

1994

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Recommended Citation

Sellers, Susan Lamadrid (1994) "The Grizzly State of the Endangered Species Act: An Analysis of the ESA's Effectiveness in Conserving the Yellowstone Grizzly Bear Population," *Land & Water Law Review*. Vol. 29 : Iss. 2 , pp. 467 - 503.

Available at: https://scholarship.law.uwyo.edu/land_water/vol29/iss2/5

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The Grizzly State of the Endangered Species Act: An Analysis of the ESA's Effectiveness in Conserving the Yellowstone Grizzly Bear Population

*"What is man without beasts? If all the beasts are gone, men would die from the great loneliness of spirit, for whatever happens to the beasts also happens to man. All things are connected. Whatever befalls the earth, befalls the sons of the earth."*¹

INTRODUCTION

Five hundred million species have occupied the Earth during its six billion years of existence.² Only ten million of those species survive today.³ The other ninety percent are extinct: only the fossil record and history recount their existence.⁴ Most species died out because of their inability to adapt to changes in the planet's climate and its habitats.⁵ Species which survived evolved in accord with Earth's metamorphisms.⁶

In the normal cycle of evolution and extinction, species evolution exceeds species extinction.⁷ In modern times, man's cultural development has accelerated that cycle to the point that species extinction far exceeds the evolution of new species.⁸ The overall result of this imbalance is the reduction of the planet's biodiversity.⁹

1. Letter from Chief Seattle of the Duwamish Tribe to President Franklin Pierce, in *EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES* 239 (P. Ehrlich & A. Ehrlich 1981) *reprinted in* *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATIONS* 7 (David J. Rolhf 1989).

2. MARVIN SOROOS, *Environmental Policies*, in *ENVIRONMENT AND THE GLOBAL ARENA* 86, 98 (Kenneth Dahlberg et al. eds., 1985).

3. *Id.*

4. *Id.*

5. STARKER LEOPOLD, *Adaptability of Animals to Habitat Change*, in *FUTURE ENVIRONMENTS OF NORTH AMERICA* (F.F. Darling et al. eds., 1966) *reprinted in* *READINGS IN WILDLIFE CONSERVATION* at 152 (James A. Bailey et al. eds., 1974).

6. *Id.*

7. SOROOS, *supra* note 2, at 98.

8. *Id.* Man has accelerated the rate of species' extinction "by hunting and killing other species for food, profit, or sport and by inadvertently undermining their survivability by destroying or altering the habitats upon which they depend." *Id.* Ecologists estimate that species are becoming extinct at a rate of 100 species per day. NORMAN MYERS, *THE SHRINKING ARK: A NEW LOOK AT THE PROBLEM OF DISAPPEARING SPECIES* 48 (1979).

9. SOROOS, *supra* note 2, at 98.

In the 1960's, Congress recognized that the loss of species deprived the people of the United States of a valuable asset.¹⁰ Congress subsequently enacted the Endangered Species Act of 1973 [hereinafter ESA] in an attempt to slow the rate of extinction of various species of fish, wildlife, and plants.¹¹ Congress intended the Act to provide a means of conserving endangered and threatened species and the ecosystems essential to their survival.¹²

Two years after the enactment of the ESA, the Secretary of the Interior [hereinafter Secretary] listed the grizzly bear as a threatened species.¹³ Because the grizzly bear was one of the first species afforded protection under the ESA,¹⁴ the management practices employed to protect the bear offer a prime example of the successes and failures of the ESA.

When Congress enacted the ESA, it passed the most powerful piece of environmental legislation in this country's history.¹⁵ The purpose of this comment is to analyze whether federal and state grizzly bear conservation practices under the ESA are sufficient to effectuate the Act's conservation goal and save the bear. To familiarize the reader with the setting in which Congress enacted the Endangered Species Act of 1973, this comment will first discuss the doctrine of state ownership of wildlife and how the federal government eventually preempted state control. This comment will address the popular contentions that the state should have primary management authority over the grizzly bear and that the ESA and

10. The Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, (1966). Similarly, in 1973 Congress recognized that endangered and threatened species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people" and enacted the Endangered Species Act. 16 U.S.C. § 1531(a)(3) (1988).

11. 16 U.S.C. § 1531(a)(1), (2), (4) (1988). The Endangered Species Act was enacted as Pub. L. No. 93-205, § 2, 87 Stat. 884 on December 28, 1973. The Act was subsequently amended: in 1979 by Pub. L. No. 96-159, § 1, 93 Stat. 1225 (1979); in 1982 by Pub. L. No. 97-304, § 9(a), 96 Stat. 1426 (1982); and in 1988 by Pub. L. No. 100-478, Title I § 1013(a), 102 Stat. 2315 (1988). The ESA is codified at 16 U.S.C. §§ 1531-1543 (1988).

12. 16 U.S.C. § 1531(b) (1988).

13. 40 Fed. Reg. 31,734 (1975) (codified at 50 C.F.R. § 17.11). This listing only affords protection to the grizzly found in the lower forty-eight states.

The grizzly bear met the criteria for threatened status for the following reasons: 1) there exists both present and threatened future destruction and/or modification of its habitat; 2) there is at present a loss or potential loss of bears by illegal killing and by control actions involving grizzly bears threatening humans or killing livestock; 3) critical data are lacking on grizzly habitat conditions, carrying capacity, population estimations, annual reproduction, mortality and population trends; and 4) some existing populations appear to be isolated from each other and cannot be reinforced by movements from other areas.

INTERAGENCY GRIZZLY BEAR COMMITTEE, INTERAGENCY GRIZZLY BEAR COMPENDIUM 1 (1987).

14. 40 Fed. Reg. 31,734 (1975) (codified at 50 C.F.R. § 17.11).

15. Tennessee Valley Authority v. Hill, 437 U.S. 153, 172 (1978).

grizzly bear regulations effectuate a Fifth Amendment taking of private land. Further, this comment will discuss the validity of those notions and their detrimental impact on the implementation of the ESA by analyzing the Interagency Grizzly Bear Committee's management of the bear. This comment will conclude that federal and state grizzly bear management efforts under the ESA are insufficient to effectuate Congress's conservation mandate. Finally, this comment will propose that Congress can assure that state and federal agencies comply with the intent of the ESA by directing the Secretary of the Interior to implement education programs and by clarifying the mandate of the ESA.

BACKGROUND

State Control of Wildlife

Americans have historically considered wildlife management to be a state function.¹⁶ The concept that the state has the right to control the wildlife within its territories dates back to feudal Europe and England.¹⁷ In those societies, respectively, feudal lords and kings prohibited members of their conquered communities from hunting.¹⁸ In England, the king's regulatory power over hunting gradually shifted to Parliament.¹⁹ When the American Revolution commenced, the Crown and Parliament alone regulated wildlife within British territories.²⁰

When the colonies became an independent nation, individual states assumed control of local wildlife.²¹ Early American courts furthered the state ownership ideology by finding that, after the Revolution, the colonial governments inherited the powers of Parliament and the Crown to regulate natural resources.²² In 1896, the Supreme Court formally

16. R. Rosenberg, *Federal Protection of Unique Environmental Interest: Endangered and Threatened Species*, 58 N.C.L. REV. 491, 496-497 (1980).

17. MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 10 (rev. ed. 1983).

18. *Id.* at 10-11. According to Sir William Blackstone, feudal barons and kings of Europe prohibited the persons they conquered from hunting to deter them from holding arms. *Id.* (citing 3 W. Blackstone, *Commentaries* 413). Similar restrictions developed across the sea in England. Lands that were not distributed to nobles after the Norman conquests were reserved as royal forests where only the king and those with his permission could hunt. Later, the king retained the right to hunt. *Id.*

19. *Id.* at 12. In an attempt to keep weapons from the populous, Parliament enacted "qualification statutes" which only allowed persons with sufficient wealth to hunt. *Id.*

20. *Id.* at 11.

21. *Toomer v. Witsell*, 334 U.S. 385, 400 (1948) (citing *Geer v. Connecticut*, 161 U.S. 519 (1896)).

22. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 412 (1842). In that New Jersey case, the issue was whether a riparian landowner could exclude others from taking oysters from a river's mud flats that the riparian owner held under a grant from the King of England. Chief Justice Roger Taney

enunciated the theory of state ownership of wildlife.²³ Early federal courts frequently utilized the state ownership doctrine to thwart federal attempts to regulate wildlife.²⁴

The Emergence of Federal Power to Control Wildlife

The judiciary subsequently abandoned those early decisions and upheld the power of the federal government to regulate wildlife within state borders under the Supremacy Clause,²⁵ the Property Clause,²⁶ and the Commerce Clause.²⁷ The first blow to the state ownership doctrine occurred in 1920 when the Supreme Court upheld the ability of federal government to enforce provisions of a wildlife treaty under the Supremacy Clause.²⁸ Within the next decade, courts determined that the Property

determined that the grant was made after the enactment of the Magna Carta, and as such, the King no longer had the power to grant rights to navigable water and rather held the property for the public trust. For other cases upholding state's right to control wildlife, *see also* *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (state ownership of soil conferred upon the state the power to regulate the oysters in the soil) and *McCready v. Virginia*, 94 U.S. 391 (1876) (the state not only owned tidewaters but fish in them).

23. BEAN, *supra* note 17, at 17 discussing *Geer v. Connecticut*, 161 U.S. 519 (1896). The issue in that case was whether a state statute prohibiting persons from taking game birds out of state improperly interfered with Congress's power to regulate interstate commerce. The Court determined that the states had the right to control wildlife and "even if interstate commerce was impeded, the 'duty of the State to preserve for its people a valuable food supply' authorized the exercise of the state's police power to that end so long as interstate commerce was only 'remotely and indirectly affected.'" *Geer* became the foundation for the state ownership doctrine. *Id.* Compare the *Geer* Court's determination with Judge Taney's qualification in *Martin v. Waddell* that "the powers assumed by the state were 'subject ... to the rights since surrendered by the Constitution to the general government.'" BEAN, *supra* note 17, at 14 citing *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

24. In *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919) and in *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915), the respective district courts rejected the federal government's attempt to regulate migratory birds through the Migratory Bird Act. Those courts rejected the government's claims that the migratory nature of birds subjected them to federal control and that the Property Clause gave the federal government power to make necessary regulations regarding wildlife. The courts rejected the latter argument because *Geer* determined that the birds were the property of the state. BEAN, *supra* note 17, at 20. Until the twentieth century, the federal government did not successfully enact any significant wildlife legislation. The Lacey Act of 1900 was the federal government's first notable step in the area of wildlife regulation. BEAN, note 17, at 17-18. That Act prohibited interstate commerce of animals killed in violation of state law. Current version at 16 U.S.C. §§ 701, 3371-3378 (1988) and 18 U.S.C. § 42 (1988).

25. U.S. CONST. art. VI. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"

26. U.S. CONST. art. IV, § 3. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"

27. U.S. CONST. art. I, § 8, cl. 2. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes"

28. *Missouri v. Holland*, 252 U.S. 416 (1920). There, the state challenged the federal government's ability to enforce federal wildlife legislation set forth in the Migratory Bird Treaty Act.

Clause empowered the federal government to regulate wildlife damaging federal lands.²⁹ In 1976, the Supreme Court abandoned the damage prerequisite for federal regulation of wildlife under the Property Clause³⁰ and noted that courts had not yet established the bounds of federal power under the Property Clause.³¹ A district court has since suggested that threats to important natural resources may suffice to allow the federal government to enact regulations under the Property Clause.³²

In addition to the Supremacy Clause and the Property Clause, Congress has the authority to regulate wildlife under the Commerce Clause. In 1977, the Supreme Court held that Congress could preempt state control of wildlife when the state's control adversely impacted interstate commerce.³³ Congressional power to regulate wildlife under the Commerce Clause has expanded and now extends to nonmigratory species that are not commercially transported amongst the states.³⁴

Enactment of the Endangered Species Act

In the 1960's, acting under power vested by the Constitution's Supremacy Clause, Congress enacted legislation intended to protect endangered and threatened species.³⁵ The culmination of such legislation was the

Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (current version at 16 U.S.C. §§ 703-711 (1976 & Supp. V 1981)).

29. *Hunt v. United States*, 278 U.S. 96 (1928) and *Chalk v. United States*, 114 F.2d 207 (4th Cir. 1940). Though the requirement that wildlife damage federal property before the federal government could preempt state control of wildlife within state borders was discarded in *New Mexico State Game Commission v. Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. denied sub nom. New Mexico State Game Comm'n. v. Hickel*, 396 U.S. 961 (1969), courts continued to require some sort of nexus protecting land and regulating wildlife. BEAN, *supra* note 17, at 24.

30. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). The Supreme Court found that protection of federal land was not a prerequisite for federal action under the Property Clause. *Id.* at 537.

31. *Id.* at 541.

32. *Palila v. Hawaii Department of Land and Natural Resources*, 471 F.Supp. 985 (D. Ha. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

33. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 (1977); *see also Hughes v. Oklahoma*, 441 U.S. 322 (1979) and *Andrus v. Allard*, 444 U.S. 51 (1979).

34. *Palila v. Hawaii Department of Land and Natural Resources*, 471 F.Supp. 985 (D. Ha. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). The district court based its decision on the policy that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species." *Id.* at 995.

35. The first such legislation was the Endangered Species Preservation Act of 1966. Pub. L. No. 89-669, 80 Stat. 926. The 1966 Act enjoyed limited success because it only afforded habitats qualified protection and failed to prohibit taking species threatened with extinction. In 1969, Congress repealed the 1966 Act and enacted the Endangered Species Conservation Act. Pub. L. No. 91-135, 83 Stat. 275 (1969). That Act expanded the provisions for habitat acquisition and prohibited interstate commerce of illegally taken wildlife. The limited scope of the 1969 Act and the Department of the

Endangered Species Act of 1973.³⁶ Congress enacted the ESA in recognition of the value of imperiled species³⁷ and in response to findings that unchecked economic growth and development combined with the detrimental effects of hunting had rendered many species extinct or threatened with extinction.³⁸

The purpose of the ESA is to afford a means for conserving endangered and threatened species and the ecosystems essential for their survival.³⁹ In drafting the ESA, Congress mandated that conservation be the utmost consideration of all entities engaging in actions impacting listed species.⁴⁰ Congress

Interiors narrow interpretation of the Act prompted President Nixon to state that wildlife legislation existing in 1972 "simply does not provide the kind of management tools needed to act early enough to save threatened species." ROHLF, *supra* note 1, at 23 (1989) citing The President's 1972 Environmental Program, 8 WEEKLY COMP. PRES. DOC. 218, 223-24 (Feb. 8, 1972). Thus, the backdrop was set for the enactment of the Endangered Species Act of 1973. 16 U.S.C. §§ 1531-1543 (1988).

36. *Id.*

37. Congress found that endangered and threatened species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3)(1988); *see also* Boyd, *Federal Protection of Endangered Wildlife Species*, 22 STAN.L.REV. 1289, 1290-91 (1970):

Besides the obvious and perhaps more persuasive aesthetic reasons for protecting our wildlife, we are rapidly learning that the preservation of all species of animal life is essential to maintaining the ecological balance necessary for many species to survive. In addition, there is economic importance in preserving wildlife resources for the hunters, fisherman, and wildlife lovers who spend billions of dollars each year pursuing wildlife. Major industries cater exclusively to satisfying these desires, and the indirect impact on the automotive, petroleum, and travel industries is enormous. A final reason for protecting endangered species is particular in the scientific interest in conserving extant species for examination and investigation.

Id.

38. 16 U.S.C. §§ 1531(a)(1),(2) (1988). Congress noted that the "economic growth and development untempered by adequate concern and conservation" in conjunction with the negative impact of recreational hunting was the cause of the extinction of multitudes of wildlife in the United States. S. REP. NO. 307, 93d Cong., 1st Sess. 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. (87 Stat. 884) 2989, at 2990.

39. The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes and treaties and conventions set forth in" this Act. 16 U.S.C. § 1531(b)(1988).

40. Testimony from the House and Senate hearings on the ESA evidences that the goal of the ESA was the restoration of listed species population levels and habitats. *Endangered Species: Hearing on H.R. 37, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife on Conservation and the Environment of the House Comm. on the Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 201, at 204 (1973) (statement of Hon. Nathaniel P. Reed, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior) ("[T]he Act will enable us to provide a 'halfway house' for animals whose populations have not declined to a point where the species is no longer a viable component of its ecosystem, but are not yet restored to where it is ready to be removed from the protective custody umbrella of the Endangered Species Conservation Act.") or *H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 186 (1973); *Endangered Species*, at 241 (statement of A. Gene Galaxy, Director, Michigan Department of Natural Resources, and Chairman, Leg-

vested the Department of the Interior with the power to implement the ESA's conservation scheme.⁴¹ The Secretary of the Interior subsequently promulgated regulations which delegated the duty and authority to conserve listed wildlife and plant species to the United States Fish and Wildlife Service [hereinafter U.S.F. & W.S.].⁴² The Secretary and the Director of the U.S.F. & W.S. share the burden of effectuating the ultimate aim of the ESA, to improve and protect the status of listed species and their habitats so that they no longer require special protection.⁴³ To achieve this end, Congress mandated that all federal agencies participate in the attempt to conserve listed species.⁴⁴ Congress set forth certain procedures for agencies to follow in dealing with the listed species⁴⁵ and prohibited agency actions that would constitute a taking of such species.⁴⁶

Management of the Bear as a Threatened Species

The Secretary listed the grizzly bear as a threatened species on September 1, 1975.⁴⁷ The Secretary listed the bear in an attempt to halt the increasing

islative Committee of the International Association of Game, Fish and Conservation Commissioners) ("[W]hile legal protection and law enforcement are needed, the maintenance of a suitable habitat is vital to the restoration of threatened wildlife."); *see also Endangered Species Conservation Act of 1972: Hearing on S. 3199 and S. 3818 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 68 (1972).

41. 16 U.S.C. §§ 1532(15), 1533(f) (1988). A transition in agency jurisdiction in 1939 gave the Department of Interior over wildlife. ROLHF, *supra* note 1, at 20 (1989). The Supreme Court found that "Congress has authorized - indeed commanded - the Secretary to issue such regulations as he deems necessary and advisable to provide for the conservation of such species." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172 (1977).

42. 50 C.F.R. § 401.1 (1992).

43. Congress sought to "improve the status of endangered and threatened species so that they would no longer require special treatment." Conference Report for the Endangered Species Act of 1973, 1973 U.S.C.C.A.N. 2989, 3002; *see also* the definition of "conserve" at 16 U.S.C. § 1532(3) (1988).

44. 16 U.S.C. § 1531(c)(1) (1988) declares that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." Courts have emphasized that the duty extends beyond mere protection and requires the Secretary to increase populations of listed species. *Organized Fisherman of Florida v. Andrus*, 488 F. Supp. 1351, 1356 n.10 (S.D.Fla. 1980) (citing *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977)).

45. Under the Act, agencies have several affirmative duties: they must comply consult the Secretary prior to commencing any action which might constitute a taking of a listed species or adversely modify or destroy the species habitat, 16 U.S.C. § 1536(a)(2) (1988); they must cooperate with state conservation efforts, 16 U.S.C. § 1535 (1988); and they must comply with regulations that the Secretary promulgates for the species conservation, 16 U.S.C. § 1533(d) (1988).

46. 16 U.S.C. § 1538(a)(1)(B) (1988). For actions constituting a taking of listed species under the ESA, *see infra* note 105 and accompanying text.

47. The grizzly bear was listed as a threatened species on September 1, 1975 in the lower 48 states. 40 Fed. Reg 31,734 (1975) (codified at 50 C.F.R. § 17.11). Whether a species is endangered or threatened is determined by the Secretary of the Interior. 16 U.S.C. § 1533(a)(1) (1988). As de-

number of grizzly bear mortalities, the destruction and modification of grizzly bear habitat, and the habitat fragmentation isolating grizzly bear populations from other breeding groups.⁴⁸ At the time the bear was listed, various forms of development⁴⁹ had reduced the grizzly bear's range by ninety-eight percent in the lower forty eight states.⁵⁰ Several threats arose as the range of the grizzly bear decreased. Breeding populations became isolated from one another.⁵¹ The grizzly bear's capacity to adapt to habitat changes diminished.⁵² The annual number of human and grizzly encounters increased.⁵³ By listing the bear, the Secretary obtained the means to impede the destruction and alteration of grizzly bear habitat.⁵⁴ The Secretary can protect areas containing

fined by the ESA, an endangered species is any species "which is in danger of extinction throughout all or a significant portion of its range," and a threatened species is any species "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6),(20) (1988). The Secretary must use the best scientific and commercial data available in making these determinations. 16 U.S.C. § 1533(b)(1)(A) (1988).

48. See *supra* note 13. Factors considered in the listing process include the present or threatened destruction, modification, or curtailment of a species's habitat or range, over utilization for commercial, recreational, scientific, or educational purposes, disease or predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors affecting a species' continued existence. 16 U.S.C. § 1533(a)(1)(A)-(E) (1988).

49. "Subdivisions, power line corridors, logging roads, recreational development, trails, sight seeing gondolas, energy and mineral exploration or development, and simply more people everywhere degrade grizzly bear habitat by co-locating grizzly bears and people." U.S. FISH AND WILDLIFE SERVICE, 1993 DRAFT GRIZZLY BEAR RECOVERY PLAN 5-6 (1993). Timber management programs removed thermal, resting, and security cover, displaced habitat, and increased grizzly bear/human encounters. Further, new roads were created which also caused bears to abandon the area. *Id.* at 10.

50. Thus the bear had to be listed in order that its range be protected and the bear saved from becoming endangered or extinct. *Id.* at 23.

51. The limitation of the bear's range has resulted in isolating the bear into several populations which have no exposure to other populations for breeding purposes. Letter from David J. Mattson, U.S. Department of the Interior Wildlife Biologist, to Brian Kuehl, University of Colorado Law Review (Oct. 25, 1992) (on file with Brian Kuehl). "In two of the three areas where grizzly bears still occur, the bears are isolated from other populations so that they cannot be reinforced, either genetically or by movement of individual bears." *Id.* Further, "it is widely accepted in conservation biology that island populations of any species are subject to high rates of extinction and that these rates are directly related to the size of the island. Wide ranging animals are particularly sensitive to detrimental effects of insular distribution." *Id.* at 26. The bear can probably survive if areas by which bears could travel to maintain links to other populations and their genetic pools were protected. Harold D. Picton, *A Possible Link Between Yellowstone and Glacier Grizzly Bear Populations*, SIXTH INTERNATIONAL CONFERENCE ON BEAR RESEARCH AND MANAGEMENT 7 (1986).

52. Natural fires and climate changes cause habitat changes which ultimately affect the bear's food sources. Brian Kuehl, Comment, *Conservation Obligations Under the Endangered Species Act: A Case Study of the Yellowstone Grizzly Bear*, 64 U. COL. L. REV. 607 (1993).

53. Human-caused mortality can stem from careless livestock husbandry, including failure to dispose of dead livestock in a manner that minimizes grizzly interactions, protection of livestock, and eroding of grizzly bear habitat for economic values. U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 5.

54. In deciding to classify a species as endangered or threatened, the Secretary must, to the maximum extent prudent, designate the area comprising the animal's critical habitat. 16 U.S.C. § 1533(a)(3) (1988). The ESA protects listed species and their critical habitats by requiring that all

biological and physical features essential for grizzly bear survival by designating them as critical habitat.⁵⁵

When the Secretary listed the bear in 1975, the ESA did not require that the Secretary simultaneously designate critical habitat for listed species.⁵⁶ Because the designation of critical habitat was discretionary under the original Act,⁵⁷ the Secretary was able to avoid designating critical habitat for the bear when strong opposition arose.⁵⁸

Through the Endangered Species Act Amendments of 1982, Congress mandated that the Secretary designate critical habitat concurrent with listing the species.⁵⁹ That amendment, however, does not require the Secretary to designate critical habitat for species listed prior to the amendment. If the Secretary determines that the designation of critical habitat is essential for bear conservation, the ESA does provide a means whereby the Secretary can make a retroactive habitat designation.⁶⁰ Despite that provision, the Secretary has not designated critical habitat for the grizzly bear and is unlikely to do so in the future.⁶¹

"persons" comply with restrictions and prescribed procedures when carrying out any activity which may affect either. The ESA defines persons to include individuals, corporations, and any instrumentality, agent or officer of the Federal or state government. 16 U.S.C. § 1532(13) (1988).

55. 16 U.S.C. § 1533(b)(2) affords the Secretary the power to designate a listed species critical habitat. Critical habitat is defined as "the specific areas within the geographical area occupied by the species, at the time it is listed, . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A) (1988). Critical habitat can also consist of "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(B) (1988).

56. Endangered Species Act of 1973, Pub. L. No. 93-205, § 4, 87 Stat. 886 (prior to 1982 amendment).

57. The Act affords the Secretary the discretion to consider political and social factors in designating critical habitat. 16 U.S.C. § 1533(b)(2) (1988).

58. In 1976, the U.S.F. & W.S. unsuccessfully proposed designating a critical habitat for the bear. 16 U.S.C. § 1532(b) (1988). Political opposition thwarted that designation. The grizzly listing was extremely controversial because of the opposing interests of livestock ranchers (who alleged significant depredation) and sport hunters and because the range of the animal and its large individual territories indicated a need for the critical habitat designation larger than any other previously made—20,000 square miles. Explicit evidence of its controversial nature can be seen in the fact that U.S.F. & W.S. held more public hearings on it than for any other designation. In addition, a special hearing was held by the Senate Committee on Appropriations in Wyoming in late 1976, the only time legislative review of a proposed designation has occurred. Finally, of the fifteen proposals made in 1975 and 1976, the grizzly proposal is the only one still outstanding. STEVEN L. YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED ACT 93 (1982).

59. Pub. L. No. 97-304, § 2(a)(1)(E), 96 Stat. 141, (codified at 16 U.S.C. § 1533(a)(3) (1988)).

60. 16 U.S.C. § 1532(5)(B) (1988).

61. Telephone Interview with David Moody, Trophy Game Coordinator, Wyoming Game and Fish Department (Sept. 27, 1993). The Secretary promulgated regulations which afford a great deal of discretion in designating critical habitat. 50 C.F.R. § 424.12 (1992).

Because the Secretary has not designated critical habitat for the bear, agencies dealing with the grizzly bear have significant leeway in managing bear habitat. The U.S.F. & W.S., the National Park Service, the Bureau of Land Management, the United States Forest Service, and state game and fish departments, [hereinafter member agencies] all manage lands inhabited by the bear. In an attempt to coordinate their efforts, those agencies formed the Interagency Grizzly Bear Committee. The Interagency Grizzly Bear Committee established the Interagency Grizzly Bear Guidelines [hereinafter Interagency Guidelines], which classify areas into one of five management situations. These classifications determine how federal and state agencies manage the grizzly bear within that area.⁶²

An area's classification depends on the importance of the habitat to the grizzly bear.⁶³ According to the Interagency Guidelines, areas containing grizzly bear population centers and habitat features essential for grizzly bear recovery are classified as management situation one areas.⁶⁴ The most important management consideration in situation one areas is conservation of the bear.⁶⁵ When human uses of situation one areas conflict with the needs of the grizzly, member agencies must resolve the conflict in favor of the bear unless the agencies determine that the bear is a nuisance bear.⁶⁶ When problems involving a nuisance bear occur, the agencies involved must pursue all reasonable measures to protect the bear and its habitat before relocating or destroying the bear.⁶⁷ This protection of a nuisance bear is unique to situation one areas: only in situation one management areas do the Interagency Guidelines require member agencies to mitigate factors leading to the nuisance classification before relocating or killing the bear.⁶⁸ The Interagency Guidelines do not afford the bear and its habitat the same level of protection in any other management situation.

Because situation two areas do not contain grizzly bear population centers, do not contain habitat which is particularly suitable for the bear,

62. INTERAGENCY GRIZZLY BEAR COMMITTEE, INTERAGENCY GRIZZLY BEAR GUIDELINES 3 (1986). For a detailed discussion of how each member agency manages the bear in different management situations; see *Id.* at 6-50.

63. *Id.* at 3.

64. *Id.* The Guidelines use the term population center to include "areas key to the survival of the grizzly where seasonal or year-long grizzly activity, under natural, free-ranging conditions is common." *Id.*

65. *Id.*

66. *Id.* Member agencies use criteria set forth in the Interagency Guidelines to determine whether a bear in management situations one or two constitute a nuisance. *Id.* at 53-55.

67. *Id.* at 3. Such measures include closing or curtailing activities in the area inhabited or visited by the bear. *Id.*

68. *Id.* at 4.

and only occasionally contain bears and their habitat components, grizzly conservation is not the primary concern of member agencies managing those areas.⁶⁹ Though the member agencies should attempt to minimize conflicts between human and grizzly uses of situation two areas, the Interagency Guidelines do not require the agencies to curtail activities which adversely affect the bear.⁷⁰ Accordingly, human land uses usually prevail over the grizzly's needs.⁷¹ The only burden that the situation two classification imposes on member agencies is that they do not allow the area to deteriorate to the point where it can no longer be recognized as a situation two habitat.⁷²

The Interagency Committee classifies areas that the bear rarely visits as situation three areas.⁷³ Areas containing campgrounds, resorts, and recreational areas often fall under the situation three management scheme.⁷⁴ Because the risks to humans from grizzly encounters in this area are great, the Interagency Guidelines emphasize minimizing human-grizzly conflicts in situation three areas.⁷⁵

Human-grizzly conflicts are not a consideration in situation four areas because grizzlies do not occupy those areas.⁷⁶ While the member agencies should not allow present conditions to deteriorate, they rarely curtail human activities in situation four areas.⁷⁷

Areas which are inhabited by the bear but which lack survival or recovery value and areas where the bear is not present but the habitat is suitable for its existence are classified as situation five areas.⁷⁸ Although member agencies may engage in habitat maintenance, that activity is optional.⁷⁹ The guidelines do not require member agencies to take any action to conserve potential bear habitat in situation five areas.⁸⁰

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* Any grizzly involved in a human-grizzly conflict is automatically designated as a nuisance in situation three and situation five areas. *Id.* at 35. To minimize human-grizzly conflicts, member agencies discourage activities which would attract the bear. *Id.* at 4. Grizzlies are attracted to food odors associated with man, livestock carrion, garbage, garbage dumps, and game meat in human possession. *Id.* Member agencies also act promptly to control grizzlies involved in human-grizzly encounter and grizzlies frequenting the area. *Id.*

76. *Id.* at 4-5. Areas classified as situation four areas are important instead because of their suitability and potential of becoming grizzly habitat. *Id.*

77. *Id.* at 5.

78. *Id.*

79. *Id.*

80. *Id.*

According to some bear experts, the Interagency Grizzly Bear Committee's management approach is problematic because management situation categories do not necessarily correspond to ecological needs of the grizzly bear.⁸¹ Commentators contend that area classifications are instead determined by political demand for the lands.⁸² This discrepancy has resulted in the grizzly bear and its habitat not being protected when humans seek land essential to the grizzly bear's survival for recreational or economic purposes.⁸³

Although the Interagency Grizzly Bear Guidelines have failed to produce a well accepted means of managing lands occupied by the bear, the Interagency Committee has generally been successful in coordinating its efforts to conserve the bear. Such coordinated federal and state grizzly bear management complies with Congress' mandate that the Secretary consult and cooperate with state conservation efforts.⁸⁴ That mandate reflects Congressional recognition that the participation of state agencies which are knowledgeable of the local wildlife and public attitudes⁸⁵ is essential to the ESA's success.⁸⁶ Accordingly, Congress empowered the Secretary to enter into cooperative agreements with the states.⁸⁷ Coopera-

81. *Id.* at 3-5.

82. The controversy over the Fishing Bridge campground in Yellowstone National Park is a prime example of this discrepancy. The campground is a popular area for tourist. Unfortunately, the bear also frequents the campground which is in the center of a grizzly bear population center. Instead of closing the campground to avoid human-grizzly encounters, the National Park Service kept the campground open due to its popularity. The ultimate result was a law suit; see *Nat'l Wildlife Federation v. National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987).

83. Management situation categories "are incorrectly classified under the MS system, because they do not correspond to ecologically based definitions of management systems." KATHERINE S. YAGERMAN, PROTECTING CRITICAL HABITAT UNDER THE FEDERAL ENDANGERED SPECIES ACT 20 *Env't. L.* 811, 837 n. 119 (1990) (citing a Letter from Tony Povilities, Ph.D, Senior Scientist for Wildlife Management Issues, Wildlife and Environment, Humane Society of the U.S., to Congressman Bruce Vento, Chairman, National Parks & Public Lands Subcommittee of the House Interior & Insular Affairs Committee (Mar. 22, 1989)). Under such management classifications, "important areas of the grizzly bear ecosystem" are not given any protection because some of those lands are "either leased for oil and gas development, intended to be logged, or subject to alteration for recreational purposes." Only in situation one areas is the agency required to resolve human-grizzly use conflicts in favor of the bear. *Id.* Even that protection is currently threatened. Due to the grizzly killing an unusually high number of livestock in 1993, the Interagency Committee is considering abandoning its twenty year old policy of resolving human-grizzly use conflicts in favor of the bear: the Committee is considering relocating twenty bears that have killed livestock in situation one areas to Yellowstone National Park. *Feds may Move Problem Grizzlies: Bears Attack Cattle on B-T*, CASPER STAR-TRIBUNE, Oct. 12, 1993, at B1, B8.

84. 16 U.S.C. § 1535(a) (1988).

85. Control of wildlife has traditionally been considered to fall within the police powers of the states. BEAN, *supra* note 17, at 16.

86. Pub. L. No. 93-205, 87 Stat. 886, 1973 U.S.C.C.A.N. 2989.

87. The Act allows the Secretary to "enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened

tive agreements allow states to establish and maintain conservation programs to manage all the listed species and their protected habitats within the state.⁸⁸ The Interagency Grizzly Bear Guidelines form the basis of the states' cooperation agreements regarding the bear.⁸⁹

The Interagency Guidelines allow state game and fish departments [hereinafter state G. & F.] to take an active role in managing the bear. The Interagency Guidelines recognize the state G. & F. as the agency responsible for managing wildlife.⁹⁰ The state G. & F. is responsible for initiating the coordination process for handling nuisance bears.⁹¹ State G. & F. departments have also worked with ranchers to devise programs which minimally modify ranchers' land use practices and simultaneously minimize the potential for encounters with grizzlies. State G. & F. have initiated a successful program of installing electric fences to protect beehives and sheep bedding areas. These fences are cost efficient and quite effective at excluding bears from those areas. The state G. & F. has also initiated a program of collecting livestock carcasses from flat land ranches and transporting them to the foothills.⁹² This program has decreased the number of grizzly bears entering ranch lands to feed on livestock carcasses.⁹³ Such programs have been successful in simultaneously reducing the annual number of human-grizzly bear encounters and allowing landowners to use their lands in an economically viable manner.⁹⁴

The regulations require that such cooperation agreements be renewed annually.⁹⁵ The Interagency Grizzly Bear Guidelines are self-renewing

species." 16 U.S.C. § 1535(b) (1988). The Secretary is also "authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species." 16 U.S.C. § 1535(c)(1) (1988).

88. *Id.*

89. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 51-52.

90. *Id.*

91. *Id.* The state G. & F. is also responsible for relaying information about the bear to the public. *Id.* at 56.

92. Telephone Interview with Glen Erikson, Montana Game and Fish Department (Aug. 18, 1993).

93. *Id.*

94. These programs have reduced human-caused mortality.

Human-caused mortality can be classified into six major categories. These categories include: (1) direct human/bear confrontations (hikers, backpackers, photographers, hunters, etc.); (2) attraction of grizzly bears to improperly stored food and garbage associated with towns, subdivisions, farms, hunter camps, campers, loggers, backpackers, and other sources; (3) careless livestock husbandry, including the failure to dispose of dead livestock in a manner that minimizes grizzly interactions; (4) protection of livestock; (5) the eroding of grizzly bear habitat for economic values; and (6) hunting (lawful and illegal).

U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 5.

95. 50 C.F.R. § 81.3 (1992).

through provisions contained therein.⁹⁶ Despite that provision, however, the state G. & F. department must file an application to renew its cooperation agreements annually with the U.S.F. & W.S.⁹⁷ In this application, the state G. & F. must announce the programs that the state intends to continue and to implement to conserve the bear and other listed species within its borders.⁹⁸ The application must also contain the state's request for conservation funding.⁹⁹ The Act requires the U.S.F. & W.S. to renew the cooperative agreement if the state has met its past obligations under the cooperative agreement.¹⁰⁰

Although the Secretary may enter cooperative agreements with the states, the Department of the Interior retains the ultimate responsibility for implementing a conservation scheme for the bear.¹⁰¹ Congress empowered the Secretary of the Interior to promulgate regulations necessary for grizzly bear restoration.¹⁰² In promulgating regulations, the Secretary determines how various agencies will manage the grizzly bear and what actions are prohibited in regards to the bear.¹⁰³

The ESA generally prohibits taking endangered and threatened species.¹⁰⁴ *Take* is broadly defined under the Act to mean "harass, harm,

96. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 52.

97. 50 C.F.R. § 81.3 (1992).

98. 16 U.S.C. § 1535(c)(1) (1988).

99. Upon renewal of the cooperation agreement, the Secretary may provide funds to the state G. & F. to carry out conservation programs. 16 U.S.C. § 1535(d)(1) (1988). Congress determined that financial assistance and other incentives would be used to encourage states to develop and maintain conservation programs for endangered and threatened species. 16 U.S.C. § 1531(a)(5) (1988).

100. 16 U.S.C. § 1535(c)(1)(A)-(E) (1988). This obligation includes maintaining the power to implement programs to conserve and research the bear, providing adequate opportunity for public participation in the conservation effort, and implementing a management program consistent with conserving the bear. *Id.*

101. 16 U.S.C. § 1533(d) (1988).

102. The Act gives the Secretary power to "issue such regulations as he deems necessary and advisable to provide for the conservation of" the bear. 16 U.S.C. § 1533(d) (1988). "Congress has authorized—indeed commanded—the Secretary to 'issue such regulations as he deems necessary and advisable to provide for the conservation of such species.'" Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172 (1977).

103. 16 U.S.C. § 1533(d) (1988). "Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to permitted activities for those species." H.R. Rep. No. 93-412, 93d. Cong., (1st Sess. 1973). For example, the Secretary could permit taking the animal but opt not to import species. *Id.*

104. 16 U.S.C. § 1538 (1988). The Secretary can authorize the taking of the grizzly through regulations because the bear is only listed as a threatened species. 16 U.S.C. § 1633(d) (1988). Further, an agency may go through the consultation process to determine if an action constitutes a taking. The Secretary may note that the action would jeopardize or adversely affect a species but issue an opinion suggesting alternatives so the agency would not violate its duty to conserve listed species. 16 U.S.C. § 1536(b)(3)(A) (1988). Such a taking is known as an incidental taking and is exempted from the prohibitions of the of 16 U.S.C. § 1538(a) (1988).

pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁰⁵ Courts have broadened the definition of take by interpreting *take* to include actions which destroy habitats essential to listed species and subsequently modify the species’ behavioral patterns.¹⁰⁶ The Act specifically imposes civil and criminal penalties for taking listed species.¹⁰⁷ However, because the bear is listed as a threatened species, the Secretary could allow taking the species if he deems the action necessary and advisable for the conservation of the species.¹⁰⁸

In order to ensure that agency action “is not likely to jeopardize the continued existence” of listed species or “result in the destruction or adverse modification of habitat of such species,” the ESA requires federal agencies to complete the consultation process.¹⁰⁹ There are two different types of consultation, formal and informal.¹¹⁰ Informal consultation is an optional process that any federal agency can initiate prior to carrying out any action that may adversely impact the bear to determine if that agency must initiate formal consultation.¹¹¹ Any form of informal communication between the federal agency proposing an action and the U.S.F. & W.S. regarding the effect of the action on the bear constitutes informal consultation.¹¹² During this procedure, the

105. 16 U.S.C. § 1532(19) (1988).

106. The Ninth Circuit held take to include “[h]abitat destruction that prevents the recovery of the species by affecting essential behavioral patterns” *Palila v. Hawaii Dep’t of Land & Natural Resources*, 649 F. Supp. 1070, 1075 (D. Haw. 1986), *aff’d* 852 F.2d 1106 (9th Cir. 1988). The regulations promulgated under the Act have also expanded the definition of taking. Under the Act, harming listed species is considered taking the species. “Harm in the definition of ‘take’ . . . means 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.” 50 C.F.R. § 17.3 (1992). “Destruction or adverse modification” is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” *Id.* § 402.02.

107. 16 U.S.C. § 1540(a)(3) (1988).

Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

Id.

108. 16 U.S.C. § 1533(d) (1988).

109. 16 U.S.C. § 1536 (1988).

110. The regulations also include early consultation procedures. 50 C.F.R. § 402.11 (1992). Early consultation is an optional procedure that an applicant for a federal license or permit may initiate if he believes that the proposed action may affect a listed species. 50 C.F.R. § 402.11(b) (1992). The early consultation procedure mimics formal consultation except that a preliminary biological opinion is issued which the U.S.F. & W.S. can adopt as the final biological opinion as the basis to require formal consultation. 50 C.F.R. § 402.11(d)-(f) (1992).

111. 50 C.F.R. § 402.13(a) (1992).

112. *Id.* § 402.13. The agencies most often conduct informal consultation through correspondence and discussions.

U.S.F. & W.S. may suggest modifications to the proposed actions which would minimize the likelihood of the action adversely affecting the bear or its habitat.¹¹³ The informal consultation procedure is frequently used by members of the Interagency Grizzly Bear Committee as they work to conserve the bear.¹¹⁴ Informal consultation is also used when emergency situations arise.¹¹⁵

Unlike informal consultation, formal consultation is a mandatory procedure.¹¹⁶ Federal agencies utilize the formal consultation procedure to determine if proposed or existing agency actions will adversely affect the grizzly bear or its habitat.¹¹⁷ Prior to formal consultation, the federal agency must complete a biological assessment of the proposed action's impact on the bear.¹¹⁸ The biological assessment determines whether the grizzly is present in the action area and evaluates the potential effects on the bear and its habitat.¹¹⁹ Upon completion of the biological assessment, either the federal agency or the Director of the U.S.F. & W.S. may initiate formal consultation.¹²⁰

Once formal consultation begins, the federal agency must provide the U.S.F. & W.S. with a description of the contemplated action, a description of the area impacted by the action, and a description of the action's individual and cumulative effects on the bear and its habitat.¹²¹ The regulations also require the federal agency to provide the U.S.F. &

113. *Id.* § 402.13(b) (1992).

114. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 6-50, 52, 55-56, 58, 99.

115. 50 C.F.R. § 402.05 (1992). When problems with nuisance grizzlies occur, the member agencies utilize the informal consultation procedures set forth in the Interagency Grizzly Bear Guidelines. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 51-56, 58-60.

116. 50 C.F.R. § 402.14 (1992). The only time that a federal agency is not required to initiate formal consultation is when, as a result of informal consultation or a biological assessment, the U.S.F. & W.S. agrees that the action will not constitute a taking, or when early consultation has occurred and U.S.F. & W.S. accepts the preliminary biological opinion as the final biological opinion. 50 C.F.R. § 402.14 (b)(1) and(2) (1988).

117. 50 C.F.R. § 402.14 (1992). The regulations afford agencies leeway as to when they must commence formal consultation with the U.S.F. & W.S.: the regulations require the agency to initiate consultation at "the earliest possible time." However, federal and state agencies and private citizens often begin the procedure prior to commencing an action in order to avoid violating the ESA's taking prohibition.

118. 50 C.F.R. § 402.14(c)(6) (1992).

119. *Id.* § 402.12. The biological assessment is prepared by or under the direction of the Federal agency. If upon initial inquiry to the U.S.F. & W.S. the Federal agency determines that the bear is not present in the action area, consultation is not required. If the grizzly does occupy or utilize the proposed action area, the U.S.F. & W.S. suggests information for the Federal agency to use in preparing the biological assessment. 50 C.F.R. § 402.12(d) (1992). One such piece of information is STEVEN P. MEALEY'S METHOD FOR DETERMINING GRIZZLY BEAR HABITAT QUALITY AND ESTIMATING CONSEQUENCES OF IMPACTS ON GRIZZLY HABITAT QUALITY *reprinted* in the INTERAGENCY GRIZZLY BEAR GUIDELINES, *supra* note 62, at 73-91.

120. 50 C.F.R. § 402.12(k) (1992).

121. *Id.* § 402.14(c)(1)-(4).

W.S. with all available relevant data about the bear, its habitat, and the action's effect thereon.¹²² The federal agency is ultimately responsible for providing the best scientific and commercial data available.¹²³

Once the U.S.F. & W.S. has all the relevant data,¹²⁴ it must evaluate the action's individual and cumulative effects on the bear and formulate a biological opinion as to whether the action is likely to jeopardize the bear's continued existence.¹²⁵ The U.S.F. & W.S. must review the biological opinion with the federal agency.¹²⁶ If the action could adversely affect the grizzly, the U.S.F. & W.S. will suggest reasonable and prudent alternatives that the agency could take to avoid jeopardizing the bear.¹²⁷

Once the U.S.F. & W.S. issues the biological opinion, the federal agency must decide whether to proceed with its action.¹²⁸ If the biological opinion suggests that the action might jeopardize the grizzly, the federal agency must inform the service as to whether the agency will continue with the action.¹²⁹ If the agency opts to carry out an action adverse to the bear's survival, it must apply for an exemption.¹³⁰

The consultation process and the issuance of regulations allow the Secretary to control the contemporary management of the bear and its habitat. Long term conservation of the bear, however, is governed by the

122. *Id.* § 402.14(c)(5)-(6).

123. *Id.* § 402.14(d). The federal agency must allow any applicant, as defined by 50 C.F.R. § 402.02 (1992), the opportunity to submit information. 50 C.F.R. § 402.14(g)(1) (1992).

124. 50 C.F.R. § 402.14(g)(8) (1992). The U.S.F. & W.S. can consider data submitted by the federal agency or by other political parties. 50 C.F.R. § 402.14(g)(1) (1992).

125. *Id.* § 402.14(g)(4). The U.S.F. & W.S. must use the best scientific and commercial data available in formulating the biological opinion. *Id.* § 402.14(g)(8). The biological opinion must contain a summary of the information upon which the U.S.F. & W.S. based its opinion, a detailed discussion of the effects of the action, and the U.S.F. & W.S.'s opinion as to whether the action would jeopardize the bear's existence. *Id.* § 402.14(h)(1)-(5).

126. 50 C.F.R. § 402.14(g)(5) (1992).

127. *Id.* The U.S.F. & W.S. may also formulate discretionary conservation recommendations as to how the agency could minimize the action's impact. *Id.* § 402.14(g)(6).

128. 50 C.F.R. § 402.15(a) (1992). Courts defer to these biological opinions to determine whether agencies have violated the substantive requirements of 16 U.S.C. § 1536(a)(2) (1988). *Tennessee Valley Auth. v. Hill*, 549 F.2d 1064, 1070 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

The Secretary is not empowered to veto the final actions of such agencies, even when he is convinced, after the requisite consultation has ensured, that they violate the Act

However, his compliance standards may properly influence final judicial review of such actions, particularly as to technical matters committed by statute to his special expertise.

Id.

129. 50 C.F.R. § 402.15(b) (1992).

130. *Id.* § 402.15 (c). The Endangered Species Committee is responsible for issuing exemption permits. Because few applicants request permits for actions which may affect the grizzly or its habitat, that procedure will not be discussed in this comment. Telephone Interview with Jane Roybal, U.S.F. & W.S. Wyoming Division Grizzly Coordinator (Aug. 21, 1993). Discussion of the exemption procedure is detailed in the regulations; *see* 50 C.F.R. § 451 (1992).

recovery plan for the grizzly.¹³¹ In 1979, the U.S.F. & W.S. appointed a plan leader to prepare a grizzly bear recovery plan.¹³² Bear experts drafted the recovery plan¹³³ which specifies how and what data should be obtained regarding the status of the grizzly bear, establishes the process and the requirements for delisting the grizzly bear, and defines the tasks of the various agencies dealing with the grizzly bear.¹³⁴ Most importantly, the recovery plan sets forth a long term management plan for the grizzly bear and its habitat.¹³⁵ The U.S.F. & W.S. is currently in the process of adopting the final draft of the grizzly bear recovery plan completed in September of 1993.¹³⁶

Many environmentalists contend that the 1993 draft recovery plan is inadequate to protect the habitat essential for grizzly bear recovery.¹³⁷ Drafts of the recovery plan recognize that various forms of development impede the bear's recovery but fail to offer solutions to the problem.¹³⁸ Instead, the 1993 draft recovery plan gives a recovery outline designed to "redress population limiting factors" and to "identify and reduce indirect mortality" but lacks specifics as to how the In-

131. Under the ESA, "[t]he Secretary shall develop and implement plans . . . for the conservation and survival of endangered species . . . unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f) (1988). Regulations govern agencies' contemporary actions dealing with listed species and their critical habitats, while long-term management is usually set forth in recovery plans.

132. U.S. DEPARTMENT OF THE INTERIOR, 1982 GRIZZLY BEAR RECOVERY PLAN, at iii (1982).

133. Congress initially intended that recovery plan contents be "based solely on biological considerations." H.R. CONF. REP. NO. 928, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 2739. The 1988 amendments added § (f)(5), which states that "[e]ach federal agency shall, prior to implementation of a new recovery or revised recovery plan, consider all information presented during the public comment period." 16 U.S.C. § 1533(f)(5) (1988).

134. U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 15-16.

135. Daniel Rohlf explained the importance of recovery plans to species' recovery:

Recovery plans in many ways possess the ideal characteristics to act as triggers for agencies' duty to conserve listed species. They are prepared by experts and contain an outline of steps necessary to promote the conservation of listed species. The plans also often identify which federal agencies are responsible for carrying out specific recovery tasks. Defining agencies' conservation duties by what is set forth in recovery plans would free the courts from sticky problems of attempting to intercept the scope of the ESA's conservation mandate on a case-by-case basis.

ROHLF, *supra* note 1, at 96.

136. In September 1993, the U.S.F. & W.S. released a tentative draft of the grizzly bear recovery plan. U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, *tit. page*.

137. Several environmentalist groups have criticized the 1993 draft and plan to ask Secretary Babbitt to withdraw the plan and start over. Todd Wilkinson, *Reports on Bears Blasted: Grizzly Plan Called 'Map to Extinction'*, DENVER POST, December 10, 1993, at B1, B8.

138. "Subdivisions, power line corridors, logging roads, recreational development, trails, sight seeing gondolas, energy and mineral exploration or development, and simply more people everywhere degrade grizzly bear habitat by co-locating grizzly bears and people." U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 5, 6.

teragency Grizzly Bear Committee can achieve those objectives.¹³⁹ Similarly, the 1993 plan acknowledges the importance of linkage zones to the survival of the grizzly bear but only suggests a five year study of the zones. The plan does not advocate heightened protection of the zones.¹⁴⁰ Without sufficient protection of habitats essential for the grizzly bear's daily existence and breeding needs, environmentalists complain that the long term management of the grizzly bear as a delisted species is likely to fail.¹⁴¹

Discontent with Centralized Management of the Grizzly Bear

Environmentalists are not the only group displeased with management of the bear. State agencies, land owners, private citizens, and scholars believe that the federal government should return primary bear management responsibilities to the individual states¹⁴² which control most other species of wildlife within their borders.¹⁴³ These groups contend that state agencies keep closer contact with state citizens than does the federal government.¹⁴⁴ Accordingly, they argue that state G. & F. departments maintain the superior position to muster local support for wildlife protection programs.¹⁴⁵ These challengers to Interagency Committee's management of the bear recognize that the support of local land users is imperative for the successful implementation of wildlife conservation laws.¹⁴⁶

Proponents of state wildlife control believe that the U.S.F. & W.S. should provide oversight and coordination of state programs and not prohibit actions the state deems necessary to manage the grizzly bear.¹⁴⁷ These challengers of federal wildlife control contend that the ESA and the Interagency Guidelines inhibit the ability of state agencies to deal with the

139. U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 34, 35.

140. *Id.* at 34-36.

141. *See* Wilkinson, *supra* note 137.

142. Telephone Interview with Glen Erikson, Montana Game and Fish Department (Aug. 18, 1993).

143. BEAN, *supra* note 17.

144. State agencies, land owners, private citizens, scholars believe that "Washington politicians and bureaucrats are too far removed to respond to local needs or to accomplish their own management objectives effectively." Goldman-Cater, *Federal Conservation of Threatened Species: By Administrative Discretion or By Legislative Standard?*, 11 ENVTL. AF. J. 63, 98 (1983). *See also* U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 30.

145. Telephone Interview with Glen Erikson, Montana Game and Fish Department (Aug. 18, 1993). The people of the area occupied by the bear and the state must be active participants if recovery is to be effectuated. U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 30.

146. *Id.*

147. Telephone Interview with Glen Erikson, Montana Game and Fish Department (Aug. 18, 1993).

grizzly bear.¹⁴⁸ State agencies often cite the consultation requirement and the taking prohibitions as particular impediments.¹⁴⁹

The ESA requires that state and federal agencies go through the consultation process prior to taking a nuisance grizzly bear.¹⁵⁰ Opponents of the ESA contend that the consultation provisions cause undue delay in dealing with the immediate threat posed by a nuisance grizzly bear.¹⁵¹ Under the Interagency Guidelines, up to eight different agencies may become involved in removing or taking a nuisance grizzly bear.¹⁵² Under the terms of the Interagency Guidelines, however, this consultation is usually informal because member agencies recognize that expeditious action is essential for effective management of nuisance bears.¹⁵³ This brief delay is necessary for the U.S.F. & W.S. and other agencies to determine the action they can take to comply with the ESA's conservation mandate and rectify the problem.¹⁵⁴

Opponents of federal control of grizzly bear management also complain that the ESA's taking prohibition and the corresponding grizzly bear regulations eliminate an effective means of managing the bear. These challengers contend that the laws needlessly restrict the abilities of state G. & F. officers to take grizzlies preying on livestock. Under the current regulations, when a rancher suspects that a grizzly is responsible for the depredation of his livestock, he must call a member of the Interagency Grizzly Bear Committee to obtain relief.¹⁵⁵ The member agency then contacts the state G. & F. and requests that a G. & F. officer investigate the matter.¹⁵⁶ The field officer must first attempt to identify the grizzly attractant and eliminate it.¹⁵⁷ When no attractant can be located or the attractant has previously been eliminated, the officer must determine if the bear is a nuisance bear.¹⁵⁸ Following that determination, the officer may consider

148. *Id.*

149. These agencies eagerly await the day the grizzly bear is delisted and returned to state control because they will no longer have to contend with the red tape of federal bureaucracy. *Id.*

150. 16 U.S.C. § 1536 (1988).

151. Telephone Interview with John Talbott, Wyoming Game and Fish Department (Aug. 18, 1993). State agencies consult with the U.S.F. & W.S. prior to carrying out actions which may constitute a taking to avoid penalties imposed by 16 U.S.C. § 1538 (1988).

152. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 58.

153. After member agencies capture a nuisance bear, the Interagency Guidelines require that the agency involved decide whether to relocate or destroy the bear within twenty-four hours. *Id.* at 55-56.

154. Telephone Interview with Jane Roybal, U.S. Fish and Wildlife Biologist (Aug. 21, 1993).

155. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 6, 14, 15, 19, 21, 22, 28-30, 33, 35, 36, 39, 50.

156. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 6, 14, 15, 19, 21, 22, 28-30, 33, 35, 36, 39, 50.

157. *Id.*

158. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 8, 13, 15, 19, 28, 30, 33,

tranquilizing, capturing, or relocating the grizzly bear.¹⁵⁹ The officer may not destroy a nuisance bear, however, without first consulting the other member agencies involved.¹⁶⁰ Opponents of the ESA claim that this limitation on the field officer's power to take the bear causes undue delay during which the bear may destroy more livestock. Scholars suggest that because ranchers perceive that U.S.F. & W.S. agents have no power to stop grizzly bears from destroying property, they will take matters into their own hands.¹⁶¹

State G. & F. departments further complain that the ESA and grizzly regulations unnecessarily preclude hunting the grizzly bear.¹⁶² The state G. & F. contends that sport hunting is an effective management tool.¹⁶³ If not for the ESA's taking prohibition, state G. & F. would issue grizzly bear hunting licenses as a means of managing the grizzly bear.¹⁶⁴

Because the grizzly bear is only listed as a threatened species, not an endangered species, the Secretary can promulgate regulations authorizing sport hunting of the bear.¹⁶⁵ In the recent past, the Secretary has permitted grizzly bear hunting for sport in limited geographic areas.¹⁶⁶ Presently, however, U.S.F. & W.S. has prohibited hunting the grizzly.¹⁶⁷ State G. & F. could apply to the Secretary for a permit authorizing the G. & F. to have a grizzly bear hunting season.¹⁶⁸ Whether the Secretary would issue

35-37, 39, 50. To determine if a bear is a nuisance, the officer considers factors set forth in the Interagency Guidelines. *Id.* at 53-55.

159. Wyoming and Montana G. & F. departments have entered cooperative agreements with U.S.F. & W.S. under 16 U.S.C. § 1536 which allow state G. & F. to trap and move the bear; however, the state must have prior approval before a bear is destroyed. Telephone Interview with John Talbott, Wyoming Game and Fish (Aug. 18, 1993).

160. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 55.

161. A similar problem exists for the wolf's recovery.

Since there is no federal government program to compensate ranchers for livestock lost to endangered species, and since private operators aren't permitted to kill problem animals themselves, these [predation] losses spurred an outpouring of anti-wolf sentiment in local communities near [Glacier National Park]. It became clear that these feelings could lead to increased illegal killing of wolves and a shoot on sight mentality.

Fischer, *Restoring the Wolf—Defenders Launches a Compensation Fund*, DEFENDERS, Jan.-Feb., 1989, at 9.

162. 50 C.F.R. § 17.40(b)(i) (1992).

163. Telephone Interview with Glen Erikson, Montana Game & Fish Department (Aug. 18, 1993).

164. *Id.*

165. Congress authorized the Secretary of the Interior to "issue such regulations as he deems necessary and advisable to provide for the conservation of . . . species." 16 U.S.C. § 1533(d) (1988).

166. Telephone Interview with Glen Erikson, Montana Game & Fish Department (Aug. 18, 1993).

167. 50 C.F.R. § 17.40(b)(i) (1992).

168. *Id.* § 451.

such permits is unclear after recent court decisions finding that sport hunting of listed wildlife violates the intent of the ESA.¹⁶⁹ Hunting the bear may also violate Congress's intent to proscribe activities that threaten listed species.¹⁷⁰

Fifth Amendment "Taking" Issue

Opponents not only contend that the ESA and grizzly bear regulations are ineffective but that such legislation violates the Constitution as well. Because an aim of the ESA is the conservation of threatened species, regulations promulgated to manage the grizzly bear are primarily designed to restore grizzly bear populations to the point that the species no longer needs special protection.¹⁷¹ The Act affords private individuals and entities only secondary concern. This has caused land owners to argue that the ESA interferes with their right to use and enjoy their property and jeopardizes their livelihood.¹⁷² Such claims have led academic authors to conclude that "the Act's most glaring weakness is its failure to adequately address the predation problems of farmers and ranchers."¹⁷³

Many private entities argue that the ESA's protection of the grizzly bear deprives land owners of their right to use and enjoy their property.¹⁷⁴ Such challenges are based on both state and federal constitutions. State

169. Telephone Interview with Glen Erikson, Montana Game & Fish Department (Aug. 18, 1993). Courts have held that hunting should not be employed when alternative management methods exist. In *Defenders of Wildlife v. Andrus*, the U.S. District Court for the District of Columbia held that the U.S.F. & W.S. must use "all methods necessary" to conserve listed species and emphasized that the agency "cannot limit its focus to what it considers the most important management tool available to it" to accomplish that end. *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.C. 1977).

170. Controlled hunting initially contributed to the threat of the grizzly bear's existence. U.S. FISH AND WILDLIFE SERVICE, *supra* note 49, at 5.

171. Congress enacted the ESA to "improve the status of endangered and threatened species so that they would no longer require special treatment." Conference report for the Endangered Species Act of 1973, 1973 U.S.C.C.A.N. 2989, 3002.

172. "Land users argue that by enacting conservation laws designed to repopulate certain species without, at the same time, minimizing the resulting tremendous financial burdens to land users, congress is infringing upon land user's rights to use and enjoy the fruits of their property, and is threatening the viability of their farming and ranching operations." Sam A. Elbadawi, Note, *Grin and Bear It: The Unbearable Consequences of the Endangered Species Act Taking Restrictions and the Hunt for a Solution*, 41 SYRACUSE L. REV. 1021, 1023. Opinions which have evaluated this argument include *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, *Christy v. Lujan*, 490 U.S. 1114 (1989); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986); *Commonwealth v. Madsen*, 175 S.W.2d 1004 (1943); *State v. Rathbone*, 100 P.2d 86 (Mont. 1940); *State v. Weber*, 736 P.2d 220 (Or. 1987); *Cross v. State*, 370 P.2d 371 (Wyo. 1962).

173. Sam A. Elbadawi, Note, *Grin and Bear It: The Unbearable Consequences of the Endangered Species Act Taking Restrictions and the Hunt for a Solution*, 41 SYRACUSE L. REV. 1021, 1024.

174. *Id.*

courts have consistently interpreted state constitutions to provide the individual with a qualified right to defend property against destruction by animals.¹⁷⁵ The Montana Supreme Court in *State v. Rathbone* defined this qualified right.¹⁷⁶ That court declared that land owners could use lethal force to protect property when all legal remedies have been exhausted, when such force is required and appropriate, and when such force is not in excess of the force a reasonable person would utilize in a similar situation.¹⁷⁷ However, because the ESA gives federal courts jurisdiction over cases dealing with listed animals¹⁷⁸ and preempts any state law that is less restrictive than the ESA's "takings" provision,¹⁷⁹ such state court holdings have limited significance.¹⁸⁰

Land owners also contend that the ESA violates property rights protected by the Fifth Amendment of the Constitution of the United States.¹⁸¹ The Due Process Clause of the Fifth Amendment states that no person shall be "deprived of life, liberty, or property without due process of law."¹⁸² Due process prohibits the government from taking private property without just compensation. Ranchers contend that, because the ESA and grizzly bear regulations prohibit them from taking grizzlies which enter their property and destroy livestock, the ESA violates the Fifth Amendment by depriving them of the use of their land without affording them just compensation.

In *Christy v. Hodel*, the Ninth Circuit had an opportunity to determine whether the prohibition against killing a grizzly bear in defense of property violated the Fifth Amendment Takings Clause.¹⁸³ In that case, a rancher was fined under the ESA for illegally taking a grizzly that had killed several of his

175. *E.g.*, *Commonwealth v. Madsen*, 175 S.W.2d 1004 (Ky. 1943); *Rathbone*, 100 P.2d 86; *State v. Burk*, 195 P. 16 (Wash. 1921); *State v. Ward*, 152 N.W. 501 (Iowa 1915).

176. *Rathbone*, 100 P.2d at 93.

177. *Id.*

178. 16 U.S.C. § 1540(c) (1988).

179. *Id.* § 1535(f).

180. State residents are only allowed to take the bear when the taking is permitted under the ESA. A taking of the grizzly bear is permissible under the express authority of the regulation in defense of life.

Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered species.

16 U.S.C. § 1540(a)(3) (1988). Whether the "taking" of a threatened species is prohibited depends on whether the Secretary has determined that such a prohibition is necessary and advisable for the conservation of the species. 16 U.S.C. § 1533(d) (1988).

181. *See supra* note 172.

182. U.S. CONST. amend. V.

183. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988).

sheep.¹⁸⁴ Christy brought an action challenging the ESA and regulations forbidding the taking of grizzly bears except in certain specified circumstances.¹⁸⁵

The Ninth Circuit held that the ESA and the grizzly bear regulations as applied did not effect a Fifth Amendment taking.¹⁸⁶ The court applied a rational review analysis to the regulations because it found that the right to defend property is not "implicit to the concept of ordered liberty" or so "deeply rooted in this nation's history and tradition" that it could be recognized as a fundamental right.¹⁸⁷ The court found that the regulations requiring private citizens to invoke the aid of experienced government officials to handle nuisance grizzly bears were reasonable.¹⁸⁸ The court also found that the regulations were reasonable because they did not prohibit livestock owners from defending their property "by means other than killing."¹⁸⁹

The *Christy* holding is significant because the Ninth Circuit recognized that the ESA and grizzly bear regulations do not effectuate a Fifth Amendment taking by prohibiting landowners from killing listed species in defense of property. The decision, however, may have limited significance. The Ninth Circuit did not determine whether the ESA and the grizzly bear regulations effectuates a Fifth Amendment taking when they deprive a landowner of the use and enjoyment of his property.

DISCUSSION

Opponents of centralized grizzly bear conservation efforts believe that the current scheme of grizzly bear management eliminates the state G. & F. departments' abilities to effectively manage the bear and effectuates a Fifth Amendment taking. These beliefs are often based on a lack of understanding

184. *Id.* Richard Christy had about 1700 sheep in pasture land located at the base of Glacier National Park in June of 1982. During June, grizzlies began attacking his sheep nightly. When Christy was unsuccessful in his attempts to frighten the bears away by setting fires and shooting the gun into the air, he enlisted the help of the U.S.F. & W.S. The field officer sent to aid Christy was unsuccessful in trapping the bears. On July the 9th, Christy and the field officer observed two bears approaching the flock. Christy shot and killed one of the bears. *Id.* at 1326. Christy was fined \$3,000 for taking a threatened species in violation of the ESA. This penalty was later reduced to \$2,500 by an administrative law judge. *Id.* at 1327.

185. *Id.* at 1327.

186. *Id.* at 1330.

187. *Id.*

188. *Id.* at 1331. The court found such regulations reasonable since a government officer would be expected to protect public interests whereas leaving such actions to private individuals would allow for the killing of the bear whenever he or she deemed it necessary. *Id.*

189. *Id.* Christy also claimed that by "protecting grizzly bears, the [Fish and Game] Department has transformed the bears into "governmental agents" who have physically taken the plaintiffs' property." *Id.* at 1334. The court rejected this claim. *Id.* at 1335.

of the content and effect of the ESA and grizzly bear regulations. Proponents of state control fail to appreciate the scope of authority that the Interagency Grizzly Bear Guidelines grant states. Persons alleging that the ESA effectuates a compensable Fifth Amendment taking fail to recognize that state conservation programs allow land owners to utilize their land and only minimally modify land use practices. Groups opposing grizzly bear conservation under the ESA need to be informed as to the actual effect of federal and state efforts to conserve the grizzly.

Grizzly Bear Recovery Requires Centralized Management

The ESA required the Secretary to consider whether sufficient management programs existed to protect the grizzly bear before listing the grizzly bear as a threatened species.¹⁹⁰ In reviewing the status of the grizzly bear prior to its listing, the Secretary found that bear habitat was being destroyed and modified, that a significant number of bears were being killed illegally and through control action, and that bear breeding populations were isolated from one another.¹⁹¹ The listing of the grizzly bear suggests that state management failed to alleviate these threats and would have further jeopardized the grizzly bear's existence.

State bear management failed because the individual states developed their wildlife management plans without coordinating their efforts with other states. The grizzly bear is a non-territorial creature that roams amongst many states in the course of its lifetime.¹⁹² Prior to the enactment of the ESA, the grizzly bear was subject to different management systems as it wandered across state borders. Individual state wildlife management programs differed partly as a result of conflicting special interest groups exerting pressure on the state legislatures. This patchwork treatment did not protect the grizzly bear. The grizzly bear population decreased and seemed to be headed towards extinction.

Since the ESA's enactment, state and federal agencies have worked together to manage the bear through the Interagency Grizzly Bear Committee. This multi-agency authority alleviates pressure on state wildlife managers to devise grizzly bear control programs that incorporate the demands of local interest groups. The centralized management of the grizzly bear under the ESA is responsible for

190. 16 U.S.C. § 1533(a)(1)(D) (1988); *see also* 50 C.F.R. § 424.11(f) (1992).

191. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 13, at 1.

192. The average total home range size for a female is 884 km² and 3,757km² for a male bear throughout their lifetimes. Bonnie M. Blanchard et al., *Movements of Yellowstone Grizzly Bears*, 58 BIOLOGICAL CONSERVATION at 41 (1991).

arresting the decline of the species and beginning the recovery of certain bear populations.

Though the ESA vested the Department of the Interior with the ultimate responsibility for grizzly bear conservation, the Interagency Guidelines allow state G. & F. to play an active role in bear management. Often, state G. & F. officers investigate human-grizzly conflicts, make the initial determination of what action member agencies should pursue, and capture nuisance bears.¹⁹³ State G. & F. offices serve as the principal coordination points for control actions involving other member agencies.¹⁹⁴ State G. & F. offices also receive grizzly related property damage reports¹⁹⁵ and coordinate all news releases about the grizzly bear.¹⁹⁶ The states can also implement conservation programs they deem appropriate to conserve the bear within their borders.

With such authority, the state G. & F. can take a very active role in managing the bear. The real hinderance to a state's ability to implement successful grizzly bear recovery programs is not the Interagency Guidelines but rather the state's unwillingness to spend state monies to fund such programs. Due to recent cuts in federal funding of grizzly bear conservation efforts, state governments must apportion state funds in order to maintain effective grizzly bear restoration programs.¹⁹⁷ Wyoming has taken this initiative.

193. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 62, at 55. The National Park Service is responsible for capturing the bear within Yellowstone National Park. *Id.*

194. *Id.* at 56.

195. *Id.* at 52.

196. *Id.* at 56.

197. One of the most serious problems facing the ESA is insufficient funding. Telephone Interview with David Moody, Trophy Game Coordinator, Wyoming Game and Fish Department (Sept. 27, 1993). Monies Congress apportions for implementation of the ESA are divided among state and federal research efforts, conservation programs and education and information dissemination. *Id.* Insufficient funding results in the termination of staff needed to implement conservation efforts, research projects necessary to ascertain what is essential for species conservation, and public education programs about the species. *Id.* Recent cuts in federal funding of wildlife conservation programs impede agencies attempts to fulfill the conservation mandate of the ESA. *Id.* Congress must increase funding for implementation of the Act if it hopes to achieve the restoration of listed species and their habitats. *Id.*

The grizzly bear is a popular animal amongst the American people and once received a substantial portion of the money apportioned for the Act. *Id.* Within the last decade, however, the Secretary diverted funding to other species. *Id.* The current level of federal funding apportioned for the grizzly bear's recovery is inadequate. *Id.* In the 1970's and 1980's, Wyoming received about \$45,000 from the federal government for grizzly bear conservation. *Id.* In 1993, the state only received \$30,000. *Id.* The Interagency Study Team, the major research group studying the grizzly bear, will run out of money in the Fall of 1993. *Id.* Such timing is unfortunate because studies regarding the unusually high number of livestock depredation in 1993 should be conducted to determine how to minimize the same problem in the future. *Id.* Because of these cutbacks, states must also supplement federal funding of grizzly bear conservation. *Id.*

In the past, Wyoming relied solely on federal funds to protect the grizzly bear. In recent years, however, Wyoming has allocated state funding for grizzly bear restoration.¹⁹⁸ Such state funding allowed the Wyoming G. & F. department to create administrative and staff positions solely responsible for conserving the grizzly bear and other trophy animals.¹⁹⁹ Wyoming also funds programs to educate backcountry users on how to minimize the threat of grizzly bear encounters.²⁰⁰ Further, because Wyoming classifies the grizzly bear as a trophy animal, the Wyoming G. & F. department must compensate ranchers for livestock destroyed by the grizzly bear.²⁰¹ Wyoming's willingness to fund grizzly bear conservation allows the state G. & F. to implement successful conservation programs despite cuts in federal funding.

Other states charged with conserving the grizzly bear do not share Wyoming's willingness to fund grizzly bear conservation efforts. Montana relies solely on federal funds. Thus, although the grizzly bear is well protected in Wyoming, when it crosses the border into neighboring states, it is inadequately protected due to the insufficient federal and state funding.²⁰² If Congress does not apportion more funding for the recovery of listed species, it must follow the mandate of the ESA and provide incentives for states to follow Wyoming's aggressive lead in providing state funds to conserve the grizzly bear.²⁰³ Without better incentives for states to actively participate in grizzly bear conservation, states may not pursue the programs necessary to conserve the bear and quiet local discontent with existing bear management practices.

Because the grizzly bear roams a large range during its life and does not respect state boundaries, centralized bear management is essential for restoration of the grizzly bear and for its long term viabil-

198. Wyoming spends between \$300,000 - \$500,000 annually to fund grizzly conservation efforts. *Id.*

199. *Id.*

200. INTERAGENCY GRIZZLY BEAR COMMITTEE, 1991 INTERAGENCY GRIZZLY BEAR REPORT 6 (1991).

201. WYO. STAT. § 23-1-101(xii) (1991) and WYO. STAT. § 23-1-901 (1991). Wyoming is unique in paying livestock owners full market value for livestock killed by the grizzly. In past years, Wyoming's compensation of livestock killed has not exceeded \$3,500. The expenditure in 1993 has already quadrupled that amount. Telephone Interview with David Moody, Trophy Game Coordinator, Wyoming Game and Fish Department (Sept. 27, 1993). Other states' statutes do not provide funding for grizzly bear damage; instead, they rely on private funds to compensate livestock owners for grizzly bear depredation. *Id.*

202. *Id.* According to Moody, some bears that the Wyoming G. & F. has monitored using radio transmitters mysteriously disappear when they cross the borders into Montana and Idaho. *Id.*

203. 16 U.S.C. § 1531(a)(5) (1988).

ity. State agencies could resolve human-grizzly conflicts in a more expeditious manner if the ESA did not prohibit G. & F. officers from taking the bear on site; however, experience suggests that such actions combined with effects of inadequate habitat protection would jeopardize the species' survival. In light of this fact, state wildlife managers who criticize the taking prohibition as too restrictive should instead focus their energy on utilizing the power afforded them by their state's cooperative agreement and the Interagency Guidelines. As the entity which deals with the bear on a frequent basis, the state G. & F. has the best knowledge of the bear's actions. State officials should combine their practical knowledge of the bear's activities with their authority to implement programs which address concerns of local land owners and simultaneously conserve the bear.

Lucas's Fifth Amendment Taking Standard

Due to the perception that interagency efforts fail to control the grizzly bear, ranchers and other landowners continue to contend that the ESA and the regulations promulgated thereunder effectuate a compensable Fifth Amendment taking. Learning from Christy's defeat, land users are likely to frame future challenges to the ESA in terms of a deprivation of the right to use and enjoy their land²⁰⁴ because that challenge has a stronger Constitutional basis. The Fifth Amendment declares that "no person shall be deprived of . . . property without due process of the law." In contrast, the right to defend property is, at most, only implied.

Courts have held that excessive regulation of property can effectuate a compensable Fifth Amendment taking.²⁰⁵ Until recently, courts determined whether a regulation constituted a taking on an ad hoc, factual basis.²⁰⁶ In the 1992 case of *Lucas v. South Carolina Coastal*

204. Though Christy addressed the Fifth Amendment issue, its effect is limited by the fact that Christy framed his challenge in terms of a right to defend property. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), cert. denied *Christy v. Lujan*, 490 U.S. 1114 (1989).

205. In the landmark case of *Pennsylvania Coal v. Mahon*, Justice Holmes declared that "while property may be regulated to a certain extent, if the regulation goes too far, it will be a taking." 260 U.S. 393, 415 (1922).

206. For a discussion of the inconsistent results of such ad hoc inquiries, see *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Traditionally, courts considered three factors to determine whether a taking had occurred: the economic impact of the regulation; the extent to which the regulation interferes with an investment backed expectation; and the character of the government action. *Connelly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, rehearing denied 439 U.S. 883 (1978).

Commission, the Supreme Court clarified the standard for determining when a regulation effectuates a taking.²⁰⁷ The Court noted that the judiciary has found two types of regulations that constitute a compensable taking: regulations which require a permanent physical invasion of property and regulations which deny the owner all economically beneficial use of land.²⁰⁸ The latter effectuates a taking because a total denial of the beneficial use of land is equivalent to a physical appropriation.²⁰⁹ The Court recognized that citizens' understanding of the nature of property rights and the state's power over that right has guided the development of takings jurisprudence. The Court was also cognizant that, though a property owner expects the state to restrict the use of property, the owner does not expect to forfeit his land.²¹⁰ After briefly summarizing the theory of takings jurisprudence, the Court announced the new takings test: "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave the property economically idle, he has suffered a compensable taking."²¹¹

Grizzly bear management under the ESA does not require that land owners leave their property economically idle: regulations allow land owners to continue utilizing their lands for a profit. Though the Interagency Grizzly Bear Guidelines authorize curtailing human land uses that

207. *Lucas v. South Carolina Coastal Commissioners*, 112 S.Ct. 2886 (1992). The facts of that case are as follows: In 1986, David Lucas purchased two ocean front lots with the intent of building a single residence upon them. At the time of the purchase, the South Carolina Beach Management Act did not prohibit Lucas's intended construction. In 1988, the South Carolina legislature amended the Act. The amendment, as applied, prohibited Lucas from building permanent structures on his property. Lucas challenged the Act in state court contending that it effectuated a Fifth Amendment taking without just compensation. The trial court found that the Act rendered Lucas's property "valueless." On appeal, the issue before the Supreme Court was whether the prohibitive regulation constituted a Fifth Amendment taking. *Id.* at 2889-2890.

208. *Id.* at 2893.

209. *Id.* at 2894 (citing *San Diego Gas & Electric v. San Diego*, 450 U.S. at 621, 652 (1981) (Brennan, J., dissenting)).

210. *Id.* at 2899 (quoting *Pennsylvania Coal Co. v. Mahone*, 260 U.S. 393 (1922)).

211. *Id.* at 2895. This standard applies to real property, not personal property. Scalia noted that due to the high degree of control the State has traditionally exercised in regards to the sale or manufacture of personal property, the owner recognizes that regulation of personal property may render it worthless. *Id.* at 2899.

Most grazing in Wyoming occurs on public land. Under the Taylor Grazing Act, the Bureau of Land Management and the National Forest Service issue permits for private use of the federal lands under their jurisdiction. 43 U.S.C. 315b (1988). Under this permit system, the right to use federal lands is a revokable privilege, not a property right. Thus, most Wyoming ranchers lack standing to claim that the ESA and grizzly bear regulations violates their Fifth Amendment right to use and enjoy their property; see *Red Canyon Sheep Company v. Ickes*, 98 F.2d. 308 (D.C.Cir. 1938) and *United States v. Cox*, 190 F.2d. 293, 296 (10th Cir. 1951), *cert. denied*, 342 U.S. 867 (1951).

conflict with bear conservation in situation one areas, member agencies rarely utilize this provision. The Yellowstone Interagency Grizzly Bear Subcommittee's consideration of relocating young male grizzlies responsible for the increased livestock depredation in 1993 in situation one habitats suggests that member agencies are unwilling to deprive ranchers of the economic use of their real property.²¹² Instead, state G. & F. departments encourage ranchers to modify poor animal husbandry practices which may attract the bear. State G. & F. departments also implement various conservation programs to minimize conflicts with the bear. These efforts allow ranchers to continue to utilize their land in an economically beneficial manner. Accordingly, grizzly management under the ESA does not effectuate a Fifth Amendment taking under the *Lucas* test.²¹³

Education as a Conservation Tool

As expressed above, many state wildlife officials, land owners, and scholars believe that the ESA and grizzly bear regulations promulgated thereunder simultaneously fail to afford states enough authority to effectively manage the bear and effectuate a Fifth Amendment taking. Such misperceptions deter the land owners from supporting grizzly bear conservation in areas the bear may reoccupy as it recovers. To counteract this sentiment and encourage these land users to become involved in grizzly bear restoration efforts,²¹⁴ Congress should require the Secretary to implement public education programs as a means of conserving listed wildlife.

212. *Feds may Move 'Problem' Grizzlies*, CASPER STAR TRIBUNE, Oct. 12, 1993 at B1.

213. Several bills which would diminish the significance of *Lucas* decision are currently awaiting debate in the House and Senate. Sen. Robert Dole introduced S. 177, the "Private Property Rights Act of 1993" and Rep. Gary Condit introduced H.R. 561. The purpose of both bills is to codify President Reagan's Executive Order 12630. The bills require that federal agencies establish appropriate procedures to determine if agency regulation may result in a compensable taking. Agency recognition that its regulation constituted a taking would require the government to compensate the landowner; see 1993 H.R. 561, 103d Congress, 1st Sess. (1993) and 1993 S. 177, 103d Congress, 1st Sess. (1993).

If enacted, these bills would only effect the U.S.F. & W.S.'s future regulation of the bear. However, their effect could be significant if the Secretary or the Director of the U.S.F. & W.S. designate critical habitat for the grizzly bear. Some land owners would be deprived of the economically beneficial use of their land unless the Endangered Species Committee exempted the land use from the ESA's taking's prohibition. In effect, the federal government would have to pay for the acquisition of the bear's critical habitat.

214. Local support of wildlife conservation efforts is essential for species recovery. Telephone Interview with David Moody, Trophy Game Coordinator, Wyoming G. & F. Department (Sept. 27, 1993).

In 1991, Wyoming began an aggressive education and information program in hopes of minimizing human-grizzly bear confrontations in recreational areas.²¹⁵ Practices employed by backcountry users prior to the education program attracted grizzly bears to human use areas in search of food. As grizzlies became habituated to recreational areas as a food source, they began to frequent these areas and the number of human-grizzly conflicts increased. Since many of these areas were classified as management three situations, the member agencies classified many bears as nuisance bears and relocated them or destroyed them. Because human-grizzly bear conflicts are annually responsible for more grizzly bear mortalities than any other source, the Wyoming G. & F. implemented an education program encouraging land users to modify their food storage and sanitation practices. By decreasing grizzly bear reliance on recreational areas for food, Wyoming's education program decreased the number of nuisance bears that the member agencies had to destroy.

The success of Wyoming's limited education program suggests that land users are receptive to conservation efforts when they understand the scope and significance of these programs. Congress should direct the Secretary to implement education programs to inform the public about the effects of such conservation regulations on land use and the status of listed species populations.

To alleviate the misconception that the ESA grizzly conservation scheme eliminates the ability of state agencies to manage the bear and effectuates a compensable taking, education programs should spotlight the existence of state grizzly bear conservation programs which allow land owners to utilize land and minimize human-grizzly conflicts. State G. & F. departments should emphasize that conservation programs suggest minor modifications to existing land practices and are almost entirely funded by federal and state wildlife agencies. Such programs are essential to grizzly bear restoration because as the grizzly bear recovers, its range will expand to encompass areas it historically occupied. Currently, the expansion of the grizzly bear's range troubles local landowners who believe that the presence of the grizzly bear will interfere with their livelihoods. If wildlife authorities implement education programs, they can dispel the myth that the presence of a listed species devastates the economic viability of an area.

215. INTERAGENCY GRIZZLY BEAR COMMITTEE, *supra* note 200, at 6.

Education programs also need to inform the public about the effect of these programs on the grizzly bear population status. Public wildlife educators should explain that, although the bear may feed on livestock occasionally, the grizzly generally prefers to avoid contact with humans when it can obtain food from more traditional sources.²¹⁶ Further, member agencies need to emphasize that the problem with the grizzly bear's preying on livestock in 1993 is not the result of the bear becoming habituated to livestock as a food source but is instead the result of a food shortage caused by unusual weather conditions.²¹⁷ The public needs to understand that just because the bear is more visible in a given year does not mean that the bear is recovering: instead, the bear's presence in human use areas suggests that the Interagency Guidelines system of classifying and managing the bear's habitat does not correspond to the bear's needs. Although the ESA benefits the bear by placing a spotlight on conservation efforts, it is important that the public not become lulled into a false sense of security that the ESA insulates the bear from the threat of becoming endangered or extinct.²¹⁸

216. "[W]hen available, Yellowstone grizzly bears consume [whitebark pine] seeds almost exclusively, typically by raiding red squirrel middens." David J. Mattson et al., *Yellowstone Grizzly Bear Mortality, Human Habitation, and Whitebark Pine Seed Crops*, J. WILDL. MANAGE., 56(3):432, at 433 (1992).

217. In 1993, a deep snow pack caused extremely wet conditions in the higher elevations of the Yellowstone Ecosystem. These conditions decreased this area's production of spotty whitebark pine seeds which is the bears preferred food source. The army cutworm moth was also unavailable to the bear. Whitebark pine seeds and the army cut worm moth are generally the bear's main sources of protein. When supplies of the two are adequate, the bear's range is usually confined to high elevation. Because production was low in 1993, the bear has had to seek other food sources. Telephone Interview with David Moody, Trophy Game Coordinator, Wyoming G. & F. Department (Sept. 27, 1993).

In years of inadequate whitebark pine seed production, the bear sometimes utilizes berries as a food source. The wet weather caused berries to cure late. By the time the berries cured in 1993, they froze. The wet climate thus deprived the bear of another food source. *Id.*

The lack of traditional food sources in high elevation forced the grizzly bear to come out of the high country to flatland ranches. *Id.* Thus, the livestock depredation that has occurred in 1993 is the result of a climate change, not the bear suddenly becoming habituated to livestock as a food source. *Id.* For discussion of how the availability whitebark pine seed affects grizzly bear movements, see David J. Mattson et al., *YELLOWSTONE GRIZZLY BEAR MORTALITY, HUMAN HABITATION, AND WHITEBARK PINE SEED CROPS* in J. WILDL. MANAGE. 56(3):432 1992 and Bonnie Blanchard et al., *Movements of Yellowstone Grizzly Bear* 58 *BIOLOGICAL CONSERVATION* 41-67 (1991). Due to the unusually long lingering snow packs in 1993, grizzly bear habitats were late spring and early summer of 1993. Todd Wilkinson, *Yellowstone May Move Grizzlies*, DENVER POST, Oct. 11, 1993, at 11A. The bear feeding on livestock suggests that the bear's habitat no longer affords it the flexibility to utilize other food sources.

218. The media often misstates the true status of the bear population. This erroneous information leads the public to believe that the bear is safe from extinction. The media has depicted the depredation of livestock in 1993 as evidence that the bear is recovering. The Denver Post attributed the depredation to "[a]n unprecedented resurgence of the grizzly bear population" Todd Wilkinson, *Yellowstone May Move Grizzlies*, DENVER POST, Oct. 11, 1993, at 11A.

The U.S.F. & W.S. and state G. & F. departments must initiate new programs and extend existing programs to include education.

Limiting Political Effects on the ESA

Misconceptions resulting from the lack of education about the ESA's effects on land use cause special interest groups to oppose conservation efforts. Political opposition inhibits the Secretary and the U.S.F. & W.S. from implementing actions necessary to restore the grizzly bear.²¹⁹ Such opposition is not only local but extends to the halls of Congress.²²⁰

The failure of the Secretary to designate critical habitat for the grizzly bear is a prime example of political opposition obstructing the ESA's mandate that the Secretary take actions necessary to achieve the Act's conservation goal. Because the U.S.F. & W.S. has not designated critical habitat for the bear, the Interagency Committee can classify and manage the bear's range according to political demands for the land rather than the needs of the grizzly bear. In all but management situation one, member agencies resolve human-grizzly conflicts in favor of human activity. Because the Interagency Guidelines rarely require land owners to curtail their use of land when human-grizzly conflicts arise, human activities continue to deteriorate the quality of the grizzly bear habitat and size of the bear range. By decreasing the size of the grizzly bear range, the current management scheme forces the bear to exist in substandard habitats and further fragments the grizzly bear range. This fragmentation isolates grizzly bear populations from one another and thereby limits the collective gene pool of the population. Despite a small, recent increase in population, this isolation poses a serious threat to the long term sustainability of grizzly bears in the United States.²²¹

219. Bruce Babitt, the Clinton administration's Secretary of the Interior, has acknowledged that the U.S.F. & W.S. has failed to fulfill its obligation under the ESA. 23 ER 2728, 2729 BNA (February 19, 1993).

220. "Members of the Congressional delegations from [Wyoming, Montana and Idaho] have made it clear that they will not stand idly by and see major parts of the economic base, lifestyle, and history of their states destroyed. . . . [T]heir fight will be a hard one but they are committed to representing their constituencies." Letter from Carl W. Eyes, Legislative Assistant, to Senator James A. Ewes at 1 (entitled: Prospects for a Legislative Solution to the Wolf Reintroduction Issue).

221. Telephone Interview between Dr. Chris Servheen, Grizzly Bear Recovery Coordinator, and Brian L. Kuehl (Aug. 10, 1992) (cited in Conservation Obligations Under the Endangered Species Act: A Case Study of the Yellowstone Grizzly, 64 U. COLO. L. REV. 607 (1993)).

The designation of critical habitat is necessary to conserve the grizzly bear and other listed species.²²² If Congress intends to conserve these species, it must require the Secretary to designate their respective critical habitats despite the political opposition. Congress can utilize direct or indirect means to require the Secretary to designate critical habitat. Congress should amend the ESA and mandate that the Secretary designate critical habitat for all listed species. In order to strengthen that mandate, the amendment should repeal current provisions that afford the Secretary the discretion to avoid establishing critical habitats.

Congress should only relieve the Secretary from his duty to protect critical habitats when, after completing the consultation process, the Secretary determines that the designation could not halt the extinction of the species. Such an amendment would shield the critical habitat designation process from political pressure which has traditionally deterred the Secretary from conserving the area essential for species restoration.

Opponents of federal wildlife control are likely to attempt to thwart any Congressional effort to amend the ESA to require the Secretary to designate critical habitats for listed species. As an alternative to directly requiring the Secretary to designate critical habitats for species whose habitats have not yet been designated, Congress should at least clarify the best scientific and commercial data standard. Such clarification would limit the ability of special interests groups to obstruct the full implementation of the ESA's conservation mandate.

The ESA requires the Secretary to use the best available scientific and commercial data in implementing conservation programs. These tasks include designating critical habitat, consulting with federal and state agencies, adopting and renewing cooperative agreements, and delisting the endangered and threatened species. The best available scientific and commercial data standard allows the Secretary to adopt

222. With the appointment of Bruce Babbitt as Secretary of the Interior, the administration adopted a new approach to conserving species listed under the ESA. Babbitt stated that he hoped to shift the Department of Interior's species oriented approach to a ecosystem approach. 23 ER 2728, BNA (Feb. 19, 1993). Shifting to the ecosystem approach will be more cost efficient since money will be put into studying the whole ecosystem rather than the individual species. Researchers studying an ecosystem can observe several species at a time. The ecosystem approach will also better conserve habitats essential to listed species conservation. Under the ecosystem approach, even though the Yellowstone grizzly bear's critical habitat has not been designated, the bear's range would be protected because the bear seldom travels beyond the bounds of the Yellowstone ecosystem.

data from governmental and commercial sources. Because the federal government has limited funding for ESA research, this flexibility is particularly important. Such flexibility, however, results in confusion: Congress has not addressed how the Secretary should interpret two conflicting reports which both constitute the best available scientific and commercial data available.

This ambiguity hampers the Director's determination of what actions the U.S.F. & W.S. and the Interagency Grizzly Bear Committee should implement to conserve the bear. When different entities submit conflicting studies to be considered during the consultation process, the Secretary must adopt one of the studies in the biological opinion. Environmental groups, land owners and state wildlife agencies²²³ can challenge the data adopted by the Secretary in the biological opinion by initiating a citizen suit.²²⁴ Such litigation forces the Department of the Interior to defend the scientific basis for the biological opinion and to expend funds that Congress appropriated for research and implementation of conservation programs.²²⁵

When Congress reauthorizes the Act, it should clarify the best scientific data standard. In accord with the ESA's conservation goal, Congress should require the Secretary to adopt the scientific or commercial data most likely to further species recovery. Congressional clarification of the standard would give state agencies, special interests groups, and courts notice of what data the ESA requires the Director to utilize in preparing a biological opinion. Clarification of the standard will eliminate much of the unnecessary litigation regarding the best available scientific and commercial data standard and allow the Department of the Interior to focus its limited resources on conserving listed species. The clarification

223. The ESA forces federal agencies to address state concerns. Under the ESA, a state can employ the ESA's consultation requirement to challenge the findings, proposals, and actions of federal agencies dealing with the grizzly bear. Telephone Interview with John Talbott, Wyoming Game and Fish Department (Aug. 18, 1993).

224. 16 U.S.C. § 1540(g) (1988).

225. In cases involving "best available scientific and commercial data" issues, courts have interpreted the standard to require federal agencies to utilize the best scientific available data when making decisions affecting the conservation of listed species. In *Conservation Law Foundation v. Watt*, the Court held that the 16 U.S.C. § 1533 conservation obligation requires the Secretary to complete studies in progress "directly relevant to a complete determination." 560 F.Supp. 561, 572 (D. Mass.), *aff'd sub nom.* *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983). Failure to use the best available information was a substantive violation of the conservation obligations. *Id.* The best available information language requires that agencies use all scientifically available information. *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1154 (D. Alaska 1983) *aff'd* 733 F.2d 605 (9th Cir. 1984).

would also minimize the impact of politics on the Act as the Secretary could not yield to political pressures contrary to Congress's original intent to conserve endangered and threatened species *and* the habitats essential for their survival.

Grizzly bear management under the ESA is not sufficient to effectuate Congress's intent in enacting the Act. Although federal and state wildlife agencies have successfully cooperated with each other in managing the bear, the lack of designated critical habitat for the bear minimizes those agencies efforts. Congress recognizes that the habitats of listed species must be protected, yet bear habitat is continually compromised for human needs. Pressure from opponents of federal wildlife control often forces these compromises. Education programs and a new best scientific data standard can help eliminate such pressure and facilitate a critical habitat designation. Until measures are taken to eliminate public opposition to grizzly bear recovery and to protect essential bear habitat, Congress's conservation goal will fail and the grizzly bear will not recover.

CONCLUSION

In enacting the Endangered Species Act, Congress intended to provide a means of conserving a valuable asset, America's wildlife. Although the judiciary abrogated the state control doctrine, states still contend that they occupy a superior position to manage listed wildlife within their borders. Advocates of state wildlife control believe that state agencies' knowledge of and proximity to local wildlife, combined with their sensitivity to community attitudes, enables them to more effectively manage the bear. Discontent with federal control of listed species prompts many land owners to contend that federal protection of listed species effectuates a Fifth Amendment taking.

Analysis of Yellowstone grizzly bear management as a threatened species suggests that these complaints are based on misconceptions about the Act. Prior to the ESA, state grizzly bear management contributed to an increase in the bear mortality rate. Centralized federal management stabilized the Yellowstone grizzly bear population. The federal management scheme, however, does not eliminate state authority to manage the bear. States can play an active role in managing the bear and in implementing conservation programs that address state citizens' concerns over federal management of the bear. State wildlife agencies have implemented successful programs that educate land owners with regards to minimizing potential human-grizzly conflicts. State and federal agencies should also implement programs which emphasize that such conservation programs

only modify methods of land use and do not require land owners to forfeit all economically beneficial uses of their lands. Education programs could help to quell the popular misperception that the ESA and grizzly bear regulations effectuate a Fifth Amendment taking.

In reauthorizing the Act, Congress should consider how to limit the ability of political opponents to interfere with implementation of the ESA's conservation goal. Congress should consider requiring the Secretary to use education programs to dispel the myths about the ESA. Congress should also consider clarifying the best scientific and commercial data standard to require the Secretary to adopt data most likely to further species conservation. Education about the Act and clarification of the best scientific and commercial data standard would minimize the political opposition which currently prohibits the successful implementation of the ESA and hinders grizzly bear recovery.

*"Alive, the grizzly is a symbol of freedom and understanding—a sign that man can learn to conserve what is left of the earth. Extinct, it will be another fading testimony to things man should have learned more about but was too preoccupied with himself to notice."*²²⁶

SUSAN LAMADRID SELLERS

226. FRANK C. CRAIGHEAD, JR., TRACK OF THE GRIZZLY 230 (1979).