazing is a potentially harmful action in riparian areas in the context of a discussion on the limitations of PACFISH, specifically that the plan “does not provide a decision framework for determining whether or not potentially harmful land use actions will assist, retard or prevent attainment of [PACFISH’s RMOs]”).

¹²⁷ 273 F.3d 1229, 1233 (9th Cir. 2001).

¹²⁸ *Id.* Insufficient descriptions of compliance with standards may also be violations of the National Forest Management Act. In *Nez Perce Tribe*, the court concluded that the forest plan’s provisions, which provided for no measurable increase in sediment in watersheds found within the planning area, did not meet the forest-plan standards and violated the National Forest Management Act. *See* No. 04-299-C-EJL, slip op. at 19. The provisions failed because the Forest Service relied on a computer program database to show compliance with the “no measurable increase” standard, and the Agency failed to take the requisite hard look at the database program under NEPA. *See id.*

¹²⁹ *Kandra v. United States*, 145 F. Supp. 2d 1192, 1207 (D. Or. 2001); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127-28 (D.D.C. 2001); *see also Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1036 (9th Cir. 2001).

adequately discuss cumulative impacts on aquatic or riparian habitats, and any discussion of such impacts should include more than just the impacts of livestock and big-game grazing, distribution, stocking rates, and economics on private lands. If it does not, the FEIS conflicts with the requirement that the government may not disregard actions on federal lands simply because their impacts may be relatively minor when compared to other actions implemented over a broad geographic scope.¹³⁰

Finally, BiOps cannot rely on uncertain, future, or third-party mitigation measures.¹³¹ For example, in some cases, agency plans inconsistent with the six-inch stubble height standard in riparian areas may impact necessary fishery habitat to such an extent that the impacts eventually rise to the level of an adverse modification or takings claim. Federal rangeland-management plans, for example, may not implement livestock-grazing seasons without complying with PACFISH standards for protection of anadromous fish.¹³² Such plans must also comply with recent precedent requiring that the consulting agency must not segregate the elements of the proposed action that the consulting agency deems to be nondiscretionary, must aggregate rather than compare the effects of the proposed action, and must adequately consult on both recovery and survival in the jeopardy determination.¹³³ Fi-

¹³⁰ See *Pac. Coast Fed'n of Fishermen's Ass'ns*, 265 F.3d at 1037.

¹³¹ *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213 (D. Or. 2003); see also *Sierra Club v. Marsh*, 816 F.2d 1376, 1388-89 (9th Cir. 1987).

¹³² See PACFISH, *supra* note 117, app. C, at 3-23.

¹³³ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, Nos. 01-640-RE (Lead Case), 05-23-RE (Consolidated Cases), 2005 WL 1278878, at *15-29 (D. Or. May 26, 2005) (opinion and order). This requirement arises out of ESA implementation regulations, which provide that in formulating its biological opinion and determining whether an action will jeopardize a species or destroy or adversely modify its critical habitat, the consulting agency must evaluate the "effects of the action" together with "cumulative effects" on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4) (2006). This multi-step analysis requires NMFS to consider: a) the direct, indirect, interrelated, and interdependent effects of the proposed action, see 50 C.F.R. § 402.02; b) the "environmental baseline," to which the proposed action will be added, (this baseline includes "all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress," 50 C.F.R. § 402.02); and c) any "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation," 50 C.F.R. § 402.02.

nally, these same factors may be considered in a determination as to whether a BiOp's analysis and conclusions with respect to critical habitat are flawed.¹³⁴

4. *Essential Fish-Habitat Consultation*

In 1996, Congress passed the Sustainable Fisheries Act,¹³⁵ which amended the Magnuson-Stevens Fishery Conservation and Management Act to establish new requirements for Essential Fish Habitat (EFH) descriptions in federal fishery-management plans¹³⁶ and to require federal agencies to consult with NOAA Fisheries on activities that may adversely affect EFH.¹³⁷ The purpose of the Sustainable Fisheries Act, in part, is to:

provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery; . . . establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; [and] promote the protection of essential fish habitat in the review of projects conducted under Federal permits, licenses, or other authorities that affect or have the potential to affect such habitat.¹³⁸

As a result, compliance with these Acts is an essential component of all livestock-grazing actions in riparian areas. The Sustainable Fisheries Act requires consultation for all actions that may adversely affect EFH, including actions taking place outside of such habitat such as upstream and upslope permitting and funding activities that may have an adverse effect on EFH.¹³⁹ In addition, the action agency may not continue with an action affecting designated EFH for chinook salmon unless it is likely

¹³⁴ *Nat'l Wildlife Fed'n*, Nos. 01-640-RE (Lead Case), 05-23-RE (Consolidated Cases), 2005 WL 1278878, at *29-34.

¹³⁵ Pub. L. No. 104-297, 110 Stat. 3559 (codified as amended in scattered sections of 16 U.S.C. (2006)).

¹³⁶ See 16 U.S.C. § 1853(a) (2006).

¹³⁷ See *id.* § 1854. "'Essential Fish Habitat' means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." 16 U.S.C. § 1802(10).

¹³⁸ *Id.* § 1801(b)(4)-(5), (7).

¹³⁹ See *id.* §§ 1855(b)(1)(D)(2), 1802(10).

“within the range of effects considered in the ESA portion of [the] consultation . . . [and] is unlikely to adversely affect” the listed species’ EFH in question.¹⁴⁰ When NOAA Fisheries concludes that livestock-grazing actions on federal land may adversely affect proposed designated-EFH for listed species, to prevent potentially adverse impacts to EFH, it must recommend conservation measures that will assist the action agency in mitigating such impacts.¹⁴¹

Finally, the Sustainable Fisheries Act requires the action agency to provide a written response to EFH Conservation Recommendations within thirty days of receipt.¹⁴² The final response must include a description of measures proposed to avoid, mitigate, or offset the adverse impacts of the activity.¹⁴³ If the response is inconsistent with the EFH Conservation Recommendation, an explanation of the reasons for not implementing them must be included.¹⁴⁴

5. *Section 9 Take*

Even a federal action that will not jeopardize a listed species or may go forward with RPAs might “take” some individuals of the species. Under the ESA, “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁴⁵ The U.S. Supreme Court further interprets “harm” to be broader than direct physical effects, concluding that the term includes adverse modification of habitat.¹⁴⁶ The portion of ESA section 9 relevant to grazing issues prohibits any person from taking any threatened or endangered species “within the United States or the territorial sea of the United States.”¹⁴⁷

In the context of federally authorized livestock-grazing actions, the most common impact on listed species occurs from “inciden-

¹⁴⁰ See, e.g., Letter from Donna Darm, Acting Reg’l Adm’r, Nat’l Oceanic and Atmospheric Admin., to Christina M. Welch, Field Manager, Bureau of Land Mgmt., 5 (Feb. 16, 2001) (on file with author).

¹⁴¹ 16 U.S.C. § 1855(b)(4)(A).

¹⁴² *Id.* § 1855(b)(4)(B).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ 16 U.S.C. § 1532(19); CONSULTATION HANDBOOK, *supra* note 62, at 4-44.

¹⁴⁶ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995).

¹⁴⁷ 16 U.S.C. § 1538(a)(1)(B).

tal take.”¹⁴⁸ In such cases, the consulting agency may grant an exemption for the activity in question if the effects are not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat, or if the effects result from an otherwise lawful activity and the impact is incidental to the purpose of the action.¹⁴⁹

Such ESA exemptions apply “[i]f after consultation under subsection (a)(2) of this section, the Secretary concludes that the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection.”¹⁵⁰ In the latter case, the consulting agency may authorize the activity by issuing an incidental take statement (ITS) specifying: the impact of the take on the listed species, “reasonable and prudent measures” to minimize the impact, and terms and conditions necessary to implement such measures.¹⁵¹

The consulting agency, however, may only issue an ITS when there is evidence that the action will take individuals of the species. In *Arizona Cattle Growers’ Ass’n v. U.S. Bureau of Land Management*, the Ninth Circuit reinforced that under the ESA, the action agency has the burden of proving that a listed species exists in an area in order to justify issuing an ITS and conditioning land-use permits based on it.¹⁵² In *Arizona*, the USFWS argued that “take” under the consultation provisions of section 7 required it to issue an ITS when “harm to a listed species was ‘possible’ or ‘likely’ in the future due to the proposed action,” instead of having to illustrate that “take has occurred or is reasonably certain to occur” as required under section 9.¹⁵³ Accord-

¹⁴⁸ “Incidental take” means a taking of threatened or endangered species that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).

¹⁴⁹ CONSULTATION HANDBOOK, *supra* note 62, at 4-45; *see also* 16 U.S.C. § 1536(h). A taking that is in compliance with the ESA’s exemption requirements is not considered to be a prohibited taking. 16 U.S.C. § 1536(o)(2); *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

¹⁵⁰ 16 U.S.C. § 1536(b)(4)(A).

¹⁵¹ *Id.* § 1536(b)(4). Therefore, even if NOAA Fisheries finds that an action is not likely to jeopardize the continued existence of a listed species, it often will condition such a decision upon the action agency’s meeting of certain RPAs and terms and conditions necessary to protect such species, *see e.g.*, CONSULTATION HANDBOOK, *supra* note 62, at 4-44, and/or it will limit the BiOp to a set period of time, *see e.g.*, 2001 BiOp, JOHN DAY RIVER BASIN, *supra* note 91, at 1.

¹⁵² 273 F.3d 1229, 1239-40 (9th Cir. 2001).

¹⁵³ *Id.* at 1240.

R

R

ing to the USFWS, section 7 authorized it to issue an ITS “whenever there is any possibility, no matter how small, that a listed species will be taken.”¹⁵⁴

The court, however, found no justification under the ESA for differential interpretations of the same term, because “the plain language of the ESA does not dictate that the [USFWS] must issue an [ITS] irrespective of whether any incidental takings will occur.”¹⁵⁵ Concluding also that, “consistent with the language of the statute, the regulations only require the issuance of an [ITS] when the ‘*resultant* incidental take of listed species will not violate section 7(a)(2),’”¹⁵⁶ and that “[i]f the sole purpose of the [ITS] is to provide shelter from Section 9 penalties, . . . it would be nonsensical to require the issuance of [an ITS] when no takings cognizable under section 9 are to occur.”¹⁵⁷ The court further reasoned that “speculative evidence” of future take does not justify imposing conditions on grazing permits and that “it would be unreasonable for the [USFWS] to impose conditions on otherwise lawful land use if a take were not reasonably certain to occur as a result of that activity.”¹⁵⁸

The *Arizona* decision indicates federal courts are more likely to apply ESA provisions when there is actual rather than speculative evidence of take, and that, in most cases, it is up to the federal government rather than private land owners to establish that a listed species is present in the area in question.¹⁵⁹

6. *Citizen Suits*

The ESA authorizes “any person” to commence a civil suit to enjoin any private individual or government agency from violating the Act or its regulations, or to compel the Secretary to apply the Act’s prohibitions on take found in section 9 or any non-discretionary act or duty related to listing species under section 4.¹⁶⁰ This provision becomes significant when compared to the disad-

¹⁵⁴ *Id.* at 1240-41.

¹⁵⁵ *Id.* at 1241-42.

¹⁵⁶ *Id.* at 1242 (citing 50 C.F.R. § 402.14(i)(1)).

¹⁵⁷ *Id.* (citing H.R. REP. NO. 97-567, at 26 (1982)).

¹⁵⁸ *Id.* at 1243.

¹⁵⁹ Where discretionary federal involvement or control over the action is retained or authorized by law and the occurrence of specific events threaten the species, the court found that the appropriate way to deal with prospective harm to a listed species was by re-initiating consultation. *Id.* at 1243-44.

¹⁶⁰ 16 U.S.C. § 1540(g)(1)(A)–(C) (2006).

vantages plaintiffs face when attempting to enforce other federal environmental statutes that do not contain citizen suit provisions.¹⁶¹

Even with both the ESA's substantive provisions and citizen suit provisions, however, there are still notable limitations on the ability of plaintiffs to prevail in federal court. In most cases, the RPAs and other conclusions reached by a consulting agency, for example, are merely recommendations, and it is up to the action agency's discretion how to proceed once it receives the BiOp.¹⁶² In addition, the action agency retains significant discretion in determining how to comply with the Act after the consulting agency recommendations are made.¹⁶³

III

THE ESA LAWSUIT

A. *Nature of Action*

The typical ESA action seeks judicial relief ordering the defendant federal land-management agency to comply with the requirements of the ESA, with respect to the agency's livestock-grazing-management actions in the planning area in question and sometimes specifically on livestock-grazing allotments, within the area. The complaint commonly describes the species listed as threatened or endangered as being found within the planning area.

B. *Jurisdiction and Venue*

Courts typically have jurisdiction over federal-agency grazing actions that arise under the laws of the United States,¹⁶⁴ including the National Environmental Policy Act,¹⁶⁵ the Forest Organic Act,¹⁶⁶ the APA,¹⁶⁷ the Declaratory Judgment Act,¹⁶⁸ and the

¹⁶¹ See discussion *infra* Part IV.

¹⁶² See *Aluminum Co. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1160-61 (9th Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000).

¹⁶³ *Id.* at 1161-62 (holding that Bonneville Power Administration's adoption of measures recommended by NOAA Fisheries for avoiding jeopardy to salmon in Columbia River Basin was supported by adequate foundation, notwithstanding difference of opinion among experts).

¹⁶⁴ 28 U.S.C. § 1331 (2006).

¹⁶⁵ 42 U.S.C. §§ 4321-4347 (2006).

¹⁶⁶ 43 U.S.C. §§ 1701-1782 (2006).

¹⁶⁷ Administrative Procedure Act, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.) (2006).

Equal Access to Justice Act.¹⁶⁹ But for requested relief to be proper under the APA and Equal Access to Justice Act, an actual and justiciable controversy must exist between the parties.¹⁷⁰ In addition, the plaintiff typically provides a statement that the defendant received written notice of the violations alleged in the complaint more than sixty days prior, in compliance with the sixty-day notice requirement.¹⁷¹

Finally, an actual controversy must be present between the parties within the meaning of 28 U.S.C. § 2201, and a substantial part of the events or omissions giving rise to the claims in the complaint must have occurred within the judicial district where the action was filed.¹⁷² Plaintiff's principal offices also must be in that district in order to establish venue in the particular federal district under 28 U.S.C. § 1391.¹⁷³

¹⁶⁸ 28 U.S.C. §§ 2201-2202 (2006).

¹⁶⁹ 5 U.S.C. § 504 (2006); 28 U.S.C. § 2412 (2006).

¹⁷⁰ See 28 U.S.C. § 2412; 5 U.S.C. § 701-06 (2006).

¹⁷¹ 16 U.S.C. § 1540(g)(2) (2006) provides:

No action may be commenced under subparagraph (1)(A) of this section—

- (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;
- (ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or
- (iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

- (i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or
- (ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

¹⁷² 28 U.S.C. § 1391(a)-(b).

¹⁷³ See *id.* § 1391(c).

C. Parties

Generally, a person wishing to appeal a federal livestock-grazing decision must have an interest that is adversely affected by the decision or have otherwise participated in the public comment period for a particular planning action, allotment management plan, or other action of the agency.¹⁷⁴ Under the informal policies of most federal land-management agencies, a person usually becomes an interested party by notifying the applicable BLM or Forest Service District in writing a desire to be placed on the mailing list for any documentation related to the allotment in question.

Participation in the administrative process prior to filing an appeal, however, is not an absolute requirement.¹⁷⁵ The basic purpose of such a process “is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise and to correct its own errors so as to moot judicial controversies,” rather than serving as a means of excluding persons from the resolution process.¹⁷⁶

Administrative remedies, therefore, must be sought prior to filing a suit with an understanding of their purpose “and of the particular administrative scheme involved.”¹⁷⁷ Where pursuit of particular remedies does not serve those purposes, however, the courts have allowed a number of exceptions. Such remedies need not be pursued: if they are inadequate or not efficacious,¹⁷⁸ if the appeal would be a futile gesture,¹⁷⁹ if irreparable injury

¹⁷⁴ See 43 C.F.R. § 4.470(a) (2006); 43 C.F.R. § 4.410(a)-(b); 36 C.F.R. § 215.11 (2006).

¹⁷⁵ See, e.g., *White Mountain Broadcasting Co., Inc. v. F.C.C.*, 598 F.2d 274, 278 (D.C. Cir. 1979) (finding that the doctrine of exhaustion is not absolute, and that in circumstances where a party’s argument is based on a determination made after the administrative process of appeal is complete, it is proper for a court to consider the issue).

¹⁷⁶ See *Parisi v. Davidson*, 405 U.S. 34, 37 (1972); see also *Marshall v. Burlington N. Inc.*, 595 F.2d 511, 513 (9th Cir. 1979).

¹⁷⁷ *McKart v. United States*, 395 U.S. 185, 193 (1969).

¹⁷⁸ *Am. Fed’n of Gov. Employees, Local 1668 v. Dunn*, 561 F.2d 1310, 1314 (9th Cir. 1977); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1081 (D.C. Cir. 1978).

¹⁷⁹ *Porter County Chapter of the Izaak Walton League of Am., Inc. v. Costle*, 571 F.2d 359, 363 (7th Cir. 1978); see *Pence v. Morton*, 391 F. Supp. 1021, 1024 n.3 (D. Ala. 1975) (finding that total exhaustion was not required when the practical purposes of the exhaustion doctrine had been met), *aff’d*, 529 F.2d 135, 143 (9th Cir. 1976).

would result unless immediate review is permitted,¹⁸⁰ or if the administrative proceeding would be void.¹⁸¹

The purpose of restricting appeals before federal courts to “parties” is achieved in those cases in which the court does not interfere with the agency’s processes, the agency has had the opportunity to correct its mistakes, and the agency has already applied its expertise, from which the court may now benefit.¹⁸² For example, in *Wright v. Inman*, a ranch, as a corporate entity, had previously pursued an administrative appeal and subsequent judicial review but was dismissed from the case for lack of standing.¹⁸³ When the independent owners of the corporation subsequently entered as individual plaintiffs, the agency argued that they lacked standing because the owners had not participated as parties in any previous proceedings.¹⁸⁴ The court, however, concluded that the owners fell under the futility exception, because they raised issues identical to those addressed in the corporation’s appeal.¹⁸⁵

D. Standing

Federal agencies sometimes insist that appellants fail to meet regulatory standing requirements for appeals of agency actions if such appellants have not shown how they are adversely affected by grazing on the particular allotments contested. Rather than use of individual allotments, however, challenges to federal livestock-grazing actions filed under the ESA to protect listed species typically address broader concerns.

In riparian areas, for example, since rivers are often in direct contact with livestock-grazing allotments, the primary impacts from federal management of such allotments are on water quality and quantity, which affects habitat for listed species. Potential ESA appellants, therefore, typically focus on the use of the river corridor for fishing, whitewater rafting, hiking, and other pursuits

¹⁸⁰ *Rhodes v. United States*, 574 F.2d 1179, 1181 (5th Cir. 1978) (citing *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974)).

¹⁸¹ *Winterberger v. Gen. Teamsters, Local Union 162*, 558 F.2d 923, 925 (9th Cir. 1977).

¹⁸² See *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 791 (9th Cir. 1986).

¹⁸³ 923 F.Supp. 1295, 1299 (D. Nev. 1996).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

related to use and enjoyment of the river and associated fishery habitat.

In addition, if the agency's interpretation of standing were correct, the vast majority of ESA-related claims regarding authorization of resource extraction in one location that impact endangered species in another would be excluded. Scientific literature supports this idea, providing that the impact to riparian areas and rivers "diminishes their capacity to provide critical ecosystem functions, including the cycling and chemical transformation of nutrients, purification of water, attenuation of floods, maintenance of stream flows and stream temperatures, recharging of groundwater, and establishment and maintenance of habitats for fish and wildlife."¹⁸⁶ Conservationists concerned with the impacts of livestock grazing, therefore, typically emphasize protection of the ecological conditions of the river environment as a whole.

As a result, it is important for plaintiffs in ESA cases to assert that the defendants' failure or refusal to comply with the ESA directly affects the plaintiff's interests. Where appropriate, plaintiffs also should claim that their interests and members have been, and will continue to be, injured and harmed by a particular federal agency's decision to proceed with grazing prior to completing consultation with NOAA Fisheries and USFWS. By doing so, plaintiffs are arguing that the BLM has foreclosed those agencies' flexibility to recommend, and the BLM's own ability to implement reasonable and prudent alternatives to the proposed action.

E. Temporary Restraining Orders and Preliminary Injunctions

ESA plaintiffs often request preliminary injunctive or temporary restraining order relief in order to forestall the irreparable harm to protected species that may result if the action agency is permitted to continue grazing livestock. The Supreme Court and the Ninth Circuit both have held that section 7 of the ESA imposes "a significant restriction on the court's equity jurisdiction."¹⁸⁷ The Ninth Circuit explained, "In Congress' view,

¹⁸⁶ J. Boone Kauffman et al., *An Ecological Perspective of Riparian and Stream Restoration in the Western United States*, FISHERIES, May 1997, at 13, 13.

¹⁸⁷ *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (discussing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) in which the Court held that Congress

projects that jeopardized the continued existence of endangered species threatened incalculable harm: accordingly, it decided that the balance of hardships and the public interest tip heavily in favor of endangered species.”¹⁸⁸

To further its policy of protecting endangered species, Congress established both substantive and procedural requirements in the ESA.¹⁸⁹ The Ninth Circuit stated: If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.¹⁹⁰ Thus, “[g]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA.”¹⁹¹

1. *Relative Harm to the Parties*

“In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ competing interests.”¹⁹² The ESA’s language, structure, and history demonstrate “Congress’ determination that the balance of hardships and the public interest tips heavily in favor of protected species.”¹⁹³

To this end, plaintiffs must claim that if the court does not rebuke the agency’s alleged disregard for the mandatory requirements of ESA section 7, the losses to plaintiff and the public will be significant and may very well be long-term or irreversible. In

explicitly had foreclosed the exercise of traditional equitable discretion by courts faced with a violation of ESA § 7); *see also* *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (“The purpose and language of the [ESA] limited the remedies available to the District Court; only an injunction could vindicate the objectives of the Act.”).

¹⁸⁸ *Sierra Club*, 816 F.2d at 1383 (citing *Tenn. Valley Auth.*, 437 U.S. at 187-88, 194-95); *see also* *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 795 (9th Cir. 2005) (reaffirming that “the test for determining if equitable relief is appropriate is whether an injunction is necessary to effectuate the congressional purpose behind the statute”) (quoting *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002)).

¹⁸⁹ *See Sierra Club*, 816 F.2d. at 1384.

¹⁹⁰ *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

¹⁹¹ *Id.*

¹⁹² *Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citing *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 933 (9th Cir. 1988)).

¹⁹³ *Id.*; *see also Sierra Club*, 816 F.2d at 1384 (holding that plaintiff was entitled to injunctive relief if agency violated substantive or procedural provisions of the ESA).

the alternative, the complaint must allege that the relative harm to the agency is minimal or nonexistent, and that continued implementation of the agency's grazing decision prior to consultation or other necessary compliance actions will violate the ESA and its implementing regulations.

2. *Likelihood of Success on the Merits*

To survive a motion to dismiss a preliminary injunction or temporary restraining order, plaintiffs must establish that they will likely succeed on the merits of their case.¹⁹⁴ The Ninth Circuit stated that the purpose of section 7(d) of the ESA is to “ensur[e] that the status quo will be maintained during the consultation process.”¹⁹⁵ For example, in *Pacific Rivers Council v. Thomas*, the District of Idaho had previously enjoined the Forest Service from turning out livestock in Idaho's Elk Creek Allotment prior to completing consultation on the impacts of grazing on spring/summer Chinook salmon.¹⁹⁶ The Forest Service then initiated consultation and returned to the court with a document entitled “Section 7(d) Determination for the Elk Creek Allotment,” arguing that section 7(d) gave the agency the authority to determine whether it could proceed with a proposed action as long as consultation has been initiated.¹⁹⁷ The Forest Service's “Section 7(d) Determination” concluded that the proposed grazing was “‘not likely to adversely affect’ the salmon.”¹⁹⁸ The court, however, refused to lift the injunction, determining that “the status quo necessarily contemplates the absence of action in this particular case—i.e., disallowing grazing activity.”¹⁹⁹

Thus, the *Pacific Rivers Council* court concluded that the Forest Service could not, after consultation had been initiated but before its completion, proceed to turn out livestock without a

¹⁹⁴ See generally Fed. R. Civ. P. 65.

¹⁹⁵ *Conner v. Buford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988); see also *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (“In order to maintain the status quo, section 7(d) forbids ‘irreversible or irretrievable commitment of resources’ during the consultation period.”) (quoting 16 U.S.C. § 1536(d) (2006)).

¹⁹⁶ *Pac. Rivers Council v. Thomas*, 936 F. Supp. 738, 741 (D. Id. 1996).

¹⁹⁷ *Id.* at 741–42.

¹⁹⁸ *Id.* at 742.

¹⁹⁹ *Id.* at 745 (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 169 (1978) (“Our responsibility under [the ESA] is to preserve the status quo where endangered species are threatened, thereby guaranteeing the legislative or executive branches sufficient opportunity to grapple with the alternatives.”)).

2006]

The Future of Livestock Grazing

415

BiOp or concurrence from NOAA Fisheries.²⁰⁰ Importantly, this decision was reached even though in this case the Forest Service had determined—albeit rather disingenuously, given the timing—that its proposed grazing was “not likely to adversely affect” listed salmon.²⁰¹

The requirement that the Forest Service properly implement RPAs and terms and conditions is supported by *Forest Guardians v. Johanns*, in which the court found that the Forest Service violated the ESA when it failed to comply with certain guidance criteria established during the initial formal consultation process regarding the environmental impact of cattle grazing on national forest land.²⁰² Specifically, the Forest Service failed to comply with the agreed-upon criteria governing the monitoring of the grazing’s impact on endangered and threatened species living in the Water Canyon Allotment of the Apache-Sitgreaves National Forest.²⁰³

The court found that section 7 of the ESA prohibited federal agencies such as the Forest Service from taking discretionary actions that would “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”²⁰⁴ The court also determined that the Forest Service’s “decision whether to take a discretionary action that may jeopardize endangered or threatened species is strictly governed by ESA-mandated inter-agency consultation procedures.”²⁰⁵

The guidance criteria in *Forest Guardians* “consisted of certain factual conditions which if satisfied, would cause the FWS to agree that a ‘not likely to adversely affect’ finding would be appropriate.”²⁰⁶ As a result, the necessary agency action was “compulsory because it would allow the Forest Service to make operational changes if necessary to reflect actual range conditions.”²⁰⁷

²⁰⁰ *Id.* at 748.

²⁰¹ *See id.*

²⁰² 450 F.3d 455, 457, 464-66 (9th Cir. 2006).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing 16 U.S.C. § 1536(c)); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (“[T]he strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”).

²⁰⁶ 450 F.3d at 458.

²⁰⁷ *Id.* at 459.

Further consultation is required if “the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.”²⁰⁸ In addition, the action agency has the burden of showing that the action will not adversely affect a listed species.²⁰⁹ As a result, the Ninth Circuit has determined that when an action agency fails to meet terms and conditions of a biological opinion the agency must reinitiate consultation.²¹⁰

3. *Likelihood of Irreparable Harm*

In order to prevail on a livestock grazing-related injunction or restraining order request, the plaintiff must also show that the harm created by the agency’s authorization of such grazing is irreparable, in that it will permit ongoing degradation of public resources and contribute toward jeopardizing the continued existence of protected species.²¹¹ The Supreme Court has concluded that “Congress has made it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”²¹² Further, “[i]t is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed.”²¹³

4. *Whether the Public Interest Favors Granting Immediate Injunctive Relief*

Finally, in grazing-related preliminary injunction and temporary restraining order situations, plaintiffs must demonstrate that the public interest favors granting immediate injunctive relief by

²⁰⁸ 50 C.F.R. § 402.16(c) (2006).

²⁰⁹ Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2006).

²¹⁰ See *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9th Cir. 1987) (holding that failing to reinitiate consultation where agreed-upon mitigation efforts were not met violated the ESA).

²¹¹ For a description of the elements for an injunction, see *Self-Realization Fellowship Church v. Ananda*, 59 F.3d 902, 913-14 (9th Cir. 1995).

²¹² *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). See also *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.”).

²¹³ *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985) (rejecting argument that plaintiff must establish injury or harm to the listed species resulting from implementation of project).

showing that they seek compliance with a federal statute and its implementing regulations controlling the agency's management of activities on the public lands, and that injunctive relief would preserve the status quo with respect to the species and habitat in question until the agency complies with its procedural duties under the ESA.²¹⁴ Therefore, in order to prevent permanent and irreparable harm to the protected species, "the public interest tip[s] heavily in favor of endangered species."²¹⁵

IV

THE ADMINISTRATIVE PROCEDURE ACT

Absent citizen-suit provisions such as those provided in substantive statutes such as the ESA, those wishing to challenge livestock-grazing decisions must do so under the federal APA.²¹⁶ As is often the case, the APA is used in tandem with the ESA to ensure that a plaintiff has brought all potential legal tools to bear in protecting federal riparian areas and rangelands.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."²¹⁷ Unlike challenges filed under the ESA, however, plaintiffs filing grazing-related suits under the APA must meet strict procedural and public participation criteria if they ever want to see the inside of a courtroom. As a result, a complete understanding of the resolution of federal livestock-grazing conflicts necessarily includes a discussion of the relationship between the administrative and judicial forums and procedures regarding such disputes.

A. *APA Challenges to Livestock-Grazing Decisions*

Under Interior Department regulations, a contestable federal decision begins with the approval or adoption of a resource management plan, which may be protested by "[a]ny person who participated in the planning process and has an interest which is or

²¹⁴ See *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 933 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987).

²¹⁵ *Sierra Club*, 816 F.2d at 1383 (citing *Tenn. Valley Author.*, 437 U.S. at 187-88, 194-95).

²¹⁶ ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2006)).

²¹⁷ 5 U.S.C. § 702 (2006).

may be adversely affected by the approval or amendment of a resource management plan.”²¹⁸ A protest may raise only those issues submitted for the record during the planning process.²¹⁹ Any protests are submitted to the Director of the BLM, whose determination is “the final decision of the Department of the Interior.”²²⁰

The Interior Board of Land Appeals (IBLA) has administrative jurisdiction over grazing-permit appeals.²²¹ Except in some specific matters regarding livestock grazing, any person adversely affected by the permitting decision of a BLM officer or administrative law judge (ALJ) must first appeal to the IBLA by filing a notice of appeal within thirty days of being served with the decision.²²² The substantive portion of the appeal, the “Statement of Reasons,” must be filed within thirty days of the notice of appeal.²²³

In addition, the appellant may file a request for stay of the agency’s decision within thirty days of the notice of appeal, requesting that the BLM halt its decision to authorize livestock grazing and providing specific reasons for granting the stay.²²⁴ If the agency grants the stay, the decision is rendered inoperative pending the administrative appeal, and if the stay is not granted, the aggrieved party may seek recourse in federal court without further pursuing available administrative remedies.²²⁵ If the agency otherwise renders the decision final, the party may also seek immediate recourse in federal court without exhausting administrative remedies.²²⁶

The IBLA process is not always predictable, however, and there are important limitations on what agency decisions are reviewable by the Board. In most livestock-grazing matters, for example, prospective appellants may not appeal to the IBLA but must first look to an ALJ within the Interior’s Hearings Divi-

²¹⁸ 43 C.F.R. § 1610.5-2(a) (2006).

²¹⁹ *Id.*

²²⁰ *Id.* § 1610.5-2(a)-(b).

²²¹ 43 C.F.R. § 4.1(b)(3)(i).

²²² 43 C.F.R. §§ 4.410(a), 4.411(a).

²²³ 43 C.F.R. § 4.412.

²²⁴ *See* 43 C.F.R. § 4.21(b).

²²⁵ *See id.* § 4.21(c).

²²⁶ *See id.*; *see also* Idaho Watersheds Project v. Hahn 307 F.3d 815, 825 (9th Cir. 2002) (finding that when an agency’s regulations do not render a decision inoperative pending appeal, exhaustion of administrative remedies is not required).

sion.²²⁷ The IBLA's "appellate review authority cannot be invoked simply because someone may object to something [the] BLM is doing."²²⁸ At minimum, therefore, any appeal to the IBLA must include a written "identifiable decision, the appellant must be a 'party' to the case, and the appellant must be 'adversely affected.'"²²⁹

Finally, an appeal of the livestock-grazing portion of a resource-management plan is not within the jurisdiction of the IBLA, because the plans are defined as final decisions within Interior.²³⁰ Instead, when challenging a resource-management plan, the parties must file an appeal with an ALJ after livestock-grazing decisions are actually implemented through specific actions, such as lease renewals or revisions to Allotment Management Plans.²³¹

Any party affected by the ALJ's decision has the right to appeal further to the IBLA itself.²³² A decision of the Director or an Appeals Board of the Office of Hearings and Appeals is final and "no further appeal will lie in the Department" from such decisions.²³³ In addition, "[a]ny persons adversely affected by a specific action being proposed to implement some portion of a resource-management plan or amendment may appeal such action pursuant to 43 C.F.R. § 4.400 at the time the action is proposed for implementation."²³⁴

In the context of Forest Service grazing decisions, any person who participated in the public comment procedures leading up to the decision²³⁵ may appeal²³⁶ any project and activity decisions documented in a Record of Decision or Decision Notice, including those which, as a part of the project approval decision, con-

²²⁷ The regulation provides "[a]ny . . . person whose interest is adversely affected by a final . . . decision may appeal . . . to an administrative law judge" by filing his appeal in the office of the authorized officer "within 30 days after receiving it." 43 C.F.R. § 4.470(a).

²²⁸ *Hacienda Del Cerezo, Ltd.*, 135 I.B.L.A. 277, 279 (1996) (quoting *S. Utah Wilderness Alliance*, 122 I.B.L.A. 17, 20 (1992)).

²²⁹ *Id.*; see also *Mesa Sand & Rock, Inc.*, 124 I.B.L.A. 243, 245 (1994).

²³⁰ See 43 C.F.R. § 4.470.

²³¹ See *id.*

²³² *Id.* § 4.478(a).

²³³ *Id.* § 4.21(d).

²³⁴ 43 C.F.R. § 1610.5-3(b).

²³⁵ 36 C.F.R. § 215.11 (2006) (defining which decisions are subject to appeal). The notice and comment procedures for grazing and other actions are listed in 36 C.F.R. § 215.3-6.

²³⁶ *Id.* § 215.13; see also *id.* § 215.6(a)(3).

tain a nonsignificant amendment to a National Forest Land and Resource Management Plan.²³⁷ As in the case of the BLM, and depending upon the circumstances, there are restrictions about which Forest Service decisions are appealable and which are not. The appellant must submit a written appeal to the Appeal Deciding Officer within forty-five days of the public notice published pursuant to the Notice of Decision.²³⁸ Such Deciding Officer's decision constitutes "the final administrative determination of the Department of Agriculture."²³⁹

Those Forest Service decisions generally not subject to appeal include: (1) project or activity decisions included in a Record of Decision for significant amendment, revision, or approval of a land and resource-management plan;²⁴⁰ (2) preliminary findings made during planning and/or analysis processes;²⁴¹ (3) actions for which notice and opportunity to comment have been published and on which no expressions of interest have been received during the comment period, and on which the Responsible Official's decision does not modify the proposed action;²⁴² and (4) decisions for actions that have been categorically excluded from documentation in an environmental assessment or Environmental Impact Statement.²⁴³

In addition, "subsequent implementing actions that result from the initial project decision that was subject to appeal" are not appealable.²⁴⁴ For example, an initial decision to offer a timber sale is appealable under this part, yet subsequent implementing actions to advertise or award such sales are not.²⁴⁵

Those who do not follow these procedures before taking their case to federal court will face stiff opposition from the agency. The Forest Service regulations expressly provide that "[i]t is the position of the Department of Agriculture that any filing for fed-

²³⁷ *Id.* § 215.11(a).

²³⁸ *Id.* § 215.15. The Notice of Decision is published pursuant to 36 C.F.R. § 215.7(b).

²³⁹ *Id.* § 215.18(c).

²⁴⁰ *Id.* § 215.12(a). Appeals of these decisions are governed by 36 C.F.R. pt. 217.

²⁴¹ *Id.* § 215.12(c). "Such findings are appealable only upon issuance of a decision document." *Id.*

²⁴² *Id.* § 215.12(e).

²⁴³ *Id.* § 215.12(f). The criteria for excluding the action in question are found in U.S. FOREST SERVICE, FOREST SERVICE HANDBOOK § 1909.15, at 31.11–31.12 (2006), except as noted in 36 C.F.R. § 215.7(b).

²⁴⁴ 36 C.F.R. § 215.12(d).

²⁴⁵ *See id.*

eral judicial review of a decision subject to appeal is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the appeal procedures in this part.”²⁴⁶

The APA provides that federal courts must reverse agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁴⁷ The courts interpret this standard rather strictly, and in order to prevail, “a contesting party must show that there is virtually no evidence in the record to support the agency’s methodology in gathering and evaluating the data.”²⁴⁸ The Ninth Circuit recently determined that analysis in relation to grazing cases “must be ‘searching and careful,’ but ‘the ultimate standard of review is a narrow one.’”²⁴⁹ In such cases, an agency’s decision is arbitrary and capricious only if the agency:

[H]as relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²⁵⁰

Therefore, plaintiffs in most domestic grazing cases face a substantial burden of proof in illustrating sufficiently specific standards in the applicable statute against which the court can measure the policy decisions in question. The Ninth Circuit, for example, concluded that the generalized policies and objectives of the Multiple Use and Sustained Yield Act did not provide standards specific enough to allow a narrow judicial review of U.S. Forest Service determination related to carrying capacity on grazing allotments.²⁵¹ Another court held that NEPA requires only that the procedural and general policy requirements of the Act have been satisfied in relation to the impacts of livestock grazing, and FLPMA and the Public Rangelands Improvement

²⁴⁶ *Id.* § 215.21 (citing 7 U.S.C. § 6912(e) (2006)).

²⁴⁷ 5 U.S.C. § 706(2)(A) (2006).

²⁴⁸ *Perkins v. Bergland*, 608 F.2d 803, 807 n.12 (9th Cir. 1979); for a general discussion of the case law in this area, see Daniel E. O’Leary, *Grazing, in ENVIRONMENTAL AND NATURAL RESOURCES LAW, OR. ST. B. CONTINUING LEGAL EDUC.* 41-18 to -21. (Donald H. Pyle et al. eds., 2006).

²⁴⁹ *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

²⁵⁰ See O’Leary, *supra* note 248, at 41-19 (quoting *Sw. Ctr.*, 100 F.3d at 1448).

²⁵¹ See, e.g., *Perkins*, 608 F.2d at 807.

Act do not require the BLM to limit overgrazing or to take measures to remedy past degradation of public lands.²⁵²

An agency decision is arbitrary and capricious, however, if it is contrary to the plain language of its own regulations,²⁵³ and if the agency fails to take a “hard look” at the environmental impact of the decision and proposed actions.²⁵⁴ On the other hand, federal agencies must conduct a reasonably thorough discussion of the most significant aspects of the probable environmental consequences of their actions and not conclude that environmental concerns trump all others.²⁵⁵

B. Final Agency Action

Although many agency decisions potentially impact rangeland ecosystems and fish and wildlife, only final agency decisions are subject to review under the APA.²⁵⁶ In the context of the ESA, an administrative agency action is final if it marks “the consummation of the agency’s decision making process” and is “one by which rights or obligations have been determined or from which legal consequences flow.”²⁵⁷

Further, according to NOAA Fisheries regulations, any action under section 7 of the ESA “means all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies. . . . Examples include, but are not limited to . . . actions directly or indirectly causing modifications to the land, water, or air.”²⁵⁸ All effects of the action must be considered, including “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.”²⁵⁹

The Ninth Circuit Court of Appeals recently found that the ESA “finality requirement is concerned with whether the initial decisionmaker has arrived at a *definitive position on the issue that*

²⁵² Natural Res. Def. Council v. Hodel, 624 F. Supp. 1045, 1049, 1054 (D. Nev. 1985).

²⁵³ Idaho Watersheds Project v. Hahn, 187 F.3d 1035, 1036-37 (9th Cir. 1999) (reversing denial of preliminary injunction upon finding that the BLM misinterpreted the timing requirements of a grazing regulation).

²⁵⁴ Save the Yaak Comm. v. Block, 840 F.2d 714, 719 (9th Cir. 1988).

²⁵⁵ Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996).

²⁵⁶ Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc. v. Nat’l Marine Fisheries Serv., 253 F.3d 1137, 1142 (9th Cir. 2001).

²⁵⁷ *Id.* at 1142.

²⁵⁸ 50 C.F.R. § 402.02 (2006) (emphasis added).

²⁵⁹ *Id.*

inflicts an actual, concrete injury.”²⁶⁰ Many livestock-grazing leases, permits, and other actions, therefore, meet the finality criteria because “the grazing permit program produces significant impacts on individual locales,”²⁶¹ and “[t]he term ‘actions’ refers not only to actions taken by federal agencies, but also to decisions made by the agencies, such as the decision to grant a license, which allow another party to take an action affecting the environment.”²⁶²

Thus, the Ninth Circuit concluded that a stay under the IBLA regulations must be enforced when necessary to prevent “unreviewed decisions to renew grazing authorizations and at the same time allow[] grazing practices that are known to harm the environment.”²⁶³ In *Idaho Watersheds Project*, the court granted a stay of certain livestock-grazing practices that “the BLM concluded in 1996, [were] responsible for the continued destruction of riparian habitat.”²⁶⁴ If not, according to the court, “pre 1997 grazing practices could continue for many years while appeals work their way through the administrative hearing process . . . [because] BLM regulations establish no time frames or deadlines for grazing permit appeals to be concluded and administrative appeals can languish for years without decision.”²⁶⁵

Recognizing the need for finality in domestic grazing decisions at the administrative level, the Ninth Circuit recently found that the Forest Service’s use of “Annual Operating Instructions” for public lands grazing constitutes final agency action for purposes of judicial review.²⁶⁶ In the initial litigation, the plaintiffs requested that the court suspend grazing in several allotments on the Malheur National Forest of Central Oregon because of the agency’s alleged failure to comply with several binding environmental requirements, including the Forest Plan as amended by PACFISH, INFISH, and the Wild and Scenic Rivers Act.²⁶⁷

²⁶⁰ *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 828 (9th Cir. 2002) (citing *Darby v. Cisneros*, 509 U.S. 137, 144 (1993)) (emphasis added).

²⁶¹ *Natural Res. Def. Council v. Morton*, 388 F. Supp. 829, 834 (D.D.C. 1974).

²⁶² *Id.* (citing *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973)).

²⁶³ *Idaho Watersheds Project*, 307 F.3d at 837.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 979, 982-83 (9th Cir. 2006).

²⁶⁷ *See id.* at 981.

The district court held that the Annual Operating Instructions were not final within the meaning of section 10(c) of the APA,²⁶⁸ and dismissed plaintiffs' lawsuit for lack of subject matter jurisdiction.²⁶⁹ The Ninth Circuit reversed and remanded the case, concluding that the Forest Service's action in issuing the Annual Operating Instructions was "final agency action" under section 10(c) and therefore, plaintiffs' claims were ripe for judicial review.²⁷⁰

C. *Exhaustion of Administrative Remedies*

The *Idaho Watersheds Project* court noted the contradictory language in BLM regulations affecting exhaustion of administrative remedies.²⁷¹ Department of the Interior regulations governing the BLM appeals process provide that:

No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.²⁷²

Additional BLM regulations, however, provide that even when a stay is granted, previously authorized grazing-use will continue at that level, subject to any relevant provisions of the stay order, even while the stay is in effect.²⁷³ A failure to enforce a stay, therefore, "has the effect of a multi-year renewal of grazing permits without environmental review and without imposing any measures to protect the environment while appeals are pending."²⁷⁴

D. *Ripeness*

Potential litigants of livestock-grazing actions must also meet "ripeness" standards developed by federal courts. The leading

²⁶⁸ *Id.* at 979.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ 307 F.3d 815, 826-828 (9th Cir. 2002).

²⁷² 43 C.F.R. § 4.21(c) (2006).

²⁷³ *Id.* § 4160.4(b) (2006).

²⁷⁴ *Idaho Watersheds Project*, 307 F.3d at 827.

case in this regard is *Ohio Forestry Association v. Sierra Club*, which determined that a complaint filed by conservationists regarding a Forest Service land-management plan was not ripe for judicial review because, by itself, the plan created no legal rights or obligations, and the plaintiffs could bring their legal challenge at the time any proposal for logging was approved and before harvesting could occur.²⁷⁵ To reach its conclusion, the Court considered: “(1) whether delayed review would cause hardship to plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether courts would benefit from further factual development of the issues presented.”²⁷⁶

V

ON-THE-GROUND APPLICATION OF THE ESA

A. *Sage Grouse*

Sage grouse habitat in the vast, scrubby lands of the sages-teppe ecosystem has undergone an extensive assault over the past hundred years from land-use practices such as livestock grazing, agriculture, and resource extraction.²⁷⁷ Sagebrush and bunchgrass habitats of this ecosystem once dominated, but now cheatgrass is most prevalent, with little or no sagebrush over-story, making population recovery difficult.²⁷⁸ As a result, the general trend of sage grouse populations is significantly downward,

frequently significantly so. . . . Close examination of what is known in [California and Colorado] demonstrates that sage-grouse populations in both states have markedly decreased since the 1960's (and later in at least Colorado). Sage-grouse have been extirpated from local areas and even counties in both states (Siskiyou in California . . . Lake and Summit in Colorado . . .) and other local populations are barely persisting.²⁷⁹

²⁷⁵ *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-36 (1998).

²⁷⁶ *Id.* at 733.

²⁷⁷ U.S. DEP'T OF INTERIOR & U.S. GEOLOGICAL SURVEY, FACT SHEET: LOSS OF SAGEBRUSH ECOSYSTEMS AND DECLINING BIRD POPULATIONS IN THE INTERMOUNTAIN WEST: PRIORITY RESEARCH ISSUES AND INFORMATION NEEDS USGS FS-122-02 (2002), available at http://sagemap.wr.usgs.gov/docs/fs-loss_of_sagebrush.pdf.

²⁷⁸ *Id.*

²⁷⁹ CLAIT E. BRAUN, PROFESSIONAL REVIEW OF: CONNELLY, J. W., S. T. KNICK, M. A. SCHROEDER & S. J. STIVER, CONSERVATION ASSESSMENT OF GREATER SAGE-GROUSE AND SAGEBRUSH HABITATS, WESTERN ASSOCIATION OF FISH AND

Under most federal management policies, however, the sage grouse is grouped with other special-status species, and vague and limited rules are laid out for their management.²⁸⁰ Due to the extensive areas and variety of habitats needed to sustain sage grouse, it is unlikely that current prescribed levels of livestock grazing under federal range-plans will allow the bird to recover.²⁸¹ However, a Memorandum of Understanding signed by the BLM and several federal agencies names the BLM as the lead party in state and local sage grouse conservation efforts.²⁸² The BLM's stated sage grouse management goal is to "[s]ustain or reestablish the integrity of the sagebrush biome to provide the amount, continuity, and quality of habitat that is necessary to maintain sustainable populations of sage grouse and other sagebrush-dependent wildlife species."²⁸³

B. Petition to Protect Sage Grouse

In December 2003, some twenty conservation groups petitioned the USFWS to extend ESA protection to the sage grouse.²⁸⁴ The groups provided information on threats to the

WILDLIFE AGENCIES, UNPUBLISHED REPORT, CHEYENNE, WYOMING 3 (2004); *see also* DAVID S. DOBKIN & JOEL D. SAUDER, HIGH DESERT ECOLOGICAL RESEARCH INST., SHRUBSTEPPE LANDSCAPES IN JEOPARDY: DISTRIBUTIONS, ABUNDANCES, AND THE UNCERTAIN FUTURE OF BIRDS AND SMALL MAMMALS IN THE INTERMOUNTAIN WEST 7 (2004).

²⁸⁰ The Department of Interior's own experts, for example, recommend implementing significant reductions or elimination of livestock grazing in affected sage grouse areas. *See* DAVID DOBKIN, U.S. DEP'T OF THE INTERIOR, MANAGEMENT AND CONSERVATION OF SAGE GROUSE, DENOMINATIVE SPECIES FOR THE ECOLOGICAL HEALTH OF SHRUBSTEPPE ECOSYSTEMS 18 (1995); *see also* BUREAU OF LAND MANAGEMENT, ET AL. GREATER SAGE-GROUSE AND SAGEBRUSH-STEPPE ECOSYSTEMS MANAGEMENT GUIDELINES 11 (2000) ("Timing and location of livestock turnout and trailing should not contribute to livestock concentrations on leks during the sage-grouse breeding season.").

²⁸¹ *See* DOBKIN & SAUDER, *supra* note 279, at 17 ("Birds that depend on native vegetation for the supporting structure and protective cover of their nests clearly are jeopardized by the complete loss of native vegetation (e.g., from agricultural conversion). The effects of livestock grazing, invasion by exotic plant species, and alteration of natural fire regimes can be much less obvious and sometimes synergistic.").

²⁸² BUREAU OF LAND MGMT., *Guidance for the Management of Sagebrush Plant Communities for Sage-Grouse Conservation in NATIONAL SAGE-GROUSE CONSERVATION STRATEGY 2* (2004), available at http://www.blm.gov/nhp/spotlight/sage_grouse/docs/Sage-Grouse_Strategy_1_4_1.pdf.

²⁸³ *Id.*

²⁸⁴ Press Release, American Lands Alliance and Twenty Other Conservation Organizations, Conservation Organizations Petition to List Greater Sage Grouse Under Endangered Species Act (Dec. 22, 2003) (on file with Journal of Environmental Law and Litigation).

R

species that was new from the last listing petition filed in 2002, claiming the dramatic increase in oil and gas drilling, paired with the failure to provide common sense protections for the most sensitive habitats, was destroying sage grouse habitat.²⁸⁵

A coalition of ranchers, miners, oil and gas, and other commercial industries, however, has launched a campaign to keep the bird off the list, leading the Bush administration to deny the petition on grounds that “there’s no evidence they are a unique subspecies of other sage grouse found in the West.”²⁸⁶ Interior Secretary Norton, speaking at the Western Governors Association annual meeting, said that “listing the sage grouse as an endangered species could significantly affect energy production and grazing.”²⁸⁷ She also said the BLM will require site-specific best-management practices to reduce the impact to the habitat.²⁸⁸ Ultimately, in 2005 the USFWS decided to not list the sage grouse²⁸⁹ despite an eighty-five percent decline of the species in some areas.²⁹⁰

The plight of the sage grouse is significant because many are concerned that its listing could have impacts similar to those of the spotted owl, which dominated the headlines in the early 1990s and drastically transformed the Northwest logging industry. A sage grouse listing could affect grazing and most other extraction activities in the West, with associated economic impacts on 10 million acres in eleven western states.²⁹¹ The listing would require the USFWS to take over management from state biologists and control approval of any activity that could affect

²⁸⁵ Associated Press, *Conservation Groups Seek Sage Grouse Protection*, CASPER STAR TRIB. (Wyo.), Dec. 24, 2003, at B1.

²⁸⁶ Associated Press, *Petition to List “Eastern” Sage Grouse Rejected*, LAS VEGAS SUN, Jan. 6, 2004, available at <http://www.lasvegassun.com/sunbin/stories/nevada/2004/jan/06/010610971.html>.

²⁸⁷ Deborah Baker, Associated Press, *Norton: Sage Grouse Listing Would Hurt Energy Production*, CASPER STAR TRIB. (Wyo.), June 24, 2004, available at <http://www.casperstartribune.net/articles/2004/06/24/news/wyoming/ce0cc60799e361f587256ebc005b15ee.txt>.

²⁸⁸ *Id.*

²⁸⁹ Press Release, U.S. Fish & Wildlife Serv., Status Review Completed: Greater Sage-Grouse Not Warranted for Listing as Endangered or Threatened (Jan. 7, 2005) (on file with Journal of Environmental Law and Litigation).

²⁹⁰ Ray Ring, *Strange Bedfellows Make a Grazing Deal in Idaho*, HIGH COUNTRY NEWS, Oct. 3, 2005, at 6.

²⁹¹ See Hal Clifford, *Last Dance for the Sage Grouse?*, HIGH COUNTRY NEWS, Feb. 4, 2002, at 1.

sage grouse.²⁹² If the USFWS is ultimately forced to list the sage grouse, the costs could fall to individuals. For instance, ranchers who graze livestock on public land may have to change the timing and duration of their animals' use of the range; and if they cannot graze for long periods of time, they may have to leave their cattle on private land—which is usually used for growing hay—or pay a private property owner to pasture their livestock.²⁹³

In a sign of potential future trends in litigation related to sage grouse, Idaho Federal District Court Judge Winmill halted livestock grazing on 800,000 acres of public lands in the BLM's Jarbridge Resource Area.²⁹⁴ The court's reasoning focused on the agency's mishandling of grazing permits for twenty-eight allotments covering 1.7 million acres of land in southern Idaho.²⁹⁵ The Western Watersheds Project claimed that the BLM violated federal policies, as well as the agency's own guidelines, when it increased grazing levels in the area compromising sage grouse and other wildlife habitat.²⁹⁶

Although the BLM argued that forage production had increased dramatically due to planting of non-native grasses, the judge agreed with the plaintiffs, finding that the Agency's own data showed that grazing was still harming sage grouse and that the BLM was "like a horse with blinders on" in its management

²⁹² *Id.* (noting that federal intervention would alienate state wildlife agencies, which enjoy greater public trust and resources).

²⁹³ In a memo released to the public in April 2004, a coalition of ranchers, miners, and oil and gas interests advocated:

"Unleash[ing] grass-roots opposition to a listing, thus providing some cover to the political leadership at (the Interior Department) and throughout the administration," . . . "waging a highly coordinated, multi-industry effort across 11 Western states to make the science-based case for the right listing decision" by organizing experts who can "scrutinize the science of those supporting a listing" and engage "political leaders in the West and in Congress to lobby the administration against listing," . . . approaching the Interior Department directly if members are rebuffed by the Fish and Wildlife Service, the agency responsible for sage grouse protection, [and] "[e]ngag[ing] with USFWS regional directors. . . . If they do not readily engage, back channel with DOI officials."

Scott Sonner, The Associated Press, *Industry Coalition's Internal Sage Grouse Memo Causes Flap*, LAS VEGAS SUN, May 6, 2004, available at <http://www.lasvegassun.com/sunbin/stories/nevada/2004/may/06/050610261.html>.

²⁹⁴ *W. Watersheds Project v. Kay Lynn Bennett*, 392 F.Supp.2d 1217, 1223, 1225 (D. Idaho 2005).

²⁹⁵ *See id.* at 1223, 1229.

²⁹⁶ *See id.* at 1220-21.

of grazing in the planning areas.²⁹⁷ As a result, the judge ordered that livestock in the affected allotments be removed within several weeks and not return until an adequate environmental impact statement was completed.²⁹⁸

C. The Columbia River Mainstem Biological Opinion

Although not a livestock grazing case, the ongoing Columbia River salmon litigation has numerous legal analogies to domestic grazing and the ESA. A key decision in the Columbia River litigation occurred after the fall of 2004, when several environmental and tribal plaintiffs sought review of the 2004 Federal Columbia River Power System (FCRPS) BiOp. NOAA Fisheries prepared the FCRPS BiOp through a reinitiated consultation with the U.S. Army Corps of Engineers, the Bonneville Power Administration, and the U.S. Bureau of Reclamation (the Action Agencies) under section 7 of the ESA.²⁹⁹ The 2004 FCRPS BiOp was intended to supercede the 2000 FCRPS BiOp and the Federal District Court of Oregon's prior summary judgment order.³⁰⁰

The plaintiffs' second supplemental complaint sought review of the 2004 FCRPS BiOp, which addressed the effects of the FCRPS and nineteen Bureau of Reclamation projects in the Columbia River Basin on ESA-listed salmon and steelhead.³⁰¹ The 2004 FCRPS BiOp sharply departed from section 7 consultations on similar proposed FCRPS actions in 1995 and 2000.³⁰² It concluded that the Action Agencies' Updated Proposed Action for the FCRPS projects and facilities would not jeopardize the continued existence of any of the twelve ESA-listed populations of

²⁹⁷ *Id.* at 1223.

²⁹⁸ *Id.* at 1229.

²⁹⁹ NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., REVISED 2004 BIOLOGICAL OPINION ON THE OPERATION OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM AND 19 U.S. BUREAU OF RECLAMATION PROJECTS (2004).

³⁰⁰ *Id.* at 1-1. For discussion of the 2000 BiOp and the district court's summary judgment order, see *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003).

³⁰¹ Second Supplemental Complaint for Declaratory and Injunctive Relief at *2, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2004 WL 3336573 (D. Or. Dec. 30, 2004) (No. 01-00640-RE).

³⁰² *See id.*

salmon and steelhead in the Columbia River Basin, nor destroy or adversely modify their designated critical habitat.³⁰³

Instead of ensuring that listed salmon and steelhead would not be driven extinct by the federal power system, however, the new BiOp concluded that the proposed operations were lawful if they would not further accelerate the trend toward extinction.³⁰⁴ The BiOp also proposed that such non-furtherance of the trend toward extinction could be accomplished by unspecified and currently unfunded “improvements” to the Columbia River dams in question.³⁰⁵ Finally, the BiOp did not provide conditions for management of water rights or tributaries to assist in mitigating the impacts on listed species caused by the dams.³⁰⁶

In the summer of 2005, U.S. District Court Judge James A. Redden granted the plaintiffs’ summary judgment motion related to the FCRPS operations.³⁰⁷ Judge Redden ordered summer “spill” to occur at four federal dams between June 20 and August 31.³⁰⁸ The spill measures were based upon recommendations made by northwest Indian tribes through the Columbia River Inter-Tribal Fish Commission 2005 River Operations Plan.³⁰⁹

Following his summary judgment decision, Judge Redden “mapped out a detailed strategy for rewriting the federal government’s Columbia River Basin hydrosystem salmon-protection plan that includes step-by-step participation by ‘sovereign entities’—the states of Idaho, Montana, Oregon, and Washington,

³⁰³ *Id.*

³⁰⁴ See NAT’L OCEANIC & ATMOSPHERIC ADMIN., BIOLOGICAL OPINION, EFFECTS OF THE BUREAU OF LAND MANAGEMENT UPPER JOHN DAY RIVER BASIN GRAZING PROGRAM FROM 2004 TO 2008, IN THE NORTH FORK, MIDDLE FORK AND UPPER JOHN DAY RIVER SUBBASINS, OREGON 8-1 to -4 (2004) [hereinafter 2004 BiOp, JOHN DAY RIVER BASIN GRAZING PROGRAM].

³⁰⁵ *Id.* at 8-8.

³⁰⁶ See generally 2004 BiOp, JOHN DAY RIVER BASIN GRAZING PROGRAM, *supra*, note 304.

³⁰⁷ Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., Nos. 01-640-RE (Lead Case), 05-23-RE (Consolidated Cases), 2005 WL 1278878, at *22 (D. Or. May 26, 2005).

³⁰⁸ Press Release, Columbia River Inter-Tribal Fish Comm’n, Charles Hudson, Snake River Salmon Get Safest Summer Trip In Years: Court Ordered Spill at Federal Dams Creditor for Substantial Survival Increase (Sept. 12, 2005), available at <http://www.critfc.org/text/press/20050912.html>.

³⁰⁹ Spilling is the practice of diverting water away from power-generating turbines and over spillways. *Id.*

2006]

The Future of Livestock Grazing

431

and treaty tribes.”³¹⁰ In a moment of foresight illustrating Judge Redden’s familiarity with the decades-old Columbia River Salmon litigation, he stated:

The Action Agencies and others will be exposed to liability for taking listed species under Section 9 of the ESA. . . . In such an event, the courts would be required to ‘run the river.’ The Executive, Legislative, and especially the Judicial Branches abhor such action by the courts.³¹¹

The remand order also required that a first quarterly report on remand progress, which was due in January 2005, include at minimum, “preliminary information from which the court, the parties, and amici are able to gain some understanding of: (1) the legal framework NOAA intends to use in its jeopardy analysis; (2) the nature and scope of any proposed agency action and/or RPA; and (3) NOAA’s plan for collaboration with the sovereign entities.”³¹²

The Redden opinion stated that the “many failures in the past have taught us that the preparation or revision of NOAA’s biological opinion on remand must not be a secret process with a disastrous surprise ending. The parties must confer and collaborate if we are to reach the goal of a valid biological opinion.”³¹³ Finally, the court warned that failure could force the federal government to consider dam breaching: “This remand, like the remand of the 2000 BiOp, requires NOAA and the Action Agencies to be aware of the possibility of breaching the four dams on the lower Snake River, if all else fails.”³¹⁴

The best illustration, however, of the success of the mainstem BiOp litigation and Judge Redden’s ordered injunctive relief was that survival levels of migrating juvenile salmon in the lower Snake River during the summer of 2005 were “the highest recorded in recent years.”³¹⁵ The analysis “found a nearly 74% survival rate for sub-yearling Fall Chinook compared to rates between 30-50% in the no-spill summers of 2001-2004.”³¹⁶

³¹⁰ Press Release, Columbia Basin Fish & Wildlife News Bulletin, Redden: Make BiOp Complaint or Courts Will ‘Run the River,’ (Oct. 7, 2005), available at <http://www.cbbulletin.com/Archive/10072005/default.aspx>.

³¹¹ Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., Nos. 01-640-RE & 05-23-RE), 2005 WL 2488447, AT *3 (D. Or. Oct. 7, 2005).

³¹² *Id.* at *6.

³¹³ *Id.* at *3.

³¹⁴ *Id.*

³¹⁵ Press Release, Columbia River Inter-Tribal Fish Comm’n, *supra* note 308.

³¹⁶ *Id.*

D. John Day Wild and Scenic River

In the spring of 2002, the BLM implemented its livestock-grazing decision in the John Day Wild and Scenic River Plan by issuing lease renewals for the T. Cole³¹⁷ and Hartung³¹⁸ Allotments located within the river corridor, and for the planning area in Central Oregon. Under the ESA, the BLM must provide sufficient in-river conditions for migrating fish to ensure against jeopardy to threatened and endangered mid-Columbia River steelhead and bull trout, and to minimize, to the maximum extent practicable, the incidental take of these species by the issuance of livestock-grazing leases within the river corridor.³¹⁹

Federal agencies may not conclude that specific actions are insignificant relative to other actions implemented over a broad geographic scope,³²⁰ but the BLM and the federal fish and wildlife agencies contended that the Plan and renewed leases impacted a relatively marginal percentage of John Day River.³²¹ Further, federal agencies generally must account for the cumulative impacts of individual actions such as issuance and renewal of livestock-grazing leases.³²² As a result, until such time as the BLM completes consultation for spring chinook salmon, mid-Columbia River steelhead, and bull trout, it may not renew grazing leases.

NOAA Fisheries provides, for example, based on the BLM's conclusion that the effects of the Plan on designated EFH for chinook salmon are likely "within the range of effects considered in the ESA portion of this consultation," and that "the Plan is unlikely to adversely affect" the spring chinook EFH.³²³ The

³¹⁷ BUREAU OF LAND MGMT., PRINEVILLE DIST., LAND USE PLAN CONFORMANCE AND NEPA ADEQUACY RE: PROPOSED GRAZING LEASE RENEWAL FOR T. COLE ALLOTMENT (Sept. 10, 2001) (on file with author).

³¹⁸ Letter from Christina M. Welch, Field Manager, Bureau of Land Mgmt., to Harold Shepherd (March 28, 2002) (on file with author).

³¹⁹ See 16 U.S.C. § 1536 (2006). NOAA Fisheries and USFWS endorsement of the BLM's actions, therefore, appears to violate section 9 of the ESA by resulting in the take of listed species.

³²⁰ *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 253 F.3d 1137, 1145 (9th Cir. 2001).

³²¹ BUREAU OF LAND MGMT., JOHN DAY RIVER PROPOSED MANAGEMENT PLAN, TWO RIVERS, AND JOHN DAY RESOURCE MANAGEMENT PLAN AMENDMENTS at 220 (2001); see also Letter from Christina Welch, Field Manager, Bureau of Land Mgmt., to Honorable Bruce R. Harris (June 28, 2001) (on file with author).

³²² *Pac. Coast Fed'n*, 253 F.3d at 1145.

³²³ Letter from Donna Darm, Acting Reg'l Adm'r, Nat'l Oceanic and Atmospheric Admin., to Christina M. Welch, Field Manager, Bureau of Land Mgmt. at 5 (Feb. 16, 2001) (on file with author).

BLM, however, indicates that “these activities will be consulted upon individually on an as-needed basis, and are not addressed in the consultation.”³²⁴

Further, the NOAA Fisheries analysis did not address water quantity and quality because the BLM represented that “the Plan does not authorize specific actions that may affect listed species.”³²⁵ Issuance of grazing leases, however, is a specific action, which will directly impact water quality and quantity in the John Day River, thereby impacting salmon habitat.

Similarly, the 2004 BiOps for the Prineville Bureau of Land Management Central Oregon Resource Area Grazing and Prescribed Burning Projects in the Upper and Lower John Day River Basin do not address livestock grazing in the T. Cole and Hartung allotments.³²⁶ In addition, the BiOps’ stubble-height standards are inconsistent with the recommendations of the Agency’s own researchers, who provide that greater than six-inch stubble heights are necessary for critical habitats for threatened, endangered or sensitive species.³²⁷ Experts also recommend a six-inch minimum stubble height for areas susceptible to bank damage.³²⁸

Further, the BiOps fail to disclose and analyze existing consistency with, and effects of the alternatives on, the eight PACFISH/INFISH ecological goals, which include maintenance restoration of habitat complexity, water quality, channel integrity, and other biotic and abiotic aspects of watersheds, streams, and habitats.³²⁹ The NOAA Fisheries BiOp on the interim PACFISH strategy in January 1995 noted that progress toward these goals is necessary to ensure restoration and concomitant improvements in fish habitat, but even if begun at the time PACFISH was adopted, “the most significant benefits of watershed restoration likely would not be realized except over a scale of decades to centu-

³²⁴ *Id.* at 2-3.

³²⁵ *Id.* at 2.

³²⁶ See 2004 BiOp, UPPER JOHN DAY RIVER BASIN GRAZING PROGRAM, *supra* note 304; see also NAT’L OCEANIC & ATMOSPHERIC ADMIN., BIOLOGICAL OPINION, EFFECTS OF THE CENTRAL OREGON RESOURCE AREA GRAZING AND PRESCRIBED BURNING PROGRAMS FOR 2004-2008, MIDDLE FORK AND LOWER JOHN DAY RIVER SUBBASIN, OREGON (2004).

³²⁷ CLARY & WEBSTER, *supra* note 122, at 3.

³²⁸ *Id.*

³²⁹ See, e.g., PACFISH, *supra* note 117, app. C, at 3.

R

R

R

ries.”³³⁰ Not only, therefore, is PACFISH considered a short-term strategy,³³¹ but without such analysis, the BLM cannot assert consistency with the PACFISH goals.

It is also clear from available literature that cattle grazing impedes progress toward these PACFISH/INFISH ecological goals.³³² The NOAA Fisheries BiOps for the 2004-2008 live-stock-grazing seasons on the John Day, therefore, do not comply with PACFISH standards for protection of anadromous fish or with recent precedent requiring consultation for the entire ongoing action. Such precedent provides that the effects of the action may not be viewed in isolation, the BiOps may not avoid considering the status of the species and the environmental baseline, aggregation is required, consideration as a back-drop is not adequate, and recovery is pertinent to an appropriate jeopardy analysis.³³³

NOAA Fisheries’ regulations implementing the ESA, as well as its ESA Section 7 Consultation Handbook, expressly require that a jeopardy analysis consider the effects of the proposed action, combined with the environmental baseline and cumulative effects in the action area, and all viewed in light of the species’ status.³³⁴ The 2000, 2001, and 2004 BiOps for the John Day, however, permit a “no jeopardy” conclusion without any effective consideration of the environmental baseline and the status of the species.³³⁵ The ESA does not permit a jeopardy analysis that deliberately attempts to view the effects of the action in isolation, divorced from the aggregate context in which the action occurs.³³⁶ Nor may NOAA Fisheries and USFWS adopt a new methodology for analyzing jeopardy inconsistent with its regulations and past practices, without following appropriate rulemak-

³³⁰ NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAT’L MARINE FISHERIES SERV., BIOLOGICAL OPINION, IMPLEMENTATION OF INTERIM STRATEGIES FOR MANAGING ANADROMOUS FISH-PRODUCING WATERSHEDS IN EASTERN OREGON AND WASHINGTON, IDAHO AND PORTIONS OF CALIFORNIA 15 (1995).

³³¹ *Id.*

³³² See W.S. Platts, *Livestock Grazing*, in INFLUENCES OF FOREST AND RANGELAND MANAGEMENT ON SALMONID FISHES AND THEIR HABITATS, 389-424 (William R. Meehan ed., 1991).

³³³ *Id.*

³³⁴ See 50 C.F.R. § 402.43 (2006); see also *id.* § 402.14(c)(4), (g)(3)-(4) (2006).

³³⁵ See 2001 BiOp, JOHN DAY RIVER BASIN, *supra* note 91; 2004 BiOp, JOHN DAY RIVER BASIN GRAZING PROGRAM, *supra* note 304.

³³⁶ 50 C.F.R. § 402.14(c)(4),(g)(3)-(4) (2006).

ing procedures and without providing a reasoned explanation for its diversion from past practices.

E. The ESA and Instream Flows On Federal Lands

It is impossible to provide a complete discussion of on-the-ground effects of litigation in relation to federal lands livestock-grazing and the ESA without discussing water. In the arid climate of the West, domestic grazing would be impossible without water, resulting in a co-evolution of the legal histories of water and grazing. In addition, state water-rights law serves as the foundation of the livestock industry's argument that federal lands grazing should be treated as a property right, and, therefore, may not be restricted by the application of environmental protection or other regulations.³³⁷

The doctrine of prior appropriation or preemption was being practiced on the western range prior to the wholesale departure from traditional land law, which came about with the addition of section 24 to the Forest Reserve Act of 1890.³³⁸ At the heart of the legal doctrine of prior appropriation is the concept of possessory interest of possessory rights. In 1879, Chief Justice Stephen Johnson Field, former Chief Justice of the Supreme Court of California, provided the basis of the prior appropriation doctrine by stating:

In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining. . . . They all

³³⁷ The riparian system of water rights was transferred to the West from England and the eastern states as the original law of water in the West. Kenneth D. Frederick, *Water Resources: Increasing Demand and Scarce Supplies*, in *AMERICA'S RENEWABLE RESOURCES, HISTORICAL TRENDS AND CURRENT CHALLENGES* 23, 30-31 (Kenneth D. Frederick & Roger A. Sedjo eds., 1991). The doctrine gave the owners of the land bordering a stream correlative right to use of the water; this posed major development problems in the West where the streams were few and their flows were unreliable. *Id.* at 31. "Even downstream, riparian lands . . . could be deprived of water by upstream diversions. Consequently, during the second half of the nineteenth century, the western states either supplemented the riparian system of rights or abandoned it for the doctrine of prior appropriation." *Id.*

³³⁸ Forest Reserve Act, Ch. 1263, § 24, 26 Stat. 650 (1890) (codified as amended at 16 U.S.C. §§ 55, 61, 471c-d (2006)).

recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced.³³⁹

During the settlement of the western United States, the doctrine of prior appropriation was used to turn the public domain into private property. Livestock interests attempted to use water rights to privatize grazing lands, just as their more successful counterparts in the farming and mining community had done.³⁴⁰ Gradually, through court decisions and legislative acts, this customary practice developed into the most prevalent water law in the West.

In 1978, as part of the state adjudication of the Rio Mimbres River located in the Gila National Forest, New Mexico's challenge to the United States' claimed reserved water rights ultimately ended up in the U.S. Supreme Court.³⁴¹ The Court concluded that the United States, in setting aside the national forest from other public lands, reserved the use of such water "as may be necessary for the purposes for which [the land was] withdrawn," but these purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing.³⁴² In a five-four decision, the Court narrowly construed the implied reserved-water-rights doctrine and determined that a federal land-management agency may not assert the implied reserved theory of water rights to obtain instream flows for the protection of recreation, fish, and wildlife.³⁴³

The Court concluded that "Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses

³³⁹ Jennison v. Kirk, 98 U.S. 453, 457-58 (1878).

³⁴⁰ Frederick, *supra* note 337, at 31.

³⁴¹ United States v. New Mexico, 438 U.S. 696 (1978).

³⁴² *Id.* at 698.

³⁴³ *Id.* at 715.

under state law.”³⁴⁴ According to the Court, “[t]his intent is revealed in the purposes for which the national forest system was created and Congress’ principled deference to state water law in the Organic Administration Act of 1897 and other legislation.”³⁴⁵ The Court also found that the forest service received no implied reserved instream flows in New Mexico since the agency failed to claim water for the primary purposes of maintaining favorable conditions of water flows and production of timber.³⁴⁶ Further, the Court stated that the forest service had to protect water needed for fish, recreation, and wildlife “in the same manner as any other public or private appropriator.”³⁴⁷

New Mexico has been widely criticized by water-rights experts who argue that the Court’s interpretation of the 1891 and 1897 Acts “is arguably wrong because the reservation of water for instream uses is consistent with the original purpose of the reserves.”³⁴⁸ Noting the “hostility” of Justice Rehnquist to federal reserved-water-rights, Sally Fairfax and Dan Tarlock conclude that the majority’s opinion overreached in an attempt to resolve issues not before the Court and potentially affected future United States’ instream-flow claims.³⁴⁹ Indeed, although the parties focused on instream claims having an 1897 priority date for fish, wildlife, and recreation purposes, the Court went out of its way to discuss those claims having a 1960 priority date.³⁵⁰

The ESA may not always assure instream-flow water for fish and wildlife species or for other resources not covered by the Act. Nevertheless, the Act may, regardless of the *New Mexico* opinion, be “the most potent legal tool for reallocating water to meet instream flow needs on federal lands.”³⁵¹ Environmental groups in Arizona and Idaho, for example, have filed lawsuits alleging that the Forest Service and the BLM failed to consult with the USFWS to determine the impacts of stream diversions and related water-transmission facilities used for federal-lands

³⁴⁴ *Id.* at 718.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 724.

³⁴⁷ *Id.* at 702.

³⁴⁸ Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509, 511 (1979).

³⁴⁹ *Id.* at 526.

³⁵⁰ See, e.g., *New Mexico*, 438 U.S. at 704, 713-15.

³⁵¹ Lois G. Witte, Still No Water For the Woods, Presented at ALI-ABI Federal Lands Law Conference 17-18 (Oct. 19, 2001), available at http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf.

livestock grazing and agricultural purposes on aquatic species.³⁵² Similarly, these groups have filed numerous Freedom of Information Act requests concerning water-diversion special-use authorizations issued by the Forest Service in Arizona.³⁵³

Hoping to weaken the species-protection aspects of the Act, agricultural interests have responded with their own litigation. The Okanogan County commissioners in Washington, for example, filed suit against NOAA Fisheries, the USFWS, and the Forest Service under the ESA for curtailing authorized water diversions on Forest Service lands for the benefit of threatened and endangered fish species.³⁵⁴ Such pending or threatened litigation has spurred a debate about federal regulatory authority over private water diversions, and whether it will prove to be the end of state historic water-allocation systems or strengthen the multiple uses and public purpose for which federal lands are intended.

VI

THE FUTURE OF THE ESA

In August 2000, the Forest Service, USFWS, and NOAA Fisheries developed a National Memorandum of Agreement regarding the application of programmatic consultation agreements for Forest Plan Revisions.³⁵⁵ Such agreements and other staff-level decisions under the Bush administration, however, are somewhat unreliable in relation to listed species, because government biologists are often discouraged from attempting to take action to protect such species.

President Bush, in fact, has listed fewer species for protection under the ESA than any other president, and only one-tenth as

³⁵² *Id.*

³⁵³ *Id.* at 18.

³⁵⁴ *Id.* at 18.

³⁵⁵ U.S. DEP'T OF AGRIC., MALHUR, UMATILLA, WILLOWA-WHITMAN NATIONAL FORESTS, BLUE MOUNTAINS FOREST PLAN REVISIONS, FREQUENTLY ASKED QUESTIONS 2-3 (2005), http://www.fs.fed.us/r6/uma/blue_mtn_planrevision/documents/2005_06_17_WebsiteQAs.pdf. Such agreements are designed to assist the Forest Service in meeting its ESA obligations related to development and implementation of forest-wide management plans including: (1) highlighting the purpose of consultation regarding forest plan revision; (2) identifying the scope of the consultation analysis; (3) stressing early and ongoing coordination; (4) establishing the consultation timeframes; and (5) establishing a consultation team and outlining a dispute-resolution process. *Id.* at 3.

many species as his father.³⁵⁶ Further, although the USFWS says it needs \$120 million to list all species needing protection, the Bush budget proposed only \$12 million.³⁵⁷

In the end, federal agencies are consistently and successfully sued by environmentalists who charge them with neglecting their ESA responsibilities. By picking a fight with environmentalists, therefore, the administration likely has increased the number of court cases and other conflicts over the Act. Moreover, reacting to the number of successful court cases under the Act, Congress introduced another ESA-reform bill in summer 2005.³⁵⁸

Although the 1973 ESA is a crucial tool for protecting the West's environment, the House approved a proposal from Chairman of the House Resources Committee Rep. Richard Pombo (R-Tracy, Cal.) to revise many of the Act's key provisions by a vote of 229 to 193.³⁵⁹ The proposal prohibited the government from declaring "critical habitat" refuges for endangered species and providing federal compensation to property owners if the law reduces the value of their land.³⁶⁰ The bill also would have imposed strict data and record-keeping requirements for listing decisions and given local political appointees more power in deciding how various animals and plants are protected.³⁶¹ Finally, the bill would have weakened the requirement for protecting "critical habitat" and required more "peer review" by scientists outside the agencies.³⁶² Because industry can afford to hire an overwhelming number of "outside scientists," agency biologists would have been completely overwhelmed by this change.³⁶³

While the White House indicated its support for the bill,³⁶⁴ the legislation faced opposition in the Senate, and the bill's momen-

³⁵⁶ Craig Welch, *Bush Switches Nation's Tack on Protecting Species*, SEATTLE TIMES, Sept. 27, 2004, at A1.

³⁵⁷ *Id.*

³⁵⁸ Farquhar, *supra* note 19.

³⁵⁹ Press Release, Action Network, House Approves Bill Gutting Endangered Species Act, http://actionnetwork.org/SierraClubNJ/notice-description.tcl?newsletter_id=3637861 (last visited Feb. 9, 2007).

³⁶⁰ Farquhar, *supra* note 19.

³⁶¹ See Matt Weiser, *Will the Real Mr. Pombo Please Stand Up?*, HIGH COUNTRY NEWS, July 25, 2005, at 8.

³⁶² *Where Do We Go From Here? Taking the West Forward*, HIGH COUNTRY NEWS, Dec. 6, 2004, at 6.

³⁶³ *Id.*

³⁶⁴ Associated Press, *House Passes Bill that Would Revise Endangered Species Act*, WASH. POST, Sept. 30, 2005, at A2.

R

R

tum ultimately waned.³⁶⁵ Senator Pombo's alleged relationship with lobbyist Jack Abramoff and his other political troubles on the hill,³⁶⁶ however, hampered progress of the ESA bill. Instead of focusing on carrying Pombo's win to the Senate, key GOP senators raised serious doubts about elements of the revision.³⁶⁷ Billy Frank Jr., a thoughtful member of the Nisqually Tribe and a national leader on Indian and environmental issues, helped to steer the Senate in the right direction during deliberations on the bill when he testified in October of 2005 before the Senate Subcommittee on Fisheries, Wildlife and Water. Frank, Chairman of the Northwest Indian Fisheries, said:

The goals and objectives of the Endangered Species Act of 1973 are more essential today than they have ever been. It has helped return the mighty [bald] eagle and the gray whale from the brink of extinction. It has helped bring attention to the plight of the salmon, and it has helped bring some badly needed funding to the effort to turn the tide on salmon decline.³⁶⁸

Ironically, therefore, the assaults on the ESA statutes could ultimately backfire because of the ruling parties' failure to account for the durability of federal environmental laws that protect our rangelands, as well as the winds of public opinion. Indeed, at the time of this writing, due in part to the Bush administration's low popularity in public opinion polls and the public faith in laws like the ESA and NEPA, the Pombo efforts to change them were floundering.³⁶⁹ Those difficulties were recently illustrated by a report from twenty-three experts appointed by six U.S. Senators and convened by the nonprofit Keyston Center.³⁷⁰

Comprised of environmentalists, land owners, academics, attorneys, timber companies, and home builders, the experts agreed that the Act could do a better job of protecting wildlife

³⁶⁵ See Tony Davis, *ESA Talks End in Stalemate*, HIGH COUNTRY NEWS, Mar. 20, 2006, at 3.

³⁶⁶ Pombo, known for his unusually vigorous support of extraction interests and big business even in today's Congress, steadily lost support for his efforts to eviscerate several of the major federal environmental laws. See Weiser, *supra* note 361.

³⁶⁷ See Betinna Boxall, *Foe of Endangered Species Act on Defensive Over Abramoff*, L.A. TIMES, Feb. 14, 2006, at 1.

³⁶⁸ John Dodge, *Species Act Backers Pin Hopes on Senate*, OLYMPIAN, Oct. 7, 2005, at 1A.

³⁶⁹ *Id.*

³⁷⁰ Davis, *supra* note 365.

R

R

habitat.³⁷¹ The group, however, could not reach consensus regarding changing the waiver of the ESA's key regulatory requirements,³⁷² including how to replace the current critical-habitat standard and strategy for preventing harm to species recovery.³⁷³ In the end, the public may determine that the financial and economic cost of activities which threaten listed species, including livestock grazing, is not worth the expense and push for removal of grazing from public lands.

VII

CONCLUSION

The jury is still out both legally and scientifically as to whether livestock-grazing management is compatible with riparian areas on lands managed by the Forest Service and the BLM. The efforts of conservationists and others to bring these problems to light through litigation have been limited thus far by complex and sometimes confusing administrative and judicial processes, as well as deference to agency decision-making in these forums.

Nevertheless, grazing in such areas often conflicts with the ESA's requirement that federal agencies "utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species."³⁷⁴ In addition, such actions are frequently contrary to the standards provided by related federal laws and regulations established to protect streamside ecosystems and their associated values.

Many advocates for public-lands-grazing reform have concluded that the only way to restore sensitive rangelands is to eliminate public-lands grazing once and for all.³⁷⁵ Such thinking

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*; see also 16 U.S.C. § 1533(b)(8) (2006).

³⁷⁴ 16 U.S.C. § 1536(a)(1).

³⁷⁵ This thinking owes its beginnings to the work of the late Harold Winegar, a career fish and wildlife biologist for the Oregon Department of Fish and Wildlife. See Bill Marlet, *Oregon's "Father of Riparian Protection" Harold Winegar Passes Away*, OR. NATURAL DESERT ASS'N, <http://www.onda.org/aboutus/HaroldWinegarInMemoriam.html> (last visited Jan. 24, 2007). His pioneering work on Camp Creek near Prineville, Oregon, in the 1960s converted the creek from a dry, unsightly gully into a permanently flowing stream. See Denzel Ferguson, 2nd Annual Desert Conservation Award Address at Desert Conference, Malheur Field Station (Apr. 1995), available at <http://www.onda.org/aboutus/DesertConfWinegarIntro.html>. Winegar's work brought stunning increases of plants and animals to Camp Creek, including

is gaining momentum as new scientific information emerges, and public attitudes toward water quality and species protection begins to change. The appearance of innovative proposals for removing livestock from public rangelands and recent successes illustrate this momentum shift.³⁷⁶ Ultimately, criticism of the ESA and recent congressional efforts to change the Act are due to its stunning success rate in preventing hundreds of species from going extinct.

Some advocate that the ESA will inevitably succeed, and the impact of proposed changes to the Act may be limited by sup-

many riparian species such as sedges, willows, rushes, beaver, and waterfowl. *See id.* "Sediment that onced washed into a downstream reservoir also was deposited among root systems streamside and caused the stream to become narrower, deeper, and cooler." *Id.*

³⁷⁶ Recent successes include the Steens Mountain Cooperative Management and Protection Act passed and signed into law by President Clinton in 2000, which resulted from months of intense negotiations between Oregon's Governor, the state's congressional delegation, public-land managers, ranchers, and conservationists. The Act established about 175,000 acres of wilderness, almost 100,000 acres of which is specifically designated as cow-free, making the Steens the first wilderness area in history having such status. Steens Mountain Cooperative Management and Protection Act of 2000, 16 U.S.C. §§ 460nnn-460nnn-122 (2006).

In addition, when livestock are removed from prairie ecosystems the improvements are remarkable, as illustrated by the recent trend at the Hart Mountain National Antelope Refuge in central Oregon. Kathie Durbin, *A Revival on Hart Mountain*, HIGH COUNTRY NEWS, Nov. 10, 2003, at 5. After a 1994 management plan revealed that cattle had trashed springs, trampled stream banks, contaminated creeks, and destroyed aspen groves, refuge manager Barry Reiswig evicted four long-time ranchers who held grazing permits on the Refuge. *Id.*

As a result of Reiswig's efforts, in 2003 sage grouse counts were at an all-time high. Migratory birds absent from the refuge for decades had returned. Forbs, which are essential food for pronghorn antelope, had increased 300% in some locations. And the survival rate for pronghorn fawns in 2003 was the highest since the founding of the refuge in 1936. *Id.* Finally, conservation groups have joined together to make an ambitious proposal to bring an immediate end to the negative impacts of livestock grazing on every watershed on public lands in the West. *See, e.g.*, National Public Lands Grazing Campaign, *available at* <http://www.publiclandranching.org/>.

The permit buy-out proposal presents a rare opportunity to appease a broad spectrum of interest groups in the public livestock-grazing debate, including ranchers who could volunteer for the program and would be paid almost triple the market value per Animal Unit Month of federal grazing permits. As a result, permit buy-outs may be especially valuable for ranchers who wish to keep their private land while receiving a one-time payment. Fiscal conservatives in Congress should also appreciate the proposal, which would have an annual net cost of \$500 million and a payback period of about six years, if all public-lands grazing permits were retired. *Id.* In addition, the permanent elimination of federal administrative costs of public lands in the west would provide cumulative and ongoing savings after the initial six-year payback period. *Id.*

porting the more amicable reforms promoted by property-rights proponents.³⁷⁷ These include tweaking one aspect of the law that many see as unfair: it applies not only to federal land, but also to private landowners. And over the years, protecting endangered species and habitat has cost landowners many millions of dollars by limiting development and reducing farm and ranch production. Some environmentalists acknowledge that if society wants to protect species and habitat on private land, the taxpayers should do more to pay for it. There have been some attempts to reform the law. Changes made during the Clinton administration, for example, allow landowners some flexibility if they participate in “habitat conservation plans” and obtain permits for impacts on endangered species. However, so far, Congress has failed to provide significant cash to landowners.³⁷⁸ Especially for the livestock industry, however, such changes would shift the burden of the ESA’s impact on reduced production from private property holders to taxpayers. Yet, in the context of livestock grazing, such reformists overlook taxpayers who are already paying the bills.³⁷⁹ Calls for reform of the ESA may instead add fuel to the arguments of those calling for removal of livestock from the public altogether.

In either case, federal agencies clearly may use their existing authority and management discretion to give the long-term health of public rangelands and riparian areas the highest priority and to adapt management, budget, and personnel priorities accordingly. Further, federal land managers, administrative bodies, and federal courts should recognize the numerous inherent impediments to meeting objectives and obtaining results when considering environmental laws and account for them in decision-making.

³⁷⁷ *Where Do We Go From Here? Taking the West Forward*, *supra* note 362.

³⁷⁸ *Id.*

³⁷⁹ In 2003, for instance, while the BLM spent \$50 million on issuing permits, developing grazing-management plans, monitoring range conditions, and other administrative costs, permittees paid the Agency only about \$12 million. April Reese, *Calling it Quits*, *HIGH COUNTRY NEWS*, Apr. 4, 2005, at 10; *see also* KAREN MOSKOWITZ & CHUCK ROMANIELLO, *CTR. FOR BIOLOGICAL DIVERSITY, ASSESSING THE FULL COST OF THE FEDERAL GRAZING PROGRAM* 4 (2002). Federal grazing fees are notoriously low; ranchers pay just \$1.79 per Animal Unit Month in such fees, far below the \$5 to \$15 per Animal Unit Month for grazing state or private lands. *Id.* Therefore, the grazing program costs the federal government about \$124 million annually, largely because attempts to increase grazing-permit fees have failed repeatedly under the weight of intense industry opposition when all of the agencies are included. *Id.*

In a speech to BLM employees in March 2000, then-Secretary of the Interior Bruce Babbitt outlined the agency's future:

[T]he BLM faces a choice. It can become the greatest modern American land management agency, the one that sets the standard for protecting landscapes, applying evolving knowledge and social standards, and brings people together to live in harmony with the land. Acting with public and private partners, the BLM can be the paradigm of the Interior Department's 150th anniversary motto: Guardians of the past, stewards of the future.

Or it can become a relic, a historical artifact, its most desirable lands carved up and parceled out to other land management agencies, with the remainder destined for the auction block of divestiture.³⁸⁰

³⁸⁰ Bruce Babbitt, Secretary, U.S. Dept. of the Interior, Speech at BLM Interactive Town Hall Meeting (Feb. 24, 2000).