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Tony A. Sullins

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**ENDANGERED SPECIES ACT—Judicial Review of an
Emergency Listing — A Wasteful Allocation of Resources?
City of Las Vegas v. Lujan, 891 F.2d 927 (D.C. Cir. 1989).**

INTRODUCTION

On August 4, 1989, Secretary of the Interior Manual Lujan, pursuant to his authority under the Endangered Species Act (ESA),¹ issued an emergency order listing the desert tortoise as an endangered species.² Though this particular action spawned the controversy in *City of Las Vegas v. Lujan*,³ the saga of the desert tortoise actually began many years ago.

The desert tortoise inhabits the arid regions of the southwestern United States and Mexico.⁴ As early as 1985, the United States Fish and Wildlife Service determined that the tortoise was in significant danger of extinction, but that listing the tortoise under the ESA was precluded by pending listings of higher priority.⁵ Subsequent to 1985, the Fish and Wildlife Service made annual findings under the authority of section 4(b)(3)(C) of the ESA, that listing the desert tortoise was "warranted but precluded."⁶ The practical result of these findings was that the tortoise was not afforded any of the protections of the ESA, even though protection was warranted.⁷ In May 1989, three environmental organizations⁸ petitioned to have the tortoise listed as an endangered species throughout its entire range.⁹ The petitioners presented evidence that the desert tortoise was facing threats serious enough to warrant emergency listing.¹⁰ The Fish and Wildlife Service reviewed the petitioners' claims and decided that an emergency listing was warranted.¹¹ The emergency listing as promulgated listed only the

1. 16 U.S.C. §§ 1531-43 (1988).

2. Emergency rule, 54 Fed. Reg. 32,326 (1989).

3. *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989).

4. 54 Fed. Reg. 32,326 (1989).

5. *Id.* See *infra*, notes 33-44 and accompanying text for an overview of the listing authority under the ESA.

6. 54 Fed. Reg. 32,326 (1989). See also 16 U.S.C. § 1533(b)(3)(B)(iii) (1988) allowing warranted but precluded status only when expeditious progress is being made to add other qualified species to the list of endangered and threatened species. Thus, warranted but precluded status is to be used in those cases when the Fish and Wildlife Service simply does not have the time or resources to proceed with listing an otherwise warranted species.

7. 16 U.S.C. § 1538(a)(1) (1988). The protections of the ESA extend only to species "listed pursuant to section 1533." *Id.*

8. 54 Fed. Reg. 32,326 (1989). The petition was filed by the Environmental Defense Council, the Natural Resources Defense Council, and Defenders of Wildlife. These same three groups had originally petitioned for listing in 1984. *Id.*

9. *Id.* The ESA allows the Secretary of the Interior to list *populations* of a species as endangered, without including all members of the biological species. 16 U.S.C. § 1532(16) (1988).

10. 54 Fed. Reg. 32,326-27 (1989). Emergency listing is to be used by the Secretary in regard to "any emergency posing a significant risk to the well-being of any species . . ." 16 U.S.C. § 1533(b)(7) (1988).

11. 54 Fed. Reg. 32,327 (1989).

Mojave population of the desert tortoise and specifically excluded the Sonoran population.¹² As required by the ESA, the emergency listing was accompanied by a discussion of the reasons justifying the action.¹³ Among those justifications were habitat destruction,¹⁴ predation,¹⁵ vandalism,¹⁶ and the presence of Respiratory Distress Syndrome.¹⁷

The City of Las Vegas and private real estate developers (Appellants) filed suit seeking to enjoin implementation of the emergency listing of the desert tortoise.¹⁸ Appellants contended that the listing was arbitrary and capricious and thus violative of the Administrative Procedure Act.¹⁹ Additionally, Appellants argued that protection of the tortoise would virtually halt private construction and public works projects in southern Nevada, thereby inflicting irreparable injury.²⁰ The Federal District Court for the District of Columbia denied Appellants' request for an injunction pending final resolution on the merits.²¹ Appellants then appealed the denial of preliminary relief.²²

The United States Court of Appeals for the District of Columbia Circuit unanimously affirmed the district court's denial of preliminary relief on the grounds that the Secretary's action was not arbitrary and capricious, and thus the ultimate quest for a permanent injunction would fail on the merits.²³ Furthermore, the court held that judicial scrutiny of emergency ESA listings is more deferential than scrutiny of normal ESA listings.²⁴

This casenote will analyze the deferential standard used to review emergency listings, concluding that the court's reasoning was in accor-

12. *Id.* at 32,326. The Mojave population of the desert tortoise includes tortoises in California, southern Nevada, and southwestern Utah. The Sonoran population is found in Arizona and Mexico. The populations are separated physically by the Colorado River. *Id.*

13. 16 U.S.C. § 1533(b)(7)(A) (1988). This section provides that the Secretary must publish in the Federal Register "detailed reasons why such regulation is necessary." *Id.*

14. 54 Fed. Reg. 32,327 (1989).

15. *Id.* The tortoise's primary natural predator is the common raven. Due to increasing human activity, raven populations in the southwestern deserts have increased. Ravens are thought to be attracted to sewage ponds and landfills. *Id.*

16. *Id.* at 32,329. Vandalism includes "shooting and crushing of tortoises under vehicles." *Id.*

17. *Id.* at 32,328. Respiratory Distress Syndrome is a fatal condition which may afflict mature tortoises. Little is known about the disease, but scientists suspect it is aggravated by stress. *Id.*

18. *City of Las Vegas v. Lujan*, Memorandum Order, No. 89-2216 (D.D.C. Aug. 24, 1989).

19. Administrative Procedures Act, 5 U.S.C. §§ 551-706 (1988). Unless otherwise specified by statute, agency actions which violate the provisions of the APA may be set aside upon review. *Id.* § 706(2)(A).

20. Appellant's Brief at 12, *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (Nos. 89-5352, 89-5362).

21. *City of Las Vegas v. Lujan*, Memorandum Order, No. 89-2216 (D.D.C. Aug. 24, 1989).

22. *City of Las Vegas*, 891 F.2d at 929.

23. *Id.*

24. *Id.* at 932.

dance with prior ESA case law and legislative intent. In practical terms, the pursuit of injunctive relief from emergency listings seems futile and counterproductive.

BACKGROUND

Congress enacted the Endangered Species Act²⁵ in 1973 as a means to "conserve"²⁶ endangered and threatened species and the ecosystems upon which they depend.²⁷ Congress found that "fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,"²⁸ and that "economic growth and development untempered by adequate concern and conservation" had led to the extinction of many species of wildlife and plants.²⁹ By enacting the ESA, Congress provided a workable framework to identify and protect those species in danger of extinction.³⁰ The Act's listing provisions,³¹ and appurtenant prohibitions³² interact to provide a statutory framework to effectuate the ESA's sweeping conservation mandate.

The authority to list a species as threatened or endangered is vested with the Secretary of the Interior, and in some cases with the Secretary of Commerce.³³ A listing may be initiated by the appropriate Secretary or by petition from any interested party.³⁴ If a petition is presented to the Secretary,³⁵ he must determine within ninety days whether there is substantial information to suggest that the petitioned action is warranted.³⁶ If such information is found to be present, the Secretary has twelve months to review relevant information on the species in question.³⁷ The Secretary must use information gained in the status review to reach one of three possible conclusions: (1) that

25. 16 U.S.C. §§ 1531-43 (1988).

26. *Id.* § 1532(3) defines "conserve," "conserving," and "conservation" as follows: "to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."

27. 16 U.S.C. § 1531(b) (1988).

28. *Id.* § 1531(a).

29. *Id.*

30. See M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW*, 319 (rev. ed. 1983). Mr. Bean refers to the ESA as "the first federal statute to embody a truly comprehensive federal effort at wildlife preservation." *Id.*

31. 16 U.S.C. § 1533 (1988).

32. *Id.* § 1538.

33. *Id.* § 1533(a)(2). Generally, the Secretary of Commerce is authorized to list only marine mammals. All other organisms fall within the authority of the Secretary of the Interior. *Id.*

34. *Id.* § 1533(b)(1)(A)-(b)(3)(A).

35. The duties of the Secretary of the Interior are actually delegated to the Fish and Wildlife Service, and the duties of the Secretary of Commerce are delegated to the National Marine Fisheries Service. 50 C.F.R. § 17.2(b) (1989).

36. 16 U.S.C. § 1533(b)(3)(A) (1988).

37. *Id.* § 1533(b)(3)(B). The only two actions which may be petitioned for under this section of the ESA are, to add a species to, or remove a species from the threatened or endangered list.

the petitioned action is warranted; (2) that the petitioned action is not warranted; or, (3) that the petitioned action is warranted but precluded by other pending proposals of higher priority.³⁸ If the Secretary determines that the petitioned action (listing or delisting) is warranted, he must publish a proposal in the Federal Register to delist or list the species as endangered or threatened.³⁹ The Secretary then has one year in which to make a final decision.⁴⁰

The formalities of normal listing do not apply when the Secretary exercises his emergency listing authority.⁴¹ The Secretary satisfies all procedural requirements of emergency listing simply by publishing notice of the rule in the Federal Register,⁴² provided the notice includes the Secretary's reasons for taking emergency action.⁴³ An emergency rule is only effective for 240 days, in which time formal rulemaking procedures may be carried out.⁴⁴

Obviously, the mere presence of an animal's name on a list does nothing to ensure the survival of that species. However, the "listing"⁴⁵ of a species as endangered or threatened carries with it a potent array of protections. Perhaps the most important of these is the ESA's prohibition against "takings."⁴⁶ The definition of this term is broad in scope;⁴⁷ virtually any action which may "harm"⁴⁸ the listed species is a prohibited taking. In addition, the ESA dictates that all federal agen-

38. *Id.* If a finding of "warranted but precluded" is made, the Secretary must reevaluate the petition every twelve months. *Id.* § 1533(b)(3)(C)(i).

39. *Id.* § 1533(b)(2)(B)(i). The Act defines the term "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range . . ." *Id.* § 1532(6).

The term "threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

40. *Id.* § 1533(b)(6)(A). Within this one-year period, the Secretary must analyze the available scientific data pertinent to the proposed listing (or delisting) and, if requested, hold a public hearing on the proposed regulation. Ultimately, he may decide to publish the proposed rule in final form, withdraw the proposed rule, or in special circumstances extend the one-year period. *Id.*

41. *Id.* § 1533(7) (waives the APA's procedural requirements found in 5 U.S.C. § 553).

42. *Id.* § 1533(b)(7).

43. *Id.*

44. *Id.*

45. The official "List of Endangered and Threatened Wildlife" is found at 50 C.F.R. § 17.11 (1989).

46. 16 U.S.C. § 1538(a)(1)(B) (1988) provides that it is unlawful to "take" any such species within the United States or the territorial sea of the United States."

47. *Id.* § 1532(19) defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or the attempt to engage in any such conduct."

The Senate Conference Report of the original bill made clear that "take" was meant to be broad. The report provides that "'take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." See S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973).

48. See 50 C.F.R. § 17.3(c) (1989), defining "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.*

cies seek to conserve listed species.⁴⁹ Any action taken by an agency which is likely to jeopardize the continued existence of a threatened or endangered species is prohibited.⁵⁰

The potential for conflict between land development and the ESA is high because of the Act's powerful conservation mandate. The famous "snail darter case" of 1978 exemplifies the type of conflict which can arise under the ESA.⁵¹ In *T.V.A. v. Hill*, the Supreme Court was asked to enjoin final construction of the Tellico Dam to save the habitat of the endangered snail darter.⁵² After an exhaustive review of the ESA's legislative history,⁵³ the Supreme Court concluded that an injunction against construction of the dam should be granted.⁵⁴ The Court held that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction whatever the cost."⁵⁵ This language underscored the absolute nature of the ESA's prohibitions and prompted many to complain that the Act was hopelessly inflexible.⁵⁶ In the years since *Hill*, lower federal courts have generally echoed the Supreme Court's sentiments, and *Hill* is often cited as determinative of the ESA's purpose.⁵⁷

Given the ESA's strength, a listing decision can be extremely important and controversial.⁵⁸ Agency actions taken under the ESA, including listing decisions, are subject to judicial review under the Administrative Procedures Act (APA).⁵⁹ In any action brought under the

49. 16 U.S.C. § 1536(a)(2) (1988). It is helpful at this point to emphasize that ESA provisions establishing federal agency obligations under the Act were not at issue in *City of Las Vegas v. Lujan*. To the contrary, Appellants' challenge to the desert tortoise arose because of the ESA's prohibition of certain *private* actions (primarily development of land on which desert tortoises are known or thought to exist). See *infra* note 20 and accompanying text.

50. 16 U.S.C. § 1536(a)(2) (1988). Under Section 7 of the ESA, federal agencies must consult the Secretary of the Interior to obtain assurance that their actions will not violate the Act. *Id.* § 1536 (1988).

51. *TVA v. Hill*, 437 U.S. 153 (1978).

52. *Id.* at 166. The Tellico Dam was 80% complete when the snail darter (a small fish) was discovered, and \$78 million was already invested in the project. Biologists thought that the reservoir created by the dam would ultimately destroy all of the snail darter's habitat. *Id.*

53. *Id.* at 173-93.

54. *Id.* at 194.

55. *Id.* at 184.

56. M. Bean, *supra* note 30, at 355. In 1978, the ESA was amended to allow possible exemptions from the Act's prohibitions. Pub. L. No. 95-632, 92 Stat. 3751 (1978). The Act was again amended in 1982 to allow "incidental takings" of listed species. 16 U.S.C. § 1539(a)(1)(B) (1988).

57. See generally *Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990); *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988); cf. *State of Louisiana ex rel Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988).

58. M. Bean, *supra* note 30, at 334 (stating that "the key determination from which all other consequences of the Endangered Species Act flow is the determination to list a species as endangered or threatened.")

59. Administrative Procedure Act, 5 U.S.C. § 706 (1988). See generally *Cabinet Mountain Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982).

ESA, courts will review the challenged agency action to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁶⁰

In *Cabinet Mountain Wilderness v. Peterson*, the United States Court of Appeals for the District of Columbia Circuit endeavored to clarify the proper standard of review under the ESA.⁶¹ The court held that since the ESA does not specify any standard of review, the APA's standards must apply.⁶² Also, a court must confine its review to the administrative record before it and de novo proceedings may not be held.⁶³ *Cabinet Mountain* served to underscore the fact that courts had consistently applied the "arbitrary and capricious" standard of review in ESA cases.⁶⁴

A clear-cut level of judicial scrutiny is elusive, however, as courts have continually struggled to articulate a definition of "arbitrary and capricious."⁶⁵ Professor Koch argues that the term "arbitrary" is difficult to define judicially because the word itself carries all the meaning needed.⁶⁶ Accordingly, "the ordinary meaning of arbitrary conveys the lower critical evaluation demanded of the reviewing court and the sense that the court should be very tolerant unless the judgment is beyond all boundaries of acceptability."⁶⁷

Generally, the degree of deference provided by the "arbitrary and capricious" standard depends on the particular facts of the case at bar. In *Natural Resources Defense Counsel v. SEC*, the court stated that it was impossible to apply the concept of "arbitrary and capricious" generally, and that the stringency of review in a given case would depend upon a number of factors present in that particular case.⁶⁸ Notwithstanding this unsettled definition, APA case law adds some clarification.⁶⁹

60. 5 U.S.C. § 706 (1988).

61. 685 F.2d 678 (D.C. Cir. 1982).

62. *Id.* at 685.

63. *Cabinet Mountain*, 685 F.2d at 685 (quoting *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)).

64. *National Wildlife Fed'n v. Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976); *Cayman Turtle Farm v. Andrus*, 478 F.Supp. 125, 131 (D.D.C. 1979).

65. C. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 9.6 at 97 (1985 & Supp. 1990) (stating that "there is no clear meaning for arbitrariness review").

66. *Id.* at 99.

67. *Id.* at 100.

68. 606 F.2d 1031, 1050 (D.C. Cir. 1979).

69. *See generally* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *on remand* 335 F. Supp. 873 (D. Tenn. 1972) (Court held that the applicable standard of review under § 706 of the APA was a deferential one); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency must show rational connection between facts found and the choice made in order to survive judicial review); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (lack of reason or logic in the decisionmaking process will result in judicial veto of the agency action).

Judicial review under the ESA has steadfastly followed the "arbitrary and capricious" standard.⁷⁰ ESA listings, as with any agency action challenged under the APA, are accorded a rebuttable presumption of validity.⁷¹ However, the agency must set forth the ground upon which it acted, and a court will not blindly apply deference to agency "expertise."⁷² Nonetheless, listings promulgated under the ESA are only infrequently challenged and have never been challenged successfully.⁷³ In the face of the ESA's strong conservation mandate and the deferential review of agency actions under the Act, invalidation of an emergency listing is a formidable task, to say the least.

PRINCIPAL CASE

City of Las Vegas v. Lujan was, in one major respect, a case of first impression; never before had an emergency listing promulgated under the ESA been challenged in court.⁷⁴ The Appellants sought a preliminary injunction to enjoin implementation of the emergency listing of the desert tortoise.⁷⁵ Thus, the court was asked to evaluate the Appellants' likelihood of final success on the merits.⁷⁶ The court stated: "At the threshold of our evaluation of appellants' likelihood of success on the merits of their challenge to the emergency listing is a determination of the appropriate standard to review the lawfulness of emergency regulations—as opposed to regulations that emerge from normal rulemaking."⁷⁷ The court recognized that all action taken by the Secretary pursuant to the ESA is subject to the APA's arbitrary and capricious standard, but that "what might constitute arbitrary and capricious action . . . in the normal course of events might well pass muster under the emergency provisions of 16 U.S.C. § 1533(b)(7)."⁷⁸ The Appellants' burden was thus greater than it would have been if they were challenging a normal listing.

70. See *supra* notes 60-64.

71. See *Spotted Owl v. Hodel*, 716 F.Supp. 479 (W.D. Wash. 1988).

72. *Id.* at 483.

73. Interestingly, the Secretary was once found to have acted arbitrarily by *not* listing a species. See *Spotted Owl*, 716 F. Supp. at 479. The district court for Washington's western district held that the Secretary had ignored scientific evidence without providing justification. *Id.*

74. Emergency regulations (as opposed to emergency listings) promulgated under the ESA have been challenged; see *State of Louisiana ex rel Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988) (court upheld emergency regulation requiring shrimp trawlers to acquire Turtle Excluder Devices for nets); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.2d 125 (1979) (court upheld emergency regulation eliminating mariculture exemption for taking of sea turtles).

75. *City of Las Vegas*, 891 F.2d at 929.

76. The test for obtaining an interlocutory injunction is set forth in *W.M.A.T.A. v. Holiday Tours, Inc.* 559 F.2d 841, 843 (D.C. Cir. 1977). The factors considered by the court upon a motion for interim relief are: (1) likelihood of success on the merits, (2) likelihood of irreparable harm absent interim relief, (3) prospect of harm to others if interim relief is granted, and (4) the effect upon the public interest of granting or denying interim relief. *Id.*

77. *City of Las Vegas*, 891 F.2d at 932.

78. *Id.*

First, Appellants argued that the Secretary based the emergency listing on inferior scientific evidence.⁷⁹ This argument focused on the disputed presence of Respiratory Distress Syndrome in Nevada tortoises. Appellants claimed that “there is no scientific evidence to support the Service’s conclusion that the Respiratory Syndrome has affected Nevada’s wild desert tortoise population.”⁸⁰ Indeed, there was no *concrete* evidence of the disease in Nevada at the time of the emergency listing.⁸¹ The Secretary maintained, however, that the disease had been identified as a contributing factor in the decline of the tortoise,⁸² and that the disease had to be “viewed against the background of the many other serious factors detrimentally affecting wild tortoise populations.”⁸³ The court held that in emergency situations, the Secretary is entitled to rely on inconclusive data, and that since there was no allegation that he disregarded scientifically superior evidence, he had satisfied his duty under the ESA.⁸⁴ Furthermore, the court held that the propriety of the emergency listing did not depend on the Secretary possessing evidence of the existence of Respiratory Distress Syndrome. The mere potential for Respiratory Distress Syndrome in Nevada tortoises would be sufficient to justify the emergency regulation.⁸⁵

Second, Appellants contended that the emergency listing was an impermissible departure from prior practice and precedent without explanation.⁸⁶ The crux of this argument was that ESA emergency regulations have “been used rarely, and in those few instances [only] to address a specific problem for which an emergency regulation provided an immediate solution.”⁸⁷ Appellants contended that this regulation would not provide such a solution.⁸⁸ The court disagreed and noted that Congress specifically directed the Secretary to “use the emergency power preemptively with regard to ‘warranted but precluded’ species.”⁸⁹ Additionally, the court stated that “the Act does not require the Secretary to demonstrate that invoking his emergency power to list a species will stave off the demise of that species, let

79. Appellant’s Brief at 19-22, *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (Nos. 89-5352, 89-5362).

80. *Id.* at 9.

81. 54 Fed. Reg. 32,328 (1989) (setting forth only that Las Vegas veterinarians had seen tortoises brought into their offices with symptoms of Respiratory Distress Syndrome).

82. Brief for Appellee at 12, *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (Nos. 89-5352, 89-5362).

83. *Id.* at 9 (quoting Emergency Rule, 54 Fed. Reg. 32,326 (1989)).

84. *City of Las Vegas*, 891 F.2d at 933.

85. *Id.*

86. *Id.* at 934.

87. Appellant’s Brief at 31, *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (Nos. 89-5352, 89-5362).

88. *Id.*

89. *City of Las Vegas*, 891 F.2d at 934. The court was referring to 16 U.S.C. § 1533(b)(3)(C)(iii) (1988) which directs the Secretary to “make prompt use” of his emergency listing authority.

alone that it will address the specific emergency that led to the listing.”⁹⁰

Ultimately, the court held that the Secretary was entitled to more discretion in issuing emergency listings, than if the rule had evolved from normal rulemaking procedures.⁹¹ The court concluded that Congress intended for the Secretary to use his emergency listing authority “less cautiously.”⁹² In addition, the court held that the emergency listing procedures contemplate a less vigorous process of investigation and explanation than do normal listing procedures.⁹³ This interpretation of the ESA’s emergency listing procedures led the court to unanimously conclude that the Secretary was not acting arbitrarily or capriciously when he listed the desert tortoise as an endangered species.⁹⁴ Absent arbitrary and capricious action, Appellants’ ultimate pursuit of an injunction would fail on the merits.⁹⁵ Thus, the district court’s decision to deny preliminary relief was affirmed.⁹⁶

ANALYSIS

“Absolute discretion, like corruption, marks the beginning of the end of liberty.”⁹⁷ This sentiment runs deep in those who feel the frustrations of dealing with seemingly unrestrained bureaucracy. Somehow, the representational nature of our society seems diminished by the difficulties encountered in holding agencies accountable. However, courts have generally recognized the inadequacy of the judiciary to review the wisdom of public policy,⁹⁸ and the scope of review generally lies between complete *de novo* review and the “rubberstamping” of agency decisions. The “arbitrary and capricious” standard of the APA recognizes the notions of institutional competency, but does not allow *absolute* discretion in agency rulemaking.⁹⁹ Accordingly, the circuit court did not grant the Secretary absolute discretion to promulgate an emergency listing of the desert tortoise. Instead, the court merely allowed emergency listings to stand when based upon rational criteria.

90. *City of Las Vegas*, 891 F.2d at 934 (citing *Louisiana ex rel Guste v. Verity*, 853 F.2d 322, 333 (5th Cir. 1988)).

91. *City of Las Vegas*, 891 F.2d at 932. Writing for the court, Circuit Judge Silberman declined to express any opinion about whether Appellant’s arguments would prevail if the Secretary had engaged in normal rulemaking. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See *supra* notes 76-77 and accompanying text.

96. *City of Las Vegas*, 891 F.2d at 935.

97. *New York v. United States*, 342 U.S. 882, 884 (1951).

98. See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 864 (1984) (“[p]olicy arguments are more properly addressed to legislators and administrators, not to judges”).

99. See O’Reilly, *Deference Makes a Difference: A Study of Impacts of The Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1975) for a good discussion of Bumper’s view of judicial deference. *But see* Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979).

Propriety Of Deference To Emergency ESA Listings

The Secretary's emergency listing authority is especially important given the tremendous number of species in possible need of listing by the Secretary. In 1985, an independent study determined that it would take the Secretary sixty years to make final decisions on all of the approximately four thousand candidate species in need of protection.¹⁰⁰ The emergency listing authority provides a safety net for species caught in this backlog. Strict judicial review of emergency listings would tear a hole in this safety net, allowing many species to slip through to possible extinction.

The court's decision in *City of Las Vegas* to review ESA emergency listings deferentially is a good one. A standard of judicial review demanding scientific *certainty* in support of an emergency listing would render the emergency listing provisions of the ESA useless. An emergency listing would fail on judicial review unless the Secretary had engaged in the very detailed procedures required to gather information and effectuate a normal listing.¹⁰¹ This would obviously circumvent congressional intent that the emergency listing authority be used promptly in regard to "warranted but precluded" species.¹⁰² The following excerpt from the circuit court's opinion highlights this concern.

At least with respect to "warranted but precluded" species, Congress therefore indicated that the Secretary was to use his emergency powers less cautiously—in a sense to "shoot first and ask [all of the] questions later." Our scrutiny of such emergency regulations is therefore less exacting on the Secretary than it would be if he enacted precisely the same regulation and gave the same explanation after normal rulemaking.¹⁰³

The emergency listing provisions of the ESA authorize immediate action "in regard to any emergency posing a significant risk to the well-being of any species of fish, wildlife, or plants."¹⁰⁴ The words "emergency" and "significant" are not defined by the Act, and seem to grant a certain degree of discretion to the Secretary. What may seem to be "significant," or an "emergency" to one person, may not be to another. Furthermore, the courts are not generally situated to collect and weigh scientific evidence needed to make this determina-

100. D. ROHLF, *THE ENDANGERED SPECIES ACT; A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 43 (1989).

101. See *supra* notes 33-40 and accompanying text for a discussion of normal listing procedures under the ESA.

102. Congress specifically directed the Secretary to "make prompt use of" his emergency listing authority. 16 U.S.C. § 1533 (b)(3)(C)(iii) (1988). It follows logically that Congress did not expect the Secretary to possess as high a degree of scientific certainty as he would have in normal listing situations.

103. *City of Las Vegas*, 891 F.2d at 932.

104. 16 U.S.C. § 1533(b)(7) (1988).

tion.¹⁰⁸ The court's proper role then, lies in ensuring that the agency actually relied on the expertise it possesses.¹⁰⁸ The Secretary met that burden in defending the desert tortoise listing.¹⁰⁷

Litigation Alternatives

The deferential standard of review announced in *City of Las Vegas* will probably discourage potential litigants from challenging ESA emergency listings. Consequently, people affected by an emergency listing must either refrain from acts which violate the ESA, or find ways to resolve conflicts created by the listing. In the wake of *City of Las Vegas*, thoughtful and sound use of the ESA's takings exceptions may be more desirable than expensive, and probably futile, litigation.

The ESA itself provides the flexibility to mitigate some of the hardships imposed by its prohibitions. In 1982, the ESA was amended to address the concerns of private landowners who are faced with having otherwise lawful actions prevented by the Act's prohibition against taking.¹⁰⁸ The amendment allows the Secretary to permit takings of listed species so long as "such taking is incidental to, and not the purpose of the carrying out of an otherwise lawful activity."¹⁰⁹

To obtain an "incidental takings" permit, the applicant must submit a Habitat Conservation Plan to the Secretary for approval.¹¹⁰ The plan must specify the impact of the proposed taking, steps the applicant will take to minimize and mitigate the impacts, and alternatives to the planned action.¹¹¹ Before granting the permit, the Secretary

105. The District Court in *Cabinet Mountains Wilderness/Scotchmans Peak Grizzly Bears v. Peterson*, 510 F. Supp. 1183, 1190-91 (D.D.C. 1981) highlighted this concern by stating:

In this case for example, a federal judge sitting in Washington D.C. is asked to speculate on whether there are any grizzly bears in a portion of Montana and whether holes drilled into a mountainside will frighten those bears away. This is not a task judges are equipped to perform, and, in any event, it is not a task they should perform.

106. *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1989).

107. See *supra* notes 78-89 and accompanying text. See also 54 Fed. Reg. 32,326 (1989) (giving reasons for emergency listing).

108. H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2860, 2870.

109. 16 U.S.C. § 1539(a)(1)(B) (1988). Section 7(o) of the ESA offers an alternative to Section 10. Section 7 is analogous to the private "incidental takings permit" and provides another way to avoid litigation in certain situations. Section 7 differs from the private "incidental takings permit" in that an "incidental take" may be allowed where there is a federal agency action involved. If a private landowner can establish some nexus between his proposed activity and the federal agency action (i.e., a § 404 dredge and fill permit under the Clean Water Act), then he may be permitted to "take" some members of a listed species if the Fish and Wildlife Service issues an "incidental take statement." *Id.* § 1536(o). The Secretary's decision to allow incidental takings by federal agencies is communicated to the Agency only after consultation procedures are satisfied under § 1536(b) of the ESA. *Id.*

110. *Id.* § 1539(a)(2).

111. *Id.* (Permit procedures are codified at 50 C.F.R. § 17.22 (1989)).

must find that the taking will not appreciably reduce the likelihood of the survival of the species.¹¹² The incidental takings provision allows development of land to continue, but only after careful consideration of the well-being of the listed species.¹¹³

The availability of the "incidental takings" provision has not gone unnoticed in the aftermath of *City of Las Vegas*. In mid-January 1991, an application for an incidental takings permit was submitted to the Secretary by the Southern Nevada Tortoise Conservation Plan Steering Committee.¹¹⁴ The plan, if approved, would allow development to continue on 22,000 acres of land in the Las Vegas Valley.¹¹⁵ The plan also calls for creation of a 400,000-acre tortoise management area on nearby federal land.¹¹⁶ This plan would allow development in the Las Vegas Valley to proceed, while securing habitat for the desert tortoise. Judicial invalidation of emergency listings would likely eliminate the impetus, and need for, such agreements.

Presumably, the resources invested in litigating the desert tortoise emergency listing could have been allocated to the Habitat Conservation Plan from the beginning. Hindsight indicates that to do so would have been the most productive way to react to the listing. Likewise, foresight suggests that future emergency listings may be met with "incidental take" permit applications instead of lawsuits.

Another litigation alternative found in the ESA is a provision which allows the Secretary to permit takings of listed species for scientific purposes.¹¹⁷ In what Nevada Governor Bob Miller called "a historic settlement,"¹¹⁸ the original parties in *City of Las Vegas* jointly applied for a permit to take desert tortoises for the purposes of scien-

112. *Id.* § 1539(a)(2). See *Friends of Endangered Species v. Jantzen*, 589 F. Supp. 113 (N.D. Cal. 1984). Group challenged Secretary's issuance of an incidental takings permit on the grounds that the permit would appreciably reduce the likelihood of survival of the mission blue butterfly. The court applied the "arbitrary and capricious" standard of review to determine that the permit was valid. *Id.*

The requirement that the incidental taking not reduce the likelihood of survival of the species should be recognized as a severe limitation on the availability of an "incidental takings permit." Consequently, the "incidental takings" exception to the ESA is not always an available option. If the permit application is denied, the applicant must refrain from any actions which will "take" the listed species. See *supra* notes 46-49.

113. See M. Bean, *supra* note 30 for discussion of the merits of the 1982 amendments. But see Comment, *Habitat Conservation Plans Under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243 (1987) for a suggestion that the incidental takings provisions are being misused.

114. Telephone interview with Paul T. Selzer P.C., attorney for the Southern Nevada Tortoise Conservation Plan Steering Committee (Jan. 23, 1991).

115. *Id.*

116. *Id.* The plan dictates that developers will be charged a fee for each acre in which incidental takings are allowed. The money collected will be used to develop and manage the tortoise management area. *Id.*

117. 16 U.S.C. § 1539 (a)(1)(A) (1988) provides that the Secretary may permit takings "for scientific purposes or to enhance the propagation or survival of the affected species"

118. Quoted in the Las Vegas Review Journal, May 2, 1990.

tific research.¹¹⁹ Under the settlement, tortoises are removed from the properties of the original plaintiff developers. Once the tortoises are removed, development will proceed on the approximately seven thousand acres covered by the permit.¹²⁰ The settlement also provided for funding of a Desert Tortoise Conservation Center in which research will be conducted, utilizing the tortoises removed from the original plaintiffs' properties.¹²¹ To the delight of all parties involved, the plan was approved by the Secretary and is being implemented.¹²²

CONCLUSION

A close examination of the emergency provisions and the ESA's available exceptions clearly reveals that litigation of emergency listings may be counterproductive. An emergency listing will expire 240 days from its issuance.¹²³ Within this time frame, a final rule may emerge through normal listing procedures.¹²⁴ In the unlikely event that a challenged emergency rule is actually declared "arbitrary and capricious," a final rule listing the species may soon be in place. Thus, any action which would "take" the species would still be prohibited unless an "incidental takings" or scientific research permit is acquired.

In the interest of time and money, an aggrieved landowner or developer would be wise to concentrate on litigation alternatives from the beginning.¹²⁵ The creative use of the scientific research permit by the parties in *City of Las Vegas* illustrates that there is willingness on the part of the Secretary to utilize the takings exceptions of the ESA when the listed species will not be jeopardized.¹²⁶ A deferential standard of judicial review of emergency listings serves to afford species

119. See 55 Fed. Reg. 9,372 (1990). The research proposed will deal primarily with (1) Respiratory Distress Syndrome, (2) impacts of cattle grazing on tortoises, (3) nutrition, (4) reproduction biology, and (5) methods to reduce tortoise losses near urban areas. *Id.*

120. *Id.*

121. *Id.*

122. As of June 29, 1990, 130 tortoises had been removed from 900 acres and transplanted to the already complete Desert Tortoise Conservation Center. *Las Vegas Review Journal*, June 29, 1990.

123. 16 U.S.C. § 1533(b)(7) (1988).

124. In the case of the desert tortoise, a proposal to list was published on October 13, 1989 (54 Fed. Reg. 42,270 (1989)), and the final designation of the tortoise as a threatened species was published on April 2, 1990 (55 Fed. Reg. 12,178 (1990)).

125. As an intervenor in *City of Las Vegas*, the State of Nevada spent \$128,580 for attorneys' fees. Additionally, the devotion of state employee time to the case was estimated to at least equal the cost of counsel. Letter from Brian Chally, Senior Deputy Attorney General of Nevada, to Tony Sullins (August 24, 1990) (discussing cost of litigation).

126. From a practical standpoint, the availability of a scientific research takings permit is very limited. The language of Section 10(a)(1)(A) clearly states that the permit may be issued only for "scientific purposes," or "to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A) (1988). In the case of the desert tortoise, there was a real and obvious need for research concerning Respiratory Distress Syndrome. See *supra* note 17.

the protections of ESA, while encouraging aggrieved parties to resolve conflicts within the Act's framework.

The disposition of *City of Las Vegas v. Lujan* neither alleviates nor escalates the degree of conflict associated with emergency listings under the ESA. Instead, the case serves to encourage creative resolution of such conflicts as they arise.¹²⁷

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127. See 55 Fed. Reg. 18,844 (1990) (emergency listing of the golden-cheeked warbler as an endangered species). At the time of the listing, a habitat conservation plan was already being prepared and presumably an application for an incidental takings permit will soon follow.